

**International
Comparative
Legal Guides**



Employment & Labour Law

2024

14th Edition

Contributing Editors:

Stefan Martin & Jo Broadbent
Hogan Lovells

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From the Publisher

Dear Reader,

Welcome to the 14th edition of *ICLG – Employment & Labour Law*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to employment and labour laws and regulations around the world, and is also available at www.iclg.com.

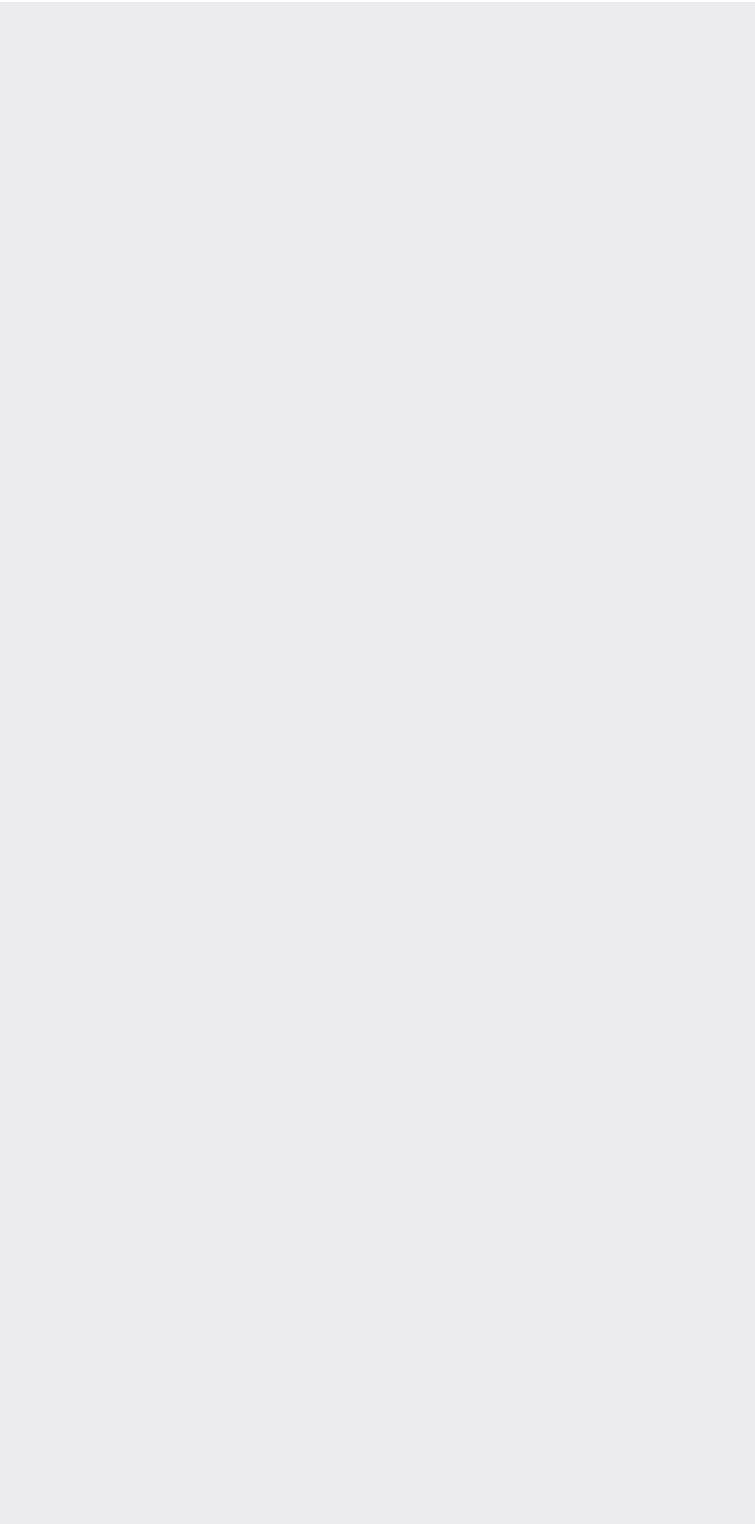
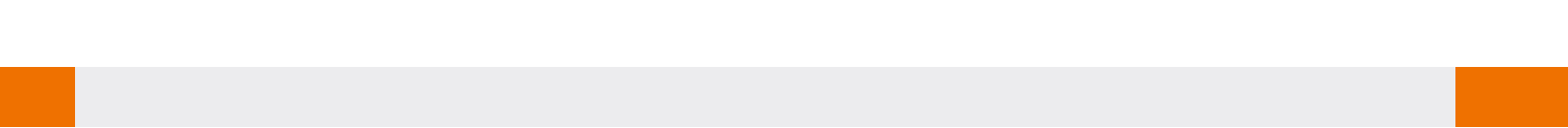
This year, there is one expert analysis chapter that focuses on women in employment in Japan.

The question and answer chapters, which in this edition cover 33 jurisdictions, provide detailed answers to common questions raised by professionals dealing with employment and labour laws and regulations.

As always, this publication has been written by leading employment lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Stefan Martin and Jo Broadbent of Hogan Lovells for their leadership, support and expertise in bringing this project to fruition.

Ben Lawless
Publisher
Global Legal Group



International Comparative Legal Guides

Women in Employment in Japan

Mori Hamada & Matsumoto



Yoshikazu Abe



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Mitsuru Igarashi

1 Current Status of Women Working in Japan

As of writing, 38.03 million men and 31.08 million women work in Japan, so women account for about 45% of the total. However, the male employment rate ranks third among OECD countries, while the female employment rate ranks 13th. Over half (53.4%) of female workers are so-called non-regular workers, such as part-time or dispatched workers (*versus* only about 22.2% of male workers). The percentage of women in management positions is a paltry 12.9%, and they only make up 9.1% of executives, which is quite low compared to other countries (see the 2023 edition of the “White Paper on Gender Equality”).

In the home, women also bear a heavy burden: 85.1% of employed women have taken childcare leave, while only 14% of men have done so, which means that women still play a major role in childcare in 21st century Japan.

It is clear that this situation is undesirable for improving women’s human rights. Further, Japan is now facing changes in various social and economic conditions, including a rapidly declining birth rate and working age population, as well as an aging population. For instance, the working-age population (15–64 years old) declined from 86.22 million in 2000 to 75.09 million in 2020; and it is estimated that it will decline further to 59.78 million by 2040. In terms of improving the country’s economy, women who want to work should be encouraged to demonstrate their qualities and capabilities and actively engage in leading professional lives. Thus, the Japanese government is working to improve the treatment of women and to balance their professional and family lives. In this chapter, we present some of those government initiatives.

2 Act on the Promotion of Women’s Active Engagement in Professional Life

In 1972, the Act on Equal Opportunity and Treatment between Men and Women in Employment was enacted in response to discrimination against women in the workplace. The law regulated discriminatory treatment of women, including sexual harassment, but did not lead to more proactive engagement of women in the workforce.

In August 2015, the Act on the Promotion of Women’s Active Engagement in Professional Life was enacted as time-limited legislation with an expiration date of March 2026.

(1) Basic Principles

This law establishes the following three basic principles:

- (i) Women’s active engagement in professional life must be promoted for the purpose of enabling women who choose or intend to work to fully demonstrate their qualities and capabilities, taking into account the state of gender disparities regarding active engagement in professional life, through the active provision of employment opportunities, education and training, workplace promotion, different types of occupations, changes in employment and other opportunities related to professional life.
- (ii) In light of how the professional lives of many women are negatively affected by having to leave work due to marriage, pregnancy, childbirth, childcare, nursing care or other reasons related to their personal lives, women’s active engagement in professional life must be promoted for the purpose of enabling a smooth and continuous balance between the professional and personal lives of all people regardless of gender, by establishing a supportive environment for those with families to allow them to carry out their household responsibilities, such as providing childcare or nursing care for other family members, through mutual cooperation and with social support.
- (iii) When promoting women’s active engagement in professional life, special attention must be paid to the importance of respecting the wishes of women concerned about balancing their professional and personal lives.

(2) Responsibilities of national and local governments

National and local governments must formulate and implement necessary measures for the promotion of women’s active engagement in professional life, in accordance with the three basic principles. Also, the national government shall endeavour to provide vocational guidance and training, employment placement, support for start-ups, and other necessary measures, and local governments shall respond to consultation requests from women, their families and other relevant persons, and endeavour to introduce them to relevant organisations, provide other relevant information and advice, and take other necessary measures.

(3) Responsibilities of employers:

(i) General responsibilities

In accordance with the basic principles, employers must endeavour to play an integral role in the active provision of opportunities for the professional lives of women, establish a work environment that contributes positively to balancing the professional and personal lives of the workers they employ, and undertake other initiatives for the promotion of women's active engagement in professional life. Also, employers must follow the related measures implemented by the national or local governments.

(ii) Employer action plan

Employers with over 100 regularly employed workers must establish a general employer action plan (meaning a plan concerning initiatives for the promotion of women's active engagement in professional life implemented by general employers) and notify the Ministry of Health, Labour and Welfare (MHLW) accordingly. In the action plan, employer must provide the planning period, the goals to be achieved by implementing initiatives for the promotion of women's active engagement in professional life, and details of the initiatives and their implementation periods.

The MHLW may certify those general employers as having implemented appropriate initiatives for the promotion of women's active engagement in professional life that conform to other standards specified by ministerial order. General employers who obtain the certification may affix a mark specified by the MHLW onto goods, services or documents used for transactions, or communications and other goods (e.g. business cards), and may appeal that they are proactive in promoting women's active engagement in professional life (as of October 2023, 2,488 companies are certified). The national government provides certified general employers with more opportunities to receive orders for procurement of goods or services from it or from public finance corporations.

(4) Employer publication of information that contributes to women's choice of occupations

Employers (limited to those with over 300 regularly employed workers) must regularly publish the following information regarding women's active engagement in professional life in their industry to contribute to the choice of occupations for women:

A. Achievements in the provision of opportunities for professional lives of women workers

(a) The employer shall select and publish one of the following eight figures:

1. Percentage of women workers in recruitment.
2. Competitive ratio in recruitment by gender.
3. Percentage of women workers in the workforce.
4. Percentage of women workers in junior managerial positions.
5. Percentage of women workers in senior managerial positions.
6. Percentage of women on boards of directors.
7. Track record of changes in job type or employment status by gender.
8. Track record of rehiring or mid-career hiring by gender.

- (b) As of 2022, employers are required to publish the difference between men's and women's wages (the ratio of average annual wages for women to men, for each of regular workers, non-regular workers, and for all workers).

B. Achievements in the development of employment environments that contribute to the balance between the professional and personal lives of workers

The employer must select and publish one of the following seven figures:

1. Average continuous service years by gender.
2. Percentage of continued employment of workers hired before and after 10 years by gender.
3. Rate of childcare leave usage by gender.
4. Average overtime hours per month for workers.
5. Average overtime hours per month for workers by employment type.
6. Percentage of workers taking paid leave.
7. Percentage of workers taking paid leave by employment type.

3 Equal Employment Opportunity Act

(1) Purposes of the law

Another basic law that provides for the prohibition of gender discrimination is the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (Equal Employment Opportunity Act).

Article 1 of the Equal Employment Opportunity Act provides as its purpose the promotion of securing equal opportunity and treatment between men and women in employment under the principle of the Constitution of Japan, ensuring equality under the law, and the promotion of measures, among other things, to ensure the health of women workers during pregnancy and after childbirth.

(2) Prohibition of discrimination

The Equal Employment Opportunity Act prohibits discrimination based on sex in all stages of employment management, including recruitment, employment, assignment (including allocation of duties and granting of authority), promotion, demotion, training, certain fringe benefits, change in job type or employment status, encouragement of retirement, mandatory retirement age, dismissal, and renewal of the labour contract (Articles 5 and 6 of the Equal Employment Opportunity Act).

The law prohibits not only direct discrimination but certain indirect discrimination as well (Article 7). The Ordinance of the MHLW defines the following three cases as indirect discrimination and prohibits them unless there is a legitimate reason: (i) having height, weight or physical strength requirements when recruiting or hiring workers; (ii) requiring workers to be able to accept transfers involving relocation when recruiting or hiring, giving promotions, or changing the type of work; and (iii) requiring workers to have experience in transferring to other locations to be eligible for promotions.

Disadvantageous treatment because of marriage, pregnancy, childbirth, or other similar reasons is also prohibited (Article 9). Specifically, employers are prohibited from the following behaviours: (1) stipulating marriage, pregnancy or childbirth as a reason for retirement of women workers; (2) dismissing women workers for getting married; and (3) treating women workers disadvantageously due to pregnancy, childbirth, requesting maternal health

management measures, requesting maternity leave or other reasons as provided by the Ordinance of the MHLW. Disadvantageous treatment includes, among other things, dismissal, non-renewal of the fixed-term contract, changing a regular worker to a part-time worker, demotion, salary reduction or unfavourable internal transfer.

In principle, any disadvantageous treatment “triggered” by pregnancy, childbirth, etc. is considered to be disadvantageous treatment “due to” such event, which is a violation of the Equal Employment Opportunity Act. Furthermore, as a general rule, if disadvantageous treatment is given within one year of pregnancy or childbirth, it is still considered to be “triggered” by such event.

(3) Employer's obligation to take measures to prevent harassment related to sex, pregnancy, childbirth and other reasons

The Equal Employment Opportunity Act requires employers to take necessary measures to prevent sexual harassment in the workplace (Article 11). Sexual harassment in the workplace is defined as when a worker is being disadvantaged in terms of work conditions because of the worker's response to sexual words or actions in the workplace that go against the worker's will or impair the worker's environment.

Further, the amendment of the Equal Employment Opportunity Act, enacted as of January 2017, requires employers to take necessary measures to prevent harassment related to pregnancy, childbirth and other reasons. As mentioned, disadvantageous treatment due to pregnancy, childbirth and other reasons is prohibited under the Equal Employment Opportunity Act, but the amendment requires one more step to be taken against employers, that preventive measures must be taken to ensure that supervisors and co-workers do not engage in acts that are detrimental to the work environment due to pregnancy, childbirth or other reasons (Article 11-2).

The guidelines published by the MHLW provide detailed measures that employers should take under the above restrictions to prevent harassment, summarised as follows:

- (i) Clarification and dissemination of the employer's policy against harassment, including the stipulations of the policy and details of the measures to be taken against harassment in documents, such as work rules, that shall be communicated and made known to all workers, including managers and supervisors.
- (ii) Establishment of a system necessary to respond appropriately to consultation requests (including complaints).
- (iii) Prompt and appropriate post-occurrence handling harassment related to sex, pregnancy, childbirth and other reasons in the workplace.
- (iv) Necessary measures taken to protect the privacy of workers who seek consultation regarding harassment, involved parties, etc.
- (v) Stipulation that workers will not be dismissed or otherwise treated disadvantageously for consulting with the employer, cooperating with fact-finding requests or using the prefectural labour bureau's assistance system.

4 Maternity and Childcare Leave

(1) Maternity leave

Japanese labour law allows all female workers to take maternity leave as a measure to protect women's maternity. Specifically, if a woman who is due to give birth within six weeks (14 weeks in the case of multiple pregnancies) requests to take leave, the employer

is prohibited from allowing her to work. Therefore, the employer is not legally obligated to grant maternity leave without the applicable worker requesting it herself. The period of leave is based on the expected date of natural childbirth. If the actual delivery is earlier than the expected date, then the period is shortened by that many number of days, and if it is later than expected, then the period is extended and thus also treated as maternity leave. The day of delivery is obviously included in maternity leave.

On the other hand, it is prohibited, in principle, for a woman to work before eight weeks have passed since childbirth. However, if a female worker who has been postpartum for six weeks requests to work, she may be allowed to do so as long as her doctor deems that there are no obstacles to her working safely. Again, the period of maternity leave shall be based on the actual date of delivery.

Dismissal during the period of maternity leave before and after childbirth and for 30 days thereafter is prohibited. Dismissal or disadvantageous treatment of a worker for requesting or taking maternity leave or other maternity protection measures before or after childbirth is also prohibited.

The Labour Standards Act does not require that workers be paid during maternity leave. Therefore, unless otherwise stated in the work rules or other stipulations, the leave is unpaid. However, a certain maternity allowance will be paid for a certain period of time by health insurance.

(2) Childcare leave

In Japan, workers are allowed to take childcare leave (or split the leave into two periods) upon request until the child reaches one year of age (or until the child reaches a maximum of two years of age in certain cases, such as when the child is unable to enter a daycare centre or the spouse who will care for the child passes away). In principle, all workers, regardless of occupation or gender, are guaranteed the right to take childcare leave. However, day-to-day workers are exempted.

In order to encourage both parents to take childcare leave, if both parents do so, the period of childcare leave is allowed until the child reaches one year and two months of age (called “Papa-mama Ikukyu-Plus”).

For fixed-term workers, the requirements for taking childcare leave have been relaxed as of 1 April 2022, allowing them to apply for leave if they meet the requirement that “it is not clear that the contract will expire before the child is one year and six months old”.

In addition, childcare leave at birth has been established since 1 October 2022, as a system to promote the advancement of women by encouraging male workers to take childcare leave and reducing the outsize burden of childcare on women. This allows workers to take childcare leave for up to four weeks within eight weeks of childbirth, in two instalments, and if a labour-management agreement is concluded, workers may also work during the leave to the extent agreed upon.

In order to ensure that requests for either type of childcare leave are carried out smoothly, employers are obliged to take one of the following measures:

- (1) Provide training on the type of childcare leave to be taken.
- (2) Establish a consultation system (set up a consultation counter) regarding childcare leave.
- (3) Collecting and providing information on cases of childcare leave taken by their own workers.
- (4) Informing their own workers about the childcare leave system and the policy on promoting childcare leave.

In addition, employers must: (i) individually inform workers who report their own or their spouse's pregnancy or childbirth of (1) the childcare leave system, (2) where to request childcare leave, (3) childcare leave benefits, and (4) social insurance premiums to be paid during the period of childcare leave; and (ii) conduct interviews with them to confirm their intention to take childcare leave.

In Japan, it is considered a challenge to increase the rate of men taking childcare leave and to reduce the outsize burden of childcare on women. Therefore, there is a particular need to create an environment and design systems that make it easier for men to take childcare leave, so various legal amendments have been made from this perspective in recent years. As part of this trend, since April 2023, employers with more than 1,000 full-time workers have been required to publicly announce once a year the status of their workers taking childcare and other types of leave. Specifically, employers are required to publish on the Internet or by other appropriate means the rate at which male workers take childcare leave or the rate at which they take childcare leave and other leaves for childcare purposes.

Wage guarantees during the period of childcare leave are not legally required. Therefore, unless otherwise stipulated in employment or other regulations, the leave is unpaid. However, a certain maternity allowance will be paid for a certain period of time by employment insurance.

(3) Measures to prevent harassment related to use of childcare leave

The Child Care and Family Care Leave Act prohibits disadvantageous treatment against the exercise of various rights to support work-life balance stipulated in the law. Specifically, it is not permissible to treat workers in a disadvantageous manner, such as by dismissing them, terminating their employment, or demoting them (so-called “maternity harassment”) on the grounds of pregnancy, childbirth, use of childcare leave or other reasons.

Legal acts in violation of these provisions shall be null and void, and such acts shall thus be deemed illegal and may give rise to liability for damages.

Employers are obliged to provide consultation to affected workers, develop related systems, take other employment management measures, or develop other systems or take other measures stipulated by the Ordinance of the MHLW to ensure that the work environment of such workers is not harmed by any words or actions concerning the use of childcare leave. In addition, disadvantageous treatment of workers for having cooperated with a consultation request is prohibited.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Labour relationships in Argentina are mainly governed by the National Constitution, international treaties and conventions, the Labour Contract Law No. 20,744 (“LCL”), Collective Bargaining Agreements (“CBAs”), individual agreements with the employees, general internal policies and customs in the workplace, and individual agreements/contracts, as long as these are more favourable than minimum statutory rights.

The National Constitution contains the overriding principles governing labour relationships, and the LCL provides the main general regulations (except for certain activities, such as rural workers and/or domestic service).

Please note that in December 2023, the Argentine National Executive issued the Urgent and Necessary Decree No. 70/2023 (“DNU”, for its acronym in Spanish) by which significant changes to labour regulations were made (eliminating fines for lack of registration of employment, flexible regulations for employees, contractors, and teleworkers, among others). However, the two union confederations in Argentina (the General Confederation of Labor (“CGT”) and Argentine Workers’ Central Union (“CTA”), entities to which all trade unions are associated) presented a challenge against the DNU before the National Labor Courts. So far, the National Labor Chamber of Appeals issued a final resolution considering the DNU as unconstitutional (stating that the DNU is not urgent and necessary, and that Congress should discuss the intended reforms). The Argentine National Executive still can appeal the resolution before the National Supreme Court. Because the scenario is still uncertain, we have not considered the DNU in our responses.

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

All types of workers under a dependency relationship with the employer are protected by employment law.

On the other hand, independent contractors are not included therein, unless they can be construed as non-registered employees (if typical features of an employment are met), or their relationship is not related in Argentina to the length or content of the contract but to the real nature of the services.

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

For an undetermined-term employment contract, which is the general rule pursuant to the LCL, there is no legal requirement to execute employment contracts in writing. Notwithstanding, written contracts are nevertheless frequent among key employees or executives.

On the other hand, fixed-term and temporary employment contracts (very restricted, extraordinary and exceptional hiring modalities) must be executed in writing and comply with certain mandatory requirements. If requirements are not met, the contract will automatically be converted into a contract for an undetermined term.

1.4 Are any terms implied into contracts of employment?

There are none in particular.

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

Yes, minimum statutory employment terms and conditions are set forth in the legal regulations and applicable CBAs. Labour provisions are of public order, and they apply to all employment contracts whether written or not.

The main issues covered by the LCL include, but are not limited to: remuneration; annual vacations and special leaves of absence; holidays and non-working days; daily and weekly working and resting hours; special provisions for women and children; illness; and termination or transfer of a labour contract.

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?

CBAs tailor the general provisions of the LCL to a specific industry sector or company. They are negotiated between the union representatives and the management of various industry sectors or a specific company. They typically involve issues such as vacations, bonuses, wage scales, overtime pay, special paid leave, and health and safety conditions in the workplace.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so do, they need to change employees' terms and conditions of employment?

Employers cannot oblige their employees to split their working time between home and the workplace. According to the Teleworking Regime (regulated by Law No. 27,555 and Decree No. 27/2021), employees must provide express and written consent to apply the teleworking modality, fully or partially (i.e., on a hybrid basis). The execution of a teleworking agreement is the most conservative way to instrument it.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Employees can request to work remotely, but employers are not obliged to accept it. It is worth mentioning that the Teleworking Regime does not treat remote work as a benefit granted to the employee. On the contrary, it aims at protecting them from any abuse by the employer.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Law No. 23,551 ("Trade Unions Law") recognises two types of trade union associations:

- Those that are merely registered.
- Those with "trade union status".

On a preliminary basis, all trade union associations are simply registered, since they must be registered before the administrative labour authority, and will have legal status as any other association.

However, Argentina's trade union model tends towards union uniqueness, granting relevant faculties to the most representative union in the applicable activity or profession. This most representative union is granted by the Labor Ministry with "union status" ("*personería gremial*"), granting certain specific rights (e.g., negotiating CBAs).

Within the last few years, the National Supreme Court and Labor Courts have been recognising rights to merely registered unions, although not – in principle – negotiating CBAs.

2.2 What rights do trade unions have?

The rights of trade unions, both merely registered or with union status, are as follows:

- **Merely registered unions:** to represent individual interests of its members; to represent collective interests, provided there is no union with legal status as a trade union; to promote the incorporation of cooperatives; the improvement of labour and social security laws; the education in general and the professional training of workers; and to impose union payments to its members.
- **Unions with union status:** to represent their members against different organisations (even governmental ones); to negotiate and sign CBAs; to exercise industrial action, such as the declaration and promotion of strikes; and to create and administrate social service organisations ("*mutuales*" and "*obras sociales*").

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

Industrial actions such as strikes are recognised by the National Constitution, though it is not regulated currently, under the understanding that, the more regulated it is, the more limited and restricted the union's scope of action and its ability to make demands.

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; the Trade Unions Law does not specifically require the existence of employee committee(s), commissions, or works councils, but provides that there should be a certain number of delegates (internal representatives) per number of employees in each establishment.

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?

Please refer to our response to question 2.4.

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

While the trade union (and its officials) have the representation of all employees framed under the specific union scope (activity, profession, etc.), delegates have a representation role focused on the employees of the specific establishment, with the following main faculties (as provided by law):

- a) to verify the application of the legal or conventional regulations, being able to participate in the inspections and audits performed by the administrative labour authority;
- b) to meet periodically with the employer or its representative; and
- c) to present before the employers or their representatives the claims of the workers on whose behalf they act, with prior authorisation from the respective union association.

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. Equal treatment is recognised for all individuals as a constitutional right, following specific provisions of the National Constitution and international treaties with constitutional hierarchy.

In the specific case of employees, the National Constitution even guarantees "decent and equitable working conditions".

From a general perspective, Law No. 23,592 (Anti-discrimination Law) expressly prohibits arbitrary discrimination,

such as that based on race, religion, nationality, ideology, political or trade union opinion, sex, economic status, social status or physical characteristics.

Finally, the LCL demands equal treatment to all employees, except when the different treatment responds to principles of the common good, such as worker's greater efficiency or commitment to his/her tasks. The LCL provides that arbitrary discrimination, such as those based on sex, religion and race, constitute unequal treatment.

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

In principle, any kind of arbitrary discrimination is unlawful, but mainly and specifically discriminations based on the above-mentioned characteristics or circumstances, as well as those resulting from maternity (please see our comments to question 4.2), marriage, and illness.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

There are no special general rules. However, Argentina has ratified ILO Convention 190 concerning the elimination of violence and harassment in the world of work, which mandates States to adopt integrated and gender-responsive approach for the prevention and elimination of violence and harassment.

3.4 Are there any defences to a discrimination claim?

Yes, as mentioned, a discrimination/distinction based on objective reasons, such as a worker's greater efficiency or commitment to his/her tasks, is not considered unlawful.

It is worth mentioning that there is a judicial precedent from the National Supreme Court (*in re. Pellicori*), in which the country's highest court ruled that, considering that the employee is in a weaker position compared to the employer, the latter is in charge of proving that the alleged act or situation was not discriminatory. Thus, evaluation is made under a burden-shifting framework.

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

Employees are entitled to enforce their discrimination rights through formal claims, and eventually a lawsuit. Also, the Labor Ministry has a specialised Office of Advice on Labor Violence that receives complaints and inquiries on labour violence and advises the person filing the complaint on their rights and the areas where to exercise them. Additionally, there is a national anti-discrimination entity ("INADI"), in which any person can denounce discrimination, regardless of labour rights, to which the employee is entitled.

Technically, the possibility of settling these claims would depend on the jurisdiction, as we explain in section 9 below.

3.6 What remedies are available to employees in successful discrimination claims?

As mentioned, employees are entitled to formally claim to the employer (if unionised, request the union assistance), and eventually present a lawsuit. Constructive dismissal cannot be disregarded.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No, "atypical" workers do not have any additional protection.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

Employees who formally request their employers to be duly registered in the labour documentation will be entitled to receive twice the severance package if dismissed within the following two years, provided that the employees have also notified the tax authority of their request. From an anticorruption perspective, Law No. 27,401 (Legal Entity's Criminal Responsibility) encourages having policies that protect whistleblowers.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

No, publication of such information is not required, and data privacy rules should be considered before disclosing any information that would be deemed sensitive under the Argentine Data Protection Law No. 25,326 ("DPI").

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

According to the LCL, a pregnant employee is entitled to 90 days' maternity leave, divided into 45 days before birth and 45 days after birth. An employee may subtract up to 15 days from the time allowed before birth and add it to the remaining days of maternity leave after birth.

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

While on maternity leave, an employee is entitled to collect a social security allowance equal to her gross monthly salary, which is paid by the Argentine Social Security Authority ("ANSES").

The period under maternity leave is considered for calculation of seniority for all its legal purposes and vacation days.

Also, job protection is guaranteed to all female employees.

A dismissal instrumented seven-and-a-half months before or after the child's birth is presumed to be grounded on the maternity (unless otherwise proved) and triggers an aggravated severance.

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

Once the maternity leave ends, the employee may choose between: (i) returning to work under the same labour conditions she had before the maternity leave; (ii) terminating the labour relationship, in which case, she will be entitled to collect a compensation equal to 25% of her salary (subject to cap) per year of service or period worked in excess of three months; or (iii) undertaking an unpaid leave for a period not less than three months, nor longer than six months.

Provided that the employee decides to return to work, she will be entitled to have two breaks per day of one-half hour each to breastfeed her child for up to one year after her child's birth. In practice, employees usually start working an hour later or leave an hour earlier.

Also, establishments with 100 or more workers (either males or females) must provide nurseries and maternity rooms for the personnel's children – between 45 days and three years old, inclusive.

4.4 Do fathers have the right to take paternity leave?

Under the LCL, fathers are entitled to two days of paid paternal leave.

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

The LCL does not include any other parental paid leave of absence other than the ones described above. However, case law and scholars have considered adoption as legally equated to motherhood. Moreover, some CBAs expressly state the special leave of absence. In addition, the Family Allowances Law No. 24,714 establishes an adoption allowance, in symmetry with the allowance for birth of a child.

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

Employees who work remotely from their homes are entitled to working schedules compatible with the care tasks and/or to interrupt the working day if they are in charge of children under 13 years old, persons with disabilities or elderly persons who require specific assistance.

5 Business Sales

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

This would essentially depend on the type of transaction:

- In the event of a share sale, employees will still have the same employer.
- In the event of an asset transfer, where a company or whole business unit is being acquired, employees can be transferred automatically from the transferor to the acquirer, without requesting their consent.

When the transaction does not involve assets or business units, but only individual contracts are assigned, the employee's consent is required.

Transferor and acquirer are jointly liable for any breach or non-compliance to labour regulations at the time of the transfer/assignment.

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

After a business sale, essential labour conditions and benefits cannot be modified in detriment of the employee (please see question 5.5).

In the case of automatic transfer, the employee may consider him/herself constructively dismissed if upon transaction the object of the business is changed, the functions, position or employment is altered, or if there is a separation between different sections, units or branches of the company, in such a way that the employer's liability is diminished as a result.

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 principle, no. However, it would be recommendable to analyse on a case-by-case basis the convenience of having conversations with the union.

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

The employees can be dismissed, but the business sale would not be a sufficient reason to avoid payment of severance compensation.

In addition, as mentioned, employees may consider themselves constructively dismissed upon transfer or assignment if their labour conditions are affected (please refer to question 5.2).

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

No. Existing labour conditions must be acknowledged by the employer.

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 provide employees with prior notice of dismissal, of one or two months, depending on whether the dismissed employee's tenure is shorter or longer than five years with the employer, respectively. However, the employer is expressly allowed by law to avoid giving prior notice and notify the dismissal with immediate effect, provided payment *in lieu* thereof is included in the employee's severance.

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 release the employee from the obligation to render services during the notice period by paying him the amount of the corresponding salaries.

On the other hand, if requested to work during the notice period, the employee shall have the right, without reduction of his/her salary, to enjoy leave of two hours a day (the first two or the last two hours of the day). The employee may also choose to accumulate the leave hours in one or more full days.

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 employer may dismiss without cause by paying a severance compensation. In general terms, no authorisation needs to be sought.

However, in cases in which dismissals are implemented due to *force majeure* or lack of or reduction of work not imputable to the employer, or when terminations affect a certain percentage of employees, a specific proceeding called “Crisis Prevention Procedure” (“CPP”) should be submitted before the Labor Ministry.

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

Yes, for maternity, marriage and union representatives (triggers aggravated severance of 13 salaries).

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 employer is entitled to dismiss for:

- Reasons related to the individual employee: if he/she fails to comply with his/her labour obligations and constitutes an injury to the employer that, due to its seriousness, does not consent to continue the employment relationship (dismissal with justified cause). In this case, the employee is not entitled to any compensation on dismissal.
- Business-related reasons: in cases in which dismissals are implemented due to *force majeure* or lack of or reduction of work not imputable to the employer and justified in a duly attested manner. Therefore, the employee shall have the right to collect a severance payment equivalent to one half of what is established for dismissal without cause.

However, these kinds of terminations should be very carefully analysed prior to being applied, since courts are very employee-biased and it could be interpreted that the termination should be framed under termination without cause instead any of these reasons.

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

The procedures with regard to dismissals, both with and without justified cause, are as follows:

- 1) Dismissal without cause:
In principle, there are no specific formalities other than the notification, payment of statutory severance and delivery of the work certificates. However, in general, and considering the conflictive environment, it is advisable to take some proactive actions (e.g., executing a settlement agreement before the authority). This should be analysed in each specific case.
- 2) Dismissal with justified cause:
From a formal perspective, the dismissal with justified cause must be notified in written form, with a detailed description of the facts and circumstances that led into the termination.

From a material perspective, the grounds for the dismissal should be of such seriousness that they should not allow for the continuity of the employment.

In this regard, the dismissal should be proportional and contemporaneous to the alleged breach.

It is worth mentioning that judges are generally very restrictive while analysing the cause for dismissal.

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

The employee may claim for a severance compensation package in the event of a dismissal without cause.

In case of a dismissal with justified cause, the employee may challenge it and also claim for severance.

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

It depends on the specific jurisdiction, as explained in section 9 below (please see reference to the National Labor Ministry (“SECLO”, for its acronym in Spanish)).

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

Yes, as referred in question 6.3 above, if employees are unionised and a certain percentage over the total payroll is affected, the CPP shall be submitted before the Labor Ministry (including presentations indicating the measures adopted by the employer in order to try to avoid the termination of the employments).

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?

Please refer to question 6.9 above. From a strictly technical standpoint, the CPP must be followed when the employer alleges reduction of work or *force majeure*, pretends to pay reduced severance compensations, and when employees are framed under a specific union representation.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Restrictive covenants – such as non-compete and confidentiality obligations – are expressly recognised by labour regulations while the relationship is active, whereas regarding the application of such restrictive covenants upon termination of the labour relationship is not expressly set forth in regulation, and criteria related thereto arise from case law.

7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants are enforceable during employment. Once terminated, there is no specific regulation.

In terms of confidentiality, it seems reasonable to consider that the employee should maintain the information confidential even after termination. As to non-compete clauses, while not regulated (after termination), they are typical in contracts or specific agreements (especially for executives or key employees), and case law have considered them valid, if limited in time and if a compensation is paid. We recommend reviewing such clauses in each specific case.

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

Not during employment, and upon termination (please refer to our response above).

7.4 How are restrictive covenants enforced?

Subject to specific case-by-case analysis, upon lack of compliance with the restrictive covenant, a judicial lawsuit could be filed against the former employee to formally request the payment of damages.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The general principle under the DPL is that all processing of personal data must be consented to by the data subject. Such consent must be prior, given freely, based upon the information previously provided to the employee (that is, informed) and expressed in writing or by equivalent means. Moreover, under the DPL, consent for the processing of personal data may be revoked.

There are certain exceptions – that should be interpreted restrictively – where consent is not required; for example, when such data is processed by virtue of a legal obligation or when such data are necessary for the development or performance of a contractual relationship with the data subject, but still, consent is advisable.

If the employees' personal data is assigned or transferred to third parties abroad, the employer should comply with the applicable rules pertaining to the assignment, data processing agreements and international transfer of personal data (e.g., requirement of legitimate interest).

Lastly, the DPL prohibits, in principle, the transfer of personal data from the Argentine Republic to countries or international or supranational organisations that, at the sole discretion of the Data Protection Authority ("DPA"), do not provide adequate levels of protection in terms of personal data protection. The DPL allows, however, transfers of personal data to countries or organisations that do not have adequate levels of protection when: (i) the controller obtains the specific consent of the data subjects; or (ii) adequate levels of protection arise from contractual clauses (such as data transfer agreements) or from self-regulatory systems (such as binding corporate rules).

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, the employee, as data subject, has the right to obtain copies of any personal information held by the employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

The general rule is that the employer can check and investigate different personal and educational references of prospective employees as long as the dignity and privacy of the candidate is not affected and, to minimise risks, the individual's consent is obtained.

In principle, except if reasonably required for the tasks to be performed, the employer is not allowed to perform criminal checks. We recommend a very specific case-by-case analysis.

On the other hand, specific pre-employment medical exams are mandatory in Argentina. The candidate can be excluded only if a pre-existing illness can be aggravated by the work to be performed, or if the employee is not capable of performing such task due to the illness.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

As of today, majority case law considers that corporate e-mail accounts and electronic devices provided by the employer are working tools and, subject to certain conditions, are subject to control and monitoring by the employer.

The most relevant condition is the respect to the employee's dignity. It is highly recommended to work on specific policies and request acknowledgement.

Notwithstanding the above-mentioned, it is noteworthy that a few criminal court decisions showed a strong tendency to the private correspondence classification, which may be of concern because violation of private correspondence (which includes electronic communications) is considered a crime.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

The employer can prohibit the use of social media at the workplace and/or during working hours. However, unless previously consented by the employee in written form, the employer cannot access the employee's personal social media network. Otherwise, it can be considered a violation to the employee's privacy.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

Yes, pursuant to applicable data privacy regulation, if decisions are made based solely on the automated processing of data and such processing produces negative legal effects or significantly affects the data subject in a negative way, then the data subject has the right to request from the controller an explanation of the logic applied in that decision. Thus, while AI is helpful, decisions should not be made based solely on automated processing of data; this applies not only for the recruitment and hiring process, but throughout the employment.

9 Court Practice and Procedure

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

Each of the 24 jurisdictions in Argentina have their own court compositions and procedural regulations.

Depending on the jurisdiction, the State/Province may have, within its judicial composition, courts or tribunals particularly accustomed to or specialised exclusively in labour matters and/or other areas.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

From a general perspective, in practically all jurisdictions, there is a first instance before a single judge, whose rulings can be appealed before a Chamber of Appeals. In the Province of Buenos Aires, there is no second instance, since first instance courts are integrated by three judges.

In the City of Buenos Aires, there is a mandatory pre-judicial conciliatory proceeding before SECLO (see question 6.8). This is an obligatory administrative stage in which the authority will try to conciliate the case. If conciliated, the Labor Ministry will evaluate the agreement and eventually approve it. The approval grants settled matter effects to the agreement, with similar effects to a judicial ruling. If not conciliated, then the employee would be entitled to assert a claim before a court.

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

It depends on the jurisdiction, but typically they take no less than three to four years.

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

It depends on the jurisdiction. In the particular case of the National Chamber of Appeals, it usually takes no less than one year/one year-and-a-half.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Austrian employment law is determined by numerous legal sources. Laws and directives form the basis. In addition, there are collective agreements at the supra-company level, as well as statutes. At the company level, there are company agreements between the employer and the relevant employee representative body, as well as individual contracts and work instructions.

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

A worker is someone who undertakes to perform work for the employer on the basis of a contract of employment. The essential characteristics of an employment relationship are the personal and economic dependence of the worker (also called “employee”). Employees are divided into the following groups with different regulations:

- White-collar and Blue-collar workers: Whether an employee is a White-collar worker or a Blue-collar-worker depends in general on the type of work. White-collar workers are predominantly employed in the commercial sector, higher, non-commercial services or in the office. The term “Blue-collar worker” is not defined by law. According to case law, Blue-collar workers are recognised as “residuals”. This means that any worker who is not a White-collar worker is generally recognised as a Blue-collar worker.
- Marginal employees: Employment is considered marginal if the remuneration does not exceed the monthly marginal earnings threshold (adjusted annually by value).

Apart from the above distinctions, there are various other forms of employment that must be distinguished from employees (e.g. apprentices, trainees).

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 conclusion of a contract of employment is not bound to any particular form. It can be in writing, verbal or implied.

The employer is obliged by law to issue a service note. The service note must contain certain information specified in the law.

1.4 Are any terms implied into contracts of employment?

In principle, an employment contract need only contain the statutory minimum content of a service note. In the context of concluding an employment contract, in practice, additional provisions (beyond the statutory minimum content) are usually made regarding the employment relationship (e.g. fixed-term, remuneration agreements for overtime work, competition clause, expiry provision).

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

Yes. These mainly refer to maximum working hours to be observed, minimum rest requirements, employee protection regulations, 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?

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

Collective bargaining primarily takes place between the respective employers’ and employees’ associations, i.e. at industry level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees’ terms and conditions of employment?

Working from home must always be agreed upon and cannot be unilaterally enforced.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Employees have no legal right to work remotely. Neither the employer nor the employee can unilaterally specify work from home or telework.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The trade unions are organised in the Austrian Trade Union Federation. They represent the political, economic and social interests of employees *vis-à-vis* employers, the state and political parties.

2.2 What rights do trade unions have?

The main tasks/rights of trade unions include:

- negotiating collective agreements; and
- supra-company co-determination within the framework of the economic and social partnership.

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

There is no statutory set right to strike, but there is a general right to take industrial action and the so-called freedom to 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?

The works council must be established based on an election. It is up to the workforce, not the employer, to ensure the establishment of a works council by organising and conducting a works council election. The basic requirement for the formation of a works council is that at least five employees with voting rights and non-family members are employed.

The works council has the task of safeguarding and promoting the economic, social, health and cultural interests of the employees in the company. This also includes the conclusion of company agreements in various areas.

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?

Certain measures that are sensitive to employees (disciplinary rules, staff questionnaires, control measures) may only be implemented by the employer with the consent of the works council and within the framework of a company agreement.

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

One of the essential provisions of the Labour Constitution Act (*Arbeitsverfassungsgesetz*) is the cooperation between works councils and trade unions (Chambers of Labour). To enable effective cooperation, the trade unions (Chambers of Labour) have specific statutory rights of access.

2.7 Are employees entitled to representation at board level?

There is a statutory right to appoint employee representatives to the board.

3 Discrimination

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

Employees are protected by law against unfavourable treatment in working life in various ways. This primarily includes comprehensive protection against discrimination based on certain protected characteristics in the Equal Treatment Act (*Gleichbehandlungsgesetz*) and the Disability Employment Act (*Behinderteneinstellungsgesetz*). In addition, there are various individual statutory prohibitions of discrimination as well as the so-called principle of equal treatment under labour law.

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

According to the Equal Treatment Act, discrimination is prohibited if employees are discriminated against on the basis of their ethnicity, gender, religion or ideology, age or sexual orientation.

Discrimination is prohibited, in particular:

- in the establishment of the employment relationship;
- all employment conditions (especially pay, voluntary social benefits, career advancement); and
- the termination of employment.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

In the event of sexual harassment, employees are entitled to compensation from the harasser. In addition, there is a claim for damages against the company if it has not taken reasonable steps to remedy the harassment.

3.4 Are there any defences to a discrimination claim?

A general exception to the principle of equal treatment exists if special requirements of professions make this unequal treatment necessary. In order for an exception to the equal treatment requirement to be permissible and lawful there must, in any case, be sufficient factual justification.

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

Persons affected by discrimination may either immediately file a lawsuit with the Labour and Social Court or file an application with the Equal Treatment Commission (*Gleichbehandlungskommission*).

An agreement based on an out-of-court solution or a court settlement may be reached between the parties either before or after the claims have been initiated.

3.6 What remedies are available to employees in successful discrimination claims?

Persons affected by discrimination have claims for damages or elimination of discrimination and compensation for pecuniary loss and compensation for the personal impairment suffered.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Yes, certain regulations exist for part-time employees, employees with fixed-term contracts and temporary agency workers to ensure that they are not disadvantaged compared to other employees due to their employment status.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Whistleblower Protection Act (*HinweisgeberInnenschutzgesetz*) came into force on 25th February 2023 and essentially provides that companies with at least 50 employees and in certain areas are obliged to set up an effective internal Whistleblower protection system. In addition, procedures for handling, documenting, storing and following up on Whistleblowers as well as special legal protection measures for Whistleblowers and administrative penalties for certain acts are provided for.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Companies with 150 or more employees are obliged to submit a “remuneration analysis report” (i.e. income report) to their employees every two years. The report must be prepared in anonymised form.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

In implementation of the Work-life Balance Directive, the Maternity Protection Act (*Mutterschutzgesetz*) and Paternity Leave Act (*Väterkarenzgesetz*) were amended for births from 1st November 2023, among other things.

In principle, parental leave can only be taken until the child is 22 months old (i.e. two months earlier than before). Parental leave will continue to be possible until the child reaches the age of 24 months, provided the mother is a single parent. Parental leave can be shared twice with the father and one part of the leave must be at least two months. If it is shared, the parental leave entitlement is extended until the child is 24 months old. Part of the parental leave may also be postponed until a later date.

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

The employer does not pay any remuneration during the protection period (i.e. period from the last eight weeks before the expected date of birth until at least eight weeks after the birth) as well as the maternity leave. During the maternity protection

period, employees are entitled to maternity allowance from the state. It is further possible to apply for childcare allowance during maternity leave. There is the possibility to choose between different systems of childcare allowance.

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

After the end of the respective maternity leave, the employee is entitled to return to the employment to which she was assigned at the time.

The employee is entitled to parental part-time work (reduction of normal weekly working hours) or to a change in working hours until the child's eighth birthday for a maximum period of seven years, if certain requirements are met (certain length of service, company size and specific range of working hours). The period between the age of seven and the child's later entry into school is to be added to this maximum amount. For applications for parental part-time work before 1st November 2023, there is an entitlement to parental part-time work until the child's seventh birthday and/or until the child starts school at a later date.

4.4 Do fathers have the right to take paternity leave?

Yes. Fathers are entitled to paternity leave under the same conditions as mothers. Furthermore, fathers have a legal entitlement to one month's leave on the occasion of the birth of a child (*Papamonat*).

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

During parental leave, the employee has special protection against termination and dismissal, according to which termination or dismissal is only permitted for certain reasons after court approval.

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

There is no legal entitlement to work “flexibly”. However, in companies with more than five employees, there is a legal entitlement to part-time care leave (reduction in weekly working hours) for a period of up to two weeks under certain conditions.

5 Business Sales

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

A transfer of an undertaking occurs when an undertaking, business or part of a business is transferred. The prerequisite for this is that the acquirer continues an existing economic entity while maintaining its identity. A change of shareholders within the company managing the company (“share sale”) does not entail a change of ownership and thus also no legal transfer of undertakings.

In the event of a transfer of undertaking, the acquirer of the undertaking automatically enters into the employment relationships existing at the time of the transfer with all rights and obligations as employer.

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

If the collective agreement or the company agreements applicable after the transfer of undertaking significantly worsen the working conditions, the employee has a privileged right of termination within one month of notification. In addition, the employee may object to the transfer of his employment relationship to the acquirer within one month of notification, if the acquirer, in the case of a change in the collective agreement, does not have certain existing protection under the previously applicable collective agreement or the previous company pension commitments do not take over.

If the acquirer is subject to the same collective agreement as the transferor, the validity of the collective agreement does not change. If a different collective agreement is applied in the acquirer's company, there is a change of collective agreement. In the case of a change of collective agreement, there is no prohibition of deterioration in this respect, only the remuneration due to the employee for regular work performance in normal working hours under the collective agreement prior to the transfer of the business may not be reduced.

If the acquirer is not subject to a collective agreement with regard to the business due to lack of own collective agreement affiliation, the acquirer must fully maintain the conditions of the previous collective agreement. In this case, the terms and conditions can only be cancelled or limited by a disadvantageous individual employment contract one year after the transfer of the business at the earliest.

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 employees shall be informed in advance in writing of the time or planned time of the transfer, the reason for the transfer, the legal, economic and social consequences of the transfer for the employees and the measures envisaged with regard to the employees. If a works council exists, it must be informed instead and, if requested, this information must be consulted with the works council. In addition, the employees must be informed in writing of any changes in the service note or the employment contract without delay or within one month at the latest.

The absence of this information results in the employees concerned being inadmissibly impaired in the assertion of their rights.

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

If the transferor or acquirer of the business gives notice of termination due to the transfer of an undertaking, this notice of termination is legally invalid.

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

No. The terms and conditions of employment shall remain in force unless otherwise provided for in the provisions on the change of affiliation to the collective agreement, the company pension commitments and the continued validity of company agreements.

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 distinction is made between termination and dismissal for cause by the employer when terminating the employment relationship.

In the event of termination by the employer, the employer must observe certain notice periods and dates when terminating the employment relationship, unless it is a fixed-term employment relationship. The notice periods are set by law:

- The employer's statutory notice periods begin with a minimum period of six weeks and increase to up to five months depending on the length of service. The employee must observe a notice period of one month to the end of the month. This notice period for both employer and employee can be extended to up to six months by agreement.
- The statutory termination date is generally the end of the respective quarter. The employer and employee can agree in individual contracts that the employment relationship can be terminated on the 15th or last day of a calendar month.

The above regulations only apply if the applicable collective agreement does not provide for any special regulations.

Dismissal is the immediate ("without notice") termination of the employment relationship by the employer for certain important reasons without observing termination dates and 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?

The employer can waive the employee's work during the notice period. However, the employer must continue to pay the full 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?

It is not necessary to state a reason for termination when giving notice. Under certain conditions, however, the employee may contest the termination at the Labour and Social Court (e.g. on grounds of social hardship or an unlawful motive for termination).

The grounds for dismissal for White-collar workers are listed by way of example in the Employees Act (*Angestelltengesetz*), and for Blue-collar workers in full in the Industrial Code 1859 (*Gewerbeordnung*). The decisive factor for any reason for dismissal is particularly serious misconduct on the part of the employee combined with the unreasonableness of continued employment for the employer. An employee may contest the dismissal in court if it was unjustified.

There are special grounds for termination and dismissal for employees who are protected by law.

There are certain information and consultation rights of the works council to be observed.

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

The following employees are under special protection:

- Mothers-to-be and mothers and fathers who are taking maternity leave or parental part-time work due to the birth of the child.
- Works councils (substitute members of the works council, members of electoral boards and candidates under certain conditions).
- Representatives of disabled people and their deputies.
- Employees who are called up for military, training or community service and women in training service.
- Disabled employees.

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?

Terminations do not have to be justified unless the employee is specially protected against termination or the termination is contested in court. In these cases, the employer may have to prove that the termination was for economic or personal reasons, e.g. if it is contested on the grounds of social hardship. Dismissals are permissible for various reasons, some of which are regulated by law, e.g. betrayal of company secrets, incapacity for work, or persistent neglect of duties. Whether the employee's behaviour is sufficient for dismissal depends on the specific individual case.

In the event of a termination without notice or in breach of the termination date, the employee is entitled to compensation for termination. The entitlement to compensation for termination includes both the current remuneration to which the employee would have been entitled to the point in time at which the employment relationship would have ended if the notice had been properly given, as well as the *pro rata* special payments and other remuneration components.

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

In companies with a works council, the employer must inform the works council of the intention to terminate the employment of an employee prior to any intended termination. Depending on the content of the works council's statement (consent, objection, silence), there are different possibilities to challenge the termination in court.

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 either claim that the termination was invalid for various reasons (social hardship, unethical motive) and that the employment relationship continues or, in the event of termination without notice or failure to meet the notice period, the employee can demand compensation for termination.

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

A settlement between employer and employee is possible at any time, even during legal proceedings.

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

The employer is obliged to notify the Austrian Public Employment Service (AMS) in writing of any intended downsizing when certain thresholds are met and at least 30 calendar days in advance. If a works council has been set up in the company, a copy of this notification must be sent to it. If there is no works council, the copy of the notification must be sent to the employees likely to be affected 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?

Failure to comply with the obligation to notify the AMS and the blocking period of 30 calendar days may result in terminations being ineffective.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Measures can be taken to protect business interests through confidentiality agreements, non-disclosure agreements, non-disclosure clauses in employment contracts, employee training, company guidelines on how to deal with secrets and non-competition clauses.

In practice, a so-called "*conventional penalty*" for breaching a non-disclosure obligation or non-disclosure clause is often agreed in the employment contract. A contractual penalty is an agreed lump-sum compensation, which serves to expressly sanction certain serious breaches of duty by the employee.

7.2 When are restrictive covenants enforceable and for what period?

This depends on the concluded agreement. However, the damage should, in any case, be asserted within the statutory limitation period or the expiry period agreed in the respective collective agreement or employment contract.

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

Unless this has been agreed between the parties to the employment contract, there is no obligation to provide financial compensation.

7.4 How are restrictive covenants enforced?

If a breach of contract or agreement has taken place, such a violation will be asserted at the Labour and Social Court.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The General Data Protection Regulation (GDPR) entails several

obligations in employee data protection. Due to the opening clause of Article 88 of the GDPR, the participation right of works councils plays a significant role in the processing of employee data in the employment relationship.

While data traffic within the EU is not subject to any restrictions due to the equal standard of data protection guaranteed by the GDPR, data traffic with third countries is only permitted under the conditions of Article 44 *et seq.* of the GDPR.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees have the right to request and obtain a copy of their personal data held by their employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

In Austria, pre-employment screenings are rather unusual. In any case, written consent is required and a data protection declaration must be obtained.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

In general, control measures that affect the personal rights of employees are only permissible to the extent that the works council has reached a company agreement with the company, or if there is no works council, the express consent of the employee concerned must be obtained. The privacy of the employee must, in any case, remain protected in the core area.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Control by the employer is only allowed if it pursues objective and legitimate monitoring goals and the control is proportionate.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are no specific restrictions (yet), but data protection and personal rights must be respected in the workplace and must not be subject to excessive interference.

9 Court Practice and Procedure

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

Labour and social jurisdiction is exercised in the first instance by the Regional Courts; only in Vienna is there an independent court. In the second instance, labour and social jurisdiction is exercised by the Higher Regional Courts, and in the third instance by the Supreme Court.

Labour and social jurisdiction is exercised in judiciary senates; in addition to the professional judges, expert lay judges from among the employees and employer representatives are also involved in the proceedings.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

A court claim may be brought in the competent court without prior compulsory conciliation. A particular characteristic of Labour Court proceedings is that at the first hearing before the court, the judge must attempt to reach a settlement. In practice, however, it is common that the claim is first asserted out of court, and only then is a claim brought before the court.

A certain "flat fee" is payable to the court for bringing a claim. The amount of the fee depends on the amount in dispute. Labour law actions that are not aimed at money, e.g. where only a right is to be established or consent to termination is to be obtained or similar, are usually free of court fees.

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

The length of the court proceedings varies and depends on the specific individual case (e.g. witnesses, complexity, obtaining expert opinions).

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

An appeal against a first instance substantive decision in the case itself can be filed within four weeks after service of a written judgment. How long the court of appeal then needs for a decision depends on the specific individual case.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Legislative Decree no. 36 of 2012 promulgating Bahrain's Labour Law ("Bahraini Labour Law").

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

The Bahraini Labour Law offers protection to all types of employees regardless of whether they are part-time, full-time, local or expatriate employees. An employee is defined by the Bahraini Labour Law as every natural person employed in consideration of a wage with an employer and under his/her management or supervision.

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 must be in writing, in Arabic, and recorded in duplicate, one copy of which shall be retained by each of the parties thereto. If a contract is drawn up in a language other than Arabic, it must be accompanied by an Arabic version thereof, pursuant to Article 19 of the Bahraini Labour Law. In absence of a written contract, the employee alone may establish all his/her rights by all methods of evidence.

1.4 Are any terms implied into contracts of employment?

Most provisions of the Bahraini Labour Law are considered commanding principles that may not be contravened. These provisions include, but are not limited to, annual and sick leave entitlements, wages, and working hours. The Bahraini Labour Law sets out the minimum requirements, such as 30 days of annual leave and the maximum threshold in other cases, such as eight working hours. However, employers are free to amend these requirements for the benefit of the employees. For example, an employer may grant an employee more than 30 days

of annual leave and require the employee to work for less than eight hours per day.

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

Some of the employee rights set down by the Bahraini Labour Law represent the minimum threshold; such rights include 30 days of annual leave and 55 days of sick leave allowance, which comprises 15 days with full pay, 20 days with half pay and 20 days without 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 is recognised by the Bahraini Labour Law under Article 137; however, it is not a common practice in the Kingdom of Bahrain to agree on the terms and conditions of employment through collective bargaining. As per the Bahraini Labour Law, bargaining may take place at company, business, industrial, professional or national level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

The Bahraini Labour Law provides employers with the authority to organise their entities as deemed necessary. As such, employers shall be able to require their employees to split their working time between home and the workplace. Employers may do so without amending the employment contract if it does not clearly identify the workplace as a specific location, such as an office's address, and instead provides that the work shall be performed in the Kingdom of Bahrain.

If the employment contract identifies the workplace as a specific location, a formal amendment to the employment agreement will be necessary.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

The Bahraini Labour Law does not provide employees with the right to work remotely. This right can only be enforced if it is provided in an employment agreement.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade unions are governed by Legislative Decree no. 33 of 2003 promulgating the Law of Labour Unions ("LUL"). For a trade union to be recognised, it must file its articles of association and the names of its founders with the Ministry of Labour and Social Development. The recognition of a trade union is subject to its articles not violating any of the public order policies of the Kingdom of Bahrain.

2.2 What rights do trade unions have?

Trade unions have the right to attend member employees' investigations, in addition to the right to assemble industrial strikes.

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

Yes, Article 21 of LUL stipulates that trade unions have the right to assemble industrial strikes, subject to the following conditions:

1. It must have a peaceful aim for the members' economic and social welfare.
2. It must be approved by the majority of the given trade union members in an extraordinary general assembly through secret ballot.
3. Employers must be notified 15 days in advance of the employees' intention to assemble a strike.
4. The strike shall not take place while the dispute is in the process of mediation or arbitration.

Strike action at vital facilities that affect national security and the day-to-day life of citizens is prohibited.

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?

Employees are not required 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 Bahrain.

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

This is not applicable in Bahrain.

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?

Employers are prohibited from discriminating between workers based on sex, ethnicity, language, religion and belief pursuant to Article 2 *bis* of the Bahraini Labour Law. Such discrimination also covers discrimination in wages based on gender.

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

Please refer to our answer to question 3.1 above.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

There are no mandatory training requirements, but Article 192 *bis* of the Bahraini Labour Law stipulates as follows: if any employee during his/her work sexually harasses any of his/her colleagues, either by reference, by word, by deed or by any other means, they shall be punished by imprisonment for a period not exceeding one year or by a fine not exceeding 100 Dinars.

If the above is committed by the employer or his/her representative, he/she shall be punished by imprisonment for a period not less than six months or a fine not less than 500 Dinars, but not more than 1,000 Dinars.

3.4 Are there any defences to a discrimination claim?

Yes; however, it is subject to the Law of Evidence provisions whereby the employer may offer witness testimonies or other documents to substantiate the contrary.

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

Employees may enforce their discrimination rights through the Labour Court and these claims may be settled before the initiation of a labour claim if a settlement was reached between the employer and employee. Please note that the Ministry of Labour and Social Development may be approached before a claim is initiated to settle such dispute.

3.6 What remedies are available to employees in successful discrimination claims?

The Bahraini Labour Law distinguishes between dismissal without a justifiable cause and unfair dismissal. If an employee is dismissed on discriminatory grounds, it is considered unfair dismissal. Compensation for each type of dismissal varies based on whether the employee's contract term is fixed or indefinite. If an employee's contract term is indefinite and is dismissed without a justifiable cause, he/she shall be entitled to compensation by the equivalent of two days' wages for each month of service.

and at no less than one month's wages up to a maximum of 12 months' wages. On the other hand, if the employee's contract term is fixed and is dismissed without a justifiable cause, he/she shall be entitled to compensation at the equivalent of the wages for the remaining period of the contract unless the parties mutually agree at a lesser compensation, provided that the agreed compensation shall not be less than three months' wages or the remaining period of the contract, whichever is less.

On top of the different compensations mentioned above, if an employee is unfairly dismissed, he/she shall be entitled to additional compensation equivalent to one-half of the above-mentioned compensations due, unless the contract provides for a higher compensation.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

The Bahraini Labour Law does not distinguish between full-time workers and "atypical" workers. Hence, all types of employees are treated similarly.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Bahraini Labour Law does not clearly provide protection to whistleblowers. However, under other legislation such as the Penal Code, whistleblowing is recognised as a mitigating factor.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

No, the law in Bahrain does not require the employers to publish such information.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

A female employee shall be entitled to maternity leave on full pay for 60 days, which shall include the period before and after her confinement, provided that she produce a medical certificate attested by a government health centre or one of the clinics approved by the employer stating the expected date of her confinement.

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

During the maternity leave, the employee's pay and benefits shall remain unaffected. In addition, a female employee shall be entitled to obtain leave without pay to provide care for her child who is not more than six years of age for a maximum of six months in each case and for three times throughout the period of her service.

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

A female employee shall be entitled, after her maternity leave and until her child is six months of age, to two periods to

breastfeed her newly born child, each of which shall not be less than one hour. She is also entitled to two periods of care for 30 minutes each until her child reaches one year of age. A female employee has the right to combine these two periods and such two additional periods shall be considered as part of the working hours without resulting in any reduction of her wage. An employer shall fix the time of the aforementioned care period according to the female employee's conditions and the interest of the business.

4.4 Do fathers have the right to take paternity leave?

Fathers are only entitled to one day of leave with full pay upon the birth of his child.

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

There are no other parental leave rights that employers must observe.

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

The Bahraini Labour Law does not provide for such flexibility; however, it may be agreed upon separately between the employer and employee.

5 Business Sales

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

Yes, employees will automatically transfer to the buyer. Both the buyer and seller shall remain jointly liable to settle the employees' entitlements.

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

All employee rights will transfer on a business sale. Furthermore, collective agreements shall remain binding on the buyer.

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 are not entitled to be consulted before a business sale; however, the employer may do so voluntarily. It is not possible to estimate a rough timeframe to conclude a business sale as it depends on the size of the entity and number of employees to be transferred.

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

In general, a business sale shall not entitle an employer to dismiss employees freely. However, employees may be dismissed on the grounds of reorganisation, downscaling of business and partial

or total closure of the entity. In such case, employees will be entitled to one-half of the compensation that they would be entitled to in the case of termination without a justifiable cause.

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

Any change can be achieved only by way of mutual agreement. Employers are not free to make any amendments unilaterally, unless such power to unilaterally amend is derived from the employment contract terms.

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, an employer is obliged to serve a termination notice should it wish to dismiss an employee. As per the Bahraini Labour Law, the notice period must not be less than 30 days. However, the employers are bound to follow a longer notice period if it is stated in the employee's contract.

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 is possible to request an employee to serve a period of garden leave.

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 considered dismissed upon the expiry of their termination notice period.

As per the Bahraini Labour Law, upon termination, employees are entitled to the following:

1. **Leave balance**
Article 58 of the Bahraini Labour Law stipulates that an employee is entitled to 30 days of annual leave.
The employee is entitled to receive payment *in lieu* of the accrued leave days.
2. **Travel tickets**
As per Article 27 of the Labour Market Regulatory Law, expatriates are entitled to a travel ticket back to their home country if they do not start working with another employer in Bahrain.
3. **End of service indemnity**
Expatriates who do not benefit from social insurance under the Social Insurance Law are entitled to an end of service indemnity. Article 116 of the Bahraini Labour Law explains the calculation method by stating that: "[A] worker shall be entitled upon the termination of his employment to a leaving indemnity at the rate of half month's wage for each of the first three years of employment and one month's wage for each of the following years in service. A worker shall be entitled to receive his leaving indemnity for fractions of the year in proportion to the period spent in the employer's service."
The calculation in the above-mentioned Article shall be based on the employee's most recent wage, excluding all allowances except social allowance.

Please note in this respect that a Bahraini employee whose salary exceeds 4,000 Dinars is also entitled to leave indemnity in respect of the amount in excess of the 4,000 Dinars only, pursuant to Article 17 of the Social Insurance Law.

4. End of service certificate

Upon termination or during the course of employment, an employer is obliged to give an employee an end of service certificate pursuant to Article 13 of the Bahraini Labour Law, which stipulates as follows: "[A]n employer shall give to a worker, upon request and free of charge, a certificate confirming the date of employment, type of job, wage, other benefits received, experience, professional skills, date and reason for termination of the contract of employment."

5. Notice period

Employees are entitled to be served notice in accordance with the terms of their contracts, subject to which the notice period should not be less than 30 days in advance. If the employer fails to serve the notice in a timely manner, the employee is entitled to his/her wages for the notice period.

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

As per Article 110 of the Bahraini Labour Law, if an employer is forced to dismiss some employees due to reorganisation, downscaling of business, or partial closure, local Bahraini employees must be retained if it is possible to terminate a foreign employee who has the same qualification and experience as the local employee instead.

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) Employee-related reasons:

An employer may terminate a contract of employment without notice or compensation in any of the following instances:

1. If the employee has assumed a false identity or submitted false certificates or testimonials.
2. If the employee has committed a fault that caused serious material loss to the employer, provided that the employer shall report the matter to the competent authorities within two working days of its knowledge of the seriousness of the material loss.
3. If the employee, despite a written warning, fails to comply with written instructions that are required to be observed for the safety of workers or the establishment, provided that such instructions are posted in a prominent place in the workplace.
4. If the employee does not attend to the workplace, without legitimate cause, for more than 20 intermittent days or for more than 10 consecutive days in one year, provided that such dismissal shall be preceded by a warning in writing by the employer to the employee after an absence of 10 days in the former instance and an absence of five days in the latter instance.
5. If the employee fails to perform his/her essential duties under the contract of employment.
6. If the employee discloses, without written permission from the employer, secrets related to work.
7. If the employee has been finally sentenced for a crime or misdemeanour involving dishonour, dishonesty or public morals.

8. If the employee is found during the hours of work to be under the influence of alcohol or drugs, or if he/she has committed an immoral act at the place of work.
9. If the employee assaults his/her employer or his/her responsible manager or commits a serious assault upon any of his/her supervisors of work during the course of employment or for reasons connected therewith.
10. The employee's failure to comply with the legally prescribed rules concerning the exercise of the right to strike.
11. If the employee becomes unfit to do his/her work, subject to the contract due to a cause attributed thereto, such as cancelling his/her permit to practise his/her work or loss of the qualifications authorising him/her to carry out the mutually agreed work.

If the employee has not committed any of the above-mentioned offences, upon dismissal the employee will be entitled to compensation that varies subject to the type of contract pursuant to Article 111 of the Bahraini Labour Law, which stipulates as follows:

- "A. If an employer terminates an employment contract of indefinite period within the first 3 months from the effective date thereof, the worker shall not be entitled to any compensation unless the termination is an unfair dismissal [...]*
- B. If an employer terminates an employment contract of an indefinite period without cause or for an unlawful cause three months after the commencement of employment, he shall compensate the worker by the equivalent of two days' wages for each month of service and at no less than one month's wages up to a maximum of twelve months' wages.*
- C. If an employer terminates an employment contract of definite period without cause or with an unlawful cause, he shall compensate the worker at the equivalent of the wages for the remaining period of the contract unless the parties mutually agree at a lesser compensation, provided that the agreed compensation shall not be less than three months' wages or the remaining period of the contract, whichever is less..."*

2) Business-related reasons:

Business-related reasons are mentioned under Article 110 of the Bahraini Labour Law, which states as follows: *"An employer may terminate the contract of employment because of the total or partial closure of the establishment, scaling down of its business or replacement of the production system by another that may affect the size of the workforce, provided that the contract's termination shall not take place except upon giving the Ministry concerning the reason for the termination 30 days before the date of giving the worker notice of termination. In cases other than the total closure of the establishment, the contract of the Bahraini worker who has the same competence and experience as the foreign worker with whom he works in the establishment shall be given priority.*

In case of termination of the contract for any of the reasons provided for in the preceding paragraph, the worker shall be entitled to receive a bonus equivalent to one half of the compensation referred to in Article (111) of this Law."

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

If an employee commits an offence that is punishable by dismissal, the employer must investigate the employee in question within seven days from the date of discovering the violation. The trade union to which the employee belongs shall be entitled to nominate a representative thereof to attend the investigation once a written notice is given by the employee to the employer.

An employer shall be empowered to personally investigate the employee or to assign the investigation to another person who has experience in respect of the subject matter of the violation or to one of the company's staff members, provided that the investigator's position shall not be less than the level of the employee involved in the investigation.

Upon conclusion of the investigation, the employee will be served a written notice of the penalties inflicted upon him/her. If the employee refuses to receive the written notice, it will be sent to his/her address via registered post with an acknowledgment of receipt.

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 seek legal redress on the grounds that he/she was unfairly dismissed or dismissed without a justifiable reason. We have previously outlined compensation for unjustifiable dismissal in our answer to question 6.5. In the case of unfair dismissal, which is dismissal based on gender, race, religion, etc., an employee will be entitled to additional compensation equivalent to one-half of the compensation due for unjustifiable dismissal.

It is also common for employees to file claims upon the termination of their contracts to claim unpaid wages, notice period compensation, annual leave payments, travel tickets, end of service indemnities and end of service certificates. The same have been listed in our answer to question 6.3.

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

Yes, it is possible to settle claims before or after they are initiated if the employer pays the employee the entitlements that he/she is entitled to.

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

If the dismissal was due to reorganisation, downscaling of business, or partial or total closure of the entity, the employer is obliged under Article 110 of the Bahraini Labour Law to notify the Ministry of Labour and Social Development 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 the case of mass dismissal, the employer and employees shall initially aim to settle the dispute amicably. If no agreement is reached within 60 days, either the employer or employees may request the Ministry of Labour and Social Development to refer the dispute to the Collective Dispute Settlement Board ("CDSB"), whose formation shall be determined by the Minister. If the CDSB does not resolve the dispute within 60 days, either the employer or employees may request the aforementioned Ministry to refer the dispute to an arbitral tribunal. The arbitral tribunal shall then issue a binding and enforceable award.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Non-competition restrictions are recognised.

7.2 When are restrictive covenants enforceable and for what period?

The non-competition restriction is only valid if:

1. The employee has reached the age of 18 at the time of concluding the contract.
2. Restriction is limited as to the time for a period not exceeding one year after the termination of the employment contract and is limited in terms of place and type of work to the protection of the employer's legitimate interests.

An employer shall not invoke such agreement if the contract is terminated or if its renewal has been rejected without any justifiable action on the employee's part. The employer may not rely on such agreement if the employee has had a justifiable reason to terminate the contract of employment.

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

In the case of breach of the non-competition restriction, the employer is entitled to compensation.

7.4 How are restrictive covenants enforced?

If an employee breaches the non-competition restriction, the employer will need to substantiate the damage it incurred and claim for compensation.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

As per the Bahraini Labour Law, employers shall maintain a file for each employee containing all particulars related thereto, especially: his/her name, age, CPR, marital status, residential address and nationality; his/her position or occupation; his/her experience and qualifications; the date of engagement for employment and wage, and any changes occurring thereto; leave he/she has taken and the penalties imposed on him/her; and the date of termination of service and the reasons therefor.

The employer shall also maintain on such file the minutes of investigation and the report of his/her supervisors on his/her work performance, as determined in the basic regulations of the establishment, as well as any other documents related to the employee's service.

The employer shall also maintain the employee's file for at least two years from the date of the termination of the work relationship.

Such data may be considered personal data and, as a result, shall not be transferred freely to other countries except upon obtaining the employee's explicit consent or if it is deemed necessary for the performance of the employment contract.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, employees do have such right.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

There is no legal obligation on employers to carry out pre-employment checks on prospective employees; however, employers customarily do so.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Under the Bahraini Labour Law, if an employee causes, by reason of his/her work, the loss or destruction of items, machinery or products owned by the employer or kept the same in his/her custody, and where this is due to his/her deliberate act or gross negligence, he/she shall be liable for payment of the value of what he/she has lost or damaged. However, the Bahraini Labour Law does not specifically provide that the employer may monitor the employee's emails, telephone calls or use of computer systems.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

The Bahraini Labour Law does not specifically provide that the employer may monitor an employee's use of social media outside the workplace. However, an employee shall not use social media platforms to disrespect his/her managers or disclose confidential information.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

No. However, using AI in such areas shall be in compliance with the personal data protections laws.

9 Court Practice and Procedure

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

All employment claims must be filed before the Labour Case Administration Office ("LCAO"). The LCAO stage shall not exceed two months but may be extended by the LCAO chief. At the end of the LCAO stage, the LCAO judge will note their opinion in a report and refer the case along with the report to the High Civil Court.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The employer and employee may mutually agree to refer their dispute to the Individual Labour Dispute Settlement Authority

(“the Authority”) at the Ministry of Labour and Social Development before taking the dispute to the Courts of Law. If a settlement of the dispute is reached, the Authority shall draw up a statement in this regard to be signed by both parties to the dispute, or their representatives, and the concerned officer. Such statement shall have the force of an execution deed.

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

Employment-related complaints typically take five to 12 months.

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

Yes, High Civil Court judgments may be appealed within 45 days before the Court of Cassation. It takes approximately up to 12 months for the Court of Cassation to issue its judgment.



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Hassan Radhi & Associates ("HRA") is one of the largest and most reputable and leading law firms in Bahrain. The office was founded in 1974 by Dr. Hassan Ali Radhi, the senior partner of the firm, who has more than 45 years of legal experience and professionalism in the legal sector, especially in banking & finance and corporate law. The firm has eight partners and eight lawyers, supported by a dedicated and professional administrative team, which provide exceptional legal services locally and internationally in Arabic and English.

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Belgium

DEL-Law



Christophe Delmarcelle

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Aside from international treaties, employment obligations arise from a number of sources that are subject to a set hierarchy:

- (i) the law;
- (ii) Collective Bargaining Agreements (“CBAs”) declared to be generally binding by Royal Decree;
- (iii) CBAs that have not been declared generally binding;
- (iv) written individual employment agreements;
- (v) CBAs that have not been declared generally binding where the employer belongs to a joint committee in which a CBA is agreed, although the employer is not a signatory or member of a signing federation;
- (vi) work regulations;
- (vii) additional statutory or regulatory provisions;
- (viii) verbal individual employment agreements; and
- (ix) general practices within the branch or the company.

Amongst the numerous laws, the most relevant would be:

- (i) the law of 3 July 1978 on employment contracts;
- (ii) the law of 16 March 1971 on working time;
- (iii) the law of 27 July 1987 on temporary work;
- (iv) the law of 12 April 1965 on the protection of remuneration; and
- (v) the law of 20 September 1948 on the organisation of the economy that sets forth the legal context of the works councils.

It is to be noted that nearly all regulations under employment law carry criminal sanctions for violation.

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

If the employer wants to proceed with the termination of the employment contract of an employee, he will always have to verify whether or not the employee is protected against dismissal. Employees who are – by way of example – taking up their right to time credit, parental leave, maternity leave and employees who have filed a complaint for harassment, discrimination, etc., are protected against dismissal. If the employer gives notice and he cannot prove that the dismissal is not related to the protection to which the employee is entitled, he will have to pay additional compensation to the employee on top of the indemnity *in lieu* of notice to which the employee is entitled.

Employees’ representatives (trade union delegates, members of works councils (“WCs”) or of the Committees for prevention

and protection at work (“CPPWs”)) are moreover entitled to a specific protection against dismissal and specific procedures exist to terminate their employment 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?

Permanent employment contracts do not have to be in writing.

However, written employment contracts are required to be in place and contain mandatory provisions before all other types of employment (i.e., fixed-term and part-time employment, student employment and homework, etc.) commence.

Furthermore, certain provisions of the employment contract must be in writing (sometimes even prior to the employment commencing) to be valid and enforceable (e.g., clauses relating to reimbursement of education costs, non-competition, homework, etc.).

There is no requirement to register the employment contract with, or notify it to, any public body, although employers must declare all new employees at the National Office for Social Security (“NOSS”) before they start working. This is called the “Dimona” declaration (or “Limosa” declaration for foreign employees).

1.4 Are any terms implied into contracts of employment?

Imperative employment law provisions generally supersede the employment contract in such way that there is no need to mention these in the agreement.

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

Yes, such as the minimum number of hours of work, minimum salary scales, minimum severance/notice periods, 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?

There are three categories of CBAs:

- National CBAs concluded at national level by all employee organisations and all employer federations. These CBAs are very similar in status to law as they automatically apply to all employees and all employers in Belgium.

- Sector CBAs concluded at sector level. These CBAs automatically apply to all employees and employers in the relevant sector (e.g., the metallic fabrications sector or the chemical sector etc.).
- CBAs concluded at company level. These CBAs are concluded at company level by one employer and (at least) one trade union; they only apply to the employees employed by the company that concluded the agreement.

The three officially recognised trade unions (socialist, catholic and liberal), the employers' federations and employers themselves (in relation to company collective agreements only) are entitled to enter into CBAs.

CBAs may cover all collective and individual issues relating to employment law. This includes working time, minimum wages, end-of-year bonuses, notice periods (for blue-collar workers), flexibility of working time, night shifts, meal vouchers, outplacement procedures, pre-retirement rights and specific protections against termination of employment, etc.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

No, telework can only be organised on a voluntary basis. An agreement has to be entered into in writing meeting the legal conditions in terms of content.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

See above.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

In Belgium, trade unions are official bodies recognised by law. However, they do not have a legal personality and can therefore not be sued directly. Three official trade unions exist in Belgium: the socialist (FGTB/ABVV); the catholic (CSC/ACV); and the liberal (CGSLB/ACLVB).

2.2 What rights do trade unions have?

Trade unions may form "trade union delegations" in companies following a specific procedure. They represent employees in collective bargaining (at all levels) and, in cases of industrial action, before the employment tribunal. They also represent the employees' interests within companies (e.g., by negotiating collective employment conditions). They have a right to prior information on changes that may affect contractual and customary employment and remuneration conditions. They can initiate collective actions.

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

Under Belgian employment law, employees have an unimpeded right to strike. Unless specifically provided for in a CBA, there is no procedure, such as giving advance notice, which must be

respected by the employees or the unions before they can resort to industrial action.

On the spot walk-outs, slow-downs, etc., cannot be prevented or sanctioned. Picketing and third-party picketing are allowed. Participating in a strike may not be invoked as a reason to terminate an employment agreement even though the strike is irregular.

The employer does not have to pay wages to striking employees. Instead, the unions will pay a daily allowance to their striking members.

If the strike is contrary to the obligations accepted by the unions under a CBA or threatens public order, recourse to the courts is possible, although exceptional.

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?

WCs are established in companies usually occupying at least 100 workers. Both parties (employer and employees) are represented in the WCs. The employer directly appoints his representatives from amongst the enterprise's senior executives, and the employees' representatives are elected by the employees every four years based on lists of candidates submitted by trade unions. The next social elections will take place in May 2024 (procedure began in December 2023).

The WC discusses and negotiates work rules and working conditions, monitors the company's economic and financial situation, gives advice and formulates proposals on the functioning of the company.

CPPWs are established in companies usually occupying at least 50 workers.

CPPWs are jointly composed of the head of the company on the one hand and employee representatives from the company on the other. The employer appoints the members of his delegation from amongst the management personnel, while the employees' representatives are elected from among/by the workers themselves during the social elections.

The CPPW's primary role is to identify, propose and contribute to all measures taken to promote the well-being of the employees during the performance of their work. This includes issuing prior opinions, giving prior consent, devising proposals, the right to information, appointing a delegation and various specific powers. However, for companies having more than 50 employees but fewer than 100 employees, the CPPW is empowered with additional information and consultation powers so to act in practice as a WC.

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 principle, there is no co-determination in Belgian labour law aside from very specific cases like the implementation of the working regulations or the setting up of the selection criteria within the scope of a collective dismissal procedure. However, there still exists a wide variety of information and consultation competences. For example, as will be explained hereafter, the WC has the right to receive different categories of information: basic information; annual information; periodic information; quarterly information; and occasional information.

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

The trade union delegation and the WC have different roles and

competencies and usually act in parallel. However, as the trade union delegates are usually also elected to the WC, they clearly act in close coordination on their specific fields of competencies.

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?

Belgian legislation prohibits direct and indirect discrimination on grounds of gender, race, colour, ethnic origin, nationality, sexual orientation, civil status, birth, wealth, age, language, belief or religion, health, disability, prior illness, genetic or physical characteristics, political opinion, social background or trade union sympathies. “Direct” discrimination is a difference in treatment that directly relates to the discriminatory ground. “Indirect” discrimination is a difference in treatment that seems to be neutral but is, in reality, related to the discriminatory ground.

There is also specific legislation regarding the equal treatment of male and female employees (including equal pay) as well as legislation prohibiting discrimination against fixed-term or part-time workers.

The anti-discrimination laws cover discrimination, the failure to make reasonable adjustments for disabled employees, harassment and any act that tends to encourage discrimination.

The prohibitions referred to in the Non-Discrimination Acts of 10 May 2007 apply to access to paid employment (including selection criteria and promotion opportunities) regardless of the activity involved or the seniority of the position.

Discrimination with respect to general working conditions, salary and redundancy conditions is also prohibited.

CBA 95 of 10 October 2008 regarding equal treatment applies to all phases of the employment relationship, including recruitment.

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

See above.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The Act of 10 January 2007 relating to protection from violence, moral harassment (bullying) and sexual harassment in the workplace aims both to prevent violence, moral harassment and sexual harassment at work and to protect workers who are victims of such acts.

Victims of harassment can submit a complaint to the prevention advisor, who will seek to find an internal solution through conciliation. If this proves unsuccessful, a specific procedure applies. The plaintiff and witnesses are protected against dismissal.

3.4 Are there any defences to a discrimination claim?

Yes, but it depends on whether a direct discrimination or an indirect discrimination is at stake.

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

They usually file a criminal complaint or can claim in civil courts the six-month damage indemnity provided for by law.

3.6 What remedies are available to employees in successful discrimination claims?

A six-month damage indemnity is due by the employer.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Yes, see above.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

EC Directive 2019/1937 has been implemented in Belgium via (i) for the private sector, the Act of 28 November 2022, and (ii) for the public sector, the Act of 8 December 2022.

In the private sector, in short, companies had to implement an internal reporting system meeting the legal requirements as follows:

- (a) for companies with 50 to 249 employees: **from 17 December 2023**;
- (b) for companies with more than 250 employees: **from 15 February 2023** – urgent action needed;
- (c) for all companies subject to the rules on *financial services, products and markets and prevention of money laundering and terrorist financing*: **from 15 February 2023**; and
- (d) for companies with less than 50 employees, which are not subject to the rules on *financial services, products and markets and the prevention of money laundering and terrorist financing*: it is not mandatory.

Whistle-blowers, facilitators and related third parties are protected against retaliation.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Directive (EU) 2023/970 of 10 May 2023 aimed at reinforcing the application of the principle of equal pay for men and women for equal work or work of equal value through pay transparency and enforcement mechanisms (the “Directive”) came into force on 6 June 2023. It has, however, not yet been transposed in Belgium – the deadline is set at 7 June 2026 to transpose it. Aside from the mandatory information to be provided in the “social balance” annexed to the annual accounts, and which include, amongst other information pertaining to the number of employees, their categories and gender, there are no specific legislation imposing information requirements aside from specific transparency obligations regarding the remuneration for quoted companies or public companies.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Pregnant employees have a prenatal leave entitlement of six weeks (or eight weeks in case of multiple births), which starts no earlier than the beginning of the sixth or eighth week before the expected date of childbirth.

Pregnant employees have a postnatal leave entitlement of nine weeks.

Employees are entitled to convert a part of their prenatal leave (maximum five or seven weeks) into postnatal leave.

The last two weeks of any prenatal leave that is converted into postnatal leave may be taken within eight weeks of the employee's return to work.

Employees are not permitted to work for a period starting on the seventh day prior to the expected date of childbirth (mandatory prenatal leave) and ending at the end of the ninth week after childbirth (mandatory postnatal leave). During this period, it is prohibited for employees to work (even at their own request).

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

The employer does not have to pay a guaranteed salary since the maternity leave compensation is fully covered by the worker's mutual insurance company, which pays her a "*maternity allowance*". Pregnancy and childbirth is a legal cause of suspension of the employment contract. During the entire period of suspension, the employee is exempted from working and the employer is no longer obliged to pay the remuneration nor provide the agreed work.

Since the benefits in kind as well as variable pay, commissions and bonuses are part of the worker's remuneration, they are also suspended during maternity leave.

The only case in which the employer is required to pay a guaranteed salary is the case where work disability occurs within five weeks (or seven weeks in the case of multiple births) before the pregnancy leave. However, the guaranteed salary is not payable if the work disability extends uninterruptedly until the pregnancy leave.

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

She is protected against dismissal and may also benefit from other family friendly rights, including:

- Parental leave to be taken in certain circumstances following the birth or adoption of a child until the child has reached the age of 12.
- Paid absence for exceptional circumstances (e.g., marriage of the employee, birth of his or her child, death of a first-degree relative, etc.).
- Unpaid absence for a compelling reason (sickness, accident or hospitalisation to persons living under the same roof as the employee or to first-degree relatives).
- Flexible working applications.

4.4 Do fathers have the right to take paternity leave?

Yes, fathers are entitled to take 10 days off in the four months following the child's birth.

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

See above.

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

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?

It depends on whether the operation qualifies as a "business transfer" in the meaning of the CBA 32*bis*, (the "TUPE regulation").

CBA 32*bis* applies to a change of employer resulting from a transfer of undertaking (or part of an undertaking) and provides for an automatic transfer of the existing employment contract on the date of transfer.

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

Aside from the automatic transfer, CBA 32*bis* also entails the following:

- the dismissal of transferred employees is prohibited;
- the transfer of all rights and duties pertaining to the employee; and
- the transfer cannot be the reason for amending the terms and conditions of employment and the transferor may only amend these to the same extent as the transferee could – bearing in mind that in Belgium, amending the terms and conditions of employment is rather difficult without taking financial risks, including with a constructive dismissal.

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 transferring employer has the obligation to inform the transferring employees about the transfer whether collectively or in the absence of any social body individually.

The penalties for failing to comply with the notification and consultation obligations include criminal sanctions and administrative fines.

Consultation must occur prior to the implementation of the transfer.

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

No, see above.

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

No, see 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?

Both parties to a permanent employment contract can terminate it with notice (the length of which is provided for by law and depends on the employee's length of service as well as the date on which the contract was entered into). Permanent contracts may also be terminated with immediate effect and payment *in lieu* of notice corresponding to the salary and benefits for the period of notice. Moreover, if one party commits a serious breach of contract, the employment contract can be terminated by the other party "for serious cause" without notice nor payment *in lieu*. Employment contracts may also be terminated by mutual agreement (with or without payment) or by an "act of God" (e.g., if an employee is rendered permanently incapable of working).

Other rules apply to the termination of fixed-term employment contracts.

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?

No, garden leave cannot be unilaterally imposed.

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?

Aside from the employee's representatives, there is no authorisation to obtain, but the termination of the employment contract must be motivated under the national CBA 109 of 12 February 2014 for reasons relating to their behaviour or capacities or for the requirements of the functioning of the company, establishment or service. In case of manifestly unreasonable termination, because the termination is not based on the employee's behaviour or capacities or on the requirements of the functioning of the company, establishment or service and would not have been decided by a normal employer: from three weeks of remuneration up to 17 weeks on top of his notice entitlement, depending on how unreasonable the termination is considered. Obviously this will require a court decision.

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

Yes, 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?

Aside from the termination of the employee's representatives or

in case of collective dismissal or closure, as a rule, an employment contract can be unilaterally terminated by either party without observing any specific procedure involving consultation with or a decision of third parties and without the prior authorisation of any social mediation, arbitration or legal body.

The only procedural requirement is that the notice of termination be in writing and, to be valid, specifies the beginning and the 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?

Aside from the severance, the employee can claim various amounts such as the damage for lack of motivation, dismissal protection, indemnity for loss of clients (for sales representatives), UCA indemnities, arrears of pay, etc.

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

Yes, at any time.

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

Specific procedural and substantive rules apply (and must be followed) to intended "collective dismissals" that would affect, during any 60-day period:

- 10 or more employees in an enterprise employing 21–99 employees;
- 10% or more of the workforce in an enterprise employing 100–299 employees; or
- 30 or more employees in an enterprise employing 300 or more employees.

Additional requirements apply in the case of a "closure" of undertaking.

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 and very strict/burdensome information and consultation procedure that must be followed. Failure can trigger criminal and civil sanctions.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Non-compete covenants may only be incorporated (in writing) in employment contracts upon compliance with a certain number of conditions (such as salary level, type of activities, limited time and geographic scope, exercise of a similar function in a similar business, possibility for the employee to harm the company, level of salary, applicable period limited to maximum 12 months, payment of a non-compete indemnity). Other conditions apply to "derogatory non-competition covenants".

It should be noted that the general *post-termination restrictions* set under Article 17 of the Employment Contracts Act provides that after the termination of their employment contract, workers must refrain from disclosing confidential information and from unfair competition:

- “confidential information”; and
- “unfair competition” encompasses any competitive activity during which the employee uses confidential information acquired during his employment with his former employer or by which he creates confusion between his former employer and a new one.

Regarding the exclusivity provisions, Article 20 of the law on transparent and predictable working conditions of 7 October 2022 stipulates that from 10 November 2022, an employer may not prohibit a worker from working for one or more other employers outside his working hours or subject him, for this reason, to unfavourable treatment. The law does, however, allow for a prohibition on working for one or more other employers “if permitted by law”.

The explanatory memorandum cites as an example that the employee must refrain, both during and after termination of the contract, from:

- (i) divulging a business secret or the secret of any matter of a personal or confidential nature of which he or she may have become aware in the course of his or her professional activity; and
- (ii) engaging or cooperating in any act of unfair competition.

7.2 When are restrictive covenants enforceable and for what period?

See above.

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

Yes, as a rule of thumb, see above.

7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced in court if necessary.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employers process personal data of their workforce on a large scale. In doing so, they have to comply with the requirements imposed by the GDPR that entered into force in May 2018 and have been implemented in Belgium by the Act of 30 July 2018.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, the GDPR entails the right to access as well as the right to portability or the right to be forgotten.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

It is generally permissible for employers to undertake *background checks* on prospective employees and factual information provided by the employees, such as academic qualifications, may be verified. The employer may even consult the former

employer if the (former) employment relationship has already terminated. The employer may not demand a criminal record check to ensure the employee’s integrity, except for professions for which a criminal record free of specific infringements is required by law (e.g., itinerant traders, security agents, etc.).

8.4 Are employers entitled to monitor an employee’s emails, telephone calls or use of an employer’s computer system?

Employees have a limited right to privacy in the workplace. This right is, however, not clearly defined or regulated. A number of general provisions seek to guarantee the privacy of all, but each of these has a number of exceptions.

Following, employers may not open private correspondence received by its employees at the workplace (by means of ground mail service or e-mail), and internet, e-mails and more generally telecommunications as well as CCTV monitoring, use, transfer and processing of any personal data implemented by employers are strictly regulated.

As far as telecommunications are concerned, one has to comply with the secrecy of telecommunications organised by two criminal provisions.

If strictly regulated/well organised, employee monitoring is still possible. To be lawful, it must, amongst others, comply with the principles of legality, purpose and proportionality, and must have been brought to the attention of the employee.

We strongly recommend obtaining legal advice before implementing or conducting a monitoring of telecommunications since it remains a grey area of law.

8.5 Can an employer control an employee’s use of social media in or outside the workplace?

Yes, to the extent the information is public and the GDPR is being complied with.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee’s performance or productivity)?

There is no specific legislation dealing with AI at the workplace. However, various specific legislation will have to be considered when implementing AI at the workplace, such as:

- (i) Collective Labour Agreement (“CLA”) n° 39 requires informing and consulting the employees when implementing a new technology that may affect the employment – not to mention getting prior advice from the CPPT, if any;
- (ii) CLA n° 38 imposes to the employer various obligations within the scope of the recruitment and selection process, such as information, privacy, confidentiality and the right to know the reasons for the decision;
- (iii) the GDPR imposes specific obligations to the processing of personal data and prohibits, save from certain exceptions, decisions solely based on automated systems;
- (iv) the health and safety legislation imposes, amongst others, the assessment and prevention of risks to the employees that could arise through the use of AI at the workplace; and
- (v) monitoring of the employee at the workplace will have to comply with the GDPR, the secrecy of the telecommunications, CLA n° 82, CLA n° 68 on video monitoring, etc.

It should be noted that an employee using GPT software without authorisation from the employer could expose himself

to disciplinary sanctions or even a termination for serious cause if it results in confidentiality or privacy breaches or an adverse impact on the employer.

9 Court Practice and Procedure

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

The main forum for determining employment disputes is the Labour Tribunal and, in appeal, the Labour Court. They are composed of one professional judge and two “social” judges: one representing the employees; and one the employers.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

There are no general procedures governing the making of complaints by employees after the termination of employment. However, employees usually issue their former employer with a formal notice before commencing legal proceedings. This notice contains a summary of the complaint and requests that the employer quickly finds a solution.

Conciliation is not a mandatory prerequisite and there are no special rules governing amicable settlements such as in the UK.

Generally, employees have five years from the date on which the facts that gave rise to the claim occurred to submit a complaint to the Employment Court, but this cannot be more than one year after termination of the employment contract. Where the claim relates to an alleged criminal offence (e.g.,

salary arrears), a longer limitation period is applicable (five years from the day on which the offence occurred), and may even, depending on the circumstances, go back indefinitely in time, insofar they are brought to court within one year of the termination of the contract. Limitation periods can be interrupted or suspended by several causes.

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

Legal proceedings usually start with the issuance of a writ of summon shortly followed with a preliminary hearing at the Labour Tribunal.

During the preliminary hearing, a calendar for the filing of written submissions is usually agreed (or otherwise determined by court) and a hearing date is set. The indisputable claims can sometimes be pleaded during this hearing or shortly after and lead to a decision.

Following submissions of the written submissions, the case is heard. It can take between a few months and two and a half years before a case can be pleaded. Decisions must theoretically be pronounced by the Labour Tribunal within a month of the hearing of pleadings, but it usually takes much longer, depending on the complexity of the case.

Appeal against the arisen decision is to be lodged before the Labour Court within a month of the notification of the decision to the unsuccessful party.

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

The appeal can take up to two years.



Christophe Delmarcelle has more than 22 years' experience in labour law (collective and individual), social security, pensions, privacy and HR income tax matters. With broad experience in both individual and collective dismissals and closure of undertaking, he has also developed a strong practice of advising on the dismissal of top executives. He advises on transfers of undertaking, the social aspects of major reorganisations, trade secrets and privacy issues including on bring-your-own-device, whistle-blowing, monitoring of telecommunications, pre-employment checks, GDPR, etc.

Christophe has been ranked by *Chambers* since 2012 up to 2018 (Band 4): "Sources regard him as 'solution-oriented and responsive,' with clients further appreciating that 'he has a lot of experience, so he can give you real-life cases and use them as background to give you advice'."

Before founding DEL-Law, after gaining experience as a tax consultant at Deloitte and as an employment lawyer at major law firms like Freshfields and Loyens, he built, from scratch, the Brussels labour team of the international law firm Bird & Bird since 2009 and headed the team as partner until 31 December 2017. Under his lead the team expanded from one lawyer to five and were ranked by *The Legal 500* and nominated by *HR Excellence*.

He regularly speaks at seminars and conferences, and wrote for various legal journals (*JTT*, *Expat News*), including a book on stock options. Since 2010, he has been a supplemental judge at the labour tribunal of Brussels.

Christophe graduated from the Catholic University of Louvain (*Magna Cum Laude*) and was admitted to the Brussels Bar in 2001.

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A team of six passionate professional lawyers dedicated to employment law services.

Providing quality, pedagogy and accuracy, this could be the motto of DEL-Law, a niche firm with great ambitions founded in 2020 by Christophe Delmarcelle.

At DEL-Law, all advice, whether in employment, social security, HR tax or privacy law, takes into account the client's reality and anticipates his needs and the subsequent required actions within the framework of a clear, understandable and synthetic strategy.

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DEL-Law has been listed as "Recommended" (in Tier 1) in the 2022 Leaders League Ranking for Belgium, for best employment law firms.

A client's testimonial: "As the EAME manager for Lenovo I have been working with Christophe Delmarcelle on several critical HR Matters in Belgium for over a decade. His creative and alternative approach has helped us close many cases in a way that was favourable to Lenovo whilst in parallel being respectful of the concerned employee. We have also appreciated his broad international network through which he was able to assist on international matters."

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

From a statutory perspective, the main sources of employment law are the Employment Act 2000 (as amended) (“the Employment Act”), the Workers’ Compensation Act 1965 (“the Workers’ Comp Act”), the Human Rights Act 1981 (“the HRA”) and the Occupational Safety & Health Act 1982 (and accompanying regulations), which collectively deal with employment standards, rights, compensation and workplace discrimination. In addition, there is a body of trade union legislation governing the rights of unionised employees.

The parties will also be bound by the contract of employment, which, if governed by Bermuda law, will be subject to the common law and jurisprudence of the Bermuda Courts.

To the extent that provisions of Bermudian legislation are similar to that of the UK, the Bermuda Courts will be bound to follow and apply any relevant decision of the Privy Council. Further, the decisions of the Superior Courts of England and Wales are highly persuasive. Depending on the facts and the circumstances, the Bermuda Employment Tribunal (“the Tribunal”) and Courts will often find assistance in the judgments of the Superior Courts/tribunals of other common law and offshore jurisdictions (including various Canadian provinces and Caricom countries).

Effective 1 June 2021, the Employment Act was amended as a result of the Employment Amendment (No.2) Act 2020. The Trade Union Labour Relations (Consolidation) Act 2020 (“the Trade Union and Labour Relations Act”) was brought into force on 1 June 2021 and effectively consolidates the various labour-related legislation.

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

The Employment Act defines an employee as being: (i) “a person who is employed wholly or mainly in Bermuda for remuneration under a contract of employment”; or (ii) any other person who “performs services wholly or mainly in Bermuda for another person for remuneration on such terms and conditions that his relationship with that person more closely resembles that of an employee than an independent contractor”. Independent contractors do not, therefore, acquire any rights or protections pursuant to the Employment Act, but expatriate workers do.

Individuals under the age of 16, casual workers, part-time employees (i.e., those who work less than 15 hours a week), temporary employees (i.e., those who work for no more than

three months in any year by an employer), students and voluntary workers are excluded from the definition of employee.

“Worker”, for the purposes of the Workers’ Comp Act, has the same meaning as employee 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?

From a statutory perspective, the Employment Act provides that a written “Statement of Employment” shall be given to the employee no later than one week after an employee commences employment with an employer. The Statement of Employment should contain various particulars of the employment relationship, including, but not limited to, the job title, brief description of the work to be conducted, salary details, hours of work/holiday, entitlement to rest days and meal breaks, entitlement to overtime, date of issue and expiry of work permit, notice and probationary period, the existence of the employee’s written policy against bullying and sexual harassment and how the policy can be accessed.

From a contractual perspective, it is open to the employer to enter into a more detailed contract with the employee. Even a verbal agreement can constitute an employment contract, assuming it can be proven.

1.4 Are any terms implied into contracts of employment?

Yes. All employment relationships implicitly include, for example, the employer’s obligation to provide work, pay for the work and provide a safe environment for its employees. With respect to the employee, every contract of employment implies that the employee will carry out the work and observe the duty of good faith and fidelity towards the employer.

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 set out in the Employment Act and include, for example, vacation pay, overtime pay, hours of work, rest breaks, holidays, leave of absence and termination of employment. If the contract contains more favourable terms than the Employment Act, the contract prevails. Parties cannot contract out of the Employment Act’s minimum requirements. Bermuda now has the Employment (Minimum Hourly Wage Entitlement) Act 2022, which became operational on 1 June 2023 and introduced a minimum wage of

\$16.40 per hour. Contravention of the minimum wage requirement enables an employee to file a complaint (which may entail an investigation and fines if found to have breached requirements).

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 including, but not limited to, pay (standard rates and overtime rates) are agreed through collective bargaining with respect to unionised employees.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

There are no express legislative provisions dealing with the concepts of working from home or remotely, either on a hybrid or full-time basis. Employers can agree such matters in the employment agreement. To the extent that employers are able to exercise autonomy insofar as the prescribed place of work for a specific role is concerned, such autonomy would remain subject to the HRA and particularly Section 6(g) of the Act, putting in place safeguards to ensure that prospective employees are not discriminated against on the basis of specific terms or conditions attached to a particular role of employment.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

As a default rule, no. Please see the answer to question 1.7 for further information on this. However, Section 6 of the HRA remains operative in favour of an employee where it can be shown, for purposes of the HRA, that an employee is being unfairly discriminated against on the basis of a term or condition attached to an employment role, i.e., a discriminatory condition excluding either the right to, or option of, remote working.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The rules relating to trade union recognition are set out in the Trade Union and Labour Relations Act. A union has the right to be recognised as the exclusive bargaining agent for a group of workers in circumstances where an employer voluntarily recognises such right or, alternatively, where a union successfully makes an application for a certification ballot. Where a union can establish to the satisfaction of the Ministry of Labour that it has members in good standing comprising 35 per cent or more of the workers in a proposed bargaining unit, it can make an application to the public office or manager of labour relations ("the Manager") to be certified as the bargaining agent for that proposed bargaining unit. The employer may agree to the application, in which case certification follows, or oppose it, thereby commencing a ballot among the workers requiring a 50 per cent majority in support of the union as their exclusive bargaining agent. Certification requires the employer to then

deal with the union and engage in the process of collective bargaining. Certification may take place without a ballot where the Manager is satisfied that more than 60 per cent of the workers support it. Certification may be cancelled by a similar process upon application by a worker to the Manager showing the support of 35 per cent of workers, followed by a ballot requiring 50 per cent support. Cancellation will be automatic if the Manager is satisfied with more than 60 per cent support.

2.2 What rights do trade unions have?

Trade unions have the fundamental right to collectively bargain with employers in circumstances where the union has obtained recognition, either voluntarily or through the statutory process. More generally, a union has the right to: (i) be registered as such; (ii) take in members and charge union dues; (iii) own property; (iv) sue and be sued; (v) intervene in labour disputes; and (vi) generally conduct business. In the context of collective bargaining, a union has the important right to initiate labour disputes and represent workers in relation to such grievances.

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

The Trade Union and Labour Relations Act sets out the rights a union has in terms of industrial action. It provides expressly for peaceful picketing and sets out a series of picketing rules. The newly-amalgamated Employment and Labour Relations Tribunal now has jurisdiction over labour disputes. The matter must first be referred to the Manager. The Manager must determine whether it is capable of resolution. If it is, the Manager must attempt a resolution between the parties. If the Manager fails to effect a resolution or determines that the dispute is not one amenable to resolution, he must refer the matter to the Minister of Labour ("the Minister").

The Minister is required to take steps to promote a settlement between the parties. If those steps prove unsuccessful, the Minister must refer the dispute to the Tribunal for determination or settlement. The right to strike is not enshrined in the legislation and, as a result, the common law principles are applicable. In relation to essential services and essential industries, lockouts, strikes and irregular industrial action short of a strike are unlawful unless a labour dispute exists, and 21 days' notice of intended action has been given. The Ministry of Labour can intervene in labour disputes and avert industrial action by referring the dispute to arbitration.

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, although some collective bargaining agreements do provide for a joint consultation process in relation to certain terms and conditions of employment.

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 Bermuda.

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

This is not applicable in Bermuda.

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?

The HRA prohibits discrimination and harassment in the employment sector on the basis of any protected characteristic, including: race; place of origin; colour; ethnic or national origin; sex or sexual orientation; pregnancy; marital status; disability; family status; religion; beliefs; political opinions; or criminal record (except where there are valid reasons relevant to the nature of the particular offence for which a person is convicted that would justify the difference in treatment). Age is not a protected characteristic under the HRA.

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

Employers are prohibited from: discriminating in respect of refusing to refer or to recruit; dismissing, demoting or refusing to employ or continue to employ; paying one employee at a rate of pay less than another employee hired on substantially the same terms; refusing to train, promote or transfer an employee; subjecting an employee to probation or apprenticeship; establishing or maintaining any employment classification or category that, by its description or operation, excludes any person or class of persons from employment or continued employment; maintaining separate lines of progression for advancement in employment or separate seniority lists; and providing, in respect of any employee, any special term or condition of employment.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The HRA provides that an employee has a right to freedom from sexual harassment in the workplace. As of 1 June 2021, pursuant to the Employment Act, employers must have in place a clear written policy against bullying and sexual harassment. Most businesses have developed their own internal policies to prevent and protect employees from sexual harassment; however, employers are required to present employees with the policy upon commencement of employment, and procedures are required to be put in place to assist every employee with understanding the policy. Employers should provide training to ensure that all employees understand the policy.

3.4 Are there any defences to a discrimination claim?

Certain express statutory exceptions are made in the HRA. Discrimination with respect to the protected characteristic will generally not exist where there is a *bona fide* and material

occupational qualification and a *bona fide* reasonable employment consideration for the position.

The HRA states that nothing in the legislation confers the right to employment for which the employee is not qualified or is not able to perform, or of which he/she is unable to fulfil a *bona fide* occupational requirement, or any right to be trained, promoted, considered or otherwise treated in, or in relation to, employment, if his/her qualifications or abilities do not warrant such training, promotion, consideration or treatment.

With respect to disabled employees, employers are required to take steps to eliminate the effects of the disability in relation to the employment. However, the HRA qualifies this by stating that such steps need only be taken if they do not cause unreasonable hardship to the employer.

The HRA also makes exceptions with respect to employment involving physical stamina and strength and in hiring by religious, charitable and social non-profit organisations.

It also makes an exception with respect to the hiring of Bermudians and for taking into account an individual's nationality *bona fide* for reasons of national security.

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

An aggrieved employee may file a complaint with the Human Rights Commission ("the Commission") orally, electronically or in writing within six months after the alleged contravention. The Executive Officer of the Commission may, however, entertain a complaint up to two years after the alleged contravention if he is satisfied there are good reasons for the delay and that no one will be prejudiced by the delay.

The Commission will determine whether there are sufficient grounds to undertake an investigation and may conduct inquiries for this purpose. The Executive Officer has a duty to seek to settle the causes of the complaint (through mediation or conciliation by mutual consent of the parties) or to endeavour to cause the breach to cease. After giving the complainant an opportunity to be heard, if the Executive Officer is of the opinion that there is no merit to the complaint, he may dismiss the complaint at any stage of the proceedings.

If it is unlikely in the circumstances that the complaint will be settled or that the Executive Officer has attempted unsuccessfully for nine months to settle the complaint, and the complaint is not so serious as to warrant prosecution, the complaint must be referred to a tribunal.

3.6 What remedies are available to employees in successful discrimination claims?

The Human Rights Tribunal ("the HR Tribunal") may order any party who has contravened the HRA to carry out any act or thing that, in the opinion of the HR Tribunal, constitutes full compliance with such provision and to rectify any injury caused to the complainant by the contravention, and/or to make financial restitution (which includes injury to feelings) provided that financial restitution shall not be ordered for any loss that might have been avoided if the complainant had taken reasonable steps to avoid it. There is no cap on the financial restitution available. The HR Tribunal may also refer the complaint to the Director of Public Prosecution if it is of the view that an offence has been committed. An employee with a successful discrimination claim can only recover up to \$1,000 of his/her costs of the proceedings.

In practice, the HR Tribunal has the power to order a person to cease any discriminatory practice and to restore rights, opportunities or privileges to the victim and/or to compensate the victim where appropriate.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No. Such “atypical” workers do not have additional protection, but they do benefit from the same protections that prohibit discrimination in employment for employees.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The only requirements in relation to whistleblowing are set out in the Employment Act. This prohibits termination of employment or imposition of disciplinary action on the ground that the employee made a protected disclosure as a whistleblower. There are no rules specific to whistleblowers who raise concerns about corporate malpractice, but businesses have put into place internal policies that set out governance on this.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

No. Employers are not required to publish diversity information about their employees in Bermuda.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

The Employment (Maternity Leave Extension and Paternity Leave) Amendment Act took effect on 1 January 2020. This piece of legislation provided an extension to maternity leave.

A pregnant employee has 13 weeks of paid maternity leave after one year of continuous employment as of her expected due date.

A pregnant employee who has been employed for less than one continuous year will be entitled to 13 weeks’ unpaid leave.

In practice, some employers elect to provide more than the statutory minimum (either on an unpaid or paid basis).

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

Entitlement to pay is referred to above. Statutory and contractual benefits will continue during the paid maternity leave period.

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

If a woman intends to return to work from maternity leave without loss of seniority, she must notify her employer at least two weeks in advance of the date on which she intends to resume work. If the position no longer exists, the employer must provide the returning employee with at least the same level

of wages and benefits as she was receiving before her maternity leave. If a woman returning from maternity leave fails to notify her employer at least two weeks in advance of the date she intends to resume work, the employee shall be deemed to have terminated her employment.

4.4 Do fathers have the right to take paternity leave?

An employee who is becoming a father and has worked for one continuous year by the expected date of birth is entitled to five days’ paid paternity leave.

Employees who have not worked for a full year will be entitled to five days’ unpaid leave. Employers can elect to provide more than the statutory minimum paternity leave.

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

Pursuant to the HRA, a woman is entitled not to be discriminated against because she is pregnant or may become pregnant.

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

There is no statutory provision that entitles employees to work flexibly if they have responsibility for caring for dependants. Employers can choose to provide flexible working hours if they wish to do so contractually or informally.

5 Business Sales

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

Bermuda does not have the equivalent of the UK’s Transfer of Undertakings legislation.

Upon the sale of shares by a vendor, the identity of the employer does not change but merely that of the shareholders. The employment contracts and collective agreements that are in force between the employer and its employees remain in full force and effect, and the employer retains all of its obligations and liabilities towards its employees.

The sale of assets operates to terminate the employment contract between the vendor and employees. It is then the purchaser’s choice as to whether they should offer new contracts to those employees.

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

As mentioned above, upon a sale of shares, all the obligations and rights of an employee are transferred to the purchaser. The purchaser must observe the terms of any collective agreement.

Upon a sale of assets, none of the obligations and liabilities are transferred to the purchaser unless contractually agreed upon in the sale and purchase agreement. Where the workforce is unionised, the purchaser will enter into discussions with the union with respect to a new collective agreement.

Pursuant to Section 5(6) of the Employment Act, where a business is sold, transferred or otherwise disposed of, the period of employment with the former employer shall be deemed to

constitute a single period of employment with the successor employer, if the employment was not terminated and severance was not paid pursuant to the Employment Act.

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 mandatory consultation rights specific to a business sale.

If there are to be any redundancies, the Employment Act states that the employee's trade union or other representative should be informed as soon as practicable about the reasons and impact of the proposed redundancies. No specific timeline for such communication is identified. The length of the process depends upon the union concerned and the likely negative impact on unionised positions. There are no formal sanctions for failing to inform.

If the sale of a business results in a large number of redundancies, the employer typically will provide advance notice to the Government Ministry responsible for Workforce Development.

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

A purchaser can decide to terminate the employment of employees upon a share sale or decide not to offer new employment to employees upon an asset sale. Severance provisions under the Employment Act or any applicable contract/collective agreement must be considered.

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

The purchaser may impose changed terms and conditions of employment with sufficient consideration. However, pursuant to the Employment Act, if the employment offered by the purchaser to the employee is refused on the basis that the new terms are less favourable than the terms upon which they were employed immediately prior to the termination, severance allowance will be payable.

6 Termination of Employment

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

Subject to the provision of the Employment Act, an employer may terminate the contract of employment for any reason and without notice during any probationary period an employee is required to undertake.

Otherwise, an employee's contract of employment cannot generally be terminated by an employer unless there is a valid reason for termination connected with the ability, performance or conduct of the employee or the operational requirements of the employer's business. If such circumstances exist, pursuant to the Employment Act, an employee is entitled to receive: a week's notice where the employee is paid each week; two weeks' notice where the employee is paid every two weeks; and one month in any other case.

The provisions of notice do not apply where an employee has reached retirement age or where the notice periods are regulated by the contract itself or by a collective agreement or otherwise by an agreement between an employer and the employee. Additionally, they do not apply where the giving of longer notice periods is customary, given the nature of the functions of the work performed by the employee.

In practice, it is not unusual to see three months' notice provisions for professional/skilled employees.

An employer must give an employee a written warning setting out the misconduct and instructions for improvement.

It is also possible for employers to terminate a contract of employment without notice in the following two ways: (i) where an employer is guilty of serious misconduct that is directly related to the employment relationship or that has a detrimental effect on the employer's business, such that it would be unreasonable to expect the employer to continue the employment relationship; or (ii) where the employee is guilty of misconduct falling short of serious misconduct or poor performance, subject to the appropriate statutory warnings having been complied with.

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 may only be imposed upon an employee if this is contractually provided for in the contract 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?

Where there is no valid reason for the termination or appropriate warnings have not been given, the employee can claim unfair dismissal and can seek to be reinstated/re-engaged and/or a compensation order. The circumstances where employees are treated as being dismissed are described above. Consent from third parties is not required before dismissal pursuant to the Employment Act.

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

Employees are protected against dismissals that are discriminatory pursuant to the HRA (for example, dismissals based on pregnancy or race).

Unionised employees may also have additional protections incorporated into their collective bargaining agreements.

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 described in question 6.1, employers are entitled to dismiss for reasons related to the individual or for business-related reasons, as long as the necessary notice and warnings are provided.

Subject to some exceptions, automatic compensation (in addition to receipt of notice) is only available to an employee

in the form of a severance allowance where the dismissal is due to: redundancy (where the employer's business has been sold or there has been a reorganisation of the business or reduction of workforce due to economic conditions); winding up or insolvency of an employer; death of the employer; or death of an employee from an occupational disease or accident resulting from that employment. Where an employee's contract is terminated, the employer is required to pay any sums due to the employee in relation to notice or severance within seven days or during the next payment cycle.

Severance allowance is calculated based on years of service: two weeks' wages, for each completed year of continuous employment up to the first 10 years; and three weeks for each completed year of continuous employment thereafter, up to a maximum of 26 weeks' wages.

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

The notice and warning provisions in the Employment Act must be adhered to. In addition, any enhanced procedures as set out in any disciplinary and grievance policy must be followed. Failure to follow such processes may result in a finding of unfair dismissal or wrongful dismissal.

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 claims of unfair dismissal and wrongful dismissal (although unfair dismissal can only be pursued through the Tribunal – not the Courts).

The remedies for unfair dismissal include: reinstatement; an order for re-engagement in a comparable position; and/or a compensation order.

A compensation order shall be of such an amount the Tribunal considers just and equitable in all the circumstances (including how the parties contributed to the dismissal). The amount of compensation shall not be less than two weeks' wages for each completed year of continuous employment, for employees with no more than two complete years of continuous employment, or four weeks' wages for each completed year of continuous employment in other cases. The compensation order has a cap at 26 weeks' wages.

Damages for wrongful dismissal will include, for example, contractual entitlement to notice and all other compensation and benefits due during a notice period.

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

Yes. This is typically carried out by way of a separation/settlement agreement, which will normally include adequate waivers, non-disparagement and protection of confidential information.

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

Where numerous dismissals are taking place (for example, due to redundancy) and depending on the industry, some employers elect to provide advance notice to the Government Ministry responsible for Workforce Development.

If the dismissals relate to unionised positions, the employer should ensure that any additional obligations under the collective bargaining agreement are also followed.

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 process and consequences are the same in relation to both individual and mass dismissals. The affected employees are able to file complaints and claim remedies pursuant to the Employment Act. Unionised employees may have additional rights pursuant to labour law.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Restrictive covenants are generally considered to be void unless they are reasonable and necessary for the legitimate protection of the employer's business. The typical type of restrictive covenants recognised in Bermuda, subject to being reasonable, include provisions protecting the confidentiality of information pertaining to the employer's business, non-solicitation/non-dealing clauses prohibiting the solicitation/dealing of the employer's customers, suppliers and staff, as well as non-competition clauses.

7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants must be reasonable in their duration, in their geographical scope and in the scope of activities that are prohibited. Courts will not "read down" or modify a covenant that they find to be unreasonable. The clause will simply be declared to be entirely unenforceable.

Although the enforceability of restrictive covenants has not been tested in the Bermuda Courts in recent times; in practice, non-competition clauses of six months are generally considered to be enforceable for professional and senior executives.

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

Yes, consideration is required in order to enter into a restrictive covenant with the employee. When restrictive covenants are given at the time of an employee's hiring, the employment of the employee constitutes sufficient consideration for the restrictive covenant. Additional consideration is required if the restrictive covenant is entered into during employment.

7.4 How are restrictive covenants enforced?

An employer can enforce a restrictive covenant by seeking an injunction (including a springboard injunction) to prevent the employee from violating the covenant or by commencing a legal action against the employee (and sometimes from his/her new employer) claiming damages suffered by the former employer as a result of the breach, by the employee, of the restrictive covenant.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Bermuda's data protection rights are enshrined in the Personal Information Protection Act 2016 ("PIPA"). The substantive provisions of PIPA have not yet come into force, save for the creation of the Office of the Privacy Commissioner, which is now producing guidance for employers on their privacy obligations.

Once in force, from 1 January 2025, employers must ensure the proper protection of employees' personal information under the employer's control. Personal information must be processed fairly and with a lawful basis (ordinarily because processing is necessary for the performance of the employment contract or in the legitimate interest of the employer or necessary to bring and defend legal claims or comply with a legal obligation). The employer should provide employees with a privacy notice setting out how their personal information is processed. The data held must not be excessive in relation to the purpose for which it is collected, should be kept securely and retained only for as long as is necessary. Employees will have rights to receive copies of their personal data held by the employer and, in limited circumstances, rights to rectification, blocking, erasure and destruction of personal data. Employees may initiate a complaint with the Privacy Commissioner in the event of a dispute with an employer over the use of personal data.

Subject to these requirements, an employer may transfer data to other countries, provided the requirements for transfers to an overseas third party are met. The employer must make its own assessment to determine that the overseas third party offers a comparable level of protection. In making that determination, the employer may rely on the Privacy Commissioner designating a particular jurisdiction or certification mechanism as providing a comparable level of protection (equivalent to the European Commission's adequacy decisions). Alternatively, or in addition, they must employ standard contractual clauses or binding corporate rules to ensure the overseas third party provides a comparable level of protection.

Exemptions to the restrictions on overseas transfers do not apply where the transfer is necessary for the establishment, exercise or defence of legal rights, or where the transfers are small scale, occasional and unlikely to prejudice the individual. These exemptions are unlikely to permit regular transfers of employee data to overseas third parties.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes. Once PIPA comes into full effect in 2025, with certain exceptions, employers must allow employees to have access to their personal information.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

There is no statutory provision that prevents pre-employment checks on prospective employees. The employer should not, however, discriminate against a candidate on the basis of one of the prohibited grounds of discrimination as set out in the HRA.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

There is no prohibition against monitoring employee's emails, telephone calls or use of the employer's computer system. However, any collection, use and storage of personal information must comply with the requirements of PIPA.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Restrictions may be placed on usage of social media both during and outside of work to the extent that it is required to protect an employer's business. Employers may, for example, state in a social media policy that employees are not to disclose confidential information regarding the employer's business or otherwise make statements regarding the employer's business that could cause disrepute or statements regarding other employees or clients that could be viewed as disparaging.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

At the time of writing, there are no restrictions on how employers use AI in the employment relationship in Bermuda.

9 Court Practice and Procedure

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

The Tribunal, as established by Section 35 of the Employment Act, has jurisdiction to hear filed complaints. Typically, the Tribunal is made up of three members, including the Chairman, who must either be an attorney of at least five years' standing or hold considerable experience in labour relations, one member representing the interests of the employee, and the other member representing the interests of the employer.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Where an inspector has reasonable grounds to believe that an employer has failed to comply, they shall, as soon as practicable, inquire into the matter. Conciliation is therefore mandatory. The inspector has the ability to request information from the parties. After conducting an initial inquiry into the complaint, the inspector shall then endeavour to conciliate and effect a settlement. Where the inspector has reasonable grounds to believe that an employer has failed to comply with any provision of the legislation or is unable to effect a settlement, the complaint is then referred to a tribunal.

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

Complaints will typically be heard within one to two years following the filing of the complaint.

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

A party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law. The appeal should be lodged within 21 days after receipt of notification of the determination or order. An appeal could take approximately three to 12 months to be determined depending upon the stance taken by the parties and the Court schedule.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main sources of employment law in Brazil are the Consolidation of Labour Laws (the Brazilian Labour Code), the Brazilian Federal Constitution, and other ancillary norms, such as decrees and regulations enacted by the Ministry of Labour and Employment.

Employment relationships in Brazil are also governed by rules set forth under collective bargaining agreements that are negotiated between Unions representing, respectfully, employees and employers, or directly executed between employees and their respective employers. These agreements usually define the annual salary increase by category and may also regulate rights related to employees' benefits.

Brazilian employment relations may also be governed by the content of offer letters, employment agreements/contracts/amendments, labour and Social Security statutes, and employers' internal policies and regulations.

Since November 2017, direct negotiations executed between employers and employees who hold university degrees and receive a monthly base salary equal to or higher than twice the maximum benefit paid by Social Security (presently totalling R\$12,867.14), were given the same status of collective bargaining agreements.

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

According to the Brazilian Labour Code, an employee is an individual who personally renders services on a regular basis to an employer (habitual work), under the orders of the latter (subordination) and in exchange for compensation (economic dependence).

There are other types of workers who are not subject to the Brazilian Labour Code and for this reason are not considered employees, such as elected officers, independent workers, and service providers.

Generally, there are some types of employees who have special protection under employment legislation, such as:

- pregnant employees;
- employees who suffer from labour-related illnesses and/or some specific diseases, even if not labour-related;
- employees who are directors of Employees' Unions;
- employees that are elected as representatives of the group of workers in the employer's Labour Accident Prevention Committee (CIPA);
- employees with special needs; and
- employees close to retirement.

Collective bargaining agreements can set forth other types of employees that would also be subject to specific protection. Some agreements, for example, protect employees that are close to retirement (usually between 12 to 36 months).

The Brazilian Labour Code distinguishes workers subject to work journey control (regular employees) from those not subject to such control (e.g. high-level workers; in other words, those employees who hold positions of trust, such as directors, managers, heads of department, employees and field workers).

In any case, all employees are equally protected by the labour legislation, respecting the specificities of their respective agreements, e.g. employees:

- paid under a monthly salary;
- paid by the hour;
- hired for an undetermined term; and
- hired for a determined term – contracts only valid for a period of experience up to 90 days, or up to two years if the services to be rendered or the activities of the company are of a transitory nature. Definite term labour contracts for less than two years may be renewed once, provided that the total duration does not exceed two years.

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

Except in the event the professional is hired to work from home and in agreements executed for a defined term, the execution of a written employment contract to govern an employment relationship is not required under Brazilian law; however, it is a common procedure adopted by companies in Brazil considering that it provides a better level of legal certainty.

In the absence of a written employment contract, employment relationships will be governed by the labour laws and the interpretation of such laws by the Labour Courts.

1.4 Are any terms implied into contracts of employment?

No terms are implied into contracts of employment. In Brazil, facts will always prevail over form.

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

Yes. The following minimum terms and conditions must be observed:

- legal national minimum wage or the minimum wage negotiated in collective bargaining agreements;
- 30-day vacation with payment of additional vacation pay (1/3 of the salary);
- maximum working hours: as a rule, eight hours per day and 44 hours per week;
- Unemployment Severance Fund – mandatory monthly deposits made by the employer of 8% calculated over the employee's monthly salary made into a special bank account designed to make savings for the employee. The amount deposited during the employment relationship can only be withdrawn in certain cases established by law, especially when the employee is dismissed without cause;
- payment of 13th salary;
- overtime limited to two hours per day (only for workers subject to a work journey control). Overtime must be paid with an addition of at least 50% over the regular salary;
- pre-notice period due to termination (30 to 90 days) (please see the answer to question 6.1 below); and
- severance payments due to termination of the employment relationship (the calculation basis will depend on the case: dismissal without cause; with cause; resignation; and termination by mutual agreement).

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 agreements are the result of negotiations carried on by Unions representing employees and Unions representing employers or by a single employer and the Union representing its employees, to implement specific labour conditions in addition to those provided for in the Brazilian labour legislation.

Collective bargaining agreements have the same status as the Brazilian labour legislation and, consequently, the employer must comply with all its provisions under penalty of levying contractual and administrative fines, being the companies also subject to a claim that can be filed by the Union or the employees.

Collective bargaining agreements may be in force for up to 24 months, with no possibility of extension. In any case, it is possible to include, in a new collective bargaining agreement, the clauses of a collective bargaining agreement that is not in force anymore.

As a rule, collective bargaining agreements take place at industry level within a certain region (usually a State or a Municipality) and refer, in general, to wages, tenure, overtime, outsourcing, social benefits and procedures for election of members of the CIPA.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Yes. If it is the case, according to Article 75-C of the Brazilian Labour Code, parties must execute an amendment to the employment contract informing that the work will be on a hybrid basis and, if by mutual agreement, who will be the party responsible for the expenses related to the services performed at home (e.g. internet and electric, among others). In the event the hybrid work is compulsory and at an employer's request, in order to mitigate risk, it is recommendable the employer-to-be is responsible for expenses related to such work regime.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Working remotely is not considered an employee's right but a possibility that can be freely agreed between the parties. If the parties choose to apply the remote work, it must be expressly included in the employment contract.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The Brazilian Federal Constitution establishes that both employers and employees are free, although not required, to associate with a Union in order to defend economic or professional interests. However, this freedom is limited by other legal provisions.

Trade Unions' rights and responsibilities in Brazil are regulated by Article 8 of the Brazilian Federal Constitution and by Articles 511 to 539 of the Brazilian Labour Code.

Trade Union recognition requires:

- the association of 1/3 of the companies of the same industry (employers) or 1/3 of the workers of the same industry;
- a mandate of three years for the respective Board of Directors;
- the president must be a Brazilian citizen born in Brazil. Other representatives must be Brazilian citizens and can be a naturalised foreigner;
- mandatory registration of the Union before the Ministry of Labour and Employment; and
- the territory covered by any given Union may be Municipal, State, Regional or Federal. However, only one Union can be recognised in one specific territory for a specific industry.

Note that, as summarised above, the general rule is that the Union represents an industry and the exceptions are the "regulated professions" (there are close to 60 – e.g. engineers, nurses, chemists, lawyers, accountants, etc.), that are represented by their specific Unions/Guilds.

2.2 What rights do trade unions have?

Unions have the following rights to:

- represent employers or employees of a specific industry before the executive, the judiciary and the legislative; and
- negotiate and execute collective bargaining agreements.

It is important to point out that collective bargaining agreements will be enforceable on all employers and all employees of each industry or each regulated profession, as the case may be, in each specific territory, whether or not they are unionised.

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

Yes, Law 7.783/1989 (Right to Strike Law) regulates workers' right to take industrial action and imposes some formal requirements to be complied with by the Workers' Unions before they take 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?

No. Works councils are not required but may be negotiated in the collective bargaining, and their scope, rights and obligations may vary from case to case. The bodies that are closest to works councils as provided by the law are, for instance, CIPAs and Employee Committees that may be elected from time to time to negotiate profit sharing agreements. Representatives of employees are elected by the 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?

Please refer to question 2.4 above.

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

Please refer to question 2.4 above.

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. Brazilian law strictly prohibits discrimination in relation to salaries, exercise of any function and/or hiring/termination criteria based on gender, age, race, civil status, sexual orientation or disability.

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

Please refer to question 3.1 above.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Yes. To promote a healthy and a safe working environment that favours the insertion and maintenance of women in the job market, Law 14.457/2022 and Decree 4219/2022 establish that companies that are obliged to have a CIPA, in addition to the measures related to the work-related accidents, must adopt the following measures to prevent and combat sexual harassment and other forms of violence in the workplace:

- inclusion in the company's internal policy, rules of conduct regarding sexual harassment and other forms of violence. The policy must be widely disseminated to employees;
- implementation of procedures related to the receiving and monitoring of complaints and initiation of investigations related to acts of sexual harassment and violence, guaranteeing the anonymity of the reporting person;
- inclusion of topics relating to preventing and combatting sexual harassment and other forms of violence in the CIPA's activities and practices; and
- carrying out, at least every 12 months, training, guidance and awareness-raising actions for employees at all hierarchical levels of the company on topics related to violence, harassment, equality and diversity within the scope of work, in accessible, appropriate formats that present maximum effectiveness of such actions.

Violence at work is any voluntary action practised by an individual or group against another individual or group that causes physical or psychological harm in the workplace or that involves relationships established at work. Examples of violence at work include: physical aggression; verbal insults; bullying; sexual harassment; discriminations; and mobbing.

3.4 Are there any defences to a discrimination claim?

Employers and the alleged offender have the right of defence in any discrimination claim.

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

Discrimination rights (as well as any other rights) are enforced through a Court of Law. In Brazil, there is a branch of the judiciary specifically directed at labour and employment litigation. The employer and employees may settle claims at any time before or during the processing of the claim.

3.6 What remedies are available to employees in successful discrimination claims?

In successful discrimination claims, the remedies available to employees include:

- Reintegration into the job with payment of all salaries since the unfair termination or payment of double their salary since the unfair termination.
- Granting of equal conditions of employment if related to unequal treatment.
- Moral damages (pain and suffering).

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No, they have the same protection as regular workers.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

No, there are no specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice.

However, in Brazil, it is typical for employees to raise concerns about corporate malpractice via a company’s hotline, before the Ministry of Finance (also responsible for employment relations since the extinction of the Ministry of Labour), or on the site of the Labour Public Prosecutors’ Office, which may start an investigation against the company and also before the Union. It is possible to make anonymous denunciations.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

According to Law 14.611/2023, companies with more than 100 employees are obliged to publish semi-annual reports regarding transparency and remuneration criteria, under penalty of an administrative fine of up to 3% of the company’s payroll, limited to 100 minimum salaries. Reports must contain anonymised data in accordance with the General Law for the Protection of Personal Data (LGPD).

If any salary or remuneration inequality criteria is identified, the company with participation of Trade Unions and employee representatives must present and implement an action plan to reduce the inequalities found and it must inform goals and deadlines.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Maternity leave lasts 120 days and it may start, by the employees’ choice, on any day during the last month of pregnancy. Such term may also be extended by collective bargaining agreements.

This period may be extended for an additional 60 days, under the terms of Law 11.770/2008 and Articles 137 to 142 of Decree 10854/2021, if the employee and employer agree and, in the case the extension is agreed, the employer will have the right to a tax benefit equal to the amount of the salary paid to the employee during this extension period.

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

Employees in Brazil have job tenure from the date of conception until five months after childbirth. For example, if an employee started her leave 28 days before the birth and returned to work 120 days after that (90 days after the birth), she will still have two months of job tenure.

Female employees receive mandatory maternity leave of four months paid by the Social Security Agency. Employers have the

option to offer an additional maternity leave of two months, and deduct the amount paid during this period from its corporate income tax.

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

A woman has the right to the remainder of the job tenure period mentioned above. She may also have the right to breaks for breastfeeding (please see the answer to question 4.6 below).

4.4 Do fathers have the right to take paternity leave?

Yes, fathers are entitled to paternity leave of five days, which can be extended to 15 additional days. The paternity leave term may be extended by collective bargaining agreements.

It should be noted that paternity leave is considered as an authorised absence. For this reason, the employer is responsible for the payment of the salary during this period. The employer must only inform in the timecard of the employee the absence due to paternity.

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

The same rights of maternity leave apply for cases of adoption. Other rights will only apply if they are included in collective bargaining agreements.

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

Not under the law, except in the case of breastfeeding. Until a child reaches six months of age, the mother shall have two 30-minute intermissions during the day to breastfeed. Under doctors’ recommendation, this period of six months may be extended. Other rights will only apply if they are included in collective bargaining agreements.

5 Business Sales

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

Not under the law, except in the event the assets involved in the transaction are also related to the employment agreements. In this case, the purchaser will assume all past labour liabilities.

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

Any change in the legal structure of the company shall not affect the employment contracts and all vested rights of its employees will be maintained. In the event of any default on the labour obligations of the employer, the successor company (the buyer of the business) will be liable for the debt, even if there is a contractual provision transferring the labour liabilities of the seller. Sales of businesses have no effect on collective bargaining 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?

No, this is not applicable.

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

Yes. Labour law, as a rule, does not impose any restriction on termination without cause, with no need to justify the decision, except for those with rights of temporary job tenure mentioned in question 1.2 above.

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

No. Any change that is considered unfavourable to the employee, even with the employee's consent, will be deemed null and void by the Labour Courts. On the other hand, employers may change the terms and conditions of the employment with the employee's consent, provided the changes are not considered detrimental.

6 Termination of Employment

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

Termination of employment in Brazil requires a notice period of 30 days during the first year of the employment. After the first year, the notice period will be increased by three days per year, up to a limit of 90 days. In some cases, depending on collective bargaining agreements, the notice period may require longer pre-notices (e.g. after employees reach a determined age).

The notice period may be either worked or indemnified. In the event the employee is required to work during the notice period, he/she will have the right to have his/her daily work journey reduced by two hours or opt not to work during the last week of the notice period. In such case, if the employee is entitled to a notice period of more than 30 days, the professional may only be required to work 30 days and the remaining period must be indemnified.

If the employee resigns, he/she is required to give pre-notice of 30 days to the employer or pay the employer an amount equal to the monthly salary.

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?

No. The Labour Courts have consistently ruled against this practice.

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 no protection against dismissal, except in the event the employee is entitled to job tenure. (Please refer to

the answer to the question 6.4 below.) A dismissed employee is the professional who was notified that his/her employment agreement was terminated with or without cause.

No consent from any third party is required for dismissing an employee.

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

Yes, employees who are entitled to job tenure include the following:

- pregnant employees;
- workers suffering from labour-related illnesses and some specific diseases not labour-related;
- workers who are directors of Workers' Unions;
- workers that are elected as representatives of the group of workers in the internal Cooperative of Credit of the company, if the company has one;
- workers that are elected as representatives of the group of workers in the CIPA; and
- workers that have received Social Security labour-related illness leave.

Please also see the answer to question 1.2 above regarding:

- employees with special needs; and
- employees who will shortly be retiring.

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?

Outside of the mentioned exceptions (see the answer to question 6.4 above), and provided that a "massive layoff" is not characterised (see the answer to question 6.9 below), there are no limits to the right of dismissing employees.

- a) An employee dismissed without cause, in general, has the right to receive the following compensation:
 - pre-notice (30 to 90 days' salary, proportionally to the time of service in the company);
 - proportional salary for the days worked after last payment;
 - proportional 13th salary (1/12 per month from January to December);
 - proportional vacation pay (1/12 per month counting from his/her last vacation);
 - proportional vacation bonus (1/12 per month counting from his/her last vacation);
 - authorisation to withdraw the Unemployment Severance Fund (8% of the salary deposited every month during the life of the labour agreement); and
 - a penalty equal to 40% of the total amount deposited in the mentioned Unemployment Severance Fund.

Please note that the notice period is counted as a work period for all effects of the law and included in the calculation basis for all labour rights.
- b) In the event the dismissal is agreed between the parties, the employee will be entitled to the same severance payment established for dismissal without cause, with exception to the notice period and penalty related to the Unemployment Severance Fund, which is paid in half.
- c) An employee dismissed for cause will only be entitled to receive a proportional 13th salary and indemnification for pending vacation, if any. The employee will not have the right to withdraw the Unemployment Severance Fund or to receive the 40% penalty.

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

Employers must provide a notice of termination and pay the termination rights up to 10 days after the date of termination. Specific procedures for individual dismissals include:

- providing a notice of termination;
- paying the termination rights up to 10 days after the effective termination date;
- making the proper notes in the employment booklet; and
- signing the term of the termination of the employment agreement.

Note that, for employees who are directors of a Union, the dismissal for cause must be preceded by a judiciary investigation of the facts pertaining to the cause for termination.

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 file a claim before a Labour Court to request any and all unpaid labour rights that the professional understands to be due, including payment for moral damages if relevant.

It is important to point out that the claims must observe the statute of limitation as follows:

- claims must be filed up to five years after the labour right was allegedly breached; and
- up to two years after the termination of the labour agreement, whatever the reason and whichever comes first.

As labour claims are usually based on facts arising from the day-to-day relationship between the parties, remedies for a successful claim may vary from case to case.

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

Employers can settle claims at any time, either before or after they are initiated.

Moreover, employees that receive more than twice the maximum benefit paid by Social Security may have arbitration clauses included in their employment agreements.

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

No, unless it is considered a “mass dismissal”. Although the legislation does not require any formality, the Superior Labour Court has consistently required that “mass dismissal” must be negotiated with the Workers’ Union. It is important to note that there is no firm indication from any decision (or from the doctrine) of what would be considered a “mass dismissal” (5%, 10%, 20% or more of the labour force).

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 Labour Court precedents require the Workers’ Union to participate in the mass dismissals procedures to seek, by means of negotiation, additional benefits to the targeted employees. If the employer fails to comply with this requirement, the

Workers’ Union may file a specific complaint before the local Labour Court that aims at the recognitions of the nullity of the dismissals and the reinstatement of the employees’ labour contracts, plus indemnification.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The most common restrictive covenants are related to non-compete and confidentiality obligations.

7.2 When are restrictive covenants enforceable and for what period?

There is no specific period defined in the law.

For confidentiality, the usual term is five years after the termination.

For non-compete, in general terms, the Courts consider that it would be reasonable if it is restricted to a specific market segment (competitive products) and if it is enforceable for up to two years.

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

Yes. If the non-compete covenant restricts the former employee from finding a suitable job, the company must pay him/her at least an amount equal to his/her monthly salary for every month the restriction applies. A confidentiality covenant does not generate compensation by law.

7.4 How are restrictive covenants enforced?

As violations of restrictive covenants may constitute a criminal offence and/or a civil illicit, companies may submit the case to a Criminal or a Civil Court, including requests for injunctions if necessary. In some specific cases, the Labour Courts may be considered concurrently competent for judging the complaint.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Data protection rights may affect employment relationships, especially due to restrictions related to employees’ background checks. This is because item X of Article 5 of the Brazilian Federal Constitution, in general terms, protects people’s privacy and intimacy.

Moreover, recently Law 13.709/2018, in force since August 2020, sets forth obligations and penalties to individuals and legal entities that do not comply with their data privacy obligation. Employers cannot transfer employee data to another country if the employee does not expressly agree with that.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, employees do have a right to obtain copies of personal information held by their employer. The employee can file

an injunction to request the exhibition of such data, if the professional demonstrates that it is necessary for the enforcement of labour rights.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Although there is no express reference to this type of pre-employment/background check, the Labour Courts have consistently decided that it would only be acceptable in cases where the law requires it (e.g. police force) or in cases where the performance of the function would reasonably require such check (e.g. treasury positions, workers involved in the transportation of valuables or providing private security services). In other cases, a background check may be considered as discriminatory. In any case, it is possible to contact the former employer to obtain both information about the professional and a reference letter.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Yes. However, for the employer to exercise the right to do so, it is mandatory to make it clear in written company policies related to the means of communication and the legal nature of work tools, including that employee communications through these means will be monitored by the employer.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Employers can control (block) the use of social media in the workplace and monitor the use of the computer by the employee. In any case, the employee must be aware that the employer is monitoring the use of the computer, as previously mentioned in question 8.4 above. The employer cannot control the use of social media outside of the workplace. However, employees will always be responsible for any damages that their use of social media may cause to their employers and/or the use of social media to speak, in name, of the employer without authorisation.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

No, there are no restrictions on how employers may use AI in the employment relationship as there are no legislation rulings on such matters at the time of writing.

9 Court Practice and Procedure

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

Employment-related complaints are under the jurisdiction of the Labour Justice.

The Labour Justice is a sub-set of the Federal Court System and it is composed of:

- First Instance Courts, composed of a singular judge.
- Regional Courts of Appeal, composed of several chambers (the number of judges and chambers may vary from region to region), each chamber composed of three judges in the judgment of ordinary appeals and a special composition chamber for the judgment of collective labour claims, writs of mandamus, rescissory action, etc.
- The Superior Labour Court, composed of 27 justices and eight chambers, each one with three judges for the judgment of special appeals, and special composition chambers with a higher number of justices for the judgment of specific appeals from collective labour claims, individual labour claims, and for writs of mandamus, rescissory action, etc.

Cases that involve Constitutional Issues can be appealed to the Supreme Court.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

There is no mandatory previous conciliation out of Court.

Employees do not have to pay any fees to submit a claim in the event it is granted free justice.

Otherwise, the parties are requested to pay 2% calculated over the total amount due. In addition, if the employee loses the case, he/she may be required to pay Court fees if in the event of an appeal and it will also be necessary to pay fees. Finally, if the pleadings are dismissed, the plaintiff will be required to pay fees to the attorney's defendant.

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

It will depend on the case. As a rule, during the first instance, employment-related complaints will typically take approximately one year to be decided. The total duration period will depend on whether the parties appeal.

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

Yes. All decisions may be subject to appeal. Appeals to the Regional Labour Court will take approximately one year to be judged. Appeals to the Superior Labour Court may take an additional 18 months.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Bulgarian employment law is regulated both from national and international legislative acts. All international acts that Bulgaria has ratified have priority over the national acts in case of discrepancy.

Bulgaria has historically ratified the main parts of important international acts and treaties in the field of employment law, such as the UN's International Covenant on Civil and Political Rights (ratified 1970) (<https://www.coe.int/bg/web/compass/the-international-covenant-on-civil-and-political-rights>) and the European Social Charter (ratified 2000).

Bulgaria ranks among the top 10 countries with the highest number of ratified International Labour Organization (the "ILO") instruments (i.e. Conventions and Protocols).

Internally, the Constitution of the Republic of Bulgaria enshrines fundamental labour rights at the highest level of Bulgarian national law. Further, the Labour Code (the "LC" – initially enacted in 1986, as subsequently amended) codifies Bulgarian employment law fully. In addition, there are numerous specialised legal acts – both laws and regulatory enactments – in the field of employment law.

The most important internal legislative acts, along with the LC, are the Social Security Code, the Health and Safety at Work Act, the Promotion of Employment Act, the Disabled Persons Act, and the Labour Migration and Labour Mobility Act.

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

Bulgarian employment law regulates the provision of employees' labour to an employer. A main characteristic of this relation is that the employer is presumably the economically stronger party and, as a result of this, the employees are in a state of dependence on the employer.

Bulgarian labour law uses the term "workers and employees" as one and the same category when it comes to the main general rules in the LC. Usually the term "workers" is used to refer to employees performing mainly physical work and "employees" refers to those performing mainly mental work.

When it comes to implementation of social security rights and obligations, employees are classified into three categories of employee – first, second and third category, with the third being the most common. Employees in this category are usually with the most standardised and favourable working conditions.

Individuals working as independent contractors or self-employed have a different legal relationship with their assignor (employer) than the regular employees. They are engaged in a civil contractual arrangement where the strict employment law regulations do not apply. These individuals provide their services under specific assignment(s) and are not considered part of the employer's regular workforce.

However, in order to protect employees and secure their employment and rights and obligations with this regard, Bulgarian law provides that if a contract with an independent service provider hides a *de facto* employment relationship, this relation should be deemed an employment one with all legal consequences for both parties with this regard.

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 parties must execute a written employment contract to create a valid employment relation. The employer is legally obliged to inform the National Revenue Agency (the "NRA") about the contract within three days of its signing. Once this notification is completed, work can officially commence. The employer must serve the employee a copy of the notification sent to the NRA. The employment contract must include the minimum contents as mandated by law. These include details on:

- Parties to the employment contract.
- Place of work performance (physical place where employment will be performed).
- Job position and job description.
- Date of signature and expected date of work commencement.
- Duration of the employment (fixed or indefinite term).
- Duration of the working day or week.
- Basic and additional employment remuneration of a permanent nature.
- Terms and conditions concerning the employment remuneration payment.
- Basic, extended and additional annual paid leave.

Notice period for employment termination (which must be with the same duration for both parties).

Further, upon execution of the employment contract the employer must present to the employee standardised and simplified information for the conditions and procedures for termination of employment under Bulgarian law.

1.4 Are any terms implied into contracts of employment?

As discussed above, all mandatory required minimum

employment conditions apply directly to each employment relation if no (or less) favourable agreement is reached between the parties in the employment contract.

Apart from this, there are certain legal consequences that automatically apply to employment contracts by operation of the law. For example, automatic transfer of employees applies to the new employer in the case of a transfer of undertakings.

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 set by the law that employers have to observe, such as provisions on minimum wage, minimum paid leave, minimum daily and weekly rest periods, maximum working time, e.g. overtime is generally forbidden except for a few narrow exceptions, etc. These apply in any case and the parties cannot agree on employment terms and conditions that are less favourable.

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 popular in many private sectors, especially traditional industry, education, healthcare, etc. On the other hand, there are sectors, such as IT, service and shared service points, where collective bargaining is not particularly common. Conditions set forth in collective bargaining agreements are usually considerably more favourable for the employees than the minimum conditions set down by law. Collective bargaining may take place at industry, sectoral, branch and/or company level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

The employer cannot unilaterally mandate employees to split their working time between home and the workplace, except for cases of a declared emergency state or emergency epidemic situation. A hybrid or fully remote working pattern might be agreed between the parties upon the initiative of either of them. For this purpose, the parties need to conclude an employment contract or an annex to an existing contract that regulates the hybrid working pattern, respectively.

It is also required that the employer adopt specific rules for remote work in its internal labour rules, covering all specific work organisational matters that the employer may unilaterally impose, as provided by law.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

The employees do not have the unilateral right to decide to work remotely.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade unions are to be registered in a special register of trade

unions and employers' organisations at the district court of their seat. Only after such registration is the trade union considered a legal entity.

Once every four years, the Council of Ministers conducts a procedure for the recognition of both employees' and employers' organisations as representative at national level. Trade union organisations eligible to be recognised as representative at national level must meet the following conditions, cumulatively, at the date they file the respective application:

- have more than 50,000 members;
- have established employees' organisations in more than a quarter of the activities defined by a code up to the second digit of the National Classification of Economic Activities established by the National Statistical Institute, with membership of not less than five per cent of employees in each economic activity or at least 50 organisations with not less than five members in each economic activity;
- have local establishments in more than a quarter of Bulgarian municipalities; and
- were registered as a trade union organisation over three years prior.

2.2 What rights do trade unions have?

Trade unions represent and defend the interests of the employees before public authorities and employers in matters of labour and social security relations and living standards through collective bargaining, participation in tripartite cooperation, organising strikes and other actions in accordance with the law.

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

Yes, special regulations do exist with this regard, setting procedures to be followed before and through any 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 employees are entitled to elect their representatives and, if they do not exert their own initiative on that matter, the employer must organise the process upon its own initiative.

There are two types of representatives of employees under Bulgarian law:

- (i) Representatives under Art. 7, para 2 of the LC (the "General Representatives")
They represent the employees' common interests in employment and social security matters before their employer or the public authorities. Each of the representatives is to be elected by a majority of more than two-thirds of all employees. All enterprises, regardless of their headcount, should have the General Representatives of the employees elected.
- (ii) Representatives under Art. 7a of the LC (the "Information and Consultation Representatives")

This second type of representative is only entitled to participate in part of the information and consultation procedures – usually such related to amendments in the activity, the economic status and the labour organisation in the enterprise. Only enterprises with more than 50 employees should elect Information and Consultation Representatives. No special majority is required for their election.

All representatives of the employees are elected from the employees' general assembly and usually one and the same employees are elected as representatives per items (i) and (ii).

Regardless of the type of representation, each employee representative has individual representation rights and obligations.

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 holds consultation procedures where the General Representatives have the right to express their opinions in a number of cases, such as:

- adoption or significant amendments to the employer's internal labour rules (the main employer's internal act with minimum required contents setting the main rules for the work organisation and requirements towards the employees);
- introduction of open-ended working time or reduced working time for certain job positions;
- extension of working hours;
- part of the information and consultation procedures held, e.g. such regarding mass layoffs, change of employer, etc; and
- information and consultation of employees in multinational companies and groups.

The Information and Consultation Representatives participate on their own behalf, only in the information and consultation procedures related to amendments in the activity, the economic status and the labour organisation of the enterprise.

The trade unions should consent with the dismissal of trade union leaders as discussed in questions 6.3 and 6.4 below.

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

Trade unions and the representatives of the employees exercise their rights separately and independently, and cooperate to the extent that the common interests of the employees require so.

2.7 Are employees entitled to representation at board level?

In limited liability and joint-stock companies with a headcount exceeding 50 employees, the employees have the right to be represented by their representative with an advisory vote in the general assembly meetings.

3 Discrimination

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

The LC encompasses the duty of the employer to ensure parity in the treatment of all employees, including, but not limited to, the equitable remuneration of men and women. The Protection against Discrimination Act (the "PDA") serves as the primary legislative framework delineating the comprehensive principles of equal treatment within the employment relationship. It is imperative that employees be shielded from disparate treatment based on attributes such as age, gender, racial and ethnic origin, nationality, pregnancy, parental responsibilities, etc.

The PDA:

- prohibits all forms of discrimination (both direct and indirect);
- regulates the prevention of discrimination;
- prescribes administrative fines and sanctions for violations of its provisions; and
- establishes a specialised State body, the Commission for Protection against Discrimination (the "Commission"), which supervises employers and monitors compliance with the PDA.

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

The PDA distinguishes direct and indirect discrimination, both of which are unlawful and thus prohibited in the working environment.

Employees are protected against any of the two types of discrimination, which are based on sex, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, opinion, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status or any other attribute established by law or by an international treaty to which the Republic of Bulgaria is a part.

Direct discrimination is a less favourable treatment of a person on the basis of any of the legally designated characteristics in comparison with the treatment of another person in comparably similar circumstances and regardless of when in time this more favourable treatment occurred.

Indirect discrimination is the placement of a person bearing any of the legally designated characteristics, or to persons who, without carrying such, together with the ones who do bear them, suffer less favourable treatment or are placed at a particular disadvantage resulting from an apparently neutral provision, criterion or practice, unless any of those is objectively justified in view of a legitimate aim and the means of achieving the aim are appropriate and necessary.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Sexual harassment is prohibited as any other harassment. If a complaint is filed, the employer must conduct a comprehensive and impartial check to determine whether the complaint has merit. In addition, the employer is required to take steps to stop the harassment, as well as to impose disciplinary action if the harassment is committed by another employee.

3.4 Are there any defences to a discrimination claim?

Persons, towards whom discrimination claims are directed as perpetrator, should be given the opportunity to defend themselves both throughout a check performed by the employer and thereafter in any proceedings before the Commission and the court. Such persons must be able to participate in any proceedings as an equal party and have the opportunity to place facts regarding their defence on the table, including use of an attorney.

The employer would be an equal party in any proceedings aiming to establish discrimination initiated by its employee before the Commission. If the employer holds that no discrimination took place, it must prove so, which might be more or less challenging having in mind that, substantially, this would require proving a negative fact.

Discrimination-related proceedings are also admissible before the court in terms of proving damages. Awarding of compensation and its value would largely depend on whether the damage suffered stemmed from a discrimination act and whether the causation between the discrimination act and the damage suffered was established before the court. If the employer is summoned as a defendant to such a claim before the court, it would participate in the proceedings as an equal party and be able to engage any admissible evidence to its defence.

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

Employees can file a complaint (or, respectively, a claim) and seek protection against discrimination before the employer itself, before the Commission and before the court, and are free to decide which tool to use for serving their defence. Irrespective of whether or not an employee, who suffered discrimination, has exercised their right to complain directly to the employer, they are entitled to:

- lodge a complaint with the Commission no later than three years after the occurrence of the discrimination; and
- file a claim to the regional civil court, where the statutory limitation period for exercising this right is five years from the date of commencement of the discriminatory treatment.

At any stage of such proceedings, and regardless of which of them, the employers can negotiate and settle the claims with the employees concerned irrespective of whether before or after the claims' initiation.

3.6 What remedies are available to employees in successful discrimination claims?

If a violation of the PDA is established by the Commission, it will impose sanctions on the employer and order the employer to discontinue the violation.

Compensation for violations of the PDA can only be awarded to an employee by the court. No State fees are charged for proceedings before the Commission. In case the three-year period has lapsed, the employee still has the option to commence civil proceedings before the regional civil court and sue the employer for discriminatory treatment.

The employee can request the court to:

- establish the fact of the violation;
- order the employer to discontinue the violation and to restore the situation to what it was before the violation, and to refrain in the future from committing this kind of violation; and
- claim compensation for the damages suffered:
 - there are no statutory thresholds for the amount of the compensation, which is determined by the court on a case-by-case basis.

The right to bring a civil claim before the court is also granted to trade unions and non-governmental organisations, which can sue the employer on the employee's behalf and, in certain circumstances, on their own behalf.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Temporary, agency, and part-time employees are entitled to receive equal treatment.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Whistleblowing Directive was transposed into Bulgarian legislation through the Protection of Persons Who Report or Publicly Disclose Information on Breaches Act (the "Whistleblowers Act") in 2023. The Whistleblowers Act imposes a general prohibition of retaliation against whistleblowers. These are actions having the character of reprisals and placing persons at a disadvantageous position, as well as threats or attempts of such actions. Such actions may include disciplinary action against employees, discrimination, damage to the reputation of the whistleblower concerned, negative performance evaluation, including in a job recommendation, etc. If a violation of this prohibition is committed, the whistleblower concerned is entitled to claim reinstatement of his/her status/rights, as well as to compensation for any damage suffered. The damage is deemed caused intentionally until the contrary is proven.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

The relevant legislation is currently under development and it is expected that large companies that trade on regulated markets will be required to include, in their activity reports, such information in respect of the current year, 2024, in the annual reporting that will take place in 2025. Small and medium-sized enterprises are expected to have the opportunity to carry out such reporting on a voluntary basis, but will not be formally obliged to do so.

Apart from the above legal framework, since 2023, a number of companies are publishing their ESG reports, despite no legal obligation. On one hand, by this they demonstrate themselves as sustainable businesses, and from the other, such are often required by counterparties in the process of their partners' procurement.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Pregnant employees are entitled to 45 calendar days' paid leave before delivery, and maternity leave of 410 calendar days for each delivered child (who is not sent for adoption or to a specialised institution at the expense of the State).

After the expiry of maternity leave, an employee who is a mother, father, adoptive mother or adoptive father is entitled to paid parental leave until the child reaches the age of two. The mother or father of either of the parents can use the parental leave instead of the mother, with the latter's consent.

During parental leave, the employee receives indemnity payments from the National Social Security Institute. The amount is determined annually under the Social Security Budget Act.

Further to the above, each parent (including adoptive parents) is entitled to different leaves, such as unpaid six-month leave until the child reaches eight years of age.

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

Pregnant women, women at an advanced stage of IVF

procedures, women on maternity leave and mothers of children of up to three years of age enjoy specific protection in relation to dismissal under the LC.

Night work and overtime is forbidden without the explicit consent of the employee for pregnant women, women at an advanced stage of IVF procedures and mothers of children of up to six years of age and mothers of disabled children (regardless of the disabled child's age).

Pregnant women and women at an advanced stage of IVF procedures may also refuse to work under certain, less favourable, health and safety conditions.

The employer cannot send on a business trip, pregnant women, women at an advanced stage of IVF procedures or mothers of a child of up to three years of age without their explicit consent.

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

Pregnant or breastfeeding employees are entitled to a change of their job function in view of ensuring more appropriate health and safety working conditions, if there is a specific prescription of a physician with this regard.

Each parent of a child of up to eight years old, having a minimum of four months' length of service at the employer, is entitled to suggest changes to his/her employment (e.g. of the determined working time, applicability of flexible working time arrangements, remote work allowance, etc.), aiming to facilitate his/her work-life balance.

If the employer refuses, it should provide reasoned written refusal within 14 days of the request receipt.

4.4 Do fathers have the right to take paternity leave?

If the father is married to the mother or is sharing one household with her, he is entitled to a one-off paid leave of 15 calendar days after the discharge of the child from the hospital, if he has acquired 12 months' working experience. The paid leave is indemnified by the National Social Security Institute in an amount determined in the same manner as applicable for indemnification for maternity leave.

Once the child reaches six months of age, the father can use the remaining maternity leave, with the mother's consent. In this case, the father is entitled to the same benefits as the mother if she had used her maternity leave. If the father is unknown, the paid leave can be used by one of the mother's parents. If the father is deceased, the paid leave can be used by any of the parents of the mother or father. Alternatively, if this type of leave was not used, the father is entitled to minimum paid two-month leave until the child reaches eight years of age.

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

The employers need to ensure all rights and additional benefits of parents, as well administrate properly and submit on the respective employees' behalf all necessary documentation with the authorities for the exercise of the main part of their rights and receiving of compensations.

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

Please see question 4.3 above.

5 Business Sales

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

By law, employees are transferred automatically along with the business by operation of law in any of the following cases:

- corporate reorganisations (e.g. M&A transaction, allocation of activities, and the transfer of a separate specified part of an enterprise);
- legal transformations (e.g. change of the legal form of a legal entity, the owner of the enterprise or a separate specified part of it);
- the transfer or assignment of an activity, along with the transfer of tangible assets from one enterprise to another; and
- lease, tenancy or concession of an enterprise or a separate specified part of it.

Our law strictly follows Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0023>).

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

Generally, no significant changes are to be done to the employment terms and conditions as a result of the above business sales. If there are such, the employees have certain rights and protections, such as protection from dismissal and right to resign without notice.

Statutory notification and consultation procedures are also required to be conducted prior to the effective date of the transfer.

The same applies to the 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?

Yes. All concerned employees or their General Representatives (please see question 2.4 above) should be informed for the change of the business within at least two months prior to its effective date. The law provides for a list of the minimum information that should be communicated with the employees. Consultation procedures should be held if any of the employers envisages specific measures for the implementation of the transfer (specific cases are listed by law).

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

If a dismissal is made solely on the grounds of a business transfer, a court can pronounce that the dismissal constituted an illegal dismissal. Where a dismissal is pronounced illegal by a court, the employee must be reinstated to their former job position as a result of the judgment (where the employee included a request for reinstatement in their initial employment claim to the court). The employer will also be obliged to pay monetary

compensation to the employee to cover the period of unemployment caused by the illegal dismissal. Finally, where no reinstatement of the employee occurs, the grounds for the dismissal must be corrected in the relevant employment documentation following the court's judgment.

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

No, employees may raise their concerns in the information and consultation procedures and resign without notice if they find that the transaction led to significantly worse working 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?

Notice periods depend on the type of contract:

- Indefinite term contract: mandatory minimum of a 30-day termination notice period applies, unless otherwise agreed by the parties, but in all cases, it cannot exceed three months. The notice period must be agreed in the employment contract and must be equal for both parties.
- Fixed-term contract: a mandatory termination notice period is fixed to three months, but cannot exceed the rest of the term of the contract.

Each of the parties can terminate the employment contract without observing the notice period and pay to the other party *in lieu* of the non-observed notice period. Compensation for a non-observed notice period could be paid by each party regardless of who is initiating the termination.

In certain circumstances, no prior notice must be served by the employer (for example, in case of a disciplinary dismissal). No prior notice is due in case of mutual consent termination as well.

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 explicitly regulated in Bulgaria. However, the employer may ask the employee not to perform and attend work during the notice period if full payment of the due remuneration for this period is made.

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 must have one of the following grounds on which to dismiss a protected employee (please see question 6.4 below):

- Partial closure of the employer's undertaking.
- Staff reduction based on changes to the employer's organisation.
- Decrease in the volume of work.
- The employee's lack of ability to effectively perform the work.
- Changes in a job position's requirements (provided that the employee does not meet the new requirements).

- The employee has committed an act of gross misconduct or has been subject to disciplinary proceedings leading to a decision for disciplinary dismissal.

In addition, the following rules must also be observed when dismissing the following employees:

- For employees who have previously been reassigned work within the undertaking due to medical reasons and who suffer from certain diseases, an expert opinion of a specialised labour medical commission must also be obtained before dismissal.
- Members of a trade union's leadership team at the employer's enterprise, or of a territorial, sectoral or national elected trade union leadership body can only be dismissed on the above grounds with the trade union's prior consent. This protection applies during the period the employee is part of the trade union's leadership team and for six months afterwards.
- Pregnant employees and employees in an advanced stage of IVF treatment can only be dismissed in a very limited number of objective circumstances (for example, on complete closure of the employer's undertaking or on the employee's refusal to relocate their employment following the undertaking's relocation).
- Employees on maternity leave can only be dismissed on a complete closure of the employer's undertaking.

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

The following categories of employees are categorised as protected employees who are subject to special protection from dismissal, and the employer must have one of the grounds for dismissal outlined in question 6.3 above and obtain the Labour Inspectorate's prior approval before dismissing these employees:

- Mothers of children under three years of age.
- Employees who have been previously reassigned work within the employer due to medical reasons.
- Employees who suffer from certain diseases.
- Employees who have commenced a period of approved leave.
- Elected representatives of employees and employees' representatives on health and safety matters (who are protected whilst they are representatives).
- Employees who, during their period of employment, are members of:
 - special negotiation bodies;
 - European works councils; and
 - representative bodies with a European commercial or co-operative company.

The employer can request an employee to provide any relevant documentation evidencing that they fall into one of the categories of protected employees, and can also request that the employee sign a declaration confirming this status.

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 generally cannot terminate an employment contract without a just cause and must follow certain formal procedural requirements. The reasons that establish "just cause" for dismissal (with notice) are explicitly outlined in the LC and include causes such as:

- Complete or partial closure of the employer's enterprise.
- Staff reduction based on changes to the employer's organisation.
- Decrease in the volume of work.
- Suspension of the employer's business activity for more than 15 working days.
- The employee's lack of qualities to effectively perform the work.
- The employee's lack of educational background or professional qualification required for the respective job position.
- Changes in a job position's requirements (provided that the employee does not meet the new requirements).
- The employee has reached retirement and has the right to collect a pension (through their length of service and age). However, the employee is not obliged to exercise this right.

An employee can also be dismissed for an act of gross misconduct or following disciplinary proceedings. Where an employee is dismissed for an act of gross misconduct or following a disciplinary procedure, the employer is not obliged to provide any notice period and the dismissal can take effect immediately. In addition, both an employee and an employer can terminate an employment contract without notice provided that the party terminating the agreement pays to the other party a compensation *in lieu* of notice as provided by law.

Finally, there are also two options to terminate an employment contract with the mutual consent of both the employer and the employee – with or without compensation.

The statutory severance payment that must be paid by an employer to an employee for termination of the employment contract varies depending on:

- The ground on which the contract is terminated.
- Whether or not the notice period was observed.
- In certain cases, the duration of the employment.

Severance payments can vary from one month up to seven months' gross salary, and such payments are made to the employee during the final month of employment prior to termination. In addition to the severance payment, an employer must also include a separate payment for any unused annual paid leave owed to the employee. Both the employer and the employee can contractually agree to exceed these statutory requirements in the employment contract.

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

If an employer initiates the termination of an employment contract, there must be strong and indisputable documentary evidence to support the termination on one of the grounds listed by law. Usually, the dismissal process is initiated by the employer providing a formal written notice to the employee, as well as preparing other documents depending on the chosen ground. Upon expiry of the notice period, the employer must also formally conclude a written document that verifies the termination of the employment contract.

Irrespective of the reason for the termination of employment, the employer must notify the relevant regional office of the NRA within seven days of the effective termination date. This notification is made by filing a standard form, which requires specific information about the termination of the employment. If the employer fails to submit the required notification within seven days, it can be subject to a fine, which can range from BGN1,500 up to BGN15,000 (*circa* from EUR750 to 7,500).

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

An employee arguing the lawfulness of a dismissal may claim:

- the court to announce that the dismissal is unlawful;
- compensation for being without work – which is capped at maximum six salaries; and
- reinstatement at the same job position.

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

Yes, it is a matter of out-of-court negotiations between the parties.

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

Bulgarian law provides for a legal definition of mass dismissals when an employer collectively dismisses a certain number of employees.

Only employers with 20 or more employees can meet the mass dismissals criteria. Such employers should carefully assess each specific situation of more than a few terminations within a short period of time, as the qualification of mass dismissals depends on number of facts that may vary within different periods of time, e.g. total number of employees *vs* number of dismissed ones, grounds for termination, period of time subject to the assessment, etc. In case the employer does perform a mass dismissal, a consultation and information procedure must be held with both trade unions and the General Representatives, and the competent authority (which is the State Employment Agency) must be notified in due terms as provided by 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?

In case of planned mass dismissals, the employer should hold prior consultations with employees' representatives and file a formal notification to the State Employment Agency. Please see question 6.9 above. The aim of this is for the employees to have enough time and options to actively look for a new job and to grant the opportunity for the employer and the General Representatives to reach an agreement, relieving some of the consequences of the mass layoffs.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Bulgarian employers influenced by multinational good practices and the needs of their business usually explore as an option and impose the following restrictive covenants:

- non-compete;
- non-solicitation; and
- confidentiality.

7.2 When are restrictive covenants enforceable and for what period?

Recent and prevailing Bulgarian court practice confirms that non-compete clauses restricting entering into new employment relations after a respective employment's termination are void as violating the employee's constitutional right of free labour and choice of employer. No terms or compensations are accepted as validating such an agreement. The same applies to non-solicitation covenants restricting passive solicitation (i.e. employees applying for a new job by themselves and are not actively solicited).

Confidentiality clauses should comply with very specific legal requirements in order to be enforceable, such as explicit listing of information defined and protected as confidential, carefully determined post-termination term of validity and penalty, if any.

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

No, and if they are, and the clause is declared void, all such payments should be returned to the employer as unduly paid.

7.4 How are restrictive covenants enforced?

Please see question 7.2.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

All requirements of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "GDPR") (<https://eur-lex.europa.eu/eli/reg/2016/679/oj>), along with a number of additional local restrictions, apply to personal data processed in an employment context.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, the employees may request at any moment copies of any documents under their employment file, including such containing personal data. As data subjects, they may exercise their rights under the GDPR, such as to:

- be informed about the types of personal data processed by the employer;
- access, and obtain a copy of, their processed personal data;
- correct or erase their personal data;
- limit processing; and
- portability of their data.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

The GDPR and Bulgarian law provide strict rules for pre-employment checks. In Bulgaria, these are limited to specific

information that might be checked – mainly previous experience and education. Criminal record information (including, but not limited to, a criminal record court certificate ("CRCC")) could be requested, processed and kept by the employer, only if the following circumstances are present, cumulatively:

- certifying of the judicial past of the employee is required by law for the relevant position; and
- it concerns a specific individual upon concluding, or the performance of, the employment contract (i.e. not upfront for all applicants).

In practice, Bulgarian laws justifying such data processing are limited to a very narrow set of job positions; for example, employees of private security service providers, State administration, etc.

On a separate note, transferring data outside of the EU (e.g. when pre-employment checks are assigned to service providers outside the EU) could be very problematic and required compliance should be carefully assessed on a case-by-case basis.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Following the rules of the GDPR and the local Bulgarian legislation, employers are entitled to monitor employee's performance and observance of labour discipline by monitoring official e-mails, technical means owned by the employer, introducing controlled access to the working premises, video monitoring, etc. For any such type of monitoring, the employer must:

- prepare a formal written balancing test, carefully assessing each aspect of the monitoring envisaged and which interest is prevailing in each case separately – its legitimate interest to perform the monitoring or employee's personal rights and interests (e.g. right of free speech, secrecy of correspondence, right not to be video-monitored, etc.); and
- based on the above, and only if the balancing tests show that the employer has the right to conduct the specific monitoring activities, the latter should issue a monitoring policy and privacy notice and deliver it to the concerned employees with all details of the monitoring and the respective data processing activities, as required by law.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Please see question 8.4 above.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

The data protection legislation and recommendations of the authorities provide for a number of rules and requirements for automatic data processing activities and automated decision-making and profiling processes, such as conducting mandatory required data protection impact assessments, obligation of the employer to provide detailed information on the processes and the consequences for the data subjects in advance, and to implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, etc.

9 Court Practice and Procedure

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

Bulgarian employment-related complaints are reviewed in civil courts within three-instance court proceedings.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Depending on the sources of the dispute, employment-related ones are divided into two main types: (i) disputes arising out of an individual employment relationship; and (ii) collective labour disputes.

The legal proceedings are conducted before the regional courts as a first instance and are free of charge for the employees (no State fees are due). However, attorney fees remain applicable for both parties. The individual employment-related complaints are to be revised under a special fast procedure but, in practice, this is quite often not the case.

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

Usually, employment-related complaints take about a year to be decided per instance.

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

Yes, employment-related complaints are revised in civil courts and all three court instances are available. However, the third cassation instance is limited to specific grounds of each appeal and not all of the cases are accepted for cassation review.



Vesela Kabatliyska advises on all aspects of employment law and compliance with the regulatory framework in place. She has extensive experience in structuring and drafting employment agreements, statutory internal rules and procedures, drafting and implementation of specific internal procedures, such as implementation of share option plans, whistleblowing systems, etc. She also advises on matters related to *Societa Europea*, dismissal and redundancy schemes as well as all issues related to temporary agency work and data protection. She defends clients' interests in unfair dismissal cases and data protection issues.

Vesela also has extensive experience in projects for compliance of various types of organisations with data privacy regulations. She was involved in a number of projects for structuring and drafting compliance documentation and procedures for different legal relations involving data flows and requiring protection – cloud services, IoT implementation, FinTech product implementation, HR systems, etc.

Vesela's high level of expertise in these areas is well recognised in Bulgaria and within the structures of a number of international organisations. As a leading data protection expert, Vesela was invited as a speaker and trainer for a number of conferences and webinars in Bulgaria and Europe, organised by reputable educational establishments and organisations, such as *Economedia*, *ICT Media*, ERA – Academy of European Law and the Employment Law Alliance.

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Compared with a common law system, under the civil law system in the People's Republic of China ("PRC"), there is no system of binding case law precedent. The main sources that govern employment relationships in the PRC generally include the *Labour Law of the PRC* ("Labour Law"), the *Employment Contract Law of the PRC* ("Employment Contract Law"), the *Implementing Regulations of the Employment Contract Law of the PRC* ("Implementing Regulations") and the *Social Security Law of the PRC*, together with other implementing rules and regulations and local legislation at provincial or municipal level, as well as varying local practices. Regarding wage, working hours, rest and vacation, the main rules and regulations generally include the *Regulations on the Composition of Gross Wages*, the *Interim Provisions on Wage Payment*, the *Minimum Wage Provisions* and the *Regulation on Paid Annual Leave for Employees*, etc.

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

Under PRC employment laws, employees who form an employment relationship with enterprises, individually-owned economic organisations, state departments, institutional organisations and social groups within the boundary of the PRC shall be protected by employment laws. Unlike employment relationships, where personal services are provided by retired persons, in the case of foreign nationals without a work permit and student interns, a non-employment service relationship between the parties is established, and these individual service providers will not be protected by employment laws; rather, civil laws such as the *PRC Civil Code* will apply.

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 Employment Contract Law, to establish an employment relationship, a written employment contract shall be entered into within one month from the date when the employee commences the work. In failing to do so, the employer shall pay twice the monthly salary to the employee from the second month of the commencement of employment until the date when a written employment contract is concluded. If, after a year from the commencement of the employment, an employer

still fails to conclude a written employment contract, an open-ended employment contract will be deemed automatically concluded between the employer and the employee. Certain essential terms must be included in an employment contract, such as the contract term, work contents, place of work, work hours, rest and leave, remuneration, social insurance, etc.

1.4 Are any terms implied into contracts of employment?

Certain mandatory legal requirements for employers (such as statutory grounds for termination of employment, statutory severance payment, minimum salary standards, working hours limits, the principle of good faith in performing the employment contract) shall be deemed as implied terms irrespective of whether they are expressly indicated in the employment contract or not.

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

PRC employment laws prescribed statutory obligations for employers, which are also minimum employment terms and conditions set down by law that the employers must observe, mainly including the minimum salary standard, working hours, overtime pay standards and time limit, statutory paid leave, social insurance and housing fund, 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?

In most cases, employment terms and conditions are agreed and executed individually, but collective bargaining also takes place at both the enterprise level and the industry level. Currently, most collective agreements are negotiated at company level. PRC employment laws permit collective employment contracts on matters relating to remuneration, working hours, rest and vacations, occupational safety and health, insurance, and welfare, while requiring the draft be submitted to the employee committee or all employees for discussion. A collective contract shall be concluded between the employer and the trade union who represents employees; for an employer that has not established a trade union, the next higher-level trade union shall guide the representatives elected by the employees to conclude a collective contract with the employer. The collective contract shall be submitted to the labour administrative department after

being concluded and shall become effective after the lapse of 15 days from the date of receipt by the labour administrative department unless any objections to the contract are raised.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

The employers generally can require employees to split their working hours between home and the workplace if such change is a temporary arrangement (e.g. due to epidemic situations such as COVID-19) and there are no material adverse effects caused to employees' rights and interests. However, if the change into hybrid mode is a long-term arrangement or the key terms and conditions during the remote working period (salary standard, work requirement and work review method, etc.) need to be adjusted, it is suggested to enter into agreement with the employee specifying the arrangements under the remote working period.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Employees generally shall abide by the work location requirement as stipulated in the employment contract to work at the workplace. Unless otherwise agreed by both the employer and employee, employees do not have the right to work remotely.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

According to the Labour Law, trade unions shall represent and safeguard the legitimate rights and interests of employees and carry out their activities independently in accordance with the law. The status, legal obligation and rights of trade unions are stipulated in more detail in the *Trade Union Law of the PRC* ("Trade Union Law"), which was enacted in 1992 and revised three times in 2001, 2009 and 2021. The newly revised Trade Union Law further clarifies the status of trade unions, which are voluntary organisations formed by employees at their own free will. It is not a requirement of the employer to set up a trade union for its employees.

2.2 What rights do trade unions have?

Trade unions have the general right to represent and protect the rights of employees. According to the Trade Union Law, specific rights of trade unions include, but are not limited to:

- (1) supervising employers' violation of relevant policies, demanding the employer to rectify, and ensuring that the employees exercise their right to democratic management in accordance with the law;
- (2) assisting and guiding the employees in signing employment contracts, attending negotiation and signing collective contracts with the employer on behalf of the employees, and filing arbitration or cases on behalf of the employees; and
- (3) providing advice regarding the employers' disposition on employees and reviewing the reason for unilateral termination of employees.

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

There are no specific rules granting either the trade union or the employees the right to take strike action in the PRC. However, according to the Trade Union Law, where a shutdown or slowdown occurs, the trade union has the right to represent employees in negotiations with the employer, bring up the opinions of the employees and advise on solutions.

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 such concept of "works councils" under the regime of PRC law; however, there is a comparable legal concept that is called "employee representatives' congresses", through which employees can exercise their right to democratic management.

Generally speaking, the congress has the right to inspect the daily operation of the employer and is responsible for representing the employees' legal interest.

The employee representatives shall be elected by employees and the specific proportion and number shall be determined in accordance with the implementation measures (detailed rules) of the employee congress of the enterprise, or determined by the enterprise through consultation with the trade union, but shall be no less than 30 people.

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?

Employees generally exercise their right to democratic management through trade unions and employee representatives' congresses. According to the Trade Union Law, employee representatives' congresses shall have co-determination rights for certain matters, e.g. a collective contract draft shall be submitted to the congress for discussion and approval. For other matters, such as internal policies directly related to the interests of the employees, although it shall be discussed with the congress, there are no rules and regulations stipulating that an employer should obtain the agreement from the congress before it can finalise and publish the policies. For these matters, employee representatives' congresses usually play their role following supervision and suggestions.

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

The missions and functions of trade unions and employee representatives' congresses in democratic management share many similarities. According to the Trade Union Law, trade unions can organise employees to participate in the democratic decision-making, management and supervision of their respective units through employee representatives' congresses. For state-owned enterprises, a trade union is the working body of the employee representatives' congress and shall be responsible for the daily affairs of the employee representatives' congress, including inspecting and supervising the implementation of resolutions of the employee representatives' congress.

2.7 Are employees entitled to representation at board level?

According to the *Company Law of the PRC*, for limited liability companies established by two or more state-owned enterprises or other state-owned investors, the board of directors shall include representatives of the employees. For other limited liability companies, the board of directors may also include representatives of the employees. For all companies, the board of supervisors shall include representatives of the employees at an appropriate ratio to be specifically prescribed in the articles of association of the company. The employee representatives who are to serve as members of the board of directors and supervisors shall be democratically elected through the employee representatives' congress or by other means.

3 Discrimination

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

Discrimination is prohibited by PRC employment laws, albeit details are often insufficient for the punishment of violation. The Labour Law generally provides that people should not be treated unfairly due to race, sex or religion, etc., and women should enjoy the same employment rights as enjoyed by men. Additionally, the *Employment Promotion Law of the PRC* provides that workers are entitled to equal employment, and workers seeking employment shall not be discriminated because of ethnicity, race, gender, religious belief, disability or whether the workers are from rural places. The *PRC Law on the Protection of Rights and Interests of Women* ("Women's Protection Law"), which was newly amended and took effect on January 1, 2023, further illustrates ensuring equal employment rights for female employees and prohibiting discrimination against female employees. There are also specific regulations prohibiting discrimination against employees who are Hepatitis B carriers.

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

Generally speaking, discrimination against employees due to ethnicity, race, gender, religious belief, etc. is all prohibited by PRC law. The law does not distinguish between the types of discrimination, such as direct or indirect discrimination.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The Women's Protection Law contains provisions on the characteristics, forms, prevention and disposal of sexual harassment, and clarifies the obligations of employers to take various measures to prevent and stop sexual harassment in the workplace, including, but not limited to, carrying out education and training activities on the prevention and stopping of sexual harassment. In addition, the *PRC Civil Code*, the *Special Provisions on the Labour Protection of Female Employees of the PRC* and other local rules and regulations also set relevant requirements regarding sexual harassment.

3.4 Are there any defences to a discrimination claim?

Despite the lack of clear stipulations, in judicial practice an

employer might be able to defend against being jointly liable for discrimination, especially for sexual harassment cases taken by a third party, such as an individual employee, if the employer can prove that it has taken reasonable care and actions for the prevention of discrimination, such as issuing anti-discrimination policies and providing training to the employees, and has taken necessary actions to handle the complaint in a timely and appropriate manner, etc.

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

Employees can file a lawsuit with judicial authorities or appeal to the labour administrative authorities against the employer, depending on the specific cause of action, and it is feasible for the employer to settle claims before or after the case was initiated.

3.6 What remedies are available to employees in successful discrimination claims?

Remedies available to employees vary depending on the specific cause of action, while monetary compensations for economic loss and emotional loss in certain circumstances are the main remedies. Taking sexual harassment claims as an example, according to the *PRC Civil Code*, the victim of sexual harassment has the right to request the perpetrator to assume civil liability according to the law, including liability for damages.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

There is no additional protection for "atypical workers", such as those working part-time, on a fixed-term contract or as temporary agency workers, in the context of discrimination. However, there is a type of employment called labour dispatch, under which an employee is employed by a dispatch agency and then seconded to work for a company. According to PRC employment laws, the dispatched worker shall enjoy the right to equal remuneration for equal work with these employees directly hired by the company.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

There is no specific law in relation to whistleblowing/employees who raise concerns about corporate malpractice in the PRC. However, there is a guiding opinion published by the PRC State Council that emphasises the role of social supervision by establishing the system of "whistleblowers and internal informants", and stresses that persons reporting serious violations of laws and regulations and significant risks shall be rewarded and protected.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

There are no specific stipulations in PRC employment laws and regulations requiring the disclosure of diversity information by employers. However, certain special enterprises, such as

listed companies, may be required or encouraged by relevant regulatory institutions to disclose ESG information, including diversity information.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

According to the *Special Provisions for Female Employees*, female employees who give birth in compliance with PRC birth control policies (“eligible female employees”) are entitled to 98 days of maternity leave, of which 15 days may be taken before delivery. The leave can be extended by an additional 15 days under special circumstances, such as dystocia and multiple births (i.e. 15 days for each additional baby). Additionally, extra maternity leave is granted by local regulations where the specific length varies from city to city. For example, in the Beijing and Shanghai municipalities, the total length of maternity leave is 158 days, including a base 98-day period per national law and 60 days granted by local regulations.

An eligible female employee who suffers a miscarriage during the first four months of pregnancy shall be entitled to 15 days of maternity leave, and those who suffer a miscarriage after four months of pregnancy shall be entitled to 42 days of maternity leave.

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

During maternity leave, eligible female employees who have participated in maternity insurance are entitled to the maternity allowance, which will be paid by the maternity insurance fund. If the maternity allowance is less than what she shall be paid prior to her maternity leave, the employer shall pay the difference.

In addition, the medical expenses for childbirth or miscarriage of eligible female employees who have participated in maternity insurance can also be reimbursed by an insurance fund.

For an eligible female employee who has not participated in maternity insurance due to the fault of the employer, the employer must pay a salary to the employee during her maternity leave and reimburse her medical expenses as well.

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

According to the *Special Provisions for Female Employees*, for a female employee whose baby is below the age of one year, the employer shall not extend her working hours or assign her to a night shift. Instead, the employer must arrange a one-hour breastfeeding time on each working day for the female employee during her nursing period, which lasts one year counting from the date of birth. In the event of multiple births, an additional hour of breastfeeding time is granted for an additional baby. Furthermore, an employer who employs a large number of female employees shall, depending on the needs of female employees, establish facilities including a female washroom, maternity rest room and breastfeeding room to properly facilitate female employees’ difficulties in physical health and breastfeeding.

Additionally, according to the Employment Contract Law, a female employee who is enjoying the nursing period is prohibited from being unilaterally terminated by her employer under certain circumstances, such as incompetency, mass layoff, etc.

4.4 Do fathers have the right to take paternity leave?

There is no unified national legislation on paternity leave for male employees in the PRC. Paternity leave is only stipulated in local regulations on a municipal or provincial level. For instance, paternity leave for male employees in Beijing is 15 days and for male employees in Shanghai it is 10 days.

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

According to the *Population and Family Planning Law of the PRC*, amended in 2021, the state encourages local authorities to introduce parental leave if conditions permit. Therefore, parental leave is granted by local regulations only. For instance, both Beijing and Shanghai have introduced parental leave (childcare leave), which entitles eligible parents to five (working) days of fully-paid leave each year until the child reaches three years of age. For both cities, the leave accrues each year starting from the birthdate of the employee’s child, as opposed to the calendar year.

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

If the dependants are children under three years of age, eligible employees are entitled to the above-mentioned parental leave according to national laws as well as local regulations.

If the dependants are parents, eligible employees may be entitled to the elder care leave granted by local regulations of some provinces and municipalities. For example, in Beijing, an employee who is the only child in his/her family is entitled to no more than 10 working days of fully-paid elder care leave per calendar year to take care of his/her parents who are in need of nursing care due to illness, injury or disability.

5 Business Sales

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

There are no such rules of automatic transfer of employees under PRC employment laws in terms of either share sale or asset transfer. The employment relationship between the seller and its employees remains unchanged unless otherwise agreed by the seller, the buyer and the individual employee.

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

In the context of a share sale, it is just that the employer’s shareholders have changed and so there will be no transfer of employment at all. Employees will continue to be employed on their existing terms and conditions, and the collective agreements will continue to be in force as well.

In terms of asset transfer, employees will not transfer to the buyer unless otherwise agreed by the seller, the buyer and employees. In the latter case where the parties agree to transfer, the employee’s previous service years at the seller will be either paid out by the seller or recognised by the buyer upon transfer. Legally speaking, employees’ rights and benefits provided by the seller do not transfer, but in practice, to obtain an employee’s consent on transfer, the buyer will usually agree to continue their

existing terms and conditions within a period of time following the transfer. The collective agreements made with the seller will not be treated as having been made with the buyer.

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?

PRC law does not require a seller to inform or consult with employees or its representatives regarding the business sale itself. However, if any vital interests of employees might be affected by such business sale, for example, the transfer of employment, change of employment terms and conditions, or layoffs, the seller, as the existing employer, will need to negotiate with each one of the affected employees to get their respective agreement or to consult with the trade union or employee representatives if required by law. Otherwise, the actions taken by the employer unilaterally will be treated as unlawful and the employer shall bear the corresponding legal responsibilities accordingly.

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

The business sale itself is not a statutory ground under the Employment Contract Law for dismissal. Unless the employer can find any statutory ground to successfully dismiss employees, such as termination on mutual agreement, major changes to the objective circumstances, economic layoffs, etc., the dismissal will be considered unlawful and the employer will face corresponding legal consequences (i.e. reinstatement of employment, or double statutory severance payment) for unlawful termination.

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

No. Under PRC employment laws, the amendment to terms and conditions of employment are only permitted if agreed by both the employee and the employer, and there is no exception for the situation of 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?

PRC employment laws provide limited grounds for the termination of an employment relationship. Whether a prior notice is necessary depends on the specific statutory ground for the termination.

Under any of the following circumstances, an employee must be given a 30-day prior written notice or one month's salary *in lieu* of notice:

- (1) The employee suffers from an illness or a non-work-related injury and is unable to take up the original work (or any other work) assigned by the employer to them after the statutory medical treatment period expires.
- (2) The employee is incompetent and remains incompetent after training or there is an adjustment of job position.
- (3) There has been a major change to the objective circumstances under which the employment contract was executed, which renders the contract impossible to

perform, and the employer and employee fail to reach an agreement on amending the contract ("Major Change to the Objective Circumstances").

In terms of economic layoffs (i.e. mass layoffs), employers shall explain the situation to the trade union or all of its employees 30 days in advance (which can be regarded as a form of prior notice) and seek their opinions before reporting the proposed layoffs to local administrative authorities.

Additionally, though not required by the Employment Contract Law, some local regulations of cities such as Beijing require the employer to give prior notice (or salary *in lieu* of notice) to employees when the term of an employment contract expires and the employer decides not to renew it.

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?

PRC law does not have the concept of garden leave; however, it is commonly used by many companies in practice, as long as such arrangement has been: (1) prescribed by the effective internal policies of the employer; or (2) agreed by the employee and the employee has been paid with normal salaries during the leave.

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?

Employers must inform the trade union when they are planning to unilaterally dismiss an employee. If the trade union considers that the proposed dismissal is not compliant with legal requirements, the trade union can request the employer to rectify the situation. The employer must consider the trade union's opinions and notify the trade union in writing of its final decision on the termination. Furthermore, judicial remedies (please see section 9 below) are also available to employees who consider that they have been wrongfully dismissed by employers.

In the PRC, an employer's decision to dismiss an employee must be clearly expressed to that employee. Under no circumstances would an employee be treated as being dismissed.

Consent from a third party is not required before an employer can proceed with the dismissal.

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

According to the Employment Contract Law, the following categories of employees are protected against being terminated unless the termination is based on a ground stipulated in Article 39 of the Employment Contract Law, such as employee's severe misconduct, gross neglect of duty, etc.:

- (1) an employee who has been exposed to occupational disease hazards and has not received any occupational health check-up, or who is suspected of having contracted an occupational disease and is being diagnosed or is under an observation period;
- (2) an employee who has been confirmed as having lost (or partially lost) their capacity to work as a result of contracting an occupational disease or sustaining a work-related injury with their current employer;

- (3) an employee who has contracted an illness or sustained a non-work-related injury and his/her medical treatment period has not expired;
- (4) a female employee during a pregnancy, maternity or nursing period; or
- (5) an employee who has been working for 15 years consecutively for the current employer and will reach statutory retirement age in less than five years' time.

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 can dismiss employees for the following reasons related to individual employees:

- (1) when the employee fails to meet the recruitment requirements during the probation period;
- (2) when the employee commits severe misconduct;
- (3) when the employee commits a serious dereliction of duty or engages in corrupt practices, causing substantial damage to the employer's interests;
- (4) when the employee establishes an employment relationship with another employer, which has a severe impact on the performance of tasks assigned by the employer, or the employee refuses to correct the wrongdoing as requested by the employer;
- (5) when the employee is subject to criminal liabilities;
- (6) when the employee uses means such as deception, coercion or taking advantage of a vulnerable position to cause the employer to enter into the employment contract or amend the employment contract contrary to the employer's true intent;
- (7) when the employee suffers from an illness or a non-work-related injury and is unable to take up the original work (or any other work) assigned by the employer to them after the statutory medical treatment period expires; or
- (8) when the employee is incompetent and remains incompetent after training or an adjustment of job position.

Employees are not entitled to any severance when being dismissed for the above reasons (1)–(6), although employees shall be entitled to statutory severance when being dismissed for the above reasons (7) and (8). The severance is usually one month's salary for each year of service with the employer. A service period of at least six months but less than a year will be counted as one year, and a service period of less than six months will be counted as half a year. The one month's salary is calculated based on the employee's average monthly salary during the 12 months prior to termination, which is capped at three times the average monthly salary of local employees, as determined by the local government.

Employers can dismiss employees for the following business-related reasons:

- (1) a Major Change to the Objective Circumstances (see question 6.1 above), such as business relocation, merger and acquisition, asset transfer, etc.; or
- (2) economic layoffs (see question 6.9 below).

Employees are entitled to statutory severance when being dismissed due to the above business-related reasons.

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

Procedural requirements for individual dismissal are as follows:

- (1) notifying the trade union of the termination ground;
- (2) delivering the termination notice to the employee and making the statutory severance payment if needed;
- (3) registering the termination with labour authorities if so required by local regulations, and assisting with the social insurance and housing fund transfer for the employee; and
- (4) issuing an employment certificate 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?

An employee being dismissed can bring a wrongful dismissal claim in the judicial authorities, and if his/her claim is upheld, possible remedies include: (1) reinstatement of employment (in which case the employer must also make up the remuneration applicable to the entire period of the judicial proceedings); or (2) double statutory severance payment.

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

Yes, employers can settle with employees by means of mediation or conciliation at any time before or after the claims are initiated.

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

According to Article 41 of the Employment Contract Law, if an employer proposes to unilaterally reduce its workforce by 20 persons or more, or by 10% or more of the total number of its employees under specific circumstances, the employer must complete the following procedures before making any redundancies:

- (1) explain the circumstances to its trade union or to all employees 30 days in advance;
- (2) consider the opinions of the trade union or the employees; and
- (3) report the redundancy plan to the competent labour administrative authorities.

In addition, employees with long fixed-term employment contracts, open-ended employment contracts or those who are the sole income earners in a family with dependent children or elderly people must be retained with priority during the 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?

Employees who consider that they have been wrongfully dismissed may bring the wrongful dismissal claim to the judicial authorities individually or through class actions. If their claim is sustained, employees will be entitled to either reinstatement of employment or double severance payment.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

In the PRC, the most commonly used restrictive covenants

imposed on employees after they leave the company are non-compete and non-solicitation:

- (1) non-competition covenants – restrictions on the former employee working for a competitor of the former employer or engaging in competitive business; and
- (2) non-solicitation covenants – which prevent the former employee from soliciting clients and employees of the former employer.

PRC law sets out some general principles on non-compete obligations but is silent on non-solicitation obligations that are, therefore, generally subject to the mutual agreement between the employer and the individual employee.

7.2 When are restrictive covenants enforceable and for what period?

Under PRC law, an employer can agree on the employee's post-termination non-compete covenant with a senior management or senior technician or an employee who is under confidentiality obligations. In order to enforce the covenant, the employer must pay monetary compensation to the employee on a monthly basis throughout the non-compete period, and the period must not exceed two years after the termination of the employment.

The scope, geographical region and term of non-solicitation restriction can be agreed by the employer and the employee upon negotiation, with no clear legal restrictions under PRC law.

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

For non-compete, the employer must pay the employee monetary compensation on a monthly basis during the restrictive period. The parties can agree on the compensation amount. Where there is no such agreement on the specific amount, the default amount is 30% of the employee's average monthly salary over the previous 12 months for each month.

Compensation is not legally required in return for a non-solicitation covenant.

7.4 How are restrictive covenants enforced?

According to the Employment Contract Law, if an employee breaches the non-compete obligations, he/she should pay liquidated damages to the employer. Meanwhile, the employer is entitled to require the employee to continue performing the non-compete obligations even after the employee has paid liquidated damages for the breach.

The enforcement and legal consequence for an employee's breach of non-solicitation depends on the contractual agreement between the parties.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

With the PRC *Personal Information Protection Law* ("PIPL") now in force, rules and regulations relating to processing personal information are stipulated with more clarity. Employers, as data processors, shall also comply with the PIPL and other data protection laws when collecting and processing the personal information of employees. There are specific requirements for

cross-border data transfer in the PIPL, including adopting any one of the approaches for outbound transfer (including entering into standard contract), obtaining each employee's separate and informed consent, conducting personal information protection impact assessment, etc. On February 24, 2023, the PRC Cyberspace Administration issued the *Measures for the Standard Contract for Outbound Transfer of Personal Information* ("Standard Contract Measures"), with the standard contract template as its annex, which just came into effect on June 1, 2023, stipulating as to how to outbound transfer personal information through the standard contract approach. Personal information processors adopting the standard contract approach shall comply with the Standard Contract Measures by November 30, 2023.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, according to the PIPL, employees have the right to obtain copies of his/her personal information that is held by the employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Employers can carry out pre-employment checks on prospective employees; however, the checks must be within a reasonable scope and on a necessity basis, and it is good practice to obtain the prospective employees' informed consent before conducting such checks.

According to the *Criminal Law of the PRC*, employees must faithfully disclose their criminal records to employers, except for those who were under the age of 18 at the time the crime was committed and were given penalties lighter than imprisonment of five years. Whether an employer can take the initiative to check employees' criminal records will depend on the nature of the employer and the position applied for. For example, the current law expressly prohibits persons who have received criminal penalties from working in the People's Bank of China, and so the bank is permitted to conduct criminal record checks on the prospective employees.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Considering that the employees' expectation of privacy on work-related issues is relatively low, employers are generally entitled to monitor the employee's work-related emails and telephone and computer system if there is a reasonable ground for such monitoring.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

The company may have the right to prohibit its employees from using social media for private purposes during business hours. Employees can use social media at private times, but his/her use of social media must not violate his/her obligations towards the company, such as confidentiality and non-defamation, nor should such use cause any negative impact on the company. Otherwise, any misuse by an employee, even outside the workplace and business hours, may account to misconduct that

an employer can take disciplinary actions against, provided that the company's internal rules have clear provisions on this issue.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are no specific restrictions on employers' use of AI during the employment relationship. However, during the AI utilisation, the employers should still comply with relevant legal requirements, such as requirements on personal information protection and non-discrimination when utilising AI during recruitment or for monitoring an employee's performance or productivity.

9 Court Practice and Procedure

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

According to the *Employment Dispute Mediation and Arbitration Law of the PRC*, before filing an employment dispute with the court, it is mandatory to submit the dispute to the competent local employment dispute arbitration committee, an institution specialising in hearing employment dispute cases. The committee is composed of representatives of labour administration departments, trade unions and enterprises. In practice, most of the cases are usually heard by a sole arbitrator sitting alone.

If any party is unsatisfied with the arbitration award, which is not final, the party is entitled to bring the lawsuit to the competent people's courts (the first instance courts and then the second instance court). The first instance tribunal is usually composed of judges and/or jurors, and the total number shall be odd. Jurors performing jury duties shall have equal rights and obligations as judges. For simple cases, the summary procedure may apply by the first instance court and the case will be tried by one judge. The second instance tribunal is composed of judges, the number of which must be odd too.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

As mentioned above, under PRC law, most of the employment-related disputes are solved under a two-stage framework: arbitration; and litigation. Without going through arbitration procedures, parties cannot commence litigation procedures for disputes. When there is a dispute, the party will usually file a claim at the arbitration committee first, and if any party is unsatisfied with the arbitral award, it can bring the case to the courts. However, the arbitral awards regarding the following employment disputes shall be final and will take effect as of the date when the awards are made:

- (1) claims for labour remuneration, medical fees for a work-related injury, severance pay or damage compensation of no more than the amount of local minimum monthly wages multiplied by 12 months; or

- (2) disputes in respect of working hours, rest and leaves, or social insurance, arising from implementing national labour standards.

For the above two types of cases, an employee still has the right to bring a lawsuit before court within 15 days after receiving the awards. In contrast, the employer has no right to bring a lawsuit over the same arbitral awards before court.

Under PRC law, an employer and employee are encouraged to consult with each other and to reach a conciliation agreement on employment dispute settlement. Even though the employment disputes had been submitted to arbitration or litigation, an employer and employee still could negotiate and reach a conciliation agreement, as long as the final arbitral award or court decision has not been made. The conciliation is not mandatory and must be based on both parties' voluntariness. The parties may choose to directly submit their employment disputes to arbitration without any pre-claim conciliation.

All the employment dispute arbitrations are free of charge. The litigation costs are RMB 10 for the first instance trial and RMB 5 for the second instance trial, and are usually borne by the losing party.

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

For arbitration, the arbitral committee shall finish making the award within 45 days from the date when it accepts the arbitration application. If an extension is needed due to the complexity of the case, an additional 15 days will be granted.

In the stage of litigation, the case in the trial of first instance shall be completed within six months and the case in the trial of second instance shall be completed within three months.

Therefore, it usually takes around one year for a case to go through both arbitration and litigation until the parties can get the final judgment. However, long delays in hearing cases happen frequently as a result of the explosion of employment dispute cases in recent years.

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

Generally, if a litigant is dissatisfied with the judgment of the first instance court, it has the right to file an appeal with the higher-level people's court within 15 days from the date of service of the judgment. The second instance proceedings should be completed within three months but can be extended subject to the approval of the president of the court. The judgments made by the courts of second instance are final and take effect upon its serving upon the parties.

For a simple employment case pertaining to payment of a small amount of money with clear facts, specific rights and obligations relationship and non-major disputes to be tried by the first instance court, "small claims procedure" may apply and the judgment of the first instance court is final and thus cannot be appealed.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The sources of employment law are international law, EU law and domestic law. Domestically, the main sources of employment law are the French Labour Code (as interpreted by case law), collective bargaining agreements, employment contracts and companies' internal regulations.

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

Any person who carries out paid work in the context of a relationship of subordination is classified as an "employee" and is protected by employment law rules. A person may qualify as an employee notwithstanding any provision to the contrary agreed upon between the company and the concerned individual (provision of services, agency contract, etc.).

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 no legal requirement for an employment relationship to be formalised by means of an employment contract. However, the collective agreement applicable to the contract of employment may require a written form.

In any case, an employment contract not in written form is considered to be a full-time and indefinite-term contract. Therefore, fixed-term contracts and part-time contracts need to be formalised in writing with specific information provided by law.

Besides, in accordance with EU law, the employer is required, in all circumstances, to inform employees during their first week of work of the identity of the parties, their place of work, their job title (or description of the work), the date of commencement of the contract, the duration and conditions of the trial period, the component elements of pay and the frequency and method of payment and their working hours and overtime arrangements (if foreseeable, the normal daily or weekly working hours).

Employees must also be informed within one month of the start of the work of the following: the amount of paid leave; the right to training; the complete procedure to be followed in case of termination of the contractual relationship (the length of the notice period); and, where applicable, the collective agreements applicable and identities of the social protection bodies collecting the social contributions.

In practice, it is thus strongly recommended to draw up an employment contract. Besides, this employment contract must be drafted in French. If not, the company will not be in a position to take advantage of its terms against its employees.

1.4 Are any terms implied into contracts of employment?

As with any contract, an employment contract must be performed in good faith.

Employees are therefore obliged to carry out the work specified in the contract personally and conscientiously and to follow the instructions given by their employer. In addition, they must not act in a manner contrary to the company's interests and must not, in particular, engage in any act of competition (duty of loyalty). They are also obliged to respect the confidentiality of any information that they learn during the performance of their duties (duty of discretion).

Employers are, in turn, obliged to respect their commitments towards employees and, in particular, to assign them the agreed work and pay them the corresponding salary. They must also ensure the adaptation of their employees to the evolution of their positions and, when applicable, ensure that they receive adequate training and an interview with their superior at least every two years (excluding assessment evaluation). Employers are also duty-bound to protect the health and safety of their employees. The employer's failure to respect their commitments towards their employees may allow them to seek constructive termination of their employment contract and thus to obtain both their end-of-contract payments (payment *in lieu* of notice period, dismissal indemnity) and damages for unfair termination (*cf.* question 6.7).

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

Employers are obliged to observe the following minimum employment terms and conditions:

Minimum wage: The wage paid by the employer cannot be less than the national minimum wage (SMIC). Since January 1, 2024, the gross monthly SMIC, for a 35-hour working week, is €1,766.92. The collective agreement applicable to the contract of employment may also specify a minimum wage depending on the employee's classification provided for by the applicable collective bargaining.

Working time: The statutory working hours are 35 hours per week. Employees can, however, work more than the statutory working hours either on a one-off basis (overtime) or as part of a specific working time arrangement. Specific rules apply both to overtime and to working time arrangements.

With occasional exceptions, employees must not work more than:

- 48 hours per week;
- an average of 44 hours per week during 12 consecutive weeks; and
- 10 hours per day.

Also, with the occasional exception, employees must rest at least once a week during 24 consecutive hours and must not work on Sundays.

Part Time: Concerning part-time contracts concluded as of July 1, 2014, the working time must be at least either 24 hours per week or a shorter duration provided by a collective agreement, except in specific cases provided by law or collective bargaining agreement (such as an explicit request of an employee for personal reasons or to have several jobs, a student status, etc.).

Paid leave: Employees are entitled to 25 days' paid leave per year, as well as public holidays (around 10 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?

Terms and conditions provided for by collective bargaining agreements, or collective agreements entered into at company level, will apply to employment contracts.

Collective agreements can be drawn up at all levels: company; group of companies; economic and social unit; establishment; industrial sector; and cross-industry sector, etc.

Numerous collective agreements are the result of negotiations within industrial sectors (e.g.: metallurgy; chemistry; construction, etc.). They are immediately applicable to companies that are members of the signatory trade unions. They will be applicable to companies falling within their scope of application if, and as soon as, an extending decree is published.

The terms and conditions of certain collective agreements ("*accord de performance collective*") automatically prevail on employment contracts. Employees may, however, refuse to apply the provisions of such collective agreement. To do so, he/she must inform his/her employer within a delay of one month as of the date the employer discloses the existence and the content of the agreement. Such refusal may lead to the termination of the employee's employment agreement.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Except in exceptional circumstances, working from home requires the employee's consent. A "hybrid working" model may be set up within the framework of a collective agreement or, failing that, within the framework of a charter drawn up by the employer after consulting the works council, if it exists, which describes, in particular, the terms of acceptance by the employee of the conditions of implementation of telework. In the absence of a collective agreement or charter setting the terms and conditions for the use of telework, the employee and the employer may agree to have recourse to home-office on an occasional or regular basis. If telework was a condition of employment, the employee has priority access to any vacant job on the company's premises that corresponds to his/her qualifications.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

The implementation of telework must be done according to the conditions defined above (cf. question 1.7). Employees cannot unilaterally decide to telework without their employer's consent. Nevertheless, an employer who refuses to grant the benefit of teleworking to an employee who occupies a position eligible for a teleworking organisation under the conditions provided for by a collective agreement or, failing that, by the charter, shall give reasons for his/her decision.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

A trade union is representative within a company if it meets the statutory criteria (respect for republican values, independence, financial transparency, a minimum of two years' existence, influence, members) and if it obtained 10% of the votes cast in the most recent elections for works council members.

2.2 What rights do trade unions have?

Any trade union with more than one member (i.e., at least two members) can form a "union section" ("*section syndicale*") within the company or the establishment. The union section can communicate freely with employees, has access to premises and can organise meetings with its members.

Where this trade union is representative (cf. question 2.1) within a company with at least 50 employees, it may appoint one or more union delegates ("*délégué syndical*"). In addition to the resources made available to the union section, union delegates may dedicate between 12 and 24 hours per month of their working time (depending on the size of the company) to their union activities, are free to move around within the company, and enjoy special protection. In collective bargaining, the employer negotiates, in particular, with the union delegates.

Where the trade union is not representative within the company, it may appoint a representative of the union section ("*représentant syndical*") whose primary role will be to lead this union section so that the trade union's vote at the next workplace election enables it to be representative. The union representative is entitled to dedicate four hours per month of his/her working time to his/her union activities.

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

Industrial action may be initiated by trade unions or by the employees themselves.

The right to strike is enshrined in the French Constitution. A strike is lawful if it is a collective and concerted cessation of work based on work-related claims presented to the employer. Except where public services are concerned, a strike may be called at any time.

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?

Rules governing works councils have been significantly modified in 2017. All companies with at least 11 employees must put in place a works council referred to as “*comité social et économique*”. Its members are elected by the employees for a four-year term of office. The number of members varies with the company’s headcount. Calling and organising these elections is subject to specific rules and notably includes the negotiation of an agreement on the election procedure.

The works council’s role will, at least, depend on whether the company employs less or more than 50 employees. Its composition, functioning and role may be negotiated within each company and determined by a collective agreement.

The works council ensures that employees’ interests are permanently taken into account in the decisions made by the employer.

The company is obliged to:

- provide periodic information or information relevant to certain occasions to the works council; and
- inform or consult the works council before taking decisions relating, in particular, to the general running of the company, working conditions, a change in the economic or legal organisation of the company, the monitoring of employees, etc. Since August 2021, when the works council’s opinion is sought on a specific item, it must be informed of the environmental consequences of the company’s activity/decisions.

The works council is in charge of the company’s social and cultural activities, for which a budget is assigned by the employer.

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 general, where the works council expresses a negative opinion on a project, the company will not be prevented from implementing it.

The works council’s favourable opinion, lack of objection or consent is required in certain cases, such as:

- appointment of the company doctor;
- introduction of personalised working schedules;
- replacement of overtime pay with time off *in lieu*;
- technical unemployment of part of the employees only; and
- when the employer, in companies with at least 50 employees, proposes internal redeployment measures before the expiry of the works council’s consultation period in the case of economic redundancy procedures involving 10 or more employees.

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

Trade unions have the monopoly of presenting candidates at the first round of the election of the works council members. Thus, generally, trade unions are represented amongst the works council members. Union delegates (*cf.* question 2.2) also attend works council meetings.

Trade unions negotiate collective agreements.

2.7 Are employees entitled to representation at board level?

The works council is represented in the meetings of the board of directors or the supervisory board in all companies with such a body.

The works council may also participate in general meetings of shareholders.

The works council’s representatives are invited in the same way as the other participants to these meetings and receive the same information. They cannot vote but have the right to express their opinion.

Employees are also represented at board level by one or two representatives, holding voting rights, in public limited companies (“*société anonyme*”) and in limited partnerships with shares (“*société en commandites par actions*”) when such a company and its direct or indirect subsidiaries employ, at the end of two consecutive financial years, at least 1,000 employees (if the registered office is located in France) or at least 5,000 employees (if the registered offices are located in France and abroad) and when such a company is subject to the implementation of a works council.

3 Discrimination

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

Discrimination is prohibited both by the Labour Code (section L.1132-1) and by the Criminal Code (sections L.225-1 to L.225-4).

Specific measures have recently been enacted in order to achieve professional equality between women and men. Since 2019, companies with at least 50 employees must publish indicators each year on the pay gap between women and men and the measures implemented to eliminate it, in accordance with procedures and methodology defined by decree. If these indicators are not met, the employer has an obligation to negotiate appropriate and relevant corrective measures and to publish them; the employer has three years to comply, failing which will subject them to financial penalties.

From March 1, 2026, in companies with at least 1,000 employees for the third consecutive year, the proportion of persons of each sex among executive managers (“*cadres dirigeants*”) and members of governing bodies (“*instances dirigeantes*”) may not be less than 30%, or less than 40% in March 2029. If the above-mentioned quota is not met, companies will have to implement several measures provided by the law to avoid penalties.

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

French law prohibits any form of direct or indirect discrimination towards a candidate or employee on the basis of his/her: origin; sex; gender identity; morals; sexual orientation; age; family situation; pregnancy; genetic characteristics; particular vulnerability resulting from its economic situation; belonging or not belonging (whether actually or supposedly) to an ethnic group, nation or race; political opinions; union or mutual society activities; exercise of an elective mandate; religious beliefs; physical appearance; name; place of residence or bank account; state of health; disability; ability to express themselves in a language other than French; or his/her status as a whistleblower, facilitator or person in contact with a whistleblower.

Besides the damages that the victim may claim, the employee is liable to criminal sanctions.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Section L.4121-1 of the Labour Code requires the employer to protect the physical and mental health of employees. Sexual harassment is included, alongside moral harassment – and sexist acts since 2016 – in the list of areas in which the employer has an obligation to prevent occupational risks. The employer has a particular duty to prevent harassment from occurring and must take all necessary measures to prevent acts of sexual harassment.

As part of its risk assessment and prevention process, the employer may:

- take all measures to disseminate, present and raise awareness in order to effectively inform employees about the legislation in force on harassment;
- implement training actions to improve knowledge, prevention and identification of harassment problems; and
- take appropriate measures to facilitate the identification of harassment.

In the prevention of sexual harassment, specific mandatory measures are enacted:

- The internal regulations must recall the provisions relating to moral and sexual harassment and sexist acts provided for in the Labour Code.
- The employer must inform employees, trainees and persons in training, by any means, in the workplace as well as on the premises or at the door of the premises where the recruitment is made, of the content of section L.222-33 of the Criminal Code.
- Since 2018, employers have the obligation to inform employees of the civil and criminal remedies available in cases of sexual harassment and the contact details of the competent authorities and services under the same conditions.
- Since 2019, companies with at least 250 employees must appoint a referent to guide, inform and support employees in the fight against sexual harassment and gender-based behaviour. A referent must also be appointed by the works council from among its members. This works council referent must be, like the members of the works council or, where applicable, the members of the health, safety and working conditions committee, trained in the exercise of its missions in the field of health, safety and working conditions.

The “Rixain” law of December 24, 2021, and its implementing decree of April 26, 2022, established a principle of gender diversity within the executive populations of companies and within the representative bodies of companies with over 1,000 employees. To achieve this goal, these texts establish quotas of each sex in the concerned companies (*cf.* question 3.1). Since March 1, 2022, the concerned companies must also publish each year, on their website or, in the absence of a website, by any other means, the gaps in representation between women and men among senior executives and members of management bodies. Various sanctions are provided against companies that do not comply with these obligations.

3.4 Are there any defences to a discrimination claim?

Different treatments are nevertheless possible when based on objective and relevant criteria unconnected to any discrimination.

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

Employees may bring a claim before the Labour Court in order to seek the invalidation of the discriminatory measure and, where applicable, compensation for the damage caused. They may also lodge a criminal complaint against the company and/or against the author of the discrimination.

A settlement ending the dispute is possible both before and after the claim is brought before the Labour Court.

This settlement does not preclude criminal proceedings, nor does it put an end to the proceedings. Discrimination is punishable by a fine of €45,000 and by a maximum of three years’ imprisonment for the company’s representative or for the author of the offence. The company is punishable by a fine of up to €225,000.

3.6 What remedies are available to employees in successful discrimination claims?

In successful discrimination claims, the discriminatory measure will be invalidated. For example, an employee who is dismissed on discriminatory grounds will be reinstated within the company and will be entitled to payment of the salary that he/she would have received between the date of dismissal and the date of reinstatement.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Atypical workers cannot be discriminated against because of the nature of their employment contract. For instance, their remuneration must be equivalent to that of the employees holding an indefinite-term employment contract.

Temporary workers cannot be assigned to particularly dangerous work, and their contract cannot be ended before the initial termination agreed date (otherwise the employee must be paid until this date, except in case of gross misconduct).

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The law on transparency, the fight against corruption and the modernisation of economic life of December 9, 2016 (known as the “Sapin II” law), created a set of rights common to all whistleblowers.

The purpose of the Sapin II law is to protect the whistleblower in the event of reprisals by the employer. Thus, it cannot be excluded from a recruitment procedure or from access to a traineeship or a period of professional training. Nor may he/she be subject to any sanction, dismissal or discriminatory measure on the grounds of his/her alert.

In the event of a dispute, where the person presents factual elements that make it possible to presume that he/she has recounted or testified in good faith to facts constituting an offence or a crime, or has reported an alert, it is for the defendant, in light of the elements, to prove that his/her decision is justified by objective elements unrelated to the declaration or testimony of the person concerned. The judge shall form his/her conviction after having ordered, if necessary, all investigative measures he/she considers appropriate.

The protection of whistleblowers has been improved by a law dated March 21, 2022. It specifies the definition of the whistleblower, broadens the scope of application of the alert and simplifies the procedure for triggering alerts. The protection of whistleblowers is strengthened and extended to defined third parties. In companies with at least 50 employees, the law specifies that an internal procedure for receiving and processing reports must be established after consulting the works council.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Companies that employ at least 50 employees have to publish, before March 1 of each year, their Index result and the measures implemented to correct it.

The Index, out of 100 points, is made up of four or five indicators depending on whether the company has fewer or more than 250 employees:

- The gender pay gap.
- Gap in the distribution of individual pay rises.
- Gap in the distribution of promotions (only in companies with more than 250 employees).
- The number of female employees receiving a pay rise when they return from maternity leave.
- Parity among the 10 highest earners.

The Index result is published on the company's website, if any. Otherwise, employees are informed of these results by any means.

More detailed information, in particular, about the calculation methods used, must be sent to the works council via the economic, social and environmental database (BDESE), and must also be sent to the French Ministry of Labour.

If the company's overall result is less than 75, corrective measures must be adopted through negotiations on professional equality or, otherwise, by the employer within three years. Failure to comply to a result equal to or above 75 may lead the company to pay a penalty equal to a maximum of 1% of the remunerations within the company.

Regarding disabled employees, although the employer does not have any obligation to publish specific figures, companies with more than 20 employees must employ at least 6% disabled workers within five years of their creation and implement an integration programme. Otherwise, the company must pay a contribution to the French association that manages the funds for the integration of disabled people (Agefiph).

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

The statutory duration of maternity leave ("*congé maternité*") varies according to the employee's family situation:

- 16 weeks for a single birth in a family with two children in total;
- 26 weeks for a single birth in a family with at least three children;
- 34 weeks for twins; and
- 46 weeks for triplets and more.

Maternity leave begins before, and continues after, birth.

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

During maternity leave, the employee receives an allowance paid

by the French Social Security. She is not paid by her employer unless otherwise specified in the collective agreement applicable to the company.

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

At the end of the maternity leave, the employee is entitled to return to her previous job or a similar job with at least equivalent pay.

An employee with at least one year's service may ask for parental leave (partially compensated for by the Social Security) or reduced working hours.

4.4 Do fathers have the right to take paternity leave?

Since 2021, in addition to three days' leave at the time of birth, fathers are entitled to 25 consecutive days of paternity leave ("*congé paternité*"), or 32 days in the case of multiple births, which must be taken within six months of the birth.

During paternity leave, the employee receives an allowance paid by the Social Security. He is not paid by his employer unless otherwise specified in the collective agreement applicable to the company.

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

Besides the three days' birth leave, employees are entitled to adoption leave:

- 16 weeks (since 2021) for the first two children joining the family;
- 18 weeks where the adoption brings the number of children in the family to three or more; and
- 22 weeks for multiple adoptions regardless of the number of children in the family.

At any time after the birth of a child, employees – who have worked at least one year within the company before the birth – may seek additional parental leave (referred to as "*congé parental d'éducation*") or may move to part-time work of a maximum period of one year (which can be renewed twice, ending on the third birthday of the child). Except in the case of part-time work, employees' salaries are not maintained by the employer.

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

Employees with specific conditions of seniority, or conditions related to the caring dependant, are entitled to three different schemes of unpaid leave:

- 14 months' leave at a maximum renewable once under conditions (over a three-year period) for caring for a child suffering from a serious disease, accident or handicap; in that scheme, another employee can give rest days to the caring employee;
- three months' leave (renewable once) for caring for a family member who suffers from a life-threatening condition; and
- three months' leave (renewable, but subject to a maximum of one year) to look after a relative with a disability or loss of independence.

Also, employees may be absent from work at least three days per year, provided that they justify their child's illness with a medical certificate. Except when provided otherwise by a collective agreement applicable to the company, such leave is unpaid.

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 share sale, employees are not affected, as they remain employed by the same company.

In the case of an asset transfer involving an autonomous economic entity, employees will have their contracts of employment automatically transferred to the buyer.

An autonomous economic entity is defined by French courts as an “organised group of persons, with its own tangible and intangible assets, allowing the exercise of an economic activity which pursues a specific objective”.

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

Employment contracts are continued with the new employer under the conditions in force at the time of the transfer.

Collective agreements continue to apply until the entry into force of “substitution agreements” negotiated during the survival period of the agreements (maximum duration of 15 months). During this period, employees also benefit from the agreements in force with the new employer.

At the end of the survival period, the original company’s collective agreements will no longer be applicable. If no substitution agreements have been concluded, employees will retain the same salary they were paid during the last 12 months for the working time provided by their employment contract.

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 is informed of, and consulted on, changes to the company’s economic or legal organisation, particularly in the event of a merger, transfer or acquisition and sale of subsidiaries.

As with any consultation, this must take place before the decision is taken by the company (therefore, at the project stage).

The length of the consultation procedure varies according to the nature and complexity of the proposal. The consultation process may not last more than one month (increased to two months when the works council is assisted by an expert or to three months when there is more than one works council to be consulted and more than one works council is being assisted by an expert).

There are also specific consultation requirements in the event of a public open bid.

Failure to comply with this duty of consultation constitutes the offence of hindering the functioning of the works council. Any employer found guilty of this offence is liable to a fine of €7,500 (increased to €37,500 for a corporation).

Companies having less than 250 employees and having an annual turnover of less than €50 million (or the annual total balance sheet does not exceed €43 million) must inform their employees of any project of sale of business (or sale of at least 50% of the shares). The purpose of the information is to allow an employee buyout. The information must be delivered to the employees either at the same time as the works council is informed and consulted, or at the latest two months before the contemplated sale when there are no employees’ representatives.

Failure to comply with this duty is sanctioned by a penalty corresponding to 2% of the sale price.

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

Except for when the transfer is part of a social plan, employers are obliged to transfer employment contracts automatically to the new employer. Employees cannot, therefore, be dismissed in an attempt to elude the transfer. Any such dismissal would be null and void and would entitle the employee concerned to be reinstated and to claim compensation for the damage suffered.

However, after the transfer has taken place, the new employer may dismiss employees (for economic or personal reasons). In most cases, these dismissals will be the result of reorganisation within the host company. In that regard, they must be based on a justified economic reason.

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

The new employer cannot change the contract of employment without the employee’s prior 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?

An indefinite-term employment contract may be terminated by the employer either as a result of a dismissal (for personal reasons or economic reasons) or as a result of retirement initiated by the company. The employer may also take the initiative for a termination by mutual consent.

The employees may also resign, retire or be at the initiative of a termination by mutual consent.

The notice period is fixed by law, collective agreement and/or employment contract. The notice period is generally between one and three months. The length of the notice period provided for by collective agreement generally varies according to the employee’s classification, length of service within the company, the nature of the termination, and, sometimes, his/her age. No notice is required in the case of a termination by mutual consent.

Besides, employees dismissed for gross misconduct are not entitled to a 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?

The employer may allow the employee not to perform during the notice period. A salary is nevertheless paid. During the unperformed notice period, the employee is free to start a new job.

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 procedure must be followed by an employer who is considering the dismissal of an employee (*cf.* question 6.6). In

principle, consent from a third party is not required except for in the dismissal of protected employees (in particular, employees' representatives), which requires the prior approval of the labour inspector.

Employees can self-terminate their contract of employment under the mechanism known as "*prise d'acte de rupture*" if they believe that the employer has breached its contractual obligations (e.g., supply of agreed work, payment of salary, etc.). The Labour Court will then decide whether the termination is a dismissal without cause or to a resignation. In the event that the courts find that the company has indeed breached its contractual obligations regarding its employee, the employer will be sanctioned to pay all end-of-contracts payments (dismissal indemnity, payment *in lieu* of notice period) and court-awarded damages for unfair termination (*cf.* question 6.7).

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

Certain employees are entitled to special protection aimed at preventing their dismissal or establishing a specific dismissal procedure.

These include pregnant women, employees on maternity or adoption leave, employees during a certain period following the birth of the child, employees on sick leave resulting from a work-related illness or accident, employees' representatives, employment tribunal judges and labour doctors.

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 employer may dismiss an employee for personal reasons; for example, in the event of misconduct, professional incompetence or insufficient results, and physical unfitness.

The employer may dismiss an employee on economic grounds where the following cumulative conditions are met:

- the termination is the result of the cancellation or alteration of the employee's position or change to the employment contract, which the employee refuses;
- the termination is the result of the company's economic difficulties, technological changes, reorganisation necessary to safeguard the competitiveness of the company or of the business sector of the group to which the company belongs or cessation of business; and
- the employee cannot be redeployed in another position within the company or group or such redeployment has been refused by the employee.

Economic difficulties are characterised either by the significant change of at least one economic indicator such as a drop in orders or sales, operating losses or a deterioration in cash flow or gross operating surplus, or by any other factor that can justify these difficulties.

A significant decrease in orders or revenues is constituted when the duration of this decrease is, compared to the same period of the previous year, at least equal to:

- one quarter for a company with fewer than 11 employees;
- two consecutive quarters for an enterprise with at least 11 employees and fewer than 50 employees;
- three consecutive quarters for an enterprise with at least 50 employees and fewer than 300 employees; and
- four consecutive quarters for a company with 300 or more employees.

The materiality of the termination, transformation or modification of an essential element of the employment contract is assessed at company level.

Economic difficulties, technological change or the need to safeguard the company's competitiveness are assessed at the level of that company if it does not belong to a group and, if not, at the level of the sector of activity common to that company and to the companies of the group to which it belongs, established in the national territory.

The sector of activity in which the economic cause of the dismissal can be assessed is characterised, in particular, by the nature of the goods or services delivered, the target clientele, and the networks and distribution methods relating to the same market.

Dismissed employees who have at least eight month's service are entitled to a legal dismissal indemnity amounting to one-quarter of the monthly salary for each year of service for the first 10 years and one-third of the monthly salary for each subsequent year. The collective agreement usually provides for a conventional dismissal indemnity that will replace the legal dismissal indemnity if it is more favourable to the employee.

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

A dismissal on personal grounds requires the employer to:

- summon the employee to a preliminary meeting by registered letter or hand-delivered letter, received five working days prior to such a meeting. This letter must state the time and place of the meeting as well as the employee's right to be assisted by an employee of the company or, when applicable, by an outside party;
- hold the meeting with the employee; and
- send the dismissal letter by registered mail after a cooling period of two days. The presentation of the letter to the employee's home will be the starting point of the notice period.

Dismissal based on economic grounds requires the employer to:

- apply selection criteria to all the employees belonging to the same professional category within which the employer wishes to cancel 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;
- offer redeployment positions to the employees whose dismissal is contemplated;
- comply with the rules governing the summons and the holding of a preliminary meeting; and
- offer either the state subsidiaries redeployment scheme ("*contrat de sécurisation professionnelle*") when the company employs less than 1,000 employees in Europe or the redeployment leave ("*congé de reclassement*") when the company employs more than 1,000 employees in Europe.

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 challenge the procedure and grounds for his/her dismissal. If the dismissal is considered deprived of a real and serious cause, the employee will be entitled to receive damages. Since 2017, there is a minimum and maximum amount of damages depending on the employee's seniority.

In companies of at least 11 employees, the damages vary from one to 20 months' salary. Such limits do not apply when the dismissal is considered null and void.

This action may be brought within one year of the termination.

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

A dispute can be ended before, and after, being brought before the courts. In order to be valid, the settlement must contain mutual concessions. In most cases, the former employee agrees not to take legal action or drops the proceedings that he/she has brought in return for a settlement payment by the company.

Besides, the process before the Labour Court begins with a so-called "conciliatory hearing". This hearing is not public and aims at finding a settlement solution on the matter. The amount of the settlement indemnity to be paid by the employer to put an end to a lawsuit, when such a settlement solution is found before the conciliatory board of the Labour Court, is provided for by the Labour Code. Its amount varies from two to 24 months' salary, depending on the employee's seniority within the company.

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

Where an employer is considering dismissing a number of employees for non-personal reasons, it must follow the specific procedure applicable to collective dismissals on economic grounds.

The employer must, first of all, inform and consult the works council (or, failing that, the employees' representatives). It may also be required to inform and consult its Health & Safety Committee.

Where the employer is considering dismissing at least 10 employees during the same 30-day period in a company employing more than 50 employees, it must also propose a "job protection plan" ("*plan de sauvegarde de l'emploi*"), about which the works council must be informed and consulted. The aim of the job protection plan is to limit the number of dismissals or limit the impact of these dismissals on the professional career of employees. It generally contains measures such as training, outplacement programmes, support in creating a company, relocation allowance, etc.

Such a job protection plan may either result from a negotiation with trade unions (subject to a limited review from the Labour Administration) or from a document prepared by the employer (subject to prior approval from the Labour Administration). The duration of the works council consultation process is limited in time. It varies from two to four months depending on the number of projected 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?

Employees are involved, through the works council, in the negotiation of the measures contained in the job protection plan.

Once the dismissal has been announced, employees may challenge the procedure and grounds for their dismissal. Claims relating to the works council's consultation procedure, the drafting and the content of the job protection plan and the decision taken by the Labour Administration in the course of the mass dismissal project, are heard by Administrative Tribunals (as opposed to the Labour Courts).

Employees may still challenge the grounds of their dismissal before the Labour Courts. Such claims may be brought within 12 months as of the date of the termination.

Employees will receive damages for dismissal without real and serious cause if (i) the dismissal is not based on a real and serious economic cause, or (ii) the employer has breached its prior redeployment obligation.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The employment contract may notably specify a duty of exclusivity, a duty of confidentiality and a post-contractual non-compete obligation.

7.2 When are restrictive covenants enforceable and for what period?

The following restrictive covenants are enforceable:

- **Exclusivity:** Even if there is no specific clause in the employment contract, employees are bound by a general duty of loyalty preventing them, *inter alia*, from carrying out any other activity that may harm their employer. Besides this duty of loyalty, the employer may want its employees to provide their services on an exclusive basis by preventing them, contractually, from carrying out any activity, whether competing or not, other than that described in the employment contract. The exclusivity clause must be specifically mentioned in the employment contract. It must, however, be justified by the nature of the task to be accomplished, be proportionate to the objective sought, and must specify the scope of the prohibited complementary activity (voluntary or lucrative, professional or leisure).
- **Confidentiality:** The duty of confidentiality is an extension of the duty of loyalty. The inclusion of a confidentiality clause in the employment contract may, however, be useful, particularly to define the scope of this obligation and the nature of confidential information.
- **Non-compete:** Insofar as it runs contrary to the constitutional principle of freedom of work, the non-compete clause must be, in order to be valid, justified by the company's legitimate interests (and, therefore, justified by the position held by the employees), limited in time and space, and contain a financial compensation. By way of illustration, the majority of collective agreements limit the duration of the restriction to between one and two years over an area limited to the surrounding regions and provide for compensation in the amount of 30% of the employee's monthly pay, paid monthly throughout the period during which the restriction applies.

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

An employee bound by a post-contractual non-compete obligation must indeed receive financial compensation (*cf.* question 7.2).

7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced as follows:

- Exclusivity/Confidentiality: Breach of the duty of exclusivity or confidentiality may lead to a disciplinary sanction (warning, suspension or even dismissal).
- Non-compete: If this clause is breached, the Labour Court may order any measures necessary to put a stop to the competition. The employee may be ordered, under threat of penalty, to stop any competing activity.

An employee who fails to observe the non-compete clause may also be ordered to pay damages as compensation for the harm suffered by his/her former employer.

It should be noted that the new employer who hires the employee concerned with the knowledge of the existence of the clause may also be ordered to pay damages.

The non-compete clause may be accompanied by a penalty clause, i.e., one that specifies, in advance, the amount of compensation that will be owed by the employee if the non-compete clause is breached. The sanction will then be applied automatically without the employer having to prove any harm or damage. Note, however, that the judge may always revise the amount of the sanction if it is manifestly excessive or derisory with respect to the harm or damage caused.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Under the European General Data Protection Regulation (GDPR), complemented in France by a law dated January 6, 1978 (amended accordingly), employers need to implement a comprehensive compliance programme in order to meet the many requirements provided for by this regulation with respect to the use of their employees' personal data (implementation of privacy principles including fairness, transparency, minimisation, data security, running prior data protection impact assessment of sensitive processing, drafting policies, documenting processes, etc.).

The National Commission on Informatics and Liberty (CNIL) is the French independent administrative regulatory body responsible for ensuring that data privacy law is complied with. The CNIL may control and sanction.

Subject to necessity, French-based employers can transfer employees' personal data both into and out of the European Economic Area or a country offering a level of protection deemed adequate by the European Commission, but only if so-called "appropriate safeguards" have been provided (e.g., execution of the European Commission's model contractual clauses or, provided that the data remains within a group of undertakings, after implementing Binding Corporate Rules approved by European supervisory authorities). By contrast, employee's consent is not deemed a valid ground for such transfers under the CNIL's doctrine. Within their general obligation to provide information to employees on how they use their data, employers should provide specific information on such transfers.

Failure to comply with data protection law may be sanctioned by a fine decided by the CNIL or criminal penalties by a court. Administrative fines may amount, depending on the category of the offence, to €20 million or, in the case of a company, up to 4% of the annual worldwide turnover. Staff representative bodies and/or employees may also take advantage of such violation (for instance, to challenge the validity of a dismissal that would rely on information that the company could not validly hold).

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees are entitled to ask their employer whether and how their personal data is being processed. They can also request a copy of such data in plain language. Theoretically, this right is unconditional, provided that the request is not manifestly spurious and does not impair third parties' rights.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Except for certain particularly sensitive jobs that require ethical conduct, an employer cannot ask for details of a person's criminal record. Indeed, in general, any request for information concerning prospective employees must be related to the employment contract and be justified by what is strictly necessary to a proper performance of the contract; otherwise, the information will be considered as part of the employee's private life. When the request for a criminal record is justified, the employer is not entitled to keep a record of its content, which belongs to a sensitive category of data (data relating to offences), unless authorised by the law.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Employees have a right to privacy, even in the workplace. Therefore, employers are entitled to access and monitor any office equipment that they have made available to their employees, including computer, emails and phone calls, unless where they are unambiguously identified as "personal" or "private" and provided that the conditions set forth in the law are met (see questions 8.1). Indeed, only a very limited exception (if extraordinary circumstances justify it) allows employers to access "personal" or "private" contents. In addition, even if content was not marked as "personal" or "private", it cannot lead to a disciplinary sanction if it appears that it actually falls within the scope of the employee's private life.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

During work time, only an abusive use of social media may justify a disciplinary sanction for serious misconduct. Connection time, frequency or duration may be used as indicators of such abuse, provided that such monitoring has been lawfully implemented (see question 8.1).

Outside working hours, insulting or otherwise damaging content may lead to a disciplinary sanction if it proves to be published outside the scope of confidentiality of private correspondence (e.g., if the account settings were not set up to ensure confidentiality of the content).

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

To date, the question of artificial intelligence (AI) is not, strictly speaking, regulated in French Labour Law.

In principle, Article 22 of the GDPR strictly limits decisions taken in a fully automated manner. A fully automated decision may only be taken in the following cases:

- the data subjects have given their explicit consent;
- the automated decision is necessary for the conclusion or performance of a contract; and
- the possibility of using a fully automated decision is governed by specific legal provisions, which is not the case in France for recruitment and the performance of employment contracts.

Within the framework of a recruitment, it seems complicated to use a fully automated decision since it is, in practice, complicated to ensure the consent of the candidates. However, employers could use an AI system for recruitment purposes if it does not lead to fully automated decisions. In this case, employers must comply with the principle of “data minimisation”, as mentioned in the CNIL’s new recruitment guide published in 2023. This means that only data that is adequate, relevant and strictly necessary for the selection of a candidate for a given post and for the conduct of the job interview may be collected. If an AI system is used, this must not have the effect of discriminating between candidates.

In addition, an employer who uses an AI system to monitor the activity of its employees will necessarily have to comply with the general principles in this area. Besides asking for the works council’s opinion on the monitoring system, the employer will have to ensure that the personal life of employees is respected and that they are properly informed of the existence of such monitoring system. Moreover, the system shall comply with GPDR rules (*cf.* question 8.1).

9 Court Practice and Procedure

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

Disputes between an employer and employee are, at first instance, referred to the Labour Court. It is composed of elected, non-professional judges with equal representation between employers and employees.

The Administrative Tribunal and the labour division of the French “*Tribunal Judiciaire*” also have jurisdiction in specific areas (e.g., protected workers, compensation for a work-related accident, etc.).

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

With the occasional exception, the procedure before the Labour Court consists of two phases:

- the conciliation phase, in which the parties are invited by two judges (one employees’ representative and one employers’ representative), in a hearing on camera, to find an amicable solution to the dispute; and
- the judgment phase, in which each party presents its arguments and its exhibits to four judges (two employees’ representatives and two employers’ representatives).

Introducing a lawsuit before any jurisdiction in France is no longer subject to a tax.

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

The duration of the Labour Court procedure varies depending on whether the four judges have reached a decision or not. Where they are unable to do so, the case will be referred to another judgment hearing chaired by a “*départition judge*” (who is a professional judge). The case will thus be heard twice at first-instance level.

On average, a first instance procedure takes between one year and one-and-a-half years.

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

An appeal is possible before the Court of Appeal, except when the claim amount is less than €5,000. The Court of Appeal is made up of professional judges. The case will be decided within an average period of one year.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The most important laws dealing with labour and employment law are the:

- German Civil Code (“*Bürgerliches Gesetzbuch*”).
- General Equal Treatment Act (AGG – “*Allgemeines Gleichbehandlungsgesetz*”).
- Part-Time and Limited Term Employment Act.
- Continuation of Remuneration Act.
- Minimum Wage Act.
- Protection Against Unfair Dismissal Act.
- Minimum Vacation Act for Employees.
- Works Constitution Act (“*Betriebsverfassungsgesetz*”).
- Hours of Employment Act.
- Maternity Protection Act.
- Federal Parental Benefit and Parental Leave Act (“*Bundeselterngeld- und Elternzeitgesetz*”).
- Labour Court Act.
- Act Regulating the Commercial Leasing of Employees.
- Act on Documenting Essential Applicable Conditions for Employment Relationships.

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

Most employment law acts and regulations apply to dependant employees only. The term “employment” has traditionally not been defined by law. However, § 84 para. 1 sentence 2 German Commercial Code (“*Handelsgesetzbuch*”) includes, according to prevailing opinions, a first indication of an attempt for a definition. A self-employed person is someone who can typically arrange his/her work (occupation) and independently determine his/her working hours. An employed person, and therefore personally dependent, is a person who cannot do so, and who – for this reason – is commonly classified as an employee, unless he/she is working for another person on the basis of a private-law contract.

The same definition and concept is now also reflected by § 611a para. 1 German Civil Code as follows: “[T]he contract of employment obliges the employee to perform work in the service of another person in personal dependence and subject to instructions from others. The right to issue instructions may concern the content, performance, time and place of the work. Those who are not essentially free to organise their activities and determine their working hours are bound by instructions. The degree of personal dependency also depends on the nature

of the respective activity. To determine whether an employment contract exists, an overall consideration of all circumstances must be made. If the actual implementation of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant.”

A distinction must also be made between an employee and a so-called “employee-like person” (“*arbeitnehmerähnliche Person*”). In order to be considered an employee-like person, the employee must be economically independent of his/her employer and socially in need of protection, cf. the legal definition in § 12a para. 1 no. 1 Collective Bargaining Act (“*Tarifvertragsgesetz*”). For those persons, some acts do not fully apply, such as the Continued Remuneration Act or the Act Against Unfair Dismissal (“*Kündigungsschutzgesetz*”).

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 common practice to agree upon an employment contract in writing, even though it is not mandatorily required. Moreover, under the Documentary Evidence Act (“*Nachweisgesetz*”), an employer is required to lay down the terms and conditions of the employment relationship no later than one month after the commencement of the employment relationship in writing and shall at least contain the following information:

- name and address of the parties to the contract;
- date of the commencement of employment;
- for employment contracts of limited duration: the foreseeable duration of the employment relationship;
- place of work or an indication that the employee can be transferred to different locations if the employees shall not work in only one location;
- a short characterisation or description of the job the employee shall take up;
- the composition and the amount of remuneration, including the payment of overtime, bonuses, extra pay, premiums and special payments as well as other parts of the salary and their due date;
- agreed working time;
- duration of annual holiday entitlement;
- the procedure to be followed by the employer and the employee when terminating the employment relationship, at least the requirement of the written form and the time limits for terminating the employment relationship, as well as the time limit for bringing an action for protection against dismissal; Section 7 Act Against Unfair Dismissal shall also apply in the event of improper proof of the time limit for bringing an action for protection against dismissal; and

- a general reference to labour agreements, company or service agreements being applicable to the employment relationship.

1.4 Are any terms implied into contracts of employment?

The clauses of employment contracts in Germany usually cover the following: starting date; job title; job description; job location and relocation clause; probationary period; salary (based, variable and fringe benefits); working time and overtime; vacation; secrecy and intellectual property; termination and notice periods; contractual and post-contractual non-compete; contractual penalty; and waiver.

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

There are quite a few laws setting out minimum terms and conditions of employment, such as the Minimum Wage Act (€12.41 gross per hour since 1 January 2024) and the Federal Vacation Act (20 vacation days per year for a five-day working week), 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?

The main sources of employment-related conditions are the several acts setting out these terms and conditions as well as the employment contract between the parties of the employment relationship. Collective bargaining agreements come into play and are to be observed only if both the employer and the employee are members of the federation of employers and a trade union or if the company and a works council have agreed under shop agreements.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

In Germany, it is not possible to require employees to split their working time between home and the workplace on a hybrid basis unless they consent to such change of the terms and conditions of employment.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

In Germany, employees do not have a right to work remotely, either from home or elsewhere, unless agreed upon with the employer. Due to the pandemic, German lawmakers created a temporary obligation to work from home on the basis of a special regulation. However, this ended on 19 March 2022 and there is no permanent legal regulation of mobile work, even though there is a corresponding draft act of the Federal Ministry of Labour and Social Affairs in the form of the Mobile Work Act ("*Mobile-Arbeit-Gesetz*").

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade unions are free associations of employees under private law on a supra-company basis that represent the collective interests of employees; in particular, by concluding collective agreements. The constitutional basis for trade unions is Article 9 para. 3 Basic Law ("*Grundgesetz*"). Trade unions' participation rights in collective bargaining law are contained in the Collective Bargaining Act and the Works Constitution Act. Only employee associations are eligible for collective bargaining, which includes trade unions, which are also prepared to strike in extreme cases and are capable of enforcing their rights *vis-à-vis* the employers.

Collective bargaining agreements can be concluded between trade unions on the worker's side and employer's associations or, rarely, employers on the employer's side. In order to extend the scope of application of collective bargaining agreements to non-organised employers and employees, German law entitles the Secretary of State for Employment to declare such agreements as generally binding ("*Allgemeinverbindlicherklärung*").

Most unions and employers' associations are organised under umbrella organisations such as the "*Deutscher Gewerkschaftsbund*" (DGB), as well as the German Confederation of Employers' Associations (BDA). In most cases, the members of the organisations of both sides conclude agreements that cover a particular industry within a certain region or within the entire territory of the Federal Republic of Germany.

2.2 What rights do trade unions have?

The right to form trade unions is protected under the Constitution, as is the right to form employers' associations. Any obstruction of this freedom of association by threat, promise or other means is illegal. Employers and works councils must ensure that any discrimination against persons on the grounds of their trade union activities or employment is avoided.

Trade union representatives are entitled to attend meetings of the works council and works meetings and have access to the workplace to carry out the tasks assigned to them. Therefore, there is no right of access to discuss general issues of the applicable collective bargaining agreement with the employees at the workplace.

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

An industrial dispute is a dispute on questions of labour law design and regulation conducted collectively by the parties to the collective agreement by exerting mutual pressure. The most important means of industrial action on the part of employees is the strike, and on the part of employers, the lockout. The precondition is always that the parties to the collective bargaining process have not been able to reach agreement on a collective agreement through negotiation – including mediation. In this case, the conclusion of the collective agreement can be enforced by means of 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?

According to the Works Constitution Act, employees of business units of an enterprise that regularly employ more than five employees are entitled to set up a works council if at least five of them are older than 16 years of age, and therefore qualified to elect, and at least three of them are 18 years of age or older, and therefore qualified to be elected.

Furthermore, there may be similar employee participation/consultation on a company or company group level. If a company has two or more business units each having a works council, a company works council (“*Gesamtbetriebsrat*”) must be formed and is responsible for matters concerning the entire company. Furthermore, the works council of a business unit can assign matters to the company works council. A group works council (“*Konzernbetriebsrat*”) composed of members of the works councils of different affiliated companies may be established and is in charge of matters regarding the whole group of companies.

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 enjoy considerable information, consultation and participation rights, which are regulated in the Works Constitution Act. Participation and co-determination rights must be differentiated. Whereas participation means information and consultation of works councils, co-determination refers to the right of employees to co-determine the company's decision-making. Although most of the rights given by the Works Constitution Act are related to information and consultation, the following co-determination areas exist:

- General co-determination rights (§ 81–86 Works Constitution Act).
- Co-determination in social matters (§ 87–89 Works Constitution Act).
- Co-determination in personnel matters (§ 92–105 Works Constitution Act).
- Co-determination in respectively economic matters (§ 106–113 Works Constitution Act).

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

Trade unions and works councils are basically active at different levels. While trade unions have the power to conclude collective agreements, which apply to their employers who are bound by collective agreements, and which generally regulate working conditions on a sectoral basis, works councils are responsible for representing employees' interests at company level. If a collective agreement exists, the works council has no power to regulate; this also applies if the matter is usually regulated by a collective agreement (collective agreement reservation). According to the collective bargaining precedence of § 87 Subsection 1 introductory sentence Works Constitution Act, the works council's right of co-determination in certain social matters (§ 87 introductory sentence 1 no. 1–13 Works Constitution Act) is further excluded there if a collective bargaining agreement exists (bargaining block). Whether the collective bargaining regulation is conclusive and thus excludes the right of co-determination is to be determined by interpretation. If the employer is left with

regulatory leeway, the co-determination right intervenes. If there is a final collective agreement regulation, deviating or supplementary works agreements are only permissible if the collective agreement expressly permits this (so-called opening clause).

2.7 Are employees entitled to representation at board level?

In Germany, corporations are subject to co-determination in accordance with the law if they have more than 500 employees. This is where the comparatively weak co-determination provisions of the One Third-Participation Act (“*Drittelbeteiligungsgesetz*”) come into play. If more than 2,000 employees are employed, more far-reaching co-determination regulations of the German Co-Determination Act (“*Mitbestimmungsgesetz*”) apply. The co-determination regulations in the Coal and Steel Co-Determination Act (“*Montan-Mitbestimmungsgesetz*”) go furthest. It applies to mining companies (mining, iron and steel) that employ more than 1,000 employees. Finally, special regulations apply for European Companies as regulated by the Act on the involvement of employees in a European Company (“*Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft*”).

3 Discrimination

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

In general, German law prohibits the discrimination of employees on the basis of sex, religion or political beliefs, etc.; furthermore, the EU anti-discrimination directives have been implemented by the AGG. The objective of this law is to prevent or to remove discrimination based on race, ethnic origin, sex, religion or belief, disability, age or sexual orientation.

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

The AGG differs between the following kinds of discrimination:

- Direct discrimination: a person based on one of the aforementioned discrimination criteria is placed, or would be placed, at a disadvantage in comparison to another person having equal status.
- Indirect discrimination: if there are seemingly neutral regulations, criteria or proceedings that can, due to one of the aforementioned discrimination characteristics, place persons at a disadvantage in comparison to others in a specific way (unless the considered regulations, criteria or proceedings are factually justified by a legitimate target and the means for achieving this target are appropriate and necessary).
- Harassment: if unwanted behaviour that is based on a discrimination criterion aims to or causes a violation of a person's dignity and thereby creates a business environment that is characterised by intimidation, hostility, degrading treatment, humiliation or insults.
- Sexual harassment: if unwanted sex-related behaviour, which also includes unwanted sexual action and asking someone to engage in such behaviour, sex-related physical touching, insinuating comments containing sexual content as well as showing or displaying pornographic illustrations, aims to or causes a violation of a person's dignity, especially if it thereby creates a business environment characterised by intimidation, hostility, degrading treatment, humiliation or insults.

- Instruction to discriminate: if a person is given an instruction that, based on a discrimination criterion, is deemed discrimination. Such instruction exists, in particular, if due to one of the mentioned criteria a person instructs another person to act discriminately or to take action that could have a discriminating effect.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

There are no such special rules or mandatory training requirements to avoid sexual harassment. However, the employer is obligated to carry out an internal investigation and to protect the individual employee who has allegedly been harassed. If the employer provides appropriate training to the employees in order to prevent discrimination, this is deemed sufficient for the fulfilment of his/her obligation to provide (also preventative) protection to employees.

3.4 Are there any defences to a discrimination claim?

The employee must assert compensation claims within a two-month period in writing unless otherwise agreed by the parties to the collective agreement. In the case of an application or professional advancement, the period commences upon receipt of the refusal; in any other cases of discrimination, the period commences by the time the employee is informed of the discrimination. If a party is able to provide circumstantial evidence leading to the assumption that there was discrimination based on a discrimination criterion specified before (race and ethnic origin; sex; religion and belief; disability; age; and sexual orientation), the other party bears the burden of proof that there was no violation against the provisions for the protection against discrimination.

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

According to the AGG, employees are granted rights of varying extent:

- Employee's right to lodge complaints with the relevant department of the company or bureau – such complaint must be examined and the claimant must be informed of the result.
- Right to refuse performance – if the employer fails to take measures or takes apparently inappropriate measures in order to prevent harassment or sexual harassment at work, the employees concerned are entitled to stop their work.

To settle shall always be possible at any stage, be it before or after the employee has tried to enforce discrimination rights.

3.6 What remedies are available to employees in successful discrimination claims?

In certain circumstances, compensation for material and/or immaterial damage must be taken into consideration as well. For instance, the employer is obligated to pay damages resulting from a violation of the prohibition of discrimination. The employee may also claim an appropriate compensation in monetary form if an immaterial damage was caused. In the case of non-employment, such compensation may not

exceed the amount of three monthly salaries, provided that the employee would not have been employed even if selection had been executed without discrimination.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

According to § 4 para. 1 German Part-Time and Fixed-Term Employment Act, a part-time employee may not be treated less favourably than a comparable full-time employee on account of part-time employment, unless objective reasons justify different treatment.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

On 2 July 2023, the Whistleblower Protection Act ("*Hinweiserschutzesgesetz*") came into force, which implements the Whistleblower Directive (EU 2019/1937). Since 1 December 2023, violations of this law are now also subject to fines. According to the Whistleblower Protection Act, companies with 50 or more employees must have an internal reporting office that employees can contact to report misconduct. For financial institutions (credit, financial services and securities institutions, investment service providers, stock exchange operators, capital management companies, etc.) this obligation applies regardless of the number of employees. If a company has fewer than 50 employees, employees can contact an external reporting office to report any violations, regardless of the number of employees. This has been set up at the Federal Office of Justice and the Federal Cartel Office.

In addition, whistleblowers may seek protection under the German Business Secret Act ("*Geschäftsgeheimnisgesetz*"), according to which the protection of business secrets from unauthorised acquisition, use and disclosure is permitted, if the disclosure serves to uncover an illegal act, or professional or other misconduct, and is suitable to protect the general public interest and contribute to social change. Differing from the previous stipulation, there is no obligation for the employee to first notify the company in order to try to remedy the situation, hence a whistleblower may immediately contact the authorities or the press.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Employers are not obliged to publicly publish information on gender-specific salary differences. However, the Remuneration Transparency Act ("*Entgelttransparenzgesetz*") provides for an individual right of employees to be informed of the gross remuneration of comparable employees of the opposite sex, see § 10 Remuneration Transparency Act. However, there is no right to information regarding a disability-related or ethnic pay gap. However, according to the AGG, employees may not be discriminated against on the basis of their ethnic origin or disability and can assert a claim for damages if the prohibition of discrimination is violated, see Section 15 AGG.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Please note that according to German labour and case law, the

employee is not obliged to disclose her status of pregnancy to the employer before signing up and/or before engaging in employment. It is prohibited under German law to ask employees if they are pregnant as this would be considered discriminatory.

Employees are entitled to maternity benefits ("*Mutterschaftsgeld*") for the last six weeks of pregnancy and eight weeks afterwards; for premature and multiple births, employees are entitled to 12 weeks without having to work during this period. Although the pregnant employee may nevertheless work during the period prior to childbirth, the period afterwards is not at her disposal. Moreover, expectant mothers are not permitted to perform certain tasks; even a general prohibition to employ can be considered in certain circumstances.

During pregnancy and for a period of four months afterwards, the employment contract of a pregnant employee cannot be terminated if the employer was informed about the pregnancy or childbirth when giving notice of termination or if the employer was informed within two weeks after delivery of the notice of dismissal. However, exceeding this term is harmless if the delay was not due to the woman's fault and notification is made immediately.

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

During maternity leave, the employee can claim full payment, part of which is compensated by the health insurance company.

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

Upon returning to work after the aforementioned maternity leave period, the employee may claim the same rights to pay and benefits as before. The same goes for returning from paternal leave. However, entitlement to holiday may be reduced by the 12th part for each completed calendar month the employee had been away on parental leave, unless the employee performed part-time work for the employer.

4.4 Do fathers have the right to take paternity leave?

Under certain conditions as set out by the Federal Parental Benefit and Parental Leave Act, employees are entitled to a special unpaid parental leave ("*Elternzeit*") for a period of up to three years following childbirth. Parental leave may be taken by either parent alone, also on a *pro rata temporis* basis, or by both parents together, but shall be limited to three years for each child. If an employee wishes to claim parental leave, he/she must demand in writing that the employer grant parental leave at least seven weeks in advance of commencement, designating the period within two years in which parental leave shall be taken. The same notice applies for the extension of the parental leave for the third year if the employee has opted for two years – this all not being subject to the consent of the employer. A portion of the parental leave of up to 12 months may be transferred with the consent of the employer for the period up to the completion of the eighth year of the life of the child.

Moreover, there is a draft bill presented by the Ministry of Family Affairs pending, the Family Start Time Act, according to which the partner will be entitled to paid time off for a period of 10 working days following the birth of a child. The draft essentially contains the following provisions:

- Introduction of a leave entitlement for the partner in the first 10 working days after a birth.

- The other parent or a person nominated by the woman may be entitled to this if the other parent does not live in the same household as the woman.
- Crediting of the period of partner leave against the entitlement to parental leave.
- Partner's salary in the amount of the average salary of the last three calendar months, if applicable, taking into account parental allowance. The costs of the leave should be covered by the employer-financed levy procedure.
- The new partnership benefits are based on maternity benefits.
- Parents whose child was born four weeks or earlier before the expected date of childbirth will receive an additional month of basic parental allowance.

The family start period serves to implement EU Directive 2019/1158 (Directive on the work-life balance for parents and family carers), which already should have been transposed into national law by 2 August 2022. As the deadline has expired, the EU has initiated infringement proceedings against Germany. Nevertheless, the Family Start Time Act has not yet been passed. The draft bill is still in the departmental coordination process because the financing of the family start time has not yet been finally clarified politically.

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

Part-time work with the employer during the parental leave period is possible to a certain extent as set out by § 15 Federal Parental Benefit and Parental Leave Act under the following conditions:

1. The employer regularly employs more than 15 employees, not counting trainees.
2. The employment relationship has existed for more than six consecutive months in the same establishment or company.
3. The contractual working time is to be reduced for at least two months to between 15 and 30 hours per week.
4. The claim is not opposed by any urgent operational grounds.
5. The claim was communicated to the employer in writing seven weeks before the reduced working time begins.

The request must state the start date and the scope of the reduced working hours. The desired distribution of the reduced working hours should be stated in the request. If the employer wishes to deny the claim for the reduction of working time, it must do so within four weeks with a written substantiation. If the employer does not consent to the reduction in working time at all, or not in a timely manner, the employee may file charges before the courts for labour matters.

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

Employees who, in an acute care situation, need time to organise or ensure the care of a close relative in need of care, can be absent from work for up to 10 days (temporary incapacity to work) and can receive care support payments as a wage replacement benefit in these cases. This is granted on application by the nursing care insurance fund or the private compulsory nursing care insurance of the person in need of nursing care.

Employees who care for a close relative or a close relative at home can also be granted complete or partial release from

work for up to six months under certain conditions (care time). Underage close relatives in need of care are also entitled to time off work if care is provided outside the home environment.

In addition, employees can claim full or partial release from work for up to three months to accompany a close relative in the last phase of life. In this case too, employees must prove the corresponding illness of the close relative by submitting a medical certificate to the employer. Employees are entitled to these exemptions from work from employers who generally have more than 15 employees.

Finally, employees in companies with generally 25 or more employees, excluding those employed for their vocational training, are entitled to family care time, i.e., to partial leave of absence for the care of a close relative in need of care in a domestic environment over a period of up to 24 months with a minimum weekly working time of 15 hours.

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 business sale – be it by way of a share or asset deal – the employees are indeed automatically transferred to the buyer because of § 613a para. 1 sentence 1 German Civil Code (the German Transfer of Undertakings (Protection of Employment) (TUPE) provision) foreseeing the following:

“Where a business or part of a business is transferred to another owner by means of a legal transaction, the new owner enters into the rights and obligations arising from the employment relationships in existence at the time of transfer.”

According to case law, an undertaking (“Betrieb”) in compliance with German labour law is usually defined as the work-organisational unit, wherein the employer, with the aid of material and immaterial operating resources, continuously pursues a certain work-technical purpose with the objective of making profit. The term “unit” thereby refers to an organised total of staff and material assets established for a permanent performance of economic activities and pursuing its own objectives, i.e., the following component aspects are considered for the overall assessment:

- type of the respective undertaking or business;
- potential transfer of the material operating resources, such as buildings and movable assets;
- value of the intangible assets as of the date of transfer;
- potential takeover of the main workforce;
- potential transfer of the customer base;
- degree of similarity between the activities performed before and after the transfer; and
- duration of a potential interruption of the activities.

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

The legal consequence of the transfer of undertaking is the transfer of the employees affected thereby. § 613a para. 1 sentence 2 German Civil Code provides that in the case of a transfer of undertaking, the acquirer succeeds to the rights and obligations of the employment contracts existing at the time of transfer; i.e., in particular, prior service years are credited. As laid down in § 613a German Civil Code, the employees concerned by the transfer have indeed, the possibility to object

to the transfer of their employment contracts. The objection must be raised within one month after receipt of the instruction in accordance with § 613a para. 5 German Civil Code. The objection can be declared to the former employer or to the new owner. The employee is not required to state any reasons for the objection. In the event that an employee objects to the transfer of the undertaking, his/her employment contract will not be transferred to the acquirer but remain with the former owner. The latter is, however, entitled to terminate the employment of the respective employee if the preconditions for a termination for operational reasons are fulfilled.

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 the preconditions for a transfer of undertaking as set out above are met, the employees must be instructed accordingly. Prior to the transfer, the former employer or the new owner is required to instruct the employees affected by the transfer in writing regarding the:

- date or planned date of the transfer;
- reason for the transfer;
- legal, economic and social consequences of the transfer for the employees; and
- measures envisaged in respect of the employees.

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

Terminations of employment due to the transfer of undertaking or part of a business by either the seller (e.g., the former employer) or the purchaser (e.g., the new owner) shall be invalid in accordance with § 613a para. 4 sentence 1 German Civil Code. The right to terminate employment for other reasons remains unaffected, however, in accordance with § 613a para. 4 sentence 2 German Civil Code. Furthermore, termination is possible, e.g., if an employee has objected to the transfer of his/her employment contract or dismissal is given on the basis of a rehabilitation concept of the seller and/or acquirer, which is permitted under certain conditions.

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

According to § 613a para. 1 sentence 1 German Civil Code, the acquirer must respect the rights and obligations out of the employment contracts existing at the time of the transfer. If the rights and obligations of the employees are regulated by collective bargaining agreements or shop agreements, these rights and obligations will become part of the employment contract and must not be changed to the disadvantage of the employee before the expiration of one year after the date of takeover (so-called “temporary ban on changes”). Based on this regulation, the regulations of collective bargaining agreements lose, in principle, their direct and mandatory effect upon transfer of the undertaking and are applicable for the business acquirer just like other employment contractual regulations.

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 notice of termination (as well as a termination agreement) must be in writing to be effective. In practice, notice periods are usually laid down in employment contracts or collective bargaining agreements. The following notice periods set forth in the German Civil Code represent the statutory minimum for dismissals and apply if the contract does not provide for any specific notice periods, which would be more favourable to the employee:

Years of Employment	Notice Period
Less than two years of service	Four weeks to the 15 th or the end of a calendar month
Two to five years of service	One month to the end of a calendar month
Five to eight years of service	Two months to the end of a calendar month
Eight to 10 years of service	Three months to the end of a calendar month
10–11 years of service	Four months to the end of a calendar month
12–14 years of service	Five months to the end of a calendar month
15–19 years of service	Six months to the end of a calendar month
More than 20 years of service	Seven months to the end of a calendar 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?

In Germany, placing employees that have been terminated on garden leave is still the most common practice and is generally considered a valuable option to best protect and secure the company's interest for various reasons. However, this is only possible if such garden leave clause is agreed upon in the employment contract and a justified reason is given. In any case, it should be ensured that release times are offset against outstanding holiday entitlements and possible uncompensated overtime in case of an irrevocable release from duties, in case of a legitimate interest for such release.

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 employed for more than six months who is employed by a company with more than 10 employees benefits from protection against unfair dismissal and can claim that the dismissal is socially unjustified (*cf.* question 6.5 for details).

Prior to termination, consent is required if the employee enjoys special protection against unfair dismissal (such as pregnant or disabled employees, *cf.* question 6.4 for more details).

Moreover, the participation of the works council may be required. According to § 102 Works Constitution Act, the works council must be consulted before any dismissal. The employer

must inform the works council of the reasons for termination of employment, including the reasons that led to the social selection pursuant to § 1 para. 3 Act Against Unfair Dismissal in the case of termination for operational reasons. A notice of termination given without the works council being heard is invalid. This applies to both ordinary and extraordinary dismissals. However, the works council's consent to the termination is not required. Even if the works council raises concerns or objects to the termination, the termination can be pronounced.

If the works council has objections to an ordinary termination, it must inform the employer of these objections within one week at the latest, stating the reasons, otherwise the works council is deemed to have given its consent. The works council may also object to the ordinary termination of employment in accordance with § 102 para. 2 Works Constitution Act within one week if the following reasons are given:

- The employer did not or did not sufficiently consider the four basic social data categories: seniority; age; maintenance obligations; and severe disability, when selecting the employee to be dismissed.
- The termination violates selection guidelines according to § 95 Works Constitution Act on the selection of personnel in the case of terminations.
- The employee to be dismissed may continue to be employed at another job in the same company or in another company within the company.
- The employee can be re-employed after reasonable retraining and further training measures.
- It is possible to continue to employ the employee under changed contractual conditions, and the employee has given his/her consent to this.

If the employer terminates the contract for one of the above five reasons despite the works council's objection, he must send the employee a copy of the works council's opinion together with the termination. If the works council raises an objection within the time limit and in due form and if the employee brings an action for protection against dismissal, the employee must continue to be employed by the works council at its request until the final conclusion of the proceedings for protection against dismissal with unchanged working conditions, unless the labour court releases the employer from this obligation at its request because the action for protection against dismissal is without sufficient prospect of success or appears deliberate, or the continued employment of the employee would lead to an unreasonable economic burden for the employer or the objection of the works council was obviously unfounded.

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

There are quite a few categories of employees benefitting from special protection against dismissal, in particular:

- Works council members (§ 15 Act Against Unfair Dismissal).
- Election committees and candidates for works council elections (§ 15 Act Against Unfair Dismissal).
- Members of the Staff Council, election committees and election candidates for this purpose (Personnel Representation Act).
- Members of youth and trainee representations (according to works constitution or staff representation law).
- Severely disabled persons only with the consent of the Integration Office (§ 168 Ninth Book of the Social Security Code).
- Representative for severely disabled persons (§ 179 Ninth Book of the Social Security Code).

- Company data protection officer(s) (§ 6 Federal Data Protection Act (BDSG)).
- Pregnant women and mothers up to four months after delivery (§ 17 Maternity Protection Act).
- Persons on parental leave (§ 18 Parental Allowance and Parental Leave Act).
- Persons on care time (§ 5 Care Time Act).
- Vocational trainees after the probationary period (§ 22 Vocational Training 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?

If an employee has not yet been with the company for the waiting period of six months, the Act Against Unfair Dismissal is not applicable. Hence, the employee can be dismissed if there is any justifiable reason for the termination (unless this reason is related to the criteria listed in the AGG). The labour law courts can only examine the dismissal on the basis of the standards of § 138 German Civil Code (unethical nature) and § 242 German Civil Code (good faith). In such actions against unfair dismissal, with the exception of special, exceptional cases, employees usually do not have any prospects of success.

Employees working for an employer who regularly employs more than 10 employees, and whose company seniority amounts to a minimum of six months, are protected against termination of their employment contract under the Act Against Unfair Dismissal. Protection against unfair dismissal means that the employment contract can only be terminated for specific reasons. Therefore, a termination of the employment relationship can only be based on personal, conduct-related or operational reasons.

With regard to the amount of severance payment to be offered, in absence of any rules dealing with the amount of severance payment (except for collective redundancies), the following best practices have been established in Germany by both courts and counsel. Where there is no room for legal argument on either side, the usual severance pay is half months' pay for each year of employment; however, if the employer has good prospects of success (and, in particular, where there is an operational shutdown with a preceding social plan and a settlement of conflicting interests), the payments are usually considerably lower. On the other hand, whenever the employer does not have a strong case, the employee would be in a position to claim more, but as a matter of practice, more than one month's salary per year of service is seldom agreed upon.

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

Any notice of termination (as well as a termination agreement) regarding an employment relationship must be in writing to be effective as required by § 623 German Civil Code. There is, in principle, no legal obligation to disclose the reasons for the termination in the dismissal letter and it is common practice to not share such reasons at all (or only verbally without going into any details). However, such reasons will only have to be given to the employee in case of a dismissal for cause if the employee is asking for it. Since it may be necessary to prove in court that all the conditions for a dismissal are given, it is recommended to arrange for proper documentation of the reasoning for the termination.

Apart from this written form requirement, the company may need to seek prior consent from authorities or even the labour

court, in case of employees enjoying special protection against unfair dismissal, or involve the works council (*cf.* also question 6.3 with regard to the hearing of the works council).

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 intends to claim that a dismissal was socially unjustified or ineffective for other reasons, he/she must file an action for protection against dismissal ("*Kündigungsschutzklage*"). Furthermore, the employee can claim payment of remuneration up and until the termination date and beyond. In case of winning, the court will order reinstatement and the employer is obliged to continue to employ the employee and to pay any outstanding remuneration.

Such action must be filed with the labour court within a period of three weeks after receipt of the written notice of dismissal (including the extraordinary notice of dismissal). In the case that the employee fails to do so, his/her objection that the dismissal would be ineffective is precluded, i.e., the termination is considered valid from the beginning.

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

To settle is always possible and, in practice, in most of the cases, a termination matter between employer and employee is very likely to be settled as a matter of fact, either before going to court or during court proceedings. The most favourable approach to avoid such court proceedings, from an employer's perspective, is to settle by way of concluding a settlement agreement.

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

Before an employer is permitted to carry out mass redundancies of employees exceeding a certain threshold provided for in § 17 para. 1 Act Against Unfair Dismissal, it must notify the Federal Employment Agency by using a certain form. In addition, the employer must provide the works council (if any) with the relevant information as soon as possible and inform it in writing of certain circumstances specified by law (§ 17 para. 2 Act Against Unfair Dismissal). Furthermore, collective redundancies form part of the so-called organisational changes. For companies with more than 20 regular employees and a works council, the Works Constitution Act provides specific procedures to be followed with regard to the negotiation of a conciliation of interest and social plan ("*Interessenausgleich und Sozialplan*").

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?

According to the Federal Labour Court, failure to inform the employment agency or an inaccurate notification of mass dismissal has so far regularly led to the invalidity of the dismissal. However, the latter may change since according to the most recent case law, the Federal Labour Court is taking the position that failure to inform the employment agency or an inaccurate notification of mass dismissal shall lead to the invalidity of the dismissal only if case errors in the consultation procedure (procedure with the works council) are at hand.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

There are post-contractual non-compete and non-solicitations covenants – both covenants follow the same rules. However, in the absence of a post-contractual non-competition obligation, an employee may prepare to set up his/her own business before the end of his/her employment for the period after his/her departure. The statutory provisions (§ 60 para. 1 German Commercial Code) only prohibit the commencement of the advertising activity, i.e., in particular, the preparation of the mediation and the conclusion of competing transactions; mere preparatory acts do not meet these requirements.

7.2 When are restrictive covenants enforceable and for what period?

According to German labour law (§§ 74a ss German Commercial Code), a post-contractual non-compete clause with employees is only enforceable if there is compensation for the duration of the prohibition (max. 24 months) to the amount of at least 50% of the average remuneration the employee has had before the ending of the employment relationship (including variable compensation). The same goes, according to the prevailing view, for non-solicitation clauses. Waiving the post-contractual non-compete is possible in Germany, but – unlike other jurisdictions – the waiver becomes effective only one year after the declaration of the employer to waive the covenant, whereas the employee would be freed with immediate effect once the employment relationship has ended. This is mandatory and cannot be changed to the disadvantage of the employee.

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

In return for post-contractual covenants, employees must be provided with financial compensation in the amount of 50% of the average remuneration the employee has had before the ending of the employment relationship (including variable compensation).

7.4 How are restrictive covenants enforced?

Restrictive covenants are typically combined with contractual penalty clauses enabling the former employer to seek damages for breach of the restrictive covenants under the contractual penalty clauses. Moreover, restrictive covenants can be enforced by way of filing injunctions against the former employee and the company wishing to employ the former employee. However, in practice, many companies refrain from doing this for the reason that litigation would result in calling the client to the stand as a witness, which may imply the risk of losing the client rather than protecting the business relationship.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The right to informational self-determination as part of the

general right of privacy under Article 2 para. 1 Basic Law in conjunction with Article 1 para. 1 Basic Law also exists in the relationship with the employer. New legal regulations have been created at the European and national levels in recent years. Both the General Data Protection Regulation (GDPR), which has been in force since 25 May 2018, and the new version of the BDSG, which flanked and amends the GDPR, now form the legal basis for employee data protection in Germany. Personal data must not be transferred to countries if the level of protection guaranteed by the GDPR cannot be guaranteed. This means that data may only be transferred to third countries in which an adequate level of data protection is guaranteed, i.e., comparable to that under EU law.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

In addition to an obligation for the employer to inform the employee about the information processed pursuant to Articles 13 and 14 GDPR, employees also have the right pursuant to Article 15 para. 1 GDPR to request information from the employer about the personal data concerning them. What the information must contain is specified in detail in Article 15 paras 1 and 2 GDPR. In addition, Article 15 para. 3 sentence 1 GDPR stipulates that the employer must provide a copy of the personal data that is the subject of the processing. The right to receive a copy must not interfere with the rights and freedoms of other persons.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

In Germany, no specific legislation exists concerning background checks; the permitted room for manoeuvre must be determined on the basis of the existing legal situation. Statutory constraints with regard to the acquisition and storage of personal data are in place, warranting the protection of the private sphere and the right of self-determination. The applicant does not need to tolerate any background checks that go beyond an employer's permissible right to ask questions within the limits of the AGG and the personality right of the applicant. The employer's legitimate interest in the answering of the question must be more important than the interest of the applicant in the protection of his personality rights. The applicant does not need to respond to inadmissible questions and is also permitted to give a wrong answer to the question.

It is possible in Germany to obtain a criminal background check; however, such background checks are only possible within strict limits. German labour law and the German labour case law balance very precisely the interests of both the employer and the employee's personal rights and his/her right to privacy, as well as the protection of personal data. The right to ask for the criminal background is limited to questions about previous convictions that may indicate that the employee is not trustworthy. A bank employee may, therefore, be asked for asset offences but not a nursery worker. Against that background, the employer generally may not ask for a so-called official certificate of good conduct ("*Führungszugnis*"), since the usual certificate of good conduct does not leave out non-relevant crimes but shows the whole criminal background of an applicant. Since the latter is not necessary for the employer to know, it means a great violation of the employee's personal rights. This means that he/she has the right to refuse to forward such certificate. In case

an applicant can prove that he/she lost his/her job or did not get the job because of not presenting the certificate, he/she may be entitled to compensation.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

The employer's monitoring rights are determined by whether the employee is permitted to privately use the email account/ internet/phone or not. If any private use is prohibited, the employer has a comprehensive right of access. This is then purely business correspondence to which the employer may have access at any time. If private use is also permitted, the employer must respect the privacy of the employee. He may, therefore, only, e.g., screen the email inbox if there is a legitimate reason to do so, e.g., in cases where there are actual indications for the suspicion of a criminal offence or concrete indications for a breach of duty to work.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

In the existing employment relationship, the employee has relatively extensive loyalty obligations, also with regard to negative statements. An employee must refrain from making public statements that are insulting and damaging to the reputation and credit of the employer. The labour court case law is inconsistent and seems to differentiate, especially in the case of social media posts, on the topic of employee statements. Depending on the case, the statement may be considered a "confidential conversation between friends" or a public or "company public" statement. Public and company public social media activities may be controlled by the employer.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

Although there is currently no artificial intelligence law and the draft artificial intelligence regulation introduced by the EU Parliament in the legislative process has not yet been adopted by the European legislator, existing laws also regulate the use of artificial intelligence in the context of an employment relationship. For example, the GDPR stipulates that applicants may not be screened out by an automated application process without a natural person dealing with the applicant. This is because Article 22 GDPR stipulates that a person may not be subject to a decision based solely on automated processing. With regard to monitoring the performance of employees using artificial intelligence, the works council must also be involved in accordance with Section 87 para. 1 no. 6 Works Constitution Act, if applicable. There is also a risk that the use of artificial intelligence could discriminate against employees based on automated decision-making and algorithms for applicant selection.

9 Court Practice and Procedure

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

The labour courts are competent to resolve litigation between the parties of an employment relationship. There are three instances:

- the labour courts: one professional judge and two honorary judges;
- the higher regional courts: one professional judge and two honorary judges; and
- the Federal Labour Court: three professional judges and two honorary judges.

Since the professional and the honorary judges have the same vote, it is unique that the honorary judges can overrule the professional judges in the first and second instance; it seldom happens in practice.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Before going to court, there are usually no formal procedures in place for employment-related complaints unless any such grievance procedure is regulated by the employment contract or an employee handbook. If the complaint shall be made in front of a court, a formal action or writ is required. Conciliation is not mandatory, but it is always helpful for the employer and the employee to find an amicable solution, and even in front of a court it is quite common to settle at any stage of the proceedings. Court fees are linked to the amount of the dispute and are regulated by law.

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

Proceedings before the labour law courts usually last approximately four to six months for the first instance. This is a rule of thumb only and, depending on the complexity of the facts or legal questions, the process may take much longer but can also be shorter depending on how busy the competent courts are and if a hearing of evidence is required.

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

It is possible to file an appeal against decisions taken by the labour courts within one month after having been notified of the verdict, and legal disputes in the second instance usually take between four and six months; again, this is a rule of thumb only.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main sources of employment law are:

- the Greek Constitution;
- the Greek Civil Code;
- laws, legislative decrees, presidential decrees and ministerial decisions; and
- case law.

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

Greek labour law distinguishes employees as blue collar or white collar according to the nature of the work performed. The practical scope of said distinction refers mainly to the payment of salaries (i.e. daily wage or monthly salary).

Furthermore, executive employees are not subject to working hours or working days and, therefore, they are not entitled to payment of any overtime, work during Sundays, holidays, etc. In order for an employee to be considered an executive, he/she must possess certain powers and fall under one of the following categories, as described by the relevant Ministerial Decision:

- they must exercise managerial rights in relation to the rest of the employees of the company, represent and bind the company before third parties, be a member of the company's board of directors (BoD) or equivalent management body, or be a shareholder or partner holding more than 0.5 per cent of the employer's vote right;
- they must be in charge of units or departments or other autonomous organisational units of the company specified in its organisational chart, under the condition that the employer has assigned them to supervise part of the company's essential (and continuous, interrupted or exceptional) operations, and their agreed monthly salary remuneration is no less than six times the minimum statutory wage, as each time in force; or
- their monthly salary is no less than eight times the minimum statutory wage, as each time in force.

If the company uses the profile of an executive to cover, in reality, positions that do not fall under the above categories, then there is a risk of future claims regarding realised overtime, etc. by these employees and the risk of imposition of fines by labour authorities.

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 agreement does not have to be in writing, except for part-time or temporary employment agreements and the renewal of fixed-term employment agreements. However, in accordance with the new labour law, Law No. 5053/2023, which transposes onto Greek legislation EU Directive 2019/1152 on transparent and predictable working conditions in the European Union, employers will now be required to inform employees in writing (either by delivering a document or electronically) about their essential terms and conditions of employment, as described in the table below:

	Essential employment term that requires employee information	Employee information time
1	The contracting parties' personal info	Within one week from hiring
2	Place of work	Within one week from hiring
3	The employee's position or specialty, grade, category or job description	Within one week from hiring
4	Date of commencement of the contract	Within one week from hiring
5	Date of expiry or intended duration of the fixed-term contract	Within one week from hiring
6	The details of the indirect employer for work provided through Temporary Employment Agencies (TEAs)	Within one month from hiring
7	The duration and conditions of the trial period	Within one week from hiring
8	The training provided by the employer, if such provision exists	Within one month from hiring

	Essential employment term that requires employee information	Employee information time
9	The duration of paid leave and the manner and time of granting it	Within one month from hiring
10	The procedure for the termination of the contract	Within one month from hiring
11	The employee's remuneration of all kinds, its periodicity and the way in which it is paid	Within one week from hiring
12	The duration of the worker's normal daily or weekly working hours, arrangements for overtime or additional work and the remuneration thereof, and arrangements for shift work	Within one week from hiring
13	For contracts with no predictable working schedule: ■ Declaration that working hours are variable. ■ Number of guaranteed paid hours of work and remuneration paid for any work in addition to these guaranteed hours. ■ Reporting hours and days. ■ Minimum period within which the employer must notify the employee before assigning the work. ■ Time limit within which the employer may cancel the assignment.	Within one week from hiring
14	The collective labour agreement that establishes the minimum terms of compensation and employment for the employee and the contracting parties of the same	Within one month of hiring
15	The social security institutions to which the employee is insured, as well as any other benefits provided by the employer related to social security	Within one month of hiring

1.4 Are any terms implied into contracts of employment?

In addition to the above explicit terms, the following implicit terms are applied in an employment relationship:

- the employee has a duty of loyalty and trust;
- the employer and employee have a duty of care towards each other and other employees;
- the employee has a duty to follow any lawful and reasonable instructions given by the employer;
- the employee must exercise reasonable care and skill in the performance of the work; and
- the employer has a duty to pay the employee's salary, provide a safe work environment and provide the necessary guidance to the employee and respect the employee's personality.

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

The following terms are implied by law into employment contracts:

- the employer must abide by the legal working hours;
- the employee may not work on Sundays or public holidays and is entitled to an annual vacation;
- the employee is entitled to take a leave of absence under certain circumstances (e.g. maternity leave, sick leave, marriage leave);
- the dismissal of an employee must be in writing and the legal severance pay must be paid in accordance with the employee's length of service; and
- the employer must follow all applicable provisions regarding collective labour agreements as well as the provisions regarding statutory minimum wage each time in force.

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 main levels of collective bargaining in Greece are:

- national level (i.e. the National General Collective Labour Agreement);
- industry/occupation level, covering specific industrial sectors/occupations; and
- company level.

A collective labour agreement may include various provisions regarding minimum salaries and benefits, as well as provisions governing the entire spectrum of the employment relationship (e.g. employee leave, working hours, etc.).

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

According to the current legal framework (Law No. 4808/2021), remote working (regardless of whether this refers to fully remote work or to a hybrid working model) should be, in principle, mutually agreed between the employer and the employee, in writing. Such agreement may be reflected either in the initial employment agreement or in an amendment of the same. By exception, it may be implemented unilaterally only in specific cases provided by the law: (a) by the employer only for specific reasons related to public health (i.e. the COVID-19 pandemic) as the same will be determined each time by a Ministerial Decision; or (b) following an employee's request due to serious health issues. The specific health problems justifying the exceptional unilateral implementation of remote working are defined in Ministerial Decision No. 105583/2022, which has been applicable since January 1, 2023.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Employees may agree with their employer to work remotely, either from their home or elsewhere. The terms of such remote work are either reflected in the relevant remote work policy or in the employment contract or an addendum of the same. By way of exception, employees with certain serious health issues, parents of children of up to 12 years old and caregivers have the right to request to work from home.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade union organisations are divided into first-level, second-level and third-level organisations. First-level unions are:

- (a) trade unions (either on an industry/occupational level or a company level);
- (b) local branches of unions with a broader regional or even national coverage as provided for in their standing rules; and
- (c) associations of persons. Second-level trade union organisations are federations and Labour Centres. Third-level trade union organisations are confederations of federations and of Labour Centres.

All employees who have worked for two months have the right to become a member of one union within the enterprise and one second-level trade union in the industry or sector in which they are working, provided that they fulfil the criteria set by the union's articles of association.

The procedure for the establishment of a trade union requires at least 20 employees who must express their will to establish a union. The founding members must file a request for recognition with the relevant court. If the court approves the request for recognition, the union obtains and records the enrolment of members in the union book.

2.2 What rights do trade unions have?

Trade union representatives have information, consultation and negotiation rights. More specifically, they should be consulted in advance regarding issues relating to collective dismissals, changes in the legal form of the business, transfer, expansion or limitation of the company's operations, introduction of new technology, annual planning of investments in health and security measures, restructuring, or any other changes in the employment conditions. They also have the right to negotiate with the employer for the conclusion of a collective labour agreement.

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

The Greek Constitution and Law No. 1264/1982, as amended and in force, safeguard the employees' right to strike. The decision to declare a strike is subject to the authority of the General Assembly of the union members.

The union declaring the strike should provide the necessary personnel for the safety of the firm's premises and the prevention of damage or accidents. The union is also obliged to give to the employer or his/her professional association 24-hour advance notice about the strike. The notice shall be in writing, served by a bailiff to the employer and shall include the day and time of the beginning and duration of the strike, its form, the demands of the strike and the reasons thereof.

According to Law No. 4808/2021, transparency for trade unions' operations is promoted in the sense that all employees' trade unions and employers' organisations should be registered to a new electronic Registry on the "ERGANI" platform as a precondition in order to participate in collective bargaining, exercise the right to strike and sign collective bargaining agreements.

Furthermore, according to new Law No. 5053/2023, the obstruction of the free entrance or exit from the workplace of employees who are not participating in a strike as well as workplace occupations both constitute a criminal offence.

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 by the employees of companies that employ at least 50 employees, where a trade union already exists in that company, or at a company employing at least 20 employees if there is no such trade union. Works councils have three to seven members who are elected by the employees during General Assembly convocation. They have an advisory role contributing to the improvement of working conditions and the development of the company. They possess rights relating to information, consultation and participation in decision making.

In terms of information and consultation rights, the employer should inform the works council before implementing any decisions regarding matters, such as:

- (a) changes to the company's legal status;
- (b) the removal, expansion or downsizing of all or part of its installations;
- (c) the introduction of new technology;
- (d) any change in the staff structure;
- (e) any increase or decrease in the number of employees, layoffs or subsidised short-time work;
- (f) the annual budget for company health and safety measures; and
- (g) the scheduling of overtime exceeding maximum working hours. Where there is no company trade union, the works council must be consulted by the employer in cases of collective redundancies and/or in any other circumstances where national legislation provides for mandatory consultations with employees.

In practice, works councils are not common in Greece. Employees are mostly represented by trade unions.

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 the right to make joint decisions with the employer on the following matters:

- drafting of the internal regulation of the company;
- health and safety regulations;
- planning holidays;
- relocation of employees disabled by work accidents to appropriate posts; and
- planning and managing cultural, entertainment and social events.

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

Works councils can exist alongside the primary level unions; however, their position is less powerful than that of a trade union (e.g. only in case of the absence of a trade union does the works council have the right to be informed and consulted regarding collective redundancies, transfers of undertakings, etc.).

That is the main reason why they have not been widely set up in Greece, other than in larger companies.

2.7 Are employees entitled to representation at board level?

There is no legislative basis for employee representation at board level in the private sector.

3 Discrimination

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

Any direct or indirect discrimination on grounds of sex, race, national origin, age, disability or chronic disease, religion or belief, or sexual orientation in the field of employment is prohibited. The foregoing provisions apply to all persons, whether in the private or public sector, and apply to work access, all types of vocational training, vocational guidance, working conditions, involvement in workers' and employees' organisations, social protection, etc. Moreover, discrimination at the stage of access to employment against persons who are infected with the HIV virus is strictly prohibited.

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

Direct discrimination occurs when a person is treated less favourably than another of the same or comparable employment status. Indirect discrimination occurs when a provision, practice or criterion puts a person at a disadvantage as compared with other people of the same employment status. Harassment occurs where undesirable behaviour is carried out that offends a person's dignity.

Indirect discrimination can be justified only by a legitimate purpose and where the means of achieving the purpose are appropriate and necessary.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Based on the provisions of Law No. 4808/2021, which ratified the Convention concerning the elimination of violence and harassment in the world of work, private companies employing more than 20 employees are expected to adopt preventive policies in fighting violence and harassment, including sexual harassment, and create internal channels for handling relevant claims, which must be further included in the Employees' Internal Regulation.

3.4 Are there any defences to a discrimination claim?

The violation of the principle of equal treatment renders the discriminatory treatment of an employee null and void, and the employee may claim the benefits associated with the application of said principle.

3.5 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 been unfairly discriminated against is entitled to bring a lawsuit against the employer before the competent courts. An employment

agreement that is unlawfully terminated for discriminatory reasons may be reinstated by court order. The relevant employee may be entitled to back pay and compensation (measured by the amount of monthly salary or wage).

Alternatively, the employee may file a complaint before the Labour Inspection Authority in order to settle the issue.

It goes without saying that the employer may proceed with the settlement of discrimination claims either before or after they are initiated. Said settlement may take place before the court or extrajudicially at any stage.

3.6 What remedies are available to employees in successful discrimination claims?

As mentioned under question 3.5 above, the employees may be awarded with the compensation or benefits related to the discriminatory behaviour of the employer and/or compensation for moral damages, according to the facts of each case.

Furthermore, the labour authorities may impose administrative sanctions on the employer.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

"Atypical" workers enjoy the same level of protection against discrimination claims as regular employees.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

Recently, Greece introduced Law No. 4990/2022 (enacted in November 2022) in compliance with the provisions of the European law, in particular EU Directive 2019/1937, regarding whistleblowing. The purpose of Law No. 4990/2022 is to ensure a comprehensive framework for the protection of persons who report violations of union law. To this end, the law establishes a system for internal and external reporting of violations of union law, the protection of reporting persons, the organisation of the procedure for the submission, receipt and follow-up of reports and the sanctions to be imposed in case a violation occurs. In accordance with the newly introduced provisions, private sector companies are expected to establish internal reporting channels by appointing an Officer for Receipt and Follow Up on Reports. In particular, companies with 50 or more employees are required to appoint an Officer and companies employing fewer than 50 employees may optionally appoint an Officer. Companies operating in financial sector services, products and markets, transport and environment sectors, as well as companies operating under an environmental permit decision, or whose activities may, by their nature, pose a risk to the environment and public health, must appoint an Officer regardless of the number of employees.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

There is no legal framework explicitly providing for the employer's obligation to publish diversity information. However, in accordance with the provisions of Law No. 3896/2010 for the implementation of the principle of equal opportunities and equal

treatment for men and women in the workplace, and Law No. 4443/2016 for the implementation of equal treatment and for the combat against any direct or indirect discrimination on the grounds of race, colour, national or ethnic origin, genealogical descent, religion or other belief, disability or chronic condition, age, social status, sexual orientation, gender identity, or gender characteristics in the field of work, employers are encouraged to cooperate with the Greek Ombudsman, the department of the Ministry of Labour and Social Affairs, which is responsible for issues relating to equal treatment for men and women, and any other competent authorities and provide any diversity information that might be required within the scope of promoting the implementation of the principle of equal treatment.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Female employees are entitled to 17 weeks of maternity leave: eight weeks before the baby is born; and nine weeks afterwards.

In addition, new mothers, insured by the e-National Social Security Fund (e-EFKA), following the grant of the aforementioned maternity leave, are entitled to special leave for the protection of maternity. Said leave can have a maximum duration of nine months. Beneficiaries of this leave are also mothers who acquire a child through the surrogacy procedure, as well as mothers who adopt a child from the child's integration into the family until the age of eight years. The mother is entitled to transfer up to seven months of the special maternity protection leave to the father, if the father is employed under an employment agreement of fixed or indefinite term, either on a full-time or part-time basis.

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

An employee on maternity leave is entitled to receive her regular salary from the employer for a period of up to 15 days (in the case that she has not completed one year of service in the company) or for up to one month (in the case that she has completed one year of service). During the maternity leave, the employee receives the following benefits from the social security and labour authorities:

- Maternity benefit provided by e-EFKA, which is equal to 50 per cent of the imputed social security regulation daily salary of the insurance range, which applies to her average remuneration for the last 30 working days of the calendar year before the potential date of birth.
- Additional maternity benefit provided by the Greek Public Employment Service (D.Y.P.A.), which is equal to the difference between the maternity benefit already received by e-EFKA and the salary paid by the employer during the period of maternity leave.

In addition, the employee is paid the legal salary as set by the law by D.Y.P.A. during the above-mentioned special leave for the protection of maternity.

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

New mothers are entitled to return to their duties after the lapse of the maternity leave, under no less favourable terms and conditions.

Furthermore, new mothers, adoptive mothers included, after the end of maternity leave, are also entitled to work one hour less each day with no decrease in regular pay for a period of 30 months from the date of delivery. Alternatively, provided that the employer agrees, new mothers may work two hours less each day for a period of 12 months and one hour for the following six months, with no decrease in regular pay.

Another option is for the new mother to receive the above-mentioned hours as paid leave, following the prior consent of her employer. In addition, the new mother may "gather the hourly entitlements" and take the same as days off, following the prior agreement of the employer.

4.4 Do fathers have the right to take paternity leave?

The father of a newborn is entitled to special paid leave of 14 days due to the birth of his child.

Furthermore, the father of a newborn is entitled to work reduced hours per day, for the purposes of childcare, with no decrease in regular pay, provided that his wife works under a dependant employment relationship and does not make use of the relevant law provisions.

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

According to Law No. 4808/2021, working parents who have completed one year of service in the company are entitled to receive a parental leave of four months, which is granted until the completion of the eighth year of the child's age. Said leave is unpaid by the employer and is considered a non-transferable individual right. During the first two months of parental leave, a statutory allowance is paid to the employee by D.Y.P.A.

In addition, working parents are entitled to receive additional unpaid leave of six working days per calendar year, in the case of their child falling ill. Such leave entitlement is increased to up to eight working days if they have two children, and up to 14 working days if they have three or more children.

Furthermore, working parents with children below 18 years old who suffer from a disease that requires blood transfusion/dialysis/neoplastic disease/disease that requires a transplant, or a rare disease/condition along with a disability rate above 67 per cent are entitled to receive a special parental paid leave of 10 working days per year. Parents of children (of any age) who have significant learning difficulties, Down's syndrome or autism are also entitled to this leave.

In case of hospitalisation of the employee's child due to sickness or an accident requiring the direct presence of the employee, the latter is entitled to receive special hospitalisation parental unpaid leave for the period of hospitalisation and in any case, for no more than 30 working days per year.

Finally, working parents with children up to 18 years old who are students at school are entitled to be absent from their work for either a few hours or the whole working day, provided that the employer agrees, in order to visit their children's school and talk to their teachers. Such leave amounts to four working days maximum per calendar year and is paid by the employer.

An employee who takes care/resides with a person in need and has completed six months of service with the company is entitled to (unpaid) caregiver's leave, for up to five working days per calendar year.

Parents and caregivers are entitled to receive one day of paid leave, for a maximum of twice per year, for reasons of *force majeure* related to urgent family matters (i.e. in case of an accident or sickness) due to which his/her physical presence is required.

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

Employees with children with disabilities, who work in enterprises employing at least 50 employees, are also entitled to work one hour less per day and receive a proportionally decreased salary.

Moreover, employees with children up to 12 years old or caregivers are entitled to flexible working arrangements (i.e. remote working, flexible working schedule, part-time) for a fixed-term period.

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, there is no change in the identity of the employer; consequently, the rules of the transfer of undertakings do not apply. All rights, duties and liabilities owed to/by the employees continue to be owed to/by that company, and the buyer therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the company.

In the case of an asset transfer, if there is a transfer of an undertaking (i.e. a transfer of an economic entity that retains its identity), the employees are automatically transferred to the buyer, under the same terms and conditions.

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

According to Greek law, all the acquired rights of the employees in case of a transfer are protected, such as the remuneration status (salary and benefits), the internal working regulation status (positioning in the job hierarchy, promotions, secondments, disciplinary measures, etc.), termination rights (early retirement rights, severance packages, etc.), recognition of previous employment, recognition of all “internal practices” of the previous employer and any existing company policies, etc. It is important to note that Greek law provides that the transferor and the transferee remain jointly and severally liable for all claims arising out of the employment relation up to the date of the transfer.

Further, the transferee must conserve the terms and conditions stipulated in any collective labour agreement applicable to the transferred employees (if such an agreement exists).

Greek law has clearly excluded from the protection of the acquired rights during transfer, the private pension schemes. According to legislation, the transferee has three options: (a) accept to continue the insurance contract under the same terms and conditions; (b) amend the existing pension plan, in which case the transferee should enter into negotiations with the employees’ representatives regarding the changes in order to reach an agreement; or (c) decide not to continue the application of said plan, which must be declared before the date of transfer, in which case, it will be terminated and liquidated as per its own rules.

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’s and the buyer’s employees’ representatives must be informed in due time as of the realisation of the transfer, on

the exact or the eventual date of the transfer, the reasons for the transfer, the legal, financial and social consequences of the transfer as far as the employees are concerned and the measures to be taken regarding the employees.

In the case that the two employers intend to take measures, which will amend the status of the employees, the employees’ representatives need to be consulted in order to reach an agreement. There is no specific timetable for the information/consultation process to take place. However, the total duration of the procedure could vary according to the facts of each transfer: if the employees’ acquired rights are respected, the information procedure will be short (e.g. in practice, a period of 20 days is considered reasonable for the conclusion of the information process). In the case of a breach of the information/consultation process of the employees’ representatives, Greek law provides only for a fine, which can vary between €147 up to €8,804 per violation.

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

The actual business transfer does not constitute in itself a ground for dismissal: the law, however, provides for the exception of dismissals that need to be realised for technical, financial and organisational reasons, under the condition, however, of non-violation of Greek employment law and of the non-abuse of rights.

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

As mentioned under questions 5.1 and 5.2 above, in the case of a transfer, the buyer is bound to respect the terms and conditions of the employment agreements in force at the time of the transfer. No harmful modification of the employment agreements can take place without their written consent. The only exception concerns the private pension schemes. (See above 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?

The employer is not obliged to terminate the employee with prior notice, it remains at its absolute discretion.

The employer has the option to notify the employee before the dismissal or not to notify and to terminate immediately. In the latter case, the totality of the legal severance is due, whereas in the case of giving the legal notice, only half of the statutory severance is due.

The following table provides the statutory notice periods in case of termination of the employment agreement by the employer:

Years of service	Statutory notice period (months)
1–2	1
2–5	2
5–10	3
10 and above	4

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 has been recently introduced by Law No. 4808/2021. According to the relevant provision, during the notice period served by the employer and until the termination of the employment agreement, the employee may be absent from work and at the same time continue to be paid the respective salary amount. It is also provided that the employee may be employed by another employer during that time of “garden leave”, without affecting the termination of the employment relationship or the employee’s entitlement to the severance amount.

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 law does not require the existence of a “serious cause” for the termination of indefinite-term contracts. However, the employee may challenge the validity of the termination in the case of an abuse of the employer’s rights.

An employee is considered as being dismissed in case of termination of his/her employment agreement by the employer for any reason.

The consent from a third party before the dismissal is not required, except for employees who enjoy special protection against dismissal (e.g. trade union officials, war veterans, etc.).

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

There are special protection procedures against dismissal for employees, such as:

- (a) war veterans and disabled people with a mandatory employment relationship;
- (b) members of the BoD of a union (for the period during their office and one year after);
- (c) employees in military service;
- (d) pregnant employees and new mothers (during the pregnancy and for a period of 18 months as of the birth date); and
- (e) father employees (for a period of six months as of the birth date).

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 fixed-term employment agreement is terminated automatically when the period of time agreed on expires. By way of exception, unilateral termination is possible in the event of a “serious cause”, i.e. if an important reason exists without prior notice or severance compensation. In the absence of a “serious cause”, the termination is invalid and the employer must accept the services of the employee or pay the employee all remaining salaries until the expiry of the contract.

The law does not require the existence of a “serious cause” for the termination of indefinite-term contracts; therefore, the employer may dismiss the employee for performance or behaviour reasons.

Redundancy (i.e. dismissal due to business reasons) is a potentially fair reason for dismissal. However, a dismissal for redundancy can still be unfair if:

- (a) the employee’s job position is not genuinely redundant;
- (b) the employee is unfairly selected for redundancy (in case the employer does not respect the social economic criteria set by law);
- (c) the employer does not consider the employee for other positions; or
- (d) the employer fails to follow a fair procedure, according to the principle of good faith. In order for the termination to be valid, it must be in writing and the legal severance amount should be paid to the employee, according to the years of his/her previous service in the company.

Severance payments are calculated based on the monthly base salary of the employee at the date of termination, multiplied by 14 (so as to take into account the Christmas and Easter bonus and the annual leave bonus, as per Greek legislation), and divided by 12, in order to produce a monthly average.

Such average salary is increased by all the fringe benefits the employee receives on a regular basis (such as a car allowance or the value of a car, housing allowance, mobile telephone, insurance coverage, commissions – if the commission plan or variable pay scheme forms part of his/her individual agreement or is covered by a collective agreement, bonuses – if given by the employer on a regular basis and on a predetermined percentage, etc.).

The amount of severance due in case of termination of an indefinite-duration employment agreement without prior notice is determined as follows:

Completed years of prior service with the same employer	Severance amount (monthly salaries)
1–4	2
4–6	3
6–8	4
8–10	5
10	6
11	7
12	8
13	9
14	10
15	11
16 and above	12

For the calculation of the above severance, the regular earnings of the last month under full employment shall be taken into account.

However, employees who have completed more than 17 years of service with the same employer are entitled to an additional severance of one monthly salary per year of service (over the 17 years) and up to 12 monthly salaries, as follows:

Years of service under same employer	Severance amount
17 years completed	12 monthly salaries + one salary up to €2,000
18 years completed	12 monthly salaries + two salaries up to €2,000 each
19 years completed	12 monthly salaries + three salaries up to €2,000 each
20 years completed	12 monthly salaries + four salaries up to €2,000 each

Years of service under same employer	Severance amount
21 years completed	12 monthly salaries + five salaries up to €2,000 each
22 years completed	12 monthly salaries + six salaries up to €2,000 each
23 years completed	12 monthly salaries + seven salaries up to €2,000 each
24 years completed	12 monthly salaries + eight salaries up to €2,000 each
25 years completed	12 monthly salaries + nine salaries up to €2,000 each
26 years completed	12 monthly salaries + 10 salaries up to €2,000 each
27 years completed	12 monthly salaries + 11 salaries up to €2,000 each
28 years completed or more	12 monthly salaries + 12 salaries up to €2,000 each

For said additional severance, the following factors shall be taken into account:

- the years of service completed by the employee until November 12, 2012, irrespective of the actual termination date; and
- the regular earnings of the last month under full employment up to €2,000.

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

The formal requirements for the valid termination of an indefinite-term employment contract are the following:

- written notification to the employee;
- simultaneous payment of the severance amount; and
- registration of the employee with the competent social security fund.

The termination of an employment agreement should be announced to the labour authorities within four days by submitting the relevant documents to the “ERGANI” platform. This procedure must be followed as a minimum for all dismissals whether individual or collective, or whether it refers to indefinite-duration contracts or definite-duration contracts’ termination.

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

In any case of termination, the employee is entitled to contest the validity of his/her dismissal within three months as of the termination date; in addition, he/she is entitled to claim an additional severance amount within six months as of the termination date in the case that he/she claims that the severance amount paid to him/her was not correctly calculated. In case the severance paid to the employee was less than the statutory amount due to a profound mistake, the court may order the employer to pay the rest of the amount instead of considering the dismissal null and void.

In the case of the court considering that the termination was invalid, the employee will then be entitled to receive salaries due as of the termination date, as well as compensation for moral damages; in addition, the employee shall be reinstated to the company, due to the invalidity of the termination.

According to the provision of Law No. 4808/2021, both the employee and the employer (in case the termination is not related to discrimination or harassment, when it is not

specifically prohibited by the law, when it is not related to the fact that the employee had received or requested to receive any type of legal leave or when the employee had exercised any legal right or has refused a company’s proposal to change his/her working status or schedule, etc.) are entitled to request the court to award, instead of reinstatement and salaries due as mentioned above, a fixed additional severance that may range from three monthly salaries and up to two times the statutory severance of the employee.

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

The employer may validly proceed with the settlement of such 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?

Specific provisions exist for collective redundancies. If an employer employs between 20 and 150 employees in any calendar month, the collective dismissal procedure will apply if the employer dismisses more than six employees per calendar month and for companies with over 150 employees, more than five per cent of the total workforce and in total more than 30 employees per calendar month.

In cases of collective redundancies, consultation and negotiations with the employees’ representatives must take place and alternative solutions must be proposed to the employees’ representatives so as to minimise the impact of the dismissals. In any case, the employer must file the information and consultation minutes to the Ministry of Labour and Social Affairs.

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 case of violation of the provisions regarding the collective dismissals procedure, the dismissals will be considered null and void.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The restrictive covenants used in employment agreements refer to the non-competition/non-solicitation obligation and the confidentiality obligation of the employee.

7.2 When are restrictive covenants enforceable and for what period?

In order for the employer to enforce a non-compete clause, the following requirements must be met:

- the employer should be able to prove that it has a legitimate business interest to protect with the use of said clause;
- the scope of the restrictions must be reasonable; said requirement applies to the job position, the needs of the company to provide for the covenant, its term, its geographical limit, the business activity, etc.; and

- (c) the employee must receive consideration for his/her loss caused by agreeing to the non-compete clause.

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

In order for a non-compete clause to be valid, the employer must offer “reasonable” compensation to the employee, which must be in relation to the restriction imposed (duration, geographic area, activity/business sector, etc.). There is no specific formula or amount provided by law, the only condition, which case law provides for, is that the compensation must be “reasonable”, which is judged on a case-by-case basis. In practice, said compensation varies between 50 per cent and 100 per cent of the monthly salary of the employee, multiplied by the number of months the restriction clause lasts.

7.4 How are restrictive covenants enforced?

The employer may file a lawsuit against the employee and claim monetary damages. Furthermore, if provided by the relative clause, the employer has the right to demand the restitution of any amounts paid to the employee, as well as the payment of a penal clause for non-respect of such clause.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

By virtue of the right conferred by Article 88 of the GDPR, Law No. 4624/2019 lays down sector-specific rules in respect of data processing in the context of the employment relationship. Data processing in the employment context may only exceptionally be based on the employee’s consent, which is, thus, in principle presumed to be invalid. Employers can only rely on consent when it is possible for the employer to demonstrate that consent is actually freely given. To assess whether consent is freely given, due attention should be paid to the level of dependency of the employee and the conditions under which consent was granted.

Employers acting as data controllers in the context of the employment relationship are under an obligation to respond to and facilitate the exercise of their employees’ data subject rights enshrined in the GDPR and Law No. 4624/2019. General data protection rules and concepts regarding management and exercise of data subjects’ rights apply equally in relation to employees.

The transfer of data to countries outside the European Economic Area is subject to the restrictions set forth by Chapter V of the GDPR on transfers of personal data to third countries or international organisations.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, by exercising their right of access as per Article 15 of the GDPR, employees are entitled to obtain a confirmation of their personal data that is processed by their employer. Employees may have access to the following types of data:

- the purposes of the processing;
- the categories of personal data concerned;

- the recipients or categories of recipients to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;
- where possible, the envisaged period for which their personal data will be stored, or, if not possible, the criteria used to determine that period;
- the existence of the right to request rectification or erasure of personal data or restriction of processing or to object to such processing;
- the right to lodge a complaint with the Hellenic Data Protection Authority;
- where the personal data are not collected from the employees, any available information as to their source;
- the existence of automated decision making, including profiling, referred to in Article 22(1) and (4) of the GDPR and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject; and
- the appropriate safeguards pursuant to Article 46 of the GDPR relating to the transfer of their data to a third country or to an international organisation.

Further to the aforementioned, a confirmation may consist of a copy of the information held by the employer, unless it adversely affects the respective rights and freedoms of other persons.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Pre-employment background checks are only permissible as long as data protection law obligations are respected. Data protection rules, therefore, end up significantly limiting an employer’s ability to conduct such checks.

According to Guideline No. 115/2001 of the Hellenic Data Protection Authority in conjunction with the GDPR and GDPR supplementing Law No. 4624/2019, basic background checks, including education and work history, based on information collected from third parties could be considered permissible, on the condition that data protection legislation, and mainly the principle of lawfulness, are respected. As a result, background checks cannot be conducted invariably on all potential staff but only on those cases justified by the nature of the role and the particular risks it raises.

Greek law is more restrictive with regard to the employers’ right to conduct criminal record checks. As a rule, processing of data relating to criminal convictions/offences or related security measures by private sector organisations is permissible only if authorised by law. Sector-specific pre-GDPR legislation provides for disclosure and processing of criminal records data only for employment vetting purposes in the case of credit and financial institutions and security and insurance companies. In the absence of explicit legal authorisation, employers shall refrain from storing and, in general, processing criminal records for vetting purposes.

8.4 Are employers entitled to monitor an employee’s emails, telephone calls or use of an employer’s computer system?

Employers have a right to monitor employees’ information and communications technology usage only by way of exception, provided that such processing is considered absolutely

necessary to pursue employers' overriding legitimate interests in ensuring the smooth running of the company, preventing breach of confidentiality, unlawful acquisition, use and disclosure of know-how, trade or business secrets, detecting possible criminal actions and managing risks to the business and property. Proportionality and subsidiarity of monitoring should be assessed having regard to factors, such as: the extent of monitoring; technical measures and procedural guarantees in place; its consequences; and whether there is a ban on using a company's resources for personal purposes.

In terms of transparency, employees should be notified by means of an internal policy (such as an Acceptable Use Policy and Privacy Policy) of: the possibility of monitoring and that eventuality; the purpose of monitoring; the extent, scope and duration of monitoring; the process of monitoring and its consequences; and the right of access to a judicial remedy.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

There is no legally established right of the employer to control an employee's usage of its personal social media accounts in or outside the workplace. It is commonplace, however, for large corporations to lay down in their internal policies specific rules on the appropriate use of social media by their employees to the extent they touch upon the company's operations.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There is no specific framework in Greece regulating development and usage of AI. General GDPR obligations apply in relation to the use of AI in the employment relationship, to the extent the latter entails data processing.

9 Court Practice and Procedure

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

Magistrates Courts and Courts of First Instance constitute the competent courts for employment-related claims.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The filing of a lawsuit before the competent court and the serving of the same to the defendant is required in order to initiate the procedure. The conciliation before such litigation procedure is not mandatory by law.

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

A lawsuit may take up to one year to be heard. Furthermore, in order for a court to issue a decision, it takes at least eight to 10 months after the hearing date.

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

The employer or the employee may file an appeal against the decision of the Court of First Instance within 30 calendar days as of the date of serving of the decision. Usually, an appeal takes at least 12 months to be heard.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The primary source of employment law in Hong Kong is legislation as supplemented by case law. The Employment Ordinance (Cap. 57) (“**EO**”), which prescribes certain basic rights and protections for employees, is the key piece of employment-related legislation.

In addition, statutes including the Employees’ Compensation Ordinance (Cap. 282) (“**ECO**”), Minimum Wage Ordinance (Cap. 608) (“**MWO**”), Occupational Safety and Health Ordinance (Cap. 509) and the Factories and Industrial Undertakings Ordinance (Cap. 59) (“**FIUO**”) address various other aspects of the employment relationship, including employees’ rights in relation to work-related injuries and diseases, minimum wage requirements, as well as employee health and safety.

The Sex Discrimination Ordinance (Cap. 480) (“**SDO**”), Disability Discrimination Ordinance (Cap. 487) (“**DDO**”), Family Status Discrimination Ordinance (Cap. 527) (“**FSDO**”) and Race Discrimination Ordinance (Cap. 602) (“**RDO**”) also provide protections to individuals against harassment and discrimination in various contexts, including in employment situations.

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

The EO protects employees engaged under a contract of employment, regardless of whether they are classified as full-time, part-time or temporary workers. It does not protect self-employed workers.

The EO also does not apply to an:

- individual who is a family member and employee of the business owner, and who lives in the same dwelling as the business owner;
- employee who is covered by the Contracts for Employment Outside Hong Kong Ordinance (Cap. 78);
- apprentice whose contract of apprenticeship has been registered under the Apprenticeship Ordinance (Cap. 47) (“**AO**”), except as provided for in that Ordinance; or
- employee who serves under a crew agreement (as defined in the Merchant Shipping (Seafarer) Ordinance (Cap. 475)) or on board a ship that is not registered in Hong Kong.

All employees covered by the EO are entitled to the basic protections under the EO. Further protections are provided to employees who are employed under a “continuous contract”, meaning they have been continuously employed by the same

employer for at least four consecutive weeks and have worked for at least 18 hours in each of those weeks.

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 no requirement in Hong Kong for contracts of employment to be in writing. However, an employer must provide the following information to individuals before they commence employment:

- the wages and wage period;
- details of the end of year payment or proportion of the end of year payment (if any is to be provided) and the payment period; and
- the length of notice required to terminate the contract of employment.

There is no requirement to provide this information in writing, but if the employer receives a written request from the individual for these details to be provided in writing, the employer must comply with this request.

1.4 Are any terms implied into contracts of employment?

In addition to express terms, there are a number of terms implied into employment contracts by legislation and common law. A non-exhaustive list of such implied terms is provided below.

Employees have an implied duty to:

- carry out their work with reasonable skill and competence;
- obey lawful and reasonable instructions of the employer;
- serve the employer with fidelity and in good faith;
- keep certain categories of information confidential; and
- account for property and secret profits received as a result of their employment.

Employers have an implied duty to:

- provide an employee with work;
- provide a safe working environment;
- behave in a manner that does not destroy the relationship of trust and confidence; and
- indemnify employees for permitted expenses incurred in the fulfilment of their duties.

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

All employees covered by the EO are entitled to basic protections, including payment of wages, restrictions on deductions from wages and unpaid statutory holidays.

Employees who are employed under a “continuous contract” (see question 1.2) are entitled to additional benefits under the EO that include statutory holiday pay, paid annual leave, rest days, sickness allowance, maternity leave, paternity leave, severance pay and long service pay.

Employers must enrol employees in, and contribute to, a Mandatory Provident Fund in accordance with the Mandatory Provident Fund Schemes Ordinance (Cap. 485) if the employee is employed in or from Hong Kong for a continuous period of at least 60 days, unless he/she is exempted, e.g. where the employee has elected to join an occupational retirement scheme offered by the employer or where the employee is not a Hong Kong permanent resident and has an overseas pension scheme.

All employees (subject to limited exceptions) must be paid at least the statutory minimum wage prescribed under the MWO.

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 Hong Kong, it is rare for terms and conditions of employment to be collectively agreed. There is no collective bargaining legislation, and trade union recognition by employers is uncommon. Even where a trade union enters into an agreement with the employer, an employee will only be able to rely on the terms of the agreement if it forms part of his/her contract of employment or if the employer and the employee otherwise agree for it to be binding between them.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

This is a matter of contract between the employer and each of its employees. The express terms of the existing contract should first be considered. Unless the parties have expressly agreed that the employee will not be required to work from home, and if the employer can demonstrate that the hybrid working requirement is a lawful and reasonable instruction, then this is permissible. If the requirement is a long-term or permanent arrangement, the new hybrid working arrangement should be documented to ensure that the terms and conditions of employment are clear and unambiguous. Where the parties have expressly agreed previously that the employee will not be required to work from home, the employer should obtain the employee's consent to the hybrid working arrangement, otherwise a unilateral imposition of the requirement could amount to a breach of contract.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

In Hong Kong, an employee does not have a statutory right to work remotely from home or elsewhere. Unless the contract of employment expressly states that the employee's place of work is his/her home or another location outside the normal workplace, the employee cannot assert a right to work remotely without the employer's consent.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The Trade Unions Ordinance (Cap. 332) (“**TUO**”) and Trade Union Registration Regulations (Cap. 332A) govern the registration and regulation of trade unions. Under the TUO, every trade union must register with the Registrar of Trade Unions within 30 days of its establishment. An application for registration of a trade union must be signed by at least seven voting members of the trade union. Upon registration of the trade union, the Registrar of Trade Unions will issue a certificate of registration.

It is a criminal offence for a person to act as an Officer of a trade union, or to take part in the management or administration of a trade union that is not duly registered.

2.2 What rights do trade unions have?

Upon registration, a trade union will become a body corporate that may sue or be sued in its own name. It is provided with certain immunities from civil legal proceedings in respect of acts done in contemplation or furtherance of a trade dispute, e.g. where the act causes a member of the trade union to breach his/her employment contract. The TUO also provides trade union members with immunity from criminal prosecution for conspiracy where they are acting in restraint of trade.

The EO provides for certain rights in relation to trade union membership and protection against anti-union discrimination. Specifically, an employee has the right to become a member or an Officer of a registered trade union, take part in its activities outside working hours (or within working hours with the employer's consent) and associate with others for the purposes of forming and applying for the registration of a trade union.

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

Under the TUO, it is lawful for trade unions to engage in peaceful and lawful picketing, subject to the limitations set out in the TUO.

The provisions of the Public Order Ordinance (Cap. 245) (“**POO**”) may apply if the industrial action is a “public procession”, “public gathering” and/or “public meeting” as defined in the POO. For example, notice must be given to the Commissioner of Police of the intention to hold a public meeting or public procession in the manner prescribed in the POO. The POO also prohibits “unlawful assembly” or “riots”.

The EO protects employees against termination, penalisation and discrimination by or on behalf of the employer when exercising their rights, including participating in lawful 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?

There is no statutory requirement for employers to set up works councils in Hong Kong.

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 Hong Kong.

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

This is not applicable in Hong Kong.

2.7 Are employees entitled to representation at board level?

There is no statutory entitlement for employees to have representation at board level in Hong Kong.

3 Discrimination

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

Employees are protected from discrimination on the grounds of sex, pregnancy, marital status, disability, family status, race, and breastfeeding under the SDO, DDO, FSDO and RDO.

See also question 2.2, in relation to protection against anti-union discrimination under the EO.

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

Each of the anti-discrimination Ordinances prohibits direct and indirect discrimination on the ground of a protected characteristic (sex, pregnancy, marital status, disability, family status, race, or breastfeeding status).

Direct discrimination occurs where a person with a protected characteristic is treated less favourably on the ground of that protected characteristic than a person without that protected characteristic is or would be treated in comparable circumstances.

Indirect discrimination occurs where a condition or requirement is applied equally to a group of individuals, but it has a disproportionately detrimental effect on individuals with the protected characteristic because they cannot comply with the condition or requirement. However, it does not constitute indirect discrimination if the application of the condition or requirement is justifiable.

Sexual harassment, disability harassment, racial harassment and breastfeeding harassment are also prohibited under the anti-discrimination Ordinances. Generally, harassment occurs if the behaviour is unwelcome in circumstances where a reasonable person would have anticipated that the person being harassed would be offended, humiliated or intimidated by the conduct. There is also the concept of “hostile environment” harassment where a person engages in conduct on the ground of an individual’s sex or race or because she is breastfeeding, which creates a hostile or intimidating environment for that individual.

The anti-discrimination Ordinances also prohibit victimisation that occurs when a person is treated less favourably on the ground that he/she has made allegations of unlawful discrimination or harassment, has commenced (or given evidence in connection with) proceedings against an alleged discriminator or has taken steps to enforce any of the anti-discrimination Ordinances.

Vilification on the ground of disability or race is also unlawful. This occurs where a person does an act in public that incites hatred towards, serious contempt for, or severe ridicule of a person or persons on the ground of disability or race. Where such behaviour involves a threat of physical harm or property damage, this may constitute serious vilification, which is a criminal offence.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

There is no express statutory requirement to provide training. However, it is recommended that employers implement appropriate policies and provide training as a matter of good practice. Further, an employer may have a defence to a claim of vicarious liability in relation to unlawful discrimination or other unlawful acts carried out by its employees or agents if the employer can prove that it has taken reasonably practicable steps (such as training) to prevent such acts from occurring.

3.4 Are there any defences to a discrimination claim?

An employer is generally afforded a defence against a discrimination claim if it can prove that:

- the act complained of was not done because of an individual’s protected characteristic;
- the individual was not treated less favourably than others who do not have the protected characteristic;
- the employee has not suffered any detriment; or
- a requirement or condition applied equally to individuals without a protected characteristic is justifiable.

Under the DDO, SDO and RDO, it is a defence to show that being a person without a disability, being a specific gender, or being a person of a particular race, respectively, is a “genuine occupational qualification” of the job.

Under the DDO, it is also a defence for an employer to show that the treatment complained of is justified because:

- the employee is unable to carry out the “inherent requirements” of the job due to his/her disability; or
- the provision of facilities or services required to enable the employee to meet the inherent requirements of the job would cause “unjustifiable hardship” to the employer.

See also question 3.3 above, regarding a potential defence in relation to vicarious liability of employers.

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

Employees can lodge a complaint with the Equal Opportunities Commission (“EOC”). The EOC may decide not to investigate the matter if it is clear that the alleged treatment was not unlawful, or if more than 12 months have elapsed since the act occurred, or if the EOC is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

Prior to fully investigating a complaint, the EOC will write to the employer to enquire whether the employer is open to conciliation. The employer may, therefore, seek to settle the claim at this stage. If conciliation attempts fail or if the employer is unwilling to conciliate, the EOC will proceed with the investigation.

The EOC does not have the power to adjudicate claims. Therefore, on completion of an investigation, if it considers that discrimination may have occurred, the EOC will, again, invite the parties to conciliate. If conciliation is successful, the EOC will facilitate the signing of a written conciliation agreement.

between the parties. However, if conciliation attempts fail, the complainant may apply to the EOC for legal assistance. This includes legal assistance for the purpose of commencing proceedings in the District Court.

It is also possible for the employee to bypass the EOC process and to file a claim directly with the District Court.

3.6 What remedies are available to employees in successful discrimination claims?

The District Court is empowered to make a declaration that the respondent has engaged in unlawful conduct, order the respondent to redress any loss or damage (e.g. by making an apology), order the respondent to re-employ the claimant, order the respondent to pay compensation to the claimant for loss or damage (including damages for injury to feelings), order the respondent to pay punitive or exemplary damages, or make an order declaring void a contract (or part of a contract) that was made in contravention of an anti-discrimination Ordinance.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

There are no additional legislative protections for part-time, fixed-term or temporary workers.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

There is no overarching whistleblowing legislation in Hong Kong. However, there are various laws and codes that provide for whistleblower protections in certain circumstances.

Under the EO, an employer cannot terminate (or threaten to terminate) the employment of an employee, or discriminate against an employee, by reason of him/her giving evidence in relation to proceedings or an inquiry in connection with the enforcement of the EO or in relation to safety at work.

Under the anti-discrimination Ordinances, it is unlawful for a person to victimise another person on the ground that he/she has made a complaint or given information or evidence in relation to a complaint of alleged discrimination.

Under the Prevention of Bribery Ordinance (Cap. 201), the names and addresses of informers are protected from disclosure in legal proceedings.

Under the Securities and Futures Ordinance (Cap. 571), a whistleblower is protected against civil liability for reporting financial irregularities.

Under the HKEX Corporate Governance Code, listed companies are expected, as a matter of best practice, to establish a whistleblowing policy and system for employees to confidentially and anonymously raise concerns about possible improprieties relating to the issuer.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

There is no requirement in Hong Kong for employers to publish information about their gender, ethnicity or disability pay gap, or other salary or diversity information.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

A female employee is entitled to maternity leave of 14 continuous weeks, provided that she: (i) has been employed under a continuous contract (see question 1.2) immediately before the commencement of maternity leave; (ii) has given notice of her pregnancy and her intention to take maternity leave to her employer; and (iii) if required by her employer, has provided a medical certificate confirming her pregnancy and date of confinement.

The employee is entitled to further maternity leave if she gives birth later than the expected due date. The employee is also entitled to additional leave of up to four weeks on the ground of illness or disability relating to pregnancy or giving birth.

The employee must commence maternity leave between two and four weeks before the expected due date. If the employee does not specify, or the employer does not agree with the commencement date, the employee must commence her maternity leave four weeks before the expected due date.

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

A female employee is entitled to 14 weeks of paid maternity leave if she has been continuously employed for at least 40 weeks immediately before the commencement date of her maternity leave and has met the requirements of points (ii) and (iii) in question 4.1 above.

Statutory maternity leave is paid at the rate of four-fifths of the employee's daily average wages earned in the 12 months (or the period of employment, if shorter) prior to the commencement of maternity leave. Maternity leave pay in respect of the 11th to 14th weeks of maternity leave is subject to a cap of HK\$80,000.

Employers are prohibited from terminating the employment of an employee who is confirmed pregnant by a medical certificate until the date when she is due to return to work upon the expiry of her maternity leave, except where: (i) the employee is being summarily dismissed; or (ii) the termination occurs during the first 12 weeks of an employee's probationary period for reasons other than pregnancy.

A pregnant employee may, on producing a supporting medical certificate, request her employer to refrain from assigning her heavy, hazardous or harmful work pursuant to the provisions of the EO.

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

Pregnant employees generally have a right to return to the role they held prior to the commencement of their maternity leave. They are protected by the SDO and FSDO against less favourable treatment by their employer on the ground that they have taken maternity leave or on the ground of their sex, family status, marital status, pregnancy or breastfeeding status.

4.4 Do fathers have the right to take paternity leave?

A male employee is entitled to five days of paternity leave, which may be taken consecutively or otherwise, if he: (i) is (or is about to become) the father of a newborn child; (ii) has been employed

under a continuous contract (see question 1.2) immediately prior to the commencement of his paternity leave; and (iii) has given the required notification to his employer.

If the employee: (i) has been continuously employed for at least 40 weeks immediately before the commencement date of his paternity leave; and (ii) provides the child's birth certificate within the required timeframe confirming that he is the child's father, he is entitled to be paid for the paternity leave. Statutory paternity leave is paid at the rate of four-fifths of the employee's daily average wages earned in the 12 months (or the period of employment, if shorter) prior to the commencement of the paternity leave.

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

There are no other statutory rights specific to parental leave that employers have to observe.

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

There are no express statutory provisions in Hong Kong providing for any entitlement to work flexibly if employees have responsibility to care for dependants. However, an employee could seek to challenge his/her employer's refusal to agree to flexible working if it can be demonstrated that this amounts to family status discrimination and/or sex discrimination.

5 Business Sales

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

Hong Kong law does not provide for an automatic transfer of employees to the buyer on an asset sale. To effect a transfer of employees to the purchaser, existing contracts of employment with the previous employer must be lawfully terminated and the purchaser must enter into new contracts of employment with the transferring employees. However, the EO provides for certain exceptions and mechanisms enabling the previous employer to avoid paying statutory severance or long service payments and preserving continuity of employment.

On a share sale, there is no need to effect any transfers of employment because the employees will remain employed by the same company.

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

Where the business sale is a share sale, there is no impact on employee rights as set out in question 5.1 above.

Where there has been a change of ownership of the business or the transfer is between associated companies as detailed in the EO, the employee relinquishes his/her rights to termination payments on a transfer to the new employer. However, the new employment contract will be on substantially the same terms as the previous employment contract and there will be no break in continuity of employment.

Whether and how a business sale affects a collective agreement will depend on the terms of the relevant 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?

There are no statutory rights for employees to be provided with information and/or be consulted on a business sale unless there is an enforceable contractual obligation to engage in any such process.

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

Employees can be dismissed in connection with a business sale. The reason for dismissal is likely to be redundancy, in which case, the statutory provisions on terminations and severance payments will apply.

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

Employers are free to change the terms being offered to employees following the usual rules governing variation of an employee's contract. However, an employee may choose to refuse the new contract (assuming that it is less favourable than his/her existing one), in which case, the refusing employee will be entitled to receive a severance payment (if he/she has the requisite years of service) and other termination payments.

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 must be given either notice of termination or payment *in lieu* of notice. Similarly, an employee can terminate his/her employment by giving notice or making a payment *in lieu* of notice to his/her employer. The requisite notice period is typically specified in the employment contract, but is subject to the overriding requirements set out in the EO as discussed below.

Under the EO, during the first month of the probationary period (if any), either party can terminate the employment without notice or payment *in lieu* of notice. For the remainder of the probationary period, either party may terminate the employment by giving the period of notice prescribed under the employment contract, which must not be less than seven days.

After completion of the probationary period, either the employer or the employee can terminate the employment by giving notice as specified in the employment contract (which must not be less than seven days). If there is no agreed notice period, the EO prescribes how the notice period should be determined.

Where an employee has engaged in gross misconduct, the employer can terminate the employee's employment without notice or payment *in lieu* of notice. This is referred to as "summary dismissal".

An employee can also terminate his/her employment contract without notice or payment *in lieu* of notice in certain situations; for example, where he/she is subjected to ill-treatment by the employer, where the employer commits a repudiatory breach going to the root of the contract or where the employer has failed to pay the employee's wages within one month from the due date. Termination by the employee in such circumstances is referred to as "constructive dismissal".

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 an employee to serve out his/her notice period on garden leave if the employment contract provides the employer with the power to do so. Otherwise, separate consent should be obtained from 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?

Under the EO, an employee with continuous employment of at least 24 months is taken as being dismissed if he/she is employed on a fixed-term contract that is not renewed, or if the employee is summarily dismissed (see question 6.1), or if the employee treats himself/herself as having been constructively dismissed (see question 6.1).

An employee who has been continuously employed for at least 24 months may also be treated as having been dismissed if the employer (i) terminates the employment contract, or (ii) varies the terms of the employment contract without the employee's consent, because the employer intends to extinguish or reduce a right, benefit or protection conferred or to be conferred on the employee by the EO. However, the employer is afforded a defence if it can show that the reason for the dismissal or the variation of contract was due to: (i) the conduct of the employee; (ii) the capability or qualifications of the employee; (iii) redundancy or other genuine operational requirements of the business; (iv) the fact that continuing the contract without the variation would be in contravention of the law; or (v) another reason of substance that would be considered sufficient grounds for dismissal by the Court or Labour Tribunal.

Consent from a third party is not required before an employer can dismiss an employee.

An employee may also have protections against dismissal under other legislation, including the anti-discrimination Ordinances and the ECO.

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

It is unlawful to terminate the employment of an employee:

- who is on paid sick leave under the EO, except if the employee is being summarily dismissed;
- who is confirmed pregnant by a medical certificate until the date when she is due to return to work from maternity leave;
- who has made a claim for employees' compensation under the ECO before the relevant certificate of assessment has been issued by the Labour Department or a settlement agreement has been reached with the employee;
- by reason of the employee exercising his/her rights under the EO in respect of trade union membership and activities; or
- who has given evidence in any proceedings or given information to a public officer in relation to an inquiry under the EO, ECO, or FIUO, or in relation to safety of persons at 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?

An employer is entitled to validly dismiss an employee for the following reasons:

- the conduct of the employee;
- the capability or qualifications of the employee;
- redundancy or other genuine operational requirements of the employer;
- the fact that the employer and/or the employee would be in contravention of the law if the employment continued; or
- any other reason of substance that would be considered sufficient grounds for dismissal by the Court or Labour Tribunal.

The EO also allows an employer to summarily dismiss an employee if the employee: (i) wilfully disobeys a lawful and reasonable order; (ii) misconducts himself/herself; (iii) is guilty of fraud or dishonesty; or (iv) is habitually neglectful in his/her duties. The employer may also justify summary dismissal on any other ground available under common law.

Where an employee's employment is terminated on the ground of redundancy, he/she will be entitled to statutory severance if he/she has been continuously employed for at least 24 months.

Where the dismissal is deemed unreasonable, an employee may be entitled to an award of terminal payments, an order for re-engagement or reinstatement (which may require the employer's consent) and/or an order of compensation of up to HK\$150,000.

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

An employer needs to:

- give the required notice to the employee or make a payment of wages *in lieu* of the required notice; and
- make all statutory and contractual termination payments due to the employee within seven days of the termination date, subject to tax withholding obligations (if applicable).

If the employer has adopted a contractual disciplinary procedure, this should be followed prior to effecting the termination.

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

Please refer to questions 6.3 and 6.5 above. Employees can attempt to conciliate claims by seeking the assistance of the Labour Relations Division of the Labour Department. Failing conciliation, employees can commence legal action in the Labour Tribunal. If the complaint involves issues of discrimination, these can only be dealt with by the EOC or the District Court. Please refer to questions 3.5 and 3.6 for discrimination complaints and remedies.

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

An employer can settle a claim with an employee before or after the claims are initiated.

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

There is no statutory obligation to engage in any consultation or process as a result of an increased number of dismissals. An obligation may arise where there is some form of collective agreement, but such agreements are rare.

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?

Mass dismissals do not give rise to any specific rights for employees or specific obligations for employers, except where they exist under a collective agreement. Employees may seek the assistance of the trade union of which they are a member. However, employees generally enforce their rights on an individual basis since there is no class action regime in Hong Kong.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The main types of restrictive covenants recognised in Hong Kong relate to non-disclosure of confidential information, non-competition, non-solicitation of employees, clients and customers and non-dealing.

7.2 When are restrictive covenants enforceable and for what period?

For restrictive covenants to be enforceable, they must be necessary to protect a legitimate business interest of the employer and must go no further than is reasonable to protect that interest. The Courts will consider factors such as the duration of the restraint period, the geographical area of the restraint and the nature and scope of the restraint in determining whether the restrictive covenants are reasonable. The appropriate period of the restraint will depend on different factors. These may include the seniority of the employee and the nature of the confidential information to which the employee has (or has had) access.

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

It is not legally required or necessary to provide financial compensation in return for covenants in order for them to be enforceable if they are included in the contract of employment. The remuneration and benefits provided under the employment contract are sufficient consideration for the post-termination restrictive covenants.

7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced by commencing legal proceedings in the District Court or High Court against a former employee and/or his/her new employer. The employer may seek an injunction to restrain the former employee from continuing the contravening activity, and/or claim damages and/or an account of profits associated with the former employee's breach of a restrictive covenant.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The collection and use of personal data in Hong Kong, including personal data collected and held by employers at various stages of the employment relationship, are governed by the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"). An individual may lodge a complaint with the Privacy Commissioner if there has been a contravention of the PDPO.

Section 33 of the PDPO, which regulates cross-border personal data transfers from Hong Kong, is not yet in force. As such, employers can, in theory, freely transfer employee data outside of Hong Kong, provided that they comply with other requirements of the PDPO. For example, the personal data of an employee may only be transferred to a third party in a class of transferees that has been notified to the employee on or before the original collection of the employee's personal data, and the transfer can only be for the stated purposes that the employer has notified to the employee or for which the employer has the employee's express consent.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees are entitled to request copies of personal data held by their employer by making a data access request. The requirements for making and complying with a data access request are prescribed under the PDPO. An employer is entitled to charge a reasonable fee for complying with the data access request.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Pre-employment checks are generally allowed, but employers should be aware of the prohibitions under the anti-discrimination Ordinances and the requirements under the PDPO. For instance, employers should ensure that: (i) prospective employees are informed about the purposes of the collection of this data; (ii) the data collected is directly related to a function or activity of the employer; (iii) only personal data that is necessary and not excessive for that purpose is collected; (iv) the data is collected through lawful and fair means; and (v) the data collected is securely stored and is not retained for longer than is necessary. If a third party is engaged in conducting the checks, it must also observe the requirements under the PDPO.

Employers are not prohibited from asking about an employee's criminal record, provided that the requirements of the PDPO are met, but employees have no duty to disclose any prior convictions. There are limited means (if any) for an employer to independently verify and confirm an employee's criminal record in Hong Kong.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Employers are not prohibited from monitoring an employee's emails, telephone calls or use of an employer's computer system, but such monitoring must comply with the PDPO if personal

data is collected. The Privacy Commissioner has issued guidelines that set out best practices when conducting such monitoring. Employers are recommended to conduct processes known as the 3As (Assessment, Alternatives and Accountability) and the 3Cs (Clarity, Communication and Control). The 3As process involves an assessment of the risks and benefits of the monitoring, considering whether less intrusive alternatives are available and ensuring proper accountability for any data that is collected. The 3Cs process is used in designing monitoring policies and involves providing clarity around the specific purposes of the monitoring, communication of this to employees prior to engaging in such monitoring and ensuring proper safeguards and controls are implemented for the holding, processing and use of monitoring records.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Employers may require employees to adhere to certain standards and expected behaviours when using social media in or outside the workplace to minimise the risk of the employer's confidential information being disclosed or the reputation of the employer being damaged. However, a balance should be carefully struck to ensure that the employer does not engage in conduct that might destroy the relationship of trust and confidence in the employment relationship, resulting in a breach of contract. Where the employee's conduct on social media causes damage to the employer, this may be taken into account in making disciplinary decisions.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are currently no specific laws or regulations in Hong Kong regarding how employers can use AI in the employment relationship. However, employers must comply with existing data privacy legislation relating to how an individual's personal data is collected, processed, stored and transferred in the recruitment process and throughout the employment relationship. In addition, employers are bound by existing laws that prohibit them from utilising AI in a manner that amounts to unlawful discrimination.

9 Court Practice and Procedure

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

The Labour Tribunal has exclusive jurisdiction to hear any claims above HK\$15,000 arising from:

- a failure to comply with the EO, the MWO, or the AO;
- a breach of an express or implied term of a contract of employment or contract of apprenticeship; and
- claims transferred by the Minor Employment Claims Adjudication Board ("MECAB") or the Small Claims Tribunal.

There is no upper limit to the monetary claims that can be heard by the Labour Tribunal.

Proceedings in the Labour Tribunal will be heard and determined by a Presiding Officer or a deputy Presiding Officer who sits alone. No legal representation is allowed. The Labour

Tribunal has a wide discretion to refer a claim to higher Courts if the circumstances justify a transfer.

The MECAB has jurisdiction to adjudicate employment claims involving not more than 10 claimants for sums of up to HK\$15,000 per claimant. The proceedings are heard and determined by an Adjudication Officer.

Claims for non-monetary remedies must be brought before the District Court or High Court. The District Court has exclusive jurisdiction to hear discrimination claims and employees' compensation cases. It also hears tort cases (including personal injuries claims) within its jurisdiction (where the claims are over HK\$75,000, but do not exceed HK\$3 million). There is no upper limit on the *quantum* of claims that can be heard by the High Court, Court of First Instance. It also hears appeals from the MECAB and Labour Tribunal.

Magistrates' Courts hear criminal prosecutions against employers that have contravened statutory provisions.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

A claimant should first make an appointment with the Labour Relations Division of the Labour Department to seek the assistance of a Conciliation Officer in reaching a settlement with the employer. If no settlement is reached, or if the employer declines to attend the conciliation meeting, the Conciliation Officer will refer the claimant to the MECAB or Labour Tribunal so that the employee can file a claim.

The employee will need to file the necessary claim forms and pay a small filing fee. The MECAB and the Labour Tribunal will not hear a claim until a certificate of conciliation in the prescribed form signed by an Authorised Officer is filed or produced.

The Officer will make inquiries about the claim and assist the employee in filing the claim. The Officer will then write to the employer with regard to the defence and other documents to be submitted. No legal representation is permitted at the MECAB or Labour Tribunal, although parties are free to take legal advice and to ask their legal representative to assist with drafting their pleadings and submissions.

It is usual for the Adjudication Officer/Presiding Officer to attempt to help the parties resolve the claim. If the parties cannot reach a settlement, directions will be given for the filing of evidence and a date will be fixed for the substantive issues to be heard.

Employment-related claims in the District Court and the High Court are governed by separate civil procedure rules.

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

Generally speaking, cases in the Labour Tribunal and the MECAB are dealt with relatively quickly. However, in the Labour Tribunal, more complex cases involving a large amount of evidence and/or multiple witnesses will usually take longer. Where the matter proceeds to trial, it may take several months for the case to be heard and decided.

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

In the Labour Tribunal, a party may apply for a review of the

award or order within seven days after the award or order is made. The review must be conducted within 14 days from the date of the award or order. The review is normally carried out by the Presiding Officer who heard the case, but he/she may transfer the review to another Presiding Officer. Following the review, the Presiding Officer may decide that the case should be re-opened and re-heard.

Either party may also, within seven days from the date of the decision, apply to the Court of First Instance for leave to appeal against the decision of the Labour Tribunal. The appeal must be based on the award, order or determination being erroneous in law or outside the jurisdiction of the Labour Tribunal. The length of the appeal will depend on factors such as the complexity of the case.



Diana Purdy is a Partner leading the Greater China Employment team. She has been practising law since 1997, handling a full range of employment matters, including contracts and policies, contentious terminations, investigations, discrimination claims, enforcement of restrictive covenants, employment transfers, data privacy, diversity and inclusion, restructuring and regional projects.

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In addition to her experience as both an advisory lawyer and litigator in private practice, Diana spent seven years working for a global bank as Head of Employment Law, Asia Pacific, covering 12 jurisdictions. She also co-leads the firm's CSR and D&I committees in Hong Kong.

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

India follows a federal form of governance and the applicable employment laws are a combination of Central and State laws.

The Central laws regulate, amongst others, payment of minimum wages and employee benefits, such as provident fund, gratuity and bonus, retrenchment and layoffs, hiring of contract labour, etc. The States, on the other hand, either expand upon or amend provisions of Central laws or enact other specific laws or rules for the protection of employees. For instance, each State and Union Territory has a separate Shops and Establishments Act (“**S&E Laws**”) that typically regulate hours of work, payment of wages, leave, holiday, terms of service and the like.

In addition to the laws, internal policies of organisations may regulate the employee conduct and conditions of work. However, these policies cannot contravene the applicable laws.

The Indian Government has proposed codification of various employment laws under four Codes – the Code on Wages, 2019, the Code on Social Security, 2019, the Industrial Relations Code, 2019 and the Occupational Safety, Health and Working Conditions Code, 2020. While these Codes have been enacted, the Government is yet to enforce most of their provisions.

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

Various employment laws in India broadly classify employees in India into the following two categories:

- (a) **Workmen Category:** Employees performing non-supervisory work, including any manual, unskilled, skilled, technical, operational or clerical work for hire or reward are referred to as ‘workmen’. People who are employed in a managerial or administrative capacity and earning more than INR 10,000 are specifically excluded from the definition of ‘workmen’.
- (b) **Non-Workmen Category:** Employees performing predominantly managerial, administrative and supervisory duties are considered as ‘Non-Workmen’. Generally, they are governed by the State-specific S&E Laws, terms and conditions of their contracts of employment, service rules and agreements entered into with the employer.

From various judicial precedents, it is now well settled that determination of whether an employee qualifies as a workman or not has to be done on a case-by-case basis. The principal nature of work performed by such employee is relevant, irrespective of his designation or emoluments.

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

Generally, there is no express requirement for contracts of employment to be in writing. However, it is a standard industry practice to sign a written employment contract at all levels. Having said that, few States’ S&E Laws, such as in Karnataka, Kerala, Telangana and Delhi, mandate issuance of appointment letters to the employee.

1.4 Are any terms implied into contracts of employment?

Courts in India have held that principles of fidelity and good faith, including confidentiality, are ordinarily implied in contracts of employment. Terms can also be implied by practice or usage if an employer consistently follows a particular practice over time.

Please also see our response under question 1.5 for minimum employment terms and conditions that an employer has to observe under applicable laws.

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

Yes, various Central and State laws, depending upon the nature of establishment, category of employees (workmen v. non-workmen), the number of employees working in such establishment, etc., provide for certain minimum employment terms to be observed by employers. Please see our response under question 1.1 above for examples of minimum terms and conditions of employment laid down under Central and State laws.

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 predominant in core industries and sectors where unionisation is more prevalent, such as mining, manufacturing, construction and plantation. Basic wage rates, other benefits and conditions of employment are usually decided through collective bargaining. Bargaining often takes place at company/establishment level; however, depending on the sector, bargaining can take place at an industry level as well, such as in textile, copper and banking industries.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Yes, there are no express restrictions in this regard. Usually, employment contracts in India identify the employee's location of work and, in the event a new working arrangement is introduced, such employment contracts can be amended to capture these changes.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

The extant employment laws do not expressly contemplate a work-from-home option for employees, unless they are temporally allowed by specific Government orders due to reasonable factors (such as the recent COVID-19 lockdown orders). However, under the Industrial Relations Code, 2019, the Government has proposed (still under draft stage and not yet enforced) to allow the employer and the workers to agree on work-from-home terms *inter se*. Please also see our response to question 4.3 for cases of maternity.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

In India, while employees have the fundamental right to unionise, the process of forming and registering trade union is governed by the Trade Unions Act, 1926 ("TU Act"), which is a Central law.

But registration of a trade union under the TU Act does not automatically make it a recognised one as well. Certain State laws provide for and regulate recognition of trade unions and the rules differ with State requirements. For instance, the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, allows a registered trade union to apply to the Industrial Court for recognition of its union with respect to a particular establishment if at least 30% of the total numbers of employees in such establishment are members of the union. In States that do not have a specific law on trade union recognition, it is generally a matter of agreement between the employer and trade union.

2.2 What rights do trade unions have?

Trade unions in India are conferred the same status as body corporate, i.e., they enjoy perpetual succession, have a common seal, and may sue and be sued. Other rights include representing workmen in proceedings under the Industrial Disputes Act, 1947 ("ID Act"), meeting and discussing with employers regarding grievances on a member's dismissal or suspension, appearing on behalf of its members in any domestic or departmental inquiry held by the employer, and immunity from certain criminal, civil, and other legal actions in cases of acts done in furtherance of a trade dispute. In addition to this, recognised trade unions are empowered to collectively bargain with the employer on behalf of its members.

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

While there are no separate rules governing trade unions taking industrial action, the ID Act regulates workmen rights to go on strike, and the same will extend to trade unions that have workmen as their members. These requirements include, amongst others, prohibition to go on strike during pendency of legal proceedings and providing prior notice to employers before going on strike in specific circumstances.

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?

While India does not have works councils, the concept of 'works committees' does exist under the ID Act. Employers are not obliged to set up works committees unless they have 100 or more workmen *and* if so required by a specific order of the Government.

The duties of the works committee include promotion of measures for securing and preserving good relations between employer and workers. The works committee constitutes representatives of both the employer and workers, who are chosen in consultation with the trade union (if any).

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 committees do not have co-determination rights.

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

While the applicable statutes do not specifically prescribe any interaction between works committees and trade unions, the rights of trade unions and works committees have potential overlaps, such as when mediating disputes between workmen and employers. Compared to the works committee, trade unions have greater rights under the law, which have been discussed in our response to question 2.2.

2.7 Are employees entitled to representation at board level?

Employees are not statutorily entitled to representation at board level of a company under any employment law.

3 Discrimination

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

The Constitution of India prohibits discrimination on the grounds of religion, race, caste, sex, etc., including in the matters of public employment.

Further, there are employment laws that prohibit and address various discrimination-related issues. For instance, the Equal Remuneration Act, 1976, mandates equal remuneration and

service conditions for men and women for the same/similar work and prohibits any form of discrimination at the time of their recruitment. Other specific laws prohibit discrimination against female employees, such as sexual harassment at the workplace, women availing maternity benefits, persons with disabilities, transgender persons and persons with HIV/AIDS, including in matters of employment.

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

Please see our response under question 3.1.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“**POSH Act**”), amongst others, requires employers to mandatorily: (i) constitute an internal committee at each branch to hear and redress grievances pertaining to sexual harassment if they have 10 or more employees in the organisation/each branch; (ii) formulate and disseminate an internal policy containing the declaration for prohibition, prevention and redressal of sexual harassment; (iii) organise periodic workshops and awareness programmes; and (iv) file annual returns, etc.

3.4 Are there any defences to a discrimination claim?

The employment laws do not expressly prescribe available defences and the same will depend upon the nature of discrimination claim.

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

There is no singular authority in India responsible for the enforcement of discrimination rights, and those holding these responsibilities vary between States and specific employment statutes. For instance, under the POSH Act, the aggrieved employee may approach the internal committee constituted thereunder and, under the Maternity Benefit Act, 1961 (“**MB Act**”), the aggrieved employee may approach the jurisdictional court.

Employers can settle claims by employees before or after they are initiated, subject to prescribed conditions. Certain legislation, such as the POSH Act, also provide for alternate dispute resolution mechanisms, such as conciliation prior to initiation of inquiry.

3.6 What remedies are available to employees in successful discrimination claims?

Depending on the nature of the claim, the remedies available to employees vary, such as compensation and reinstatement (with or without back pay, in case of arbitrary/unlawful dismissals). For instance, under the POSH Act, the successful claimant may be provided compensation. Under certain statutes, sanctions and penalties may also be imposed upon the employer for contravention of the provisions of the statute.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No, ‘atypical’ workers do not have any additional protection.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Indian Companies Act, 2013, and securities law makes it mandatory for specified classes of companies to establish vigil or whistleblower mechanisms to receive and address complaints or grievances raised by employees or directors and provides safeguards against the victimisation of persons who utilise such measures.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

No, there are no such express requirements.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

It is mandatory to provide 26 weeks of paid maternity leave to female employees (who have worked for a minimum period of 80 days), out of which not more than eight weeks should precede the expected date of delivery. However, in case a female employee has two or more surviving children, maternity leave is available for 12 weeks, out of which not more than six weeks should precede the expected date of delivery.

Women who legally adopt a child below the age of three months or a commissioning mother are eligible for maternity leave of 12 weeks from the date of handover of the child. Separately, six weeks of maternity leave are allowed following a miscarriage or medical termination of pregnancy, two weeks following tubectomy operations, and an additional period of leave not exceeding one month for reasons of any illness, delivery, miscarriage, etc.

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

There are a host of rights available to an eligible employee under the MB Act during her maternity leave, which include: (i) payment at the rate of the average daily wage for the period of her actual absence; (ii) the right to not be asked to do arduous work closer to her expected date of delivery; and (iii) the right to not be dismissed on account of absence from work while availing maternity benefit.

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

The MB Act mandates employers employing 50 or more employees (this threshold may differ in few States) in an establishment to provide *crèche* facilities where women are allowed to visit their child four times in a day upon her return to work.

The MB Act also envisages a work from home option for women depending on the nature of work and on certain mutually agreed terms and conditions between the employer and the employee.

4.4 Do fathers have the right to take paternity leave?

India's employment laws do not provide for paternity leave. However, increasingly, most companies in practice have started to provide for paternity leave in their leave policies.

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

Few States (under their S&E Laws) allow for employees to take casual leave that is usually taken for personal matters, including to attend their child's matters.

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

There is no such work flexibility formally provided under law.

5 Business Sales

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

India follows an established principle of law, that employees cannot be treated as chattel that can be transferred from one person to another like goods or property. Therefore, employees need to consent to the transfer.

Under Section 25FF of the ID Act, in the event of transfer of employment of workmen on account of transfer of ownership or management of an undertaking, any workman who has completed at least one year of continuous service with the transferor employer is entitled to notice and retrenchment compensation as if such workman is terminated from employment, unless the following conditions are satisfied:

- (i) service of the workman has not been interrupted by the transfer;
- (ii) his conditions of service are no less favourable than those applicable prior to the transfer; and
- (iii) the transferee employer recognises continuity of service (tenure with the transferor employer) while calculating retrenchment compensation at the time of termination of such employee.

Most business transfers will entail a contractual commitment from the buyer to offer continuity of service to incoming employees, and employment/transfer letters are consented to by the employees in the interest of implementing an efficient transfer.

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

As discussed above, employees and their rights are not automatically transferred upon a business sale. Pursuant to Section 25FF of the ID Act, most business transfers will include a contractual commitment from the buyer to offer continuity of service and terms of employment that are no less favourable than provided by the transferor employer to incoming workmen employees.

While the benefits of Section 25FF of the ID Act are not available to non-workmen employees, any collective bargaining agreements agreed with such employees may need to be accounted for by the new employers during business 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?

There are no express consultation requirements under Indian law unless the employer has recognised any trade union in its establishment or has entered into a collective bargaining agreement. Practically, given that employee consent is taken for transfer of employment, communications around the business sale are made to the employees in advance.

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

While redundancy of a role on account of a business sale may be justified as a permitted reason for termination, in our experience, courts do delve into the *bona fides* of the business reasons that contributed to such redundancies, should employees file a suit against such terminations.

Further, in cases where conditions of Section 25FF of the ID Act are not met or where the workman does not consent to being transferred, then he will be deemed dismissed by the seller. The seller will have to pay all statutory entitlements, including the retrenchment compensation to such workman.

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

For non-workmen employees, amendment of terms and conditions of employment will be governed by their employment contracts and State-specific S&E Laws.

For workmen, the ID Act requires an advance notice of 21 days (longer in some States) to be issued to workmen for changing certain terms and conditions of employment. A copy of notice is required to be sent to the applicable Labour Commissioner.

It may be noted, however, that attempts to modify the terms of employment during a transfer to the disadvantage of transferred employees, such that the transferee employer is responsible for a reduced *quantum* of employee benefits, may not be compliant with the applicable law.

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, except in case of termination due to proven misconduct, all employees must be provided with a prior notice of termination in the manner prescribed. Under the ID Act, the notice period to be provided to workmen varies from one to three months, and for others, provision of notice will be determined by the respective State S&E Laws, unless their employment contracts prescribe an extended 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?

While the concept of garden leave is not expressly recognised under Indian law, in our experience, many employers impose garden leave as a matter of contractual right in the interest of protecting confidential information of the employer, where they can require employees to not attend work during their 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 rights of employees during termination of employment are governed by the conditions and procedures prescribed under the ID Act (at Central and State levels), applicable standing orders, State S&E Laws, and collective bargaining agreements.

Under Indian law, employers can terminate employment on account of misconduct or for reasonable cause. While reasonable cause is not defined, it has been interpreted by judicial precedents to include redundancies, underperformance, violation of policies, loss of confidence, no longer fit to perform, etc., i.e., primarily where the cause can be demonstrated to be *bona fide* or is beyond the reasonable control of the employer, such as in cases of financial constraints. In case of misconduct, an employee must be granted an opportunity of being heard during a disciplinary inquiry.

Specifically for workmen, under the ID Act, termination of their employment is permitted on account of disciplinary or any other reason, provided the notice and compensation conditions are fulfilled by the employer.

Third-party consent is not required for a dismissal, though prior consent from the applicable labour authority is mandatory in cases of dismissal of workmen in a manufacturing unit, plantation or mine where more than 100 workmen (over 300 in some States) were employed in the preceding year.

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

Yes, please see our 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?

We have discussed the grounds for dismissal of individual workmen and non-workmen employees in our response to questions 5.4 and 6.3.

Indian courts have recognised redundancy of positions due to business-related reasons as a valid ground for dismissal by an employer. The ID Act also recognises and prescribes specific processes for dismissal of workmen on account of permanent closure, or transfer, of an establishment. Having said the above, Indian courts adopt a labour welfare approach, and if these dismissals are challenged, the employer may have to establish, by way of adequate evidence, the *bona fides* of the reason for dismissal.

In addition to statutory entitlements payable to all employees (such as notice pay, gratuity, accrued leave, etc.), workmen employees who have completed continuous service of at least one year with the employer must be provided with:

- (i) one month's/three months' notice in writing, indicating the reasons for dismissal (or pay salary *in lieu* thereof); and
- (ii) retrenchment compensation at the rate of 15 days of average pay for every completed year of continuous service or any part thereof above six months.

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

In cases of dismissal of a workman for misconduct, it is essential to establish such misconduct through a disciplinary inquiry in accordance with the principles of natural justice. A non-workman employee must be granted an opportunity of being heard prior to being dismissed on grounds of misconduct.

Please see our response to question 6.5 for monetary entitlements of workmen employees at the time of their dismissal for other causes.

Prior consent from the applicable labour authority is mandatory in cases of dismissal of workmen in a manufacturing unit, plantation, or mine where more than 100 workmen (over 300 in some States) were employed in the preceding year.

For non-workmen employees, compensation payments may be set out in their contracts or agreed policies.

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

Depending on the facts, an employee can bring claims of unlawful or wrongful termination that may include allegations that proper procedure was not followed at the time of dismissal, dismissal was unlawful or unfair, statutory payments were not paid, unfair labour practices were being undertaken and the like.

Remedies/reliefs awarded to employees on a successful claim include reinstatement with or without back wages, payment of other employment benefits due to such employee, retrenchment compensation, compensatory damages, etc.

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

There is no specific bar in settling 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?

There are no additional obligations arising from dismissal of a specific number of workmen at the same time, except that closure of an establishment is subject to a specific procedure.

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?

Workmen or trade unions can file an industrial dispute under the ID Act to enforce their rights. An individual employee can file claims on grounds described in our response to question 6.7 above.

In case of a violation by an employer, in addition to reliefs awarded to successful employees as mentioned under our response to question 6.7, fines can be imposed on employers, and against officers of a company, who fail to follow prescribed statutory procedures.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The most common forms of restrictive covenants in employment contracts include exclusivity, non-compete, non-solicitation and confidentiality. When enforced during the existence of employment, these covenants (unless completely unconscionable) are usually recognised.

On the other hand, covenants that restrain an employee from exercising a lawful profession, trade, or business ‘post termination’ of employment (such as a non-compete operating post-termination), even if reasonable in nature, are void by virtue of Section 27 of the Indian Contract Act, 1872, save for limited cases pertaining to sale of goodwill.

Confidentiality has generally been enforced by courts even in a post-employment context. Courts in India have also upheld non-solicitation obligations to be a reasonable restriction in limited circumstances.

7.2 When are restrictive covenants enforceable and for what period?

Please see our response to question 7.1 above. There is no uniform period for which restrictive covenants are enforceable, but they should be of a reasonable time limit and scope.

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

Given that restrictive covenants are contractual obligations, they should be supported by a consideration that can be part of the employment contract.

7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced as contractual obligations before civil courts, where one can seek remedies in the form of damages or injunctions.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employers must comply with the extant data protection law *viz.* Section 43A of the Information Technology Act, 2000 (“**IT Act**”), and rules framed thereunder, namely the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (“**SPDI Rules**”), when processing employee data. Particularly, employers must obtain written consent of the employees to process their sensitive personal data, including passwords, financial information, medical records and biometric information; such consent

is not expressly mandated for processing non-sensitive personal data. There is no prohibition in transferring personal data of employees to other countries, provided the transferee follows the same level of data protection standards as of the transferor and such transfer being necessary or otherwise supported by employee consent.

As of August 11, 2023, India has enacted the Digital Personal Data Protection Act, 2023 (“**DPDP Act**”) – which is currently pending enforcement. Once the DPDP Act is brought into force, it will replace the above data protection regime. The DPDP Act allows processing of personal data based on (i) consent (which must be free, specific, informed, unconditional and unambiguous with a clear affirmative action), or (ii) without consent, based on a ‘legitimate use’, which includes processing data for the ‘purposes of employment’, etc. The DPDP Act does not generally restrict transfer of personal data outside India, except to countries or territories to be identified by the Government *vide* a notification.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Under the current SPDI Rules, employees are entitled to review their data and request to update their incorrect or incomplete data.

Under the DPDP Act, to the extent processing of employee personal data is not covered under ‘legitimate use’, the employee can exercise rights to (i) obtain a summary of data processed by the employer and the processing activities, and (ii) correct, complete and update their data.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

There is no bar on employers processing personal data for carrying out pre-employment checks, provided the processing is done only to the extent it is necessary for the stated purpose and subject to compliance with applicable data protection laws.

Under the DPDP Act, in the absence of conclusive guidance on whether pre-employment checks would be considered within ‘purposes of employment’, employers are advised to obtain a clear affirmative consent from prospective employees for undertaking pre-employment checks.

8.4 Are employers entitled to monitor an employee’s emails, telephone calls or use of an employer’s computer system?

There is no express bar on an employer monitoring its own property, such as laptops and electronic devices provided to employees in connection with their employment, subject to compliance with applicable data protection laws.

8.5 Can an employer control an employee’s use of social media in or outside the workplace?

Some employers in India do implement organisational policies around employees’ use of social media at or outside of the workplace to the extent it relates to the employer’s business. It is advisable to build a justifiability defence in such policies to ensure such monitoring is related to safeguarding the employer from loss or liability.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There is no such statutory restriction prescribed as of today.

9 Court Practice and Procedure

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

Jurisdiction of courts or tribunals will vary, depending on the law pursuant to which relief is sought by the subject employee and the employee classification.

For instance, under the ID Act, the Conciliation Officer, Board of Conciliation, Courts of Inquiry, Labour Courts, and Industrial and National Tribunals are empowered to hear claims of workmen employees.

Non-workmen employees can file their employment or contractual dispute before the civil courts, or the jurisdictional courts under the State S&E Laws.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The process varies as per the relevant employee category, the State, and legislation pursuant to which the relief is sought.

Under the ID Act, an employment dispute is termed as an industrial dispute, which must be filed with the appropriate Government, which usually refers the matter for conciliation. If no conciliation is reached between the parties, a report is sent to the appropriate Government, and the issue is ultimately adjudicated by the Labour Court or Industrial Tribunal, depending on the nature of the case. Therefore, conciliation is mandatory before the industrial dispute can be adjudicated by the courts.

Disputes relating to dismissal may be filed directly with the Labour Court or Industrial Tribunal by the aggrieved workman.

Payment of fees by the employee will depend on the tribunal/court before whom the complaint is filed. Generally, nominal court fees are payable by the complainant before a civil court, and some exemptions may be available for workmen employees.

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

The timeline varies considerably. Under the ID Act, officers/tribunals are mandated to resolve an industrial dispute within a time frame ranging from two to six months; however, in our experience, these timelines are extended at the discretion of the authorities.

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

Yes, usually parties have a right to appeal against the first decision; however, an appeal may not be accepted by the tribunal/court as a matter of right. Timelines vary depending on the facts and circumstances of each case.



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Indonesia

ARMA Law



Merari Sabati



Mikhail Sibbald

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Indonesia's main source of employment law is governed by Law No. 13 of 2003 on Manpower, with amendments and improvements introduced through Government Regulation *in lieu* of Law No. 2 of 2022 on Job Creation (collectively, the “**Manpower Law**”). Meanwhile, employment dispute is covered by Law No. 2 of 2004 on Industrial Relation Dispute (“**Industrial Relation Dispute Law**”). Additionally, trade unions (labour unions) in Indonesia are regulated by Law No. 21 of 2000 on Labour Unions (“**Labour Union Law**”).

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

The Manpower Law classifies two types of workers: those employed for an indefinite period (permanent); and those on fixed-term contracts. Part-time and foreign workers fall under fixed-term contracts. The primary distinction between these two types of worker lies in the duration of the employment and the nature of the work involved.

To highlight, consultants and independent contractors are not considered employees under the Manpower Law.

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

Either verbal or written employment contracts are permitted under the Manpower Law. However, for fixed-term employment, written contracts are mandatory. In cases where a permanent employment contract is made verbally, the employer must issue an appointment letter with essential details, such as: identity of the employee; address; the starting date of working; type of work; and wages.

1.4 Are any terms implied into contracts of employment?

Yes. In principle, the terms under of the Manpower Law are implied into contracts of employment regardless of whether explicitly stated. The terms in the employment contracts must align with the Manpower Law and should not contradict it.

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

Yes. The Manpower Law regulates that an employment contract must possess at least the following terms: (i) name, company name and business activity; (ii) gender, age and employees address; (iii) position/type of work; (iv) place of work; (v) salary and its method of payment; (vi) terms of employment, which consist of the rights and obligations of the parties; (vii) working period; (viii) date and place of agreement; and (xi) the signature of both parties.

The contract must be written in Indonesian. In case of bilingual contract, the prevailing language should be Indonesian.

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 collectively negotiated through agreement between labour unions and employers, known as collective labour agreements. These negotiations occur at company level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Generally, employers in Indonesia have the authority to set the terms and conditions of employment, including work arrangements. Any modification of the terms and conditions in an employment contract requires mutual agreement from both the employer and the employee. However, it is common in employment contracts to provide the employer with flexibility in determining the working time at the employer's discretion. In this case, formal amendments to the employment contract are often unnecessary.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Remote working in Indonesia gained widespread acceptance following circular letters issued by the Manpower Offices in response to COVID-19. Currently, it is entirely at the discretion of the employer to permit employees to work remotely, be it from home or elsewhere. For companies in certain sectors, the Manpower Law also enables employers to assign their employees to work flexible hours or outside of the usual working area.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The Manpower Law regulates the recognition and rights of labour unions. Employees have the right to form and join a labour union. A labour union can be formed by a minimum of 10 employees within a company. The union must have articles of association, by-laws and other mandatory elements based on the Labour Union Law. The formation of the labour union must be formally notified in writing to the local Manpower Offices under the Ministry of Manpower, who are obligated to record and issue a registration number within 21 working days upon receiving the notification.

2.2 What rights do trade unions have?

The main rights of a labour union are: (a) engaging in negotiation and forming a collective labour agreement with the employer; (b) representing employees in resolving industrial disputes; (c) acting as representatives for employees in employment-related institutions; (d) establishing an institution or conducting activities to improve employee welfare; and (e) engaging in other employment-related activities that align with the prevailing laws.

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

Yes, the right of a labour union to undertake industrial action is governed by the Manpower Law and Minister of Manpower Decree No. 232 of 2003 on the Legal Consequences of the Unlawful Strike. These regulations provide a framework for lawful industrial actions and specify the repercussions for any actions that are deemed unlawful within the context of labour 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?

Indonesia does not have a comprehensive and standardised system of works councils as seen in some other countries. However, it shares some similarities with Bipartite Cooperation Bodies (“**LKS Bipartit**”), which companies with a workforce exceeding 50 employees are obligated to form. This body serves as a platform for communication and consultation between the employer and representatives from the labour union or employees, aimed at enhancing industrial relations. Further, this body comprises representatives from both the employer and the employees or labour union, maintaining a 1:1 composition with a minimum of six members.

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?

As the LKS Bipartit serves solely as a communication and consultative forum, there are no situations in which the LKS Bipartit possesses co-determination rights that could impede an employer's decision-making process.

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

Labour unions and the LKS Bipartit play different but complementary roles. Labour unions focus on industry-level negotiations, while the LKS Bipartit handles specific workplace issues within a company. They may collaborate on matters that affect both the industry and a particular company, but their interactions are usually cooperative, not involving strong decision-making rights.

The labour unions play a part in selecting representatives for the LKS Bipartit based on the number of unions within a company. If a company has only one union, its members can appoint representatives to the LKS Bipartit. However, if there are multiple labour unions, each union has the right to appoint its own representatives. Apart from the appointment of representatives for the works councils by the labour unions of a company, the LKS Bipartit also has the duty to provide advice, considerations and opinions to labour unions.

2.7 Are employees entitled to representation at board level?

As of February 2024, the Manpower Law does not address the entitlement of employees to have representation at the board level or within the management of a company.

3 Discrimination

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

Yes. The Manpower Law, particularly in Articles 5 and 6, states the right of every employee to receive equal treatment without discrimination from the employer. Additionally, ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation, which has been ratified by Law No. 21 of 1999, further regulates fair treatment of workers.

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

Although the Manpower Law does not provide detailed explanations, Law No. 21 of 1999 provides a comprehensive definition of discrimination. Discrimination is characterised by any form of distinction, exclusion, or preference based on factors such as race, colour, gender, religion, political belief, nationality, or social origin, which result in eliminating or reducing equality of opportunity or treatment in employment or position.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Yes. Recently, the Ministry of Manpower issued Minister of Manpower Decree No. 88 of 2023 concerning the Guidelines for Prevention and Handling of Sexual Violence in the Workplace (“**MOM Decree 88/2023**”). This decree provides detailed guidelines to optimise the implementation of measures against sexual violence in the workplace. MOM Decree 88/2023 mandates employers to form a task force, responsible for developing and implementing programmes and activities based on the company's policy regarding the prevention and handling of

sexual violence at work. Furthermore, employers must explicitly outline this policy in employment contracts, company regulations, or collective labour agreements. Additionally, employers are required to provide education and training to employees. Labour unions must also incorporate information on sexual harassment into their education and training for members.

3.4 Are there any defences to a discrimination claim?

Currently, the Manpower Law does not stipulate concerning defences to discrimination claims. Employees intending to file discrimination claims are required to obtain concrete evidence of discrimination by their employers. Should the claim be determined false by the industrial court, such employee may face the consequence of having their employment terminated by the employer based on the Manpower Law.

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

Employees have the authority to initiate the resolution of an industrial relations dispute under the provisions of the Industrial Relation Dispute Law. In this case, employers are able to settle the potential dispute at any time with the agreement of the concerned employee.

3.6 What remedies are available to employees in successful discrimination claims?

Various potential remedies are available. An employee may receive compensation for damages if such claim is grounded in tort as stipulated in the Indonesian Civil Code. Moreover, the employee has the option to include a claim for the termination of his/her employment relationship, potentially leading to receive termination benefits based on the Manpower Law.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

The rights and protections for atypical workers, including those working part-time, on fixed-term contracts, or as temporary agency workers, are generally outlined in the Manpower Law. The Manpower Law provides the same protection and rights for all types of employees, thus not having any special treatment for atypical workers.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

Currently, the Manpower Law lacks any provisions concerning whistleblowing. Although, it is very common for companies in Indonesia to provide protection for whistleblowing through their own internal company regulations.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

For private companies, there is no specific requirement in the Manpower Law to publish such information. However, publicly

listed companies (“Tbk”) have a different set of obligations. This is due to the obligation of providing public information disclosure to its shareholders. Therefore, information, such as the gender and salaries of the management of a Tbk, is required to be published for the purposes of gaining public trust.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

According to the Manpower Law, maternity leave spans three months, evenly divided into one and a half months before the expected delivery date and one and a half months after childbirth. However, the duration of maternity leave may be extended based on a medical certificate from the obstetrician or midwife, both before and after childbirth. Additionally, Indonesia is currently in the process of creating a law on the welfare of mothers and children, potentially providing extended leave.

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

During maternity leave, a woman is entitled to receive her full pay and benefits as stipulated in her employment agreement. This includes any allowances, bonuses, and other benefits specified in the employment contract. The employer is obliged to maintain these payments throughout the maternity leave period.

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

Upon returning to work following maternity leave, a woman has the right to reclaim her previous position and responsibilities. She should also receive the same level of pay and benefits as before taking maternity leave. It is important to note that employers are prohibited from discriminating against women due to pregnancy, childbirth, or maternity leave.

4.4 Do fathers have the right to take paternity leave?

The Manpower Law mandates two days of paternity leave. However, some progressive companies may provide paternity leave as part of their internal policies. Employees are encouraged to review their employment agreements or company policies to determine if such provisions exist.

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

Yes. Aside from maternity leave, Indonesia grants additional parental leave rights related to significant family events, such as marriage, circumcision, baptism, and the unfortunate event of a child’s death. In these circumstances, employees are entitled to two days of paid leave.

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

There are currently no specific legal provisions regarding flexibility in work arrangements for individuals responsible for the care of dependents.

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 or asset transfer, employers or companies must notify their employees of such transfer and provide them the option to either continue working under the new management or terminate their employment. Should the employee opt to terminate their relationship, they are entitled to certain termination benefits in which the calculations are determined by the Manpower Law.

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

Government Regulation No. 35 of 2021 concerning Employment Agreements for A Specified Period of Time, Outsourcing, Working Time and Rest Time, and Termination of Employment specifically regulates employees' rights to terminate their existing contracts and not continue with the new management. The termination benefits may include a severance pay, long service pay, separation pay, and compensation pay (for unused leaves).

In regards to the impact of a business sale on collective agreements, there may be possibilities of a renegotiation phase between the new owners and the existing labour unions, should there be adjustments to the company policies.

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 Manpower Law does not mandate employers to engage in consultations with employees regarding business sales. However, in accordance with Law No. 40 of 2007 on Limited Liability Companies (as amended), a company is obligated to formally notify its employees in writing about an acquisition plan at least 30 days before convening a general meeting of shareholders to approve the acquisition. Notably, there are no specified penalties or sanctions outlined in existing laws for failing to carry out this announcement.

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

Should the employer decide not to continue employment following a business sale, employees can be terminated, and they are entitled to receive a termination benefit.

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

Alterations to the terms and conditions of employment are permissible only with the explicit consent of 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?

As stipulated in the Manpower Law, the termination of employment notification is to be formalised in the form of a notification letter. The employer is required to officially and reasonably convey the letter to the employee and/or labour union at least 14 working days prior to the intended termination of employment.

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 terms of "garden leave" are not addressed in the Manpower Law. However, this condition may be applicable when an employee is under suspension, typically during the termination process of the employee's employment agreement. Employees continue to be entitled to their salary during the period of suspension.

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?

Should an employer decide to terminate an employee, the Manpower Law provides the employee with the right to object to the termination, and to contest the grounds for it. In case of a dispute, the employee has the option to file a claim through the Industrial Relations Court over the alleged wrongful termination.

Employees will be deemed terminated if they do not contest the termination upon receiving notification, or upon obtaining a conclusive and binding court decision.

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

While not explicitly categorised as special protection, the Manpower Law prohibits employment termination due to the following reasons:

- a. An employee is unable to attend work due to illness, as certified by a doctor, for a continuous period not exceeding 12 months.
- b. An employee is unable to perform his/her duties due to fulfilling obligations to the State in accordance with prevailing laws and regulations.
- c. An employee is engaged in religious duties as mandated by his/her faith.
- d. An employee gets married.
- e. A female employee, who is pregnant, giving birth, experiencing a miscarriage, or breastfeeding her infant(s).
- f. An employee has a blood relationship and/or marital ties with other employees within the same company, except as regulated in the employment agreement, company regulations, or collective labour agreement.
- g. An employee establishes, becomes a member and/or official of a labour union, or engages in union activities outside working hours or during working hours.
- h. An employee reports the employer to the authorities for criminal offences.

- i. Due to differences in understanding, religion, political beliefs, ethnicity, skin colour, social class, gender, physical condition, or marital status.
- j. An employees with permanent disabilities, illness resulting from a work accident, or illness due to work-related factors as certified by a doctor, with a recovery period that cannot be determined according to the medical certificate.

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 has the authority to initiate the termination of an employee, and this may occur for various reasons related to the individual employee or business-related considerations, as outlined below:

Reasons of dismissal related to individual employees:

- a. If an employee files for termination of employment, citing grounds that the employer is engaging in the following acts:
 - i. torturing, rudely abusing, or threatening the employee;
 - ii. persuading and/or ordering the employee to commit an act in contrary to laws and regulations;
 - iii. not paying wages on time at the stipulated time for three or more consecutive months, even if paid on time afterwards;
 - iv. assigning the employee to a task outside the agreed-upon job; or
 - v. providing a job that endangers the life, safety, health and morality of the employee, while the job is not included in the Employment agreement;
 and there is a decision by the Industrial Relations Court stating the employer's innocence.
- b. If an employee is absent for five or more consecutive working days without written information and valid evidence, despite being properly summoned by the employer twice in writing.
- c. If an employee commits violations of his/her employment agreement, company regulations and collective labour agreements after receiving warning letters.
- d. If an employee is detained for six months or more.
- e. If an employee suffers from prolonged illness or disability due to an occupational accident and is unable to perform their work after exceeding the limit of 12 months.
- f. If an employee has reached retirement age.
- g. The death of an employee.

Reasons of dismissal related to business:

- a. Merger, consolidation, acquisition, or spin-off of the company and the employee decides not to continue the employment, or the employer is unwilling to continue the employee's working relationship.
- b. Redundancy, with or without the closing down of the employer due to losses.
- c. The company permanently closes down the business due to suffering continuous losses for two years.
- d. The employer permanently closes down the company due to an event of *force majeure*.
- e. The employer is under a state of suspension of payment.
- f. The employer is declared bankrupt.

Termination benefits, such as severance pay, long service pay, separation pay, and compensation pay for unused leave is provided to employees in the event of dismissal. The calculations are primarily based on the duration of the employee's term of work. Different reasons for dismissal may result in different calculations for termination benefits.

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

Employers are required to adhere specific procedures when carrying out individual dismissals. These procedures typically involve issuing written notice of termination, explicitly outlining the grounds for dismissal, and allowing the employee an opportunity to respond to the termination. In certain cases, employers may need to obtain approval from the manpower authorities before proceeding with the dismissal.

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 faces dismissal, they have the option to file claims for wrongful termination. The claims may include a challenge to the grounds for dismissal, an argument asserting that due process was not followed, or contest against the validity of the termination. Remedies for a successful claim may include reinstatement to the position, compensation for lost wages, termination benefit, or other appropriate relief, depending on the circumstances.

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

Employers and employees can reach settlements both before and after claims are initiated.

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

When an employer is dismissing a significant number of employees simultaneously, additional obligations come into play. These may include providing advance notice to the affected employees, notifying and consulting with labour unions or workers' representatives, and reporting the planned dismissals to the relevant manpower authorities. The purpose is to ensure a fair and transparent process and to allow for negotiations or discussions regarding alternatives to 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?

The Manpower Law does not distinguish between mass and individual dismissals. Disputes concerning employees' rights can be addressed through the initiation of the industrial relations dispute settlement process.

Should an employer fail to fulfil its obligations under a binding court decision, the court has the authority to order executorial attachment on the employer's assets to ensure compliance.

The Manpower Law includes criminal sanctions, such as imprisonment and/or fines, for employers who fail to meet their obligation to provide termination benefit.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Restrictive covenants are recognised and commonly used to protect business interests but are not specifically regulated by

the Manpower Law. These covenants may include non-compete clauses, non-solicitation clauses, and confidentiality clauses. Non-compete clauses restrict former employees from undertaking similar business activities for a certain period and within a defined geographical area. Non-solicitation clauses prevent former employees from soliciting clients or employees of the former employer. Confidentiality clauses aim to maintain the confidentiality of proprietary information.

7.2 When are restrictive covenants enforceable and for what period?

In the absence of specific regulations governing restrictive covenants, their enforceability and validity period depend on the agreement reached between the parties, as indicated in question 7.1. As such, the enforceability of restrictive covenants is contingent upon the occurrence of a breach. Under general contract law, the terms and conditions agreed upon by both parties in the covenant will determine the extent to which it can be enforced.

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

The provision of financial compensation in exchange for restrictive covenants is typically determined by the mutual agreement of the parties involved. In practice, there have been cases where employers opt to provide financial compensation to employees during the validity period of the restrictive covenants, particularly following termination. The specifics of such compensation, including amount and duration, are subject to negotiation and agreement between the employer and the employee.

7.4 How are restrictive covenants enforced?

Given their contractual nature, restrictive covenants can be enforced through legal means, usually by initiating a lawsuit with the relevant court. In the event of a breach, the aggrieved party, typically the employer, has the option to seek legal remedies to enforce the terms of the covenant. The court will consider the specifics of the agreement, the reasonableness of the restrictions, and other relevant factors when adjudicating such cases. It is important for parties involved to carefully draft and negotiate the terms of restrictive covenants to ensure clarity and enforceability.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employee data protection rights are not explicitly governed by the Manpower Law in Indonesia. However, the use of personal information falls under Law No. 27 of 2022 on Personal Data Protection (“**PDP Law**”) and other regulations related to electronic information and transactions. The PDP Law establishes lawful bases for processing personal data, including consent, contractual necessity, legal obligations, protection of vital interests, public interest, and legitimate interest. Offshore transfer of personal data is subject to requirements, including assessing the adequacy of protection in the receiving country or implementing appropriate safeguards. Consent from the data subject is required if these conditions are not met. Ministry of Communications and Informatics Regulation No. 20 of 2016 (“**MOCI Reg 20/2016**”) mandates coordination with the relevant authorities for offshore data transfers.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

While the Manpower Law does not specifically address this, the PDP Law and MOCI Reg 20/2016 grant individuals, including employees, the right to access and obtain copies of their personal data. Employees have the right to request records detailing their personal information kept by employers and even change/update said information, and such entitlement can be detailed in employment agreements, company regulations, or collective labour agreements.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Pre-employment checks, including criminal record checks, are not specifically regulated under the Manpower Law. Although, the PDP Law does not restrict the acts of pre-employment checks, even through unofficial databases or sources, as long as they comply with the privacy regulations.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Under the PDP Law, employers have the authority to monitor employees' emails, telephone calls, and use of computer systems based on the employer's “legitimate interest”; therefore, allowing employers control and monetisation in operating its business. However, it is recommended to obtain prior consent of the employees to prevent personal data violations, which are regulated in the employment contracts, company regulations, or separate policies.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

There are no specific laws governing an employer's control over an employee's use of social media. However, this can be regulated through employment contracts, company regulations, or collective labour agreements, providing guidelines on the acceptable use of social media both within and outside the workplace.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

Currently, the Manpower Law is silent concerning the use of AI for monitoring or productivity purposes.

9 Court Practice and Procedure

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

The Industrial Relations Court holds the responsibility of adjudicating and reviewing disputes in industrial relations. The panel comprises a career judge serving as the chairperson, along with two *ad hoc* judges as members.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

According to the Industrial Relation Dispute Law, an employee may submit a complaint or claim to the local Manpower Offices, should there be an element of an industrial relations dispute, which in this case is differentiated into four types, which are disputes with the employer over rights, interest, termination of employment and conflicts between labour unions within a single company.

Before initiating the dispute through the Industrial Relations Court, the local Manpower Offices will conduct an attempt to resolve such disputes through a bipartite negotiation between both the employer and employee across a period of 30 business days, starting from the bipartite negotiation's initiation. At the end of the bipartite process, the Manpower Offices will then provide a recommendation to both parties. Should the parties find an agreement, such negotiation results will then be implemented in a mutual agreement, which shall be submitted to the relevant industrial court. On the other hand, should the parties still stand in disagreement after the issuance of the recommendation, the disputing parties can then escalate the matter through conciliation, arbitration, or mediation before going to the Industrial Relations Court.

No court fee will be imposed for claims under Rp 150 million, while claims exceeding Rp 150 million will incur a court fee at the discretion of the panel of judges.

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

The Industrial Relations Court is required to deliver its decision within 50 business days from the initial hearing, although practically such decision may take longer.

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

It is possible to submit an appeal through the Supreme Court, although such appeal can only be submitted should the basis of the claim be due to the disputes of rights and termination of employment. According to the Industrial Relation Dispute Law, in the event of submission of an appeal, the Supreme Court is obligated to provide its decision within 30 business days upon receiving such appeal.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

While the employment relationship is primarily one governed by contract law and the parties are free to choose the law that applies to their working relationship, there are certain mandatory laws that will apply to employees working in Ireland that set out certain minimum protections. These mandatory laws are set out in primary legislation, much of which derives originally from European Union directives and regulations. Irish common law and constitutional law also provide employees with significant protections, particularly in requiring employers to apply fair procedures when dealing with employees, including on dismissal.

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

Irish law distinguishes between an individual who is an employee (that is, working under a contract of service) and an individual who is either self-employed or an independent contractor (that is, working under a contract for services). The majority of statutory employment rights apply to employees only. However, certain employment law rights can apply to others, such as protections for agency workers and protection on making a protected disclosure (i.e., whistleblowing), which applies to “workers” (a broader concept discussed at question 3.8 below).

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 a written contract of employment is not required, under the Terms of Employment (Information) Acts 1994 to 2014, an employer must provide its employee with a written statement setting out certain particulars of the terms of employment. An employer must provide certain particulars to employees in writing within five days of the commencement of their employment. Such particulars include, among others:

- (1) full name of employer and employee;
- (2) address of employer;
- (3) the expected duration of the contract (if temporary in nature);
- (4) the date on which the contract expires (if the contract is for a fixed term);
- (5) hours of work; and
- (6) the rate of pay or method of calculation of pay and the pay reference period.

Failure to provide the above information within the five-day period is a criminal offence. Other details, however (such as place of work, job title, details of rest breaks and details of paid leave), must be provided to employees in writing within two months of commencement.

When providing details of paid leave and rate of pay or method of calculation of pay, an employer may refer an employee to other documents. However, for ease of reference they are usually included in the contract of employment.

1.4 Are any terms implied into contracts of employment?

Terms can be implied into an employment contract by legislation, any agreed collective agreements, principles of employment law (such as the implied duty of trust and confidence) or by virtue of longstanding custom and practice with either the employer in which the employee works, or the particular industry.

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

Yes. Irish employment law regulates numerous areas of employment law, including:

- (1) unfair dismissal;
- (2) minimum notice;
- (3) minimum wage rates;
- (4) redundancy compensation;
- (5) health and safety;
- (6) protection for whistleblowing;
- (7) equality and discrimination;
- (8) maternity and paternity protection;
- (9) adoptive and parental leave; and
- (10) working time.

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 is provision for collective bargaining at both company and industry level under Irish law. Collective bargaining is more common at company level, where a trade union is recognised, than at industry level. It is more common in heavily unionised employments, such as the public sector, than the private sector.

Joint Labour Committees (“JLCs”) exist in some industries and consist of employer and worker representatives appointed by the Labour Court. JLCs can draw up Employment Regulation Orders, which set minimum wage rates and conditions

of employment in the relevant industry. These must then be approved by the Labour Court and are given statutory effect by the Minister for Enterprise, Trade and Employment (the “Minister”).

In addition, trade unions or employers’ organisations can request that the Labour Court conduct an examination of the terms and conditions relating to the remuneration, sick pay and pension provision in relation to a particular sector of the economy. Following such examination, the Labour Court may make a recommendation for the establishment of a Sectoral Employment Order (“SEO”) to be adopted by the Minister. Once adopted, an SEO sets a legally binding floor on rates and obligations in the relevant sector.

SEOs had been adopted for the construction, electrical contracting, and mechanical engineering sectors. The High Court struck down the electrical contracting SEO in 2020 as its introduction had not complied with the statutory procedures set out in the Industrial Relations Act 2015. Whilst the High Court also concluded that all SEOs were unconstitutional, this aspect of the decision was overturned by the Supreme Court in 2021. As a result, the construction and mechanical engineering SEOs remain in place.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees’ terms and conditions of employment?

No. An employer cannot unilaterally require employees to split their working time between home and the workplace. This is a matter for individual negotiation and agreement with the employee(s) concerned.

Employers are required to detail the place of work in the statement of employment issued to employees referenced in question 1.3 above. If the employer and employee agree to change to a hybrid working basis, the employee must receive written notification of that change no later than the day on which the change takes effect.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

The Work Life Balance and Miscellaneous Provisions Act 2023 (the “WLBMPA”) provides for a statutory right to request remote working. This right will take effect upon the publication of an accompanying and explanatory Code of Practice by the Workplace Relations Commission (expected in early 2024).

The employee must submit their request at least eight weeks prior to the proposed date of commencement of the remote working arrangement, and the employee must have six months’ continuous service at the proposed date. Upon receipt, the employer must have regard to the reasons underpinning the request and respond within four weeks (which may be extended to eight weeks in certain circumstances). If the request is declined, the employer must provide written reasons.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Employees in Ireland have a constitutional right to join a trade union, but employers in Ireland are not required to recognise or negotiate with trade unions. The law on collective bargaining

was reformed by the Industrial Relations (Amendment) Act 2015, which provides for an enhanced framework for workers seeking to improve their terms and conditions where collective bargaining is not recognised by their employer. However, the voluntarist nature of the Irish industrial relations system remains and does not oblige employers to engage in collective bargaining *per se* or require formal recognition of trade unions.

2.2 What rights do trade unions have?

There is no legal obligation on an employer to negotiate with a union on behalf of an employee member, unless previously agreed. If recognised, however, trade unions may have rights to be consulted with on certain business changes, such as collective redundancies and transfers of undertakings. Trade unions also have certain statutory protections when acting in the interests of their members.

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

The rules relating to the right to take lawful industrial action are complex and trade unions must carefully follow these to avoid an employer having a right to seek a court order preventing industrial action. These include an obligation to arrange a secret ballot and to provide the employer with notice of the industrial action. So long as the statutory rules are complied with, striking employees are granted certain immunities from liability, which they might otherwise incur for action in contemplation of, or in furtherance of, a 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?

The Transnational Information and Consultation of Employees Act 1996 applies with regard to European Works Councils, and the Employees (Provision of Information and Consultation) Act 2006 applies with regard to domestic works councils. Works councils are not mandatory and can be established at the initiative of the employer or following an employee request that meets certain criteria (such as the employer having at least 50 employees and that the request comes from a minimum threshold number of employees). If set up, the role of the works council will be determined by agreement or, otherwise, there are statutory default rules. Works councils are not common in Ireland.

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?

There are no statutory co-determination rights for works councils in Ireland.

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

There are no statutory provisions that determine the relationship between trade unions and works councils in Ireland. However, in practice, works councils are very rare in Ireland, and if a works council and recognised trade union co-existed in

a workplace, it is likely that in the event of a dispute the trade union would take precedence due to its ability to institute industrial action. Furthermore, in collective consultation processes, such as on a collective redundancy or transfer of undertaking, the employer would generally consult with the trade union.

2.7 Are employees entitled to representation at board level?

The Worker Participation (State Enterprises) Acts 1977 to 2001 provide for employee representation and participation at board and sub-board level in certain State enterprises. However, this is a very limited right and, in general, unless it is agreed, employees are not entitled to management representation.

3 Discrimination

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

The Employment Equality Acts 1998 to 2015 (the “Employment Equality Acts”) prohibit direct and indirect discrimination on nine grounds, namely:

- (1) gender;
- (2) civil status;
- (3) family status;
- (4) sexual orientation;
- (5) religious belief;
- (6) age;
- (7) disability;
- (8) race; and
- (9) membership of the Traveller community.

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

Direct discrimination occurs if an employee is treated less favourably because of a protected characteristic. Specific protections apply in respect of discrimination in relation to:

- access to employment;
- conditions of employment;
- training or experience for or in relation to employment;
- promotion or re-grading;
- classification of posts; and
- equal remuneration for like work.

Indirect discrimination occurs where an “apparently neutral provision” puts people who share a protected characteristic at a particular disadvantage. However, indirect discrimination can be objectively justified if the employer can show that it was an appropriate and necessary means of achieving a legitimate aim.

Associative discrimination occurs where a person is treated less favourably by virtue of their association with another person who has a protected characteristic.

Imputative discrimination occurs where a protected characteristic is imputed upon a person and that person is treated less favourably by virtue of that imputation.

The Employment Equality Acts also provide employees with protection against harassment and sexual harassment, as well as making it unlawful to victimise an employee who asserts their rights under the Employment Equality Acts.

Employees who suffer from a disability are entitled to reasonable accommodation to assist them in performing their role.

Discrimination is also prohibited when advertising for prospective employees.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The Employment Equality Acts place an obligation on all employers to prevent harassment and sexual harassment in the workplace. Said Acts provide for a defence; however, if the employer can show that it took reasonable steps to prevent the occurrence of harassment or sexual harassment or, where it has already occurred, to prevent the victim from being treated differently as a result and to reverse its effects. In order to rely on this defence, it is generally accepted that an employer must have a policy and procedures to deal with and prevent harassment at work. The policy should set out what is unacceptable behaviour and an effective grievance or complaints procedure should be in place to deal with complaints about harassment. A statutory Code of Practice relating to sexual harassment also exists, entitled the Code of Practice on Sexual Harassment and Harassment at Work (the “Code”). While the Code does not in itself impose any legal obligations, it aims to give practical guidance to employers, employers’ organisations, trade unions and employees. The Code notes that employers who take the steps set out in the Code to prevent sexual harassment or harassment, to reverse the effects of it and to prevent its recurrence, may avoid liability for such acts in any legal proceedings brought against them, although of course each case will be judged on its individual merits. While there are no mandatory training requirements relating to sexual harassment, an organisation’s policy should be communicated effectively to all those potentially affected by it. The Code suggests training manuals and training courses as examples of effective means of such communication.

3.4 Are there any defences to a discrimination claim?

There are a number of technical defences available, depending on the type of discrimination alleged. In particular, in cases of indirect discrimination or when setting a compulsory retirement age, it may be possible to objectively and reasonably justify such discrimination by a legitimate aim, so long as the means of achieving that aim are appropriate and necessary.

In harassment and sexual harassment cases, while the employer may be vicariously liable for the acts of its employees, it is a defence for the employer to show that it took such reasonable practicable steps as it could to prevent the harassment.

In a disability claim, it is a defence to show that the “accommodation” required would not be reasonable.

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

If the matter cannot be resolved with the employer, the employee can take a complaint to the Workplace Relations Commission and, in certain cases, to the Circuit Court. Claims can be settled before or after they are initiated.

3.6 What remedies are available to employees in successful discrimination claims?

Depending on the nature of the discrimination, an adjudicator may award one or more of the following:

- an order for equal treatment;
- an order for equal pay and up to three years’ arrears of pay from the date of the claim;

- an order for compensation of up to two years' pay or €40,000, whichever is greater, for acts of discrimination, discriminatory dismissal and/or victimisation;
- an order for reinstatement or re-engagement;
- an order for compensation of up to €13,000 for a complainant who is not an employee of the respondent; and/or
- an order to a specified person to take a specified course of action.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Fixed-term employees are entitled to be treated no less favourably than a comparable permanent employee unless such treatment can be justified on objective grounds. There are some exceptions in relation to pension entitlements. The Protection of Employees (Fixed-Term) Work Act 2003 gives fixed-term workers other rights, including, in particular, rights for fixed-term employees to obtain a "contract of indefinite duration" in particular circumstances.

The Protection of Employees (Temporary Agency Work) Act 2012 affords temporary agency workers the right to equal treatment with regular workers as regards basic working and employment conditions as if they had been directly employed by the hirer under a contract of employment.

The treatment of part-time employees is governed under the terms of the Protection of Employees (Part-Time Work) Act 2001. A part-time employee has the right not to be treated in a less favourable manner than a comparable full-time employee in respect of his or her conditions of employment (with certain narrow exceptions), unless objectively justified.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Protected Disclosures Act 2014 (the "PDA") provides protection to whistleblowers or workers who make a "protected disclosure", and this includes employees, agency workers, contractors, trainees, volunteers, board members, shareholders and job applicants. In order to come within the definition of protected disclosure, an employee must have a reasonable belief that a wrongdoing is occurring, and the relevant wrongdoing must have come to their attention in the course of their employment.

The PDA provides for an express obligation on public bodies to establish procedures to deal with protected disclosures and to publish an annual report in this respect. The obligation to maintain these procedures was extended to private bodies with 50 or more employees, and to certain sectors regardless of their size, such as certain financial services firms.

The PDA provides protection from penalisation for employees who make a protected disclosure and sets out significant remedies in the event such penalisation does occur. This includes potential awards of compensation of up to five years' remuneration as well as the ability to obtain interim relief against penalisation (including dismissal), which occurs wholly or mainly for having made such disclosure. It also specifies that a whistleblower's identity should not be disclosed without the explicit consent of the whistleblower (although this is subject to certain exceptions, including where the disclosure is a necessary and proportionate obligation imposed by law). The PDA provides for a stepped disclosure regime, which is aimed at encouraging internal resolution of matters, wherever possible. Only where

a number of conditions have been met may a worker make a protected disclosure to a person who is not their employer or the relevant responsible person. Therefore, it is advisable for all employers to implement well-considered whistleblowing policies to avoid unnecessary claims, defend them where they arise, provide an early-warning mechanism for issues of concern, avoid retaliation against whistleblowers and make third-party disclosures more difficult.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

The Gender Pay Gap Information Act 2021 (the "2021 Act") introduced mandatory gender pay gap reporting obligations in 2022, initially for private and public sector employers with 250+ employees, extending to employers with 150+ employees from 2024, and to employers with 50+ employees from 2025. The 2021 Act requires in-scope employers to report on the differences in male and female remuneration as follows:

- (1) mean and median hourly remuneration for all employees;
- (2) mean and median hourly remuneration for part-time employees;
- (3) mean and median hourly remuneration for employees on temporary contracts;
- (4) mean and median bonus remuneration percentage of all employees;
- (5) percentage of male and female employees that received bonus remuneration;
- (6) percentage of male and female employees that received benefits-in-kind; and
- (7) the percentage of male and female employees in each of the employer's lower, lower middle, upper middle and upper quartile pay bands.

Employers that are not within the scope of the 2021 Act may still have a requirement to report on certain gender pay gap information concerning Irish employees under the Corporate Sustainability Reporting Directive (EU) 2022/2464 (the "CSRD").

Currently, under Irish employment law, there is no obligation to publish information about ethnicity or disability pay gaps, salary or other diversity information. There may be a requirement for in-scope employers to disclose under the CSRD.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Female employees and transgender men are entitled to take maternity leave of up to 42 weeks (26 weeks' "ordinary maternity leave" and 16 weeks' "additional maternity leave"), provided the employer is given at least four weeks' notice of the commencement of that leave. The maternity leave must include at least two weeks' absence before the birth and at least four weeks' absence after the birth. If the birth occurs more than two weeks before the expected date of birth, the employee is entitled to take further maternity leave, the duration of which is equal to the duration of the premature birth.

Employees are also entitled to attend antenatal appointments during their working hours.

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

An employer is not obliged to pay the employee during maternity

leave, but the State provides a maternity benefit of up to €274 per week during the first 26 weeks' leave. The employee is also entitled to take up to 16 weeks' additional maternity leave at her own expense.

Save for rights to remuneration, women's employment rights are preserved during periods of maternity leave, i.e., the period of leave is reckonable service for employment rights purposes. If general pay or other conditions have improved while on maternity leave, then an employee is entitled to these benefits on return to work. Dismissals arising from taking maternity leave are deemed automatically unfair and any attempted dismissals during a period of maternity leave are void.

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

An employee is entitled to return to work to the same job with the same contract of employment. If this is not reasonably practicable, then the employer must provide suitable alternative work on terms not substantially less favourable than those of the previous one.

4.4 Do fathers have the right to take paternity leave?

A father has the right to take two consecutive weeks' paternity leave under the Paternity Leave and Benefit Act 2016. This Act, applicable to births and adoptions on or after 1 September 2016, permits a "relevant parent" to take two consecutive weeks' statutory paternity leave from his or her employment on the birth or adoption of a child. This leave must be taken within 26 weeks of the birth or adoption of the child in question. In addition to statutory paternity leave, a relevant parent will be entitled to receive a social welfare payment of €274 per week, the same rate as the maternity benefit.

The remit of the Paternity Leave and Benefit Act 2016 is not confined to the father of the child and same-sex couples are provided for on an equal basis with other couples.

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

Adoptive leave, parental leave, parent's leave, *force majeure* leave, and unpaid leave for medical care are available. Carers' leave is also available.

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

The Parental Leave Acts 1998 to 2019 give parents the right to 26 weeks' unpaid leave for each child. The leave must be taken before the child is 12 years old (subject to extensions for an adopted child or a child with a disability or long-term illness) and can be taken as a continuous period, in portions or, with the agreement of the employer, by working reduced hours.

The Parent's Leave and Benefit Act 2019 gives parents the right to seven weeks' statutory paid leave for each child that is under two years of age, or within two years of the placement of a child in cases of adoption. This is set to increase to nine weeks' paid leave from August 2024. The leave should be taken after any period of maternity, paternity or adoptive leave to which the employee is entitled. The current rate of parent's benefit is €274 per week.

Employees who have been employed for a minimum period of 12 months can, in limited circumstances, take between 13 and 104 weeks' unpaid carer's leave to care for an incapacitated dependant. State carer's benefit or carer's allowance may be payable.

An employee can take *force majeure* leave on full pay for urgent family reasons owing to an injury or illness requiring the employee's immediate presence. The employee can take three days in any 12-month period, with a maximum of five days in any 36-month period.

The WLBMPA provides for five days' unpaid leave in any 12-month period for the purpose of providing personal care or support to a relevant person in need of care for a serious medical reason.

The WLBMPA also provides for a statutory right for parents and carers to request flexible working. This right will take effect upon the publication of an accompanying and explanatory Code of Practice by the Workplace Relations Commission (expected in early 2024).

5 Business Sales

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

On a share sale, where there is no change in employer, the employees' employment simply continues with the same employer with no change in terms and conditions. Under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the "TUPE Regulations"), on a business transfer (primarily asset sales or changes in service providers), employees automatically transfer to the purchasing entity along with the business and assets.

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

On a share sale, employees continue on the same terms and conditions with no change.

On an asset sale to which the TUPE Regulations apply, all rights and obligations arising from contracts of employment (with an exception for certain pension rights), as well as any rights under collective agreements, are automatically transferred to the transferee.

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 is no legal requirement to consult with employees ahead of a share sale unless there is an existing agreement to do so (for example, in a collective agreement or in a works council agreement).

In advance of an asset sale to which the TUPE Regulations apply, the transferor and transferee must inform, and in certain circumstances consult with, the representatives of affected employees. This process must commence, in most cases, at least 30 days prior to the date of transfer.

An employee or an employee representative can make a complaint in respect of a contravention of the TUPE Regulations. Compensation not exceeding four weeks' remuneration may be awarded for a breach of the information and consultation

obligations, and compensation not exceeding two years' remuneration or reinstatement or re-engagement may be awarded for a breach of any other provision of the TUPE Regulations.

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

Employees can only be dismissed in connection with an asset sale to which the TUPE Regulations apply for "economic, technical or organisational reasons".

Any dismissal in connection with a business sale (whether an asset sale or a share sale) will also be subject to the general protections for employees provided under Irish law as discussed in question 6.3 below.

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

Harmonisation of employment terms can only be implemented post-transfer with the employees' 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?

Under the Minimum Notice and Terms of Employment Acts 1973 to 2005, minimum statutory notice periods apply to all employees who have completed 13 weeks of continuous service with the employer. The duration of statutory notice required will depend on the length of service of the employee (between one week and eight weeks). The employment contract can, and frequently does, set out longer 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?

Yes, employers can require employees to serve a period of garden leave during their notice period, but only if provided for in 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?

The Unfair Dismissals Acts 1977 to 2015 provide an employee with a means of challenging the fairness of a dismissal. In the case of such challenge, these Acts place the onus on the employer to demonstrate that the dismissal was fair. The rights under these Acts generally only apply once the employee has one year's service (exceptions apply). These Acts also provide an employee with protection against constructive dismissal, although the onus of proof is placed on the employee in such proceedings.

The Employment Equality Acts protect employees from discriminatory dismissal.

Wrongful dismissal is a dismissal in breach of contract, where an employee can bring a common law claim in the civil courts. Such a breach may include a breach of an employee's fair procedure rights. Employees may seek an injunction restraining a wrongful dismissal.

Employees can also seek to restrain a dismissal if the dismissal is by reason of the employee having made a "protected disclosure" (i.e., if a whistleblower).

The consent of a third party is not required in order to dismiss an employee.

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

Usually, an employee must have one year's continuous service with an employer in order to rely on the Unfair Dismissals Acts 1977 to 2015. However, in certain circumstances this is not necessary. Employees who believe their dismissal was connected to a protected ground under the Employment Equality Acts (i.e., gender, civil status, family status, sexual orientation, religion, age, disability, race and/or membership of the Traveller community) may bring a claim of discriminatory dismissal. Dismissal on any of these grounds is deemed automatically unfair.

Furthermore, any attempted dismissal while an employee is on certain protective leaves (e.g., maternity leave, adoptive leave, etc.) is void.

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 permissible for an employer to dismiss an employee in accordance with his or her notice entitlement. However, the obligations under the Unfair Dismissals Acts 1977 to 2015 will still apply to such terminations and it will be for the employer to show that the dismissal was not unfair. Under the Unfair Dismissals Acts 1977 to 2015, a dismissal shall be deemed not to be unfair if it is carried out pursuant to a fair and reasonable process and results wholly or mainly from one or more of the following:

- the capability, competence or qualifications of the employee for performing work of the kind that he or she was employed by the employer to do;
- the conduct of the employee;
- the redundancy of the employee;
- that the employer was prohibited by statute from continuing to employ the individual in the job; and
- that there were some other substantial grounds justifying the dismissal.

Where the termination of employment arises by reason of redundancy, the redundancy must be genuine and a fair process must be followed. The employer is required under the Redundancy Payments Acts 1967 to 2014 to make a statutory redundancy lump sum payment to the employee where the employee has accrued 104 weeks' continuous service. Employers may also make an *ex gratia* payment in addition to the statutory lump sum; however, there is no legal obligation on employers to do so.

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

Under the Unfair Dismissals Acts 1977 to 2015, employers must act "reasonably" and afford employees full and fair procedures in relation to any dismissal. Employers should have regard to the Code of Practice on Grievance and Disciplinary Procedures (Statutory Instrument 146 of 2000). In order for an employer to dismiss an employee (even in circumstances of gross misconduct), the employer is required to:

- have a clear and documented procedure in place that is fair and reasonable; and
- follow that procedure.

The general principles of “full and fair” procedures and “natural justice” include, but are not limited to:

- an entitlement to be accompanied to meetings;
- access to documentary evidence;
- compliance with the principle of proportionality;
- confidentiality; and
- allowing employees an opportunity to respond to allegations against them.

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

The primary remedy available to employees is under the Unfair Dismissals Acts 1977 to 2015. If the dismissal is found to have been unfair, the employee may be reinstated or re-engaged or, more commonly, may receive compensation for the loss of earnings caused by the dismissal. Generally speaking, the maximum compensation is two years’ pay unless the dismissal followed the making of a protected disclosure within the meaning of the PDA where the maximum compensation is five years’ pay. If the dismissal is a discriminatory dismissal, then the employee can bring a claim under the Employment Equality Acts, under which damages of up to two years’ remuneration can be awarded.

In the case of a wrongful dismissal, or a dismissal by reason of an employee having made a protected disclosure, the employee can seek to restrain the dismissal by way of injunction.

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

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?

There are special statutory rules for collective redundancies. Collective redundancies arise where, during any period of 30 consecutive days, the number of employees being made redundant is:

- five employees where 21–49 are employed;
- 10 employees where 50–99 are employed;
- 10% of the employees where 100–299 are employed; or
- 30 employees where 300 or more are employed.

The employer is obliged to enter into consultations “with a view to agreement” with employee representatives. These consultations must occur at least 30 days before the notice of redundancy is given and should consider whether there are any alternatives to the redundancies. The employer is required to provide specific information in writing to the employee representatives and the Minister.

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 (whether directly or through their representatives) may bring a claim to the Workplace Relations Commission for failure to inform and consult on behalf of the affected employees. If successful, compensation of up to four weeks’ remuneration may be awarded to each affected employee.

Certain breaches of collective redundancy legislation (such as failure to notify the Minister or failure to provide appropriate information to employee representatives) amount to criminal offences attracting fines of up to €5,000 for each offence. Effecting redundancies before the expiry of a period of 30 days following the notification to the Minister can lead to a fine of €250,000.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Express covenants that protect an employer’s legitimate proprietary interests (such as customer connections or goodwill, trade secrets or confidential information) are recognised.

7.2 When are restrictive covenants enforceable and for what period?

Post-termination restrictive covenants are presumed unenforceable as a restraint of trade and are contrary to public policy, unless:

- they go no further than is reasonably necessary in scope, duration and geographical extent to protect an employer’s legitimate proprietary interests; and
- they do not otherwise offend public policy.

Recent case law has shown that restrictive covenants will be very strictly construed. If, for example, the covenant specifies a period that is longer than necessary to protect the employer’s legitimate business interests, then a court may strike down the clause in its entirety as unenforceable. This is very much case-specific, depending on the facts, but the generally recognised maximum is nine to 12 months (and only then for the most senior employees).

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

No, employees do not have to be provided with financial compensation in return for covenants, although the agreement under which these are set out must contain consideration to make these contractually binding.

7.4 How are restrictive covenants enforced?

Where an employer is aware of an actual or potential breach of restrictive covenants and where appropriate undertakings cannot be obtained from the employee, proceedings can be brought to seek an order seeking enforcement of restrictive covenants in the High Court. These proceedings are taken as an interlocutory injunction and will be heard within a number of weeks of an action commencing.

Damages may also be awarded for breach of these covenants.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The General Data Protection Regulation (GDPR) (EU) 2016/679 (the “GDPR”) and the Data Protection Acts 1988 to

2018 (the “Data Protection Acts”) regulate how employers in Ireland collect, store and use personal data held by them about their employees (past, prospective and current). Infringement of the GDPR can lead to:

- investigation by the Data Protection Commission;
- administrative fines of up to €20 million or 4% of worldwide turnover (whichever is the greatest);
- criminal penalties in certain limited circumstances; and/or
- compensation claims from affected employees.

Employers should not provide employee data to third parties otherwise than in accordance with the principles and processing conditions set out in the GDPR and the Data Protection Acts. It may be necessary to obtain express consent from the employee to such disclosure in the absence of a legitimate business purpose for the disclosure and depending on the nature of the information and the location of the third party. Where a disclosure is based on consent, an employer will have to satisfy itself that the consent is freely given, fully informed, and specific and unambiguous, in accordance with the requirements under the GDPR. Where the data is being transferred to a third party within the EEA, a written contract should be entered into whereby the recipient agrees to process the data in accordance with the instructions of the transferor and to comply with the security obligations set out in the GDPR. Where the third party is based outside the EEA, the GDPR prohibits the transfer of data unless that country ensures an adequate level of protection for personal data or the transfer is subject to specific safeguards or derogations set out in the GDPR.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

As provided for under the GDPR, employees in their capacity as data subjects may make various data subject requests that will entitle them, in certain circumstances, to:

- be informed as to what personal data is held about them and to whom it is disclosed;
- obtain a copy of their personal data;
- have personal data amended or deleted if incorrect;
- have personal data erased;
- restrict the manner in which their data is used; and
- object to the processing of their data (where consent is used as a legal basis).

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Employers must comply with fair collection and processing obligations under the Data Protection Acts and the GDPR. Potential employees should be notified of the nature and extent of background checks. Either their consent should be obtained or the processing must be necessary in the employer’s legitimate interests when balanced against the rights of the potential employee. Given the requirements applying to the use of consent under the GDPR, it is recommended that consent is not used as a justification for processing where possible. It is an offence to require an employee to lodge data access requests for the purpose of obtaining a background check.

8.4 Are employers entitled to monitor an employee’s emails, telephone calls or use of an employer’s computer system?

Employers may only do so where the right to do so is set out

and communicated under a policy of which employees are made aware. All such monitoring is subject to compliance with data protection law and must, therefore, be proportionate and in pursuit of the employer’s legitimate interests. Certain types of monitoring may also be subject to restrictions under the Postal and Telecommunications Services Act 1983 and the EC (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011. In order to comply with data protection law, employees should be notified in advance of any monitoring that may be carried out, as well as its purpose. Employees have the right to object to the processing of their personal data.

8.5 Can an employer control an employee’s use of social media in or outside the workplace?

Yes, provided an employer has a relevant and reasonable social media policy that is notified in advance to employees.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee’s performance or productivity)?

The use of AI in the employment relationship is not currently subject to any specific legislation. However, employers will need to ensure that the use of AI for the purpose of recruitment or in order to monitor employees’ performance or productivity is compliant with applicable data protection law, including, in particular, the obligations on controllers of personal data relating to automated decision making and profiling under the GDPR.

9 Court Practice and Procedure

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

Save for claims for wrongful dismissal (which go before the civil courts) and certain employment equality claims (which can be brought in the Circuit Court), an Adjudication Officer of the Workplace Relations Commission hears most employment law complaints at first instance.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

A claim form is submitted to the Workplace Relations Commission. No fee is applicable. Voluntary mediation may be available if the Workplace Relations Commission deems the case appropriate for mediation.

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

Workplace Relations Commission cases can be scheduled for hearing within approximately three to six months of a claim form being submitted, depending on geographic location, with decisions issuing one month to six weeks later.

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

A decision of an Adjudication Officer of the Workplace Relations Commission can be appealed to the Labour Court. Such an appeal must be filed with the Labour Court within 42 days of the Adjudication Officer's decision. Depending on the circumstances of a case, appeals can be heard and decided within six to 12 months.

A further appeal, only on a point of law, then lies to the High Court. These cases can take one to two years to be heard and decided.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The two principal sources of employment law are the Labour Standards Act (the “LSA”) and its Enforcement Ordinance, both of which provide minimum standards for the terms and conditions of employment contracts. In addition, the Labour Union Act (the “LUA”) governs collective labour relationships, while the Labour Contract Law (the “LCL”) governs individual labour relationships by providing for the principles under which a labour contract is to be entered into or changed through voluntary negotiations between a worker and an employer. The LCL also governs other basic matters concerning labour contracts. Other important sources of employment law include the Industrial Safety and Health Act, the Employment Security Act, the Act on Improvement etc. of Employment Management for Part-Time and Fixed-Term Workers (the “Part-Time/Fixed-Term Employment Act”), and the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (the “Temporary Staffing Services Law”).

In June 2018, the National Diet passed laws to amend employment regulations (including the LSA and the LCL) and improve the working environment, focusing mainly on the problems of long working hours and wage gaps between regular workers and non-regular workers (the so-called “Work-Style Reform Laws”). The main parts of these new laws came into force on April 1, 2019.

Some important court decisions also function as a source of law. The decisions of the higher courts, especially the Supreme Court, are seen as a source of law for lower courts, which usually hesitate to render judgments that contradict higher court rulings, as such judgments would likely be overruled at the higher courts.

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

The LSA defines a “worker” as someone who is employed at and receives wages from a business or office, regardless of the type of occupation, and a worker is protected by Japan’s employment law. Independent contractors or self-employed people who enter into an outsourcing contract with a company and certain company executives, such as board members and corporate officers, who can work at their own discretion, are not protected under employment law as they are not considered “workers”. The distinction between an independent contractor and a company executive on the one hand, and a worker protected

by employment law on the other hand, should be made based on the person’s actual working conditions (not only by job title or the form or name of the contract) by taking into account various factors such as whether: (i) he/she has any discretion to refuse assignments; (ii) he/she is under someone’s control and should follow specific instructions regarding his/her work; (iii) the place and time for work are fixed; (iv) other persons are permitted to do the work; and (v) he/she is receiving wages in exchange for providing the work.

Workers who are protected by employment law can be classified into the following categories:

- i) non-fixed-term workers (the so-called “regular workers”);
- ii) fixed-term workers, whose term of employment must not exceed three years (or five years in certain cases stipulated in the LSA);
- iii) part-time workers, whose prescribed working hours are shorter than those for regular workers; and
- iv) temporary workers or dispatched workers, who are employed by temporary staffing agencies and dispatched to other companies under the Temporary Staffing Services Law.

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 does not have to be in writing; an oral agreement for employment is effective. However, an employer is required to expressly provide certain key employment terms and conditions in writing to their workers. These key terms and conditions include matters concerning the:

- i) period of the employment contract;
- ii) place of work and job description;
- iii) start time and the end time for working hours, possible overtime work, break time, rest period, rest days, and change in shifts (if the worker will work two or more shifts);
- iv) determination, calculation and payment of wages (except retirement allowance and extraordinary wages (such as bonuses)), and the dates for the calculation of wages, payment of wages and wage increases; and
- v) termination of employment (including regarding resignation, retirement, dismissal or any other cause for termination).

1.4 Are any terms implied into contracts of employment?

The minimum standards set out in the LSA are implied into employment contracts with fixed-term workers (see question

1.2) if the contract is silent, or if it provides terms that are less favourable for the workers than the minimum standards set out in the LSA.

If a certain employment term is applied repeatedly and continuously for a long period of time, it is possible for that term to be implied into the employment contract on the basis of an implied agreement and general custom or practice.

In addition, under the LCL, a fixed-term employment contract may be deemed renewed: (i) if the status of the fixed-term employment contract is not substantively different from a non-fixed-term employment contract due to repeated renewals; or (ii) when the continuation of employment can reasonably be expected even after the expiration of the term of the fixed-term employment contract, unless there is a justifiable reason not to renew the fixed-term employment contract upon expiration and non-renewal is deemed to be socially acceptable.

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

The LSA and its Enforcement Ordinance set down minimum employment terms and conditions, such as the following terms:

- i) An employer can require their workers to work longer than the statutory maximum hours, i.e., eight hours a day and 40 hours a week, only if they enter into a labour-management agreement (known as an “Article 36 Agreement”) with a union organised by a majority of the workers at the workplace or, where no union exists, with a worker representing a majority of such workers, and file such agreement with the local Labour Standards Inspection Office. The Work-Style Reform Laws set out legal caps for overtime hours. In principle, overtime hours should not be longer than 45 hours per month and 360 hours per year. Even in special circumstances where a temporary necessity for overtime work arises, overtime hours should be capped at 720 hours per year, 100 hours per month (including work on holidays), and an average of 80 hours per month for each period of two, three, four, five and six months (including work on holidays). These new legal caps came into force on April 1, 2019 for large-sized employers and on April 1, 2020 for small- and medium-sized employers. Certain businesses or professions, including construction workers, car drivers and doctors, are also exempt from the new legal caps for five years (until March 31, 2024).
- ii) If an employer extends the working hours beyond the statutory maximum hours, the employer must pay higher wages for each overtime hour equal to 125 per cent of the normal wages per work hour. For each overtime hour in excess of 60 overtime hours in one month, the rate for each overtime hour increases to 150 per cent of the normal wages per work hour.
- iii) An employer is also required to pay higher wages equal to 135 per cent of the normal wages per work hour for work on holidays.
- iv) An employer must also pay an additional 25 per cent of the normal wages per work hour for work from 10pm to 5am. If a worker works overtime between 10pm to 5am, the employer must pay wages at the rate of 150 per cent of the normal wages per work hour (i.e., 125 per cent as overtime pay plus 25 per cent as night shift pay). If a worker works between 10pm to 5am on holidays, the employer must pay wages at the rate of 160 per cent of the normal wages per work hour (i.e., 135 per cent as holiday pay plus 25 per cent as night shift pay).

- v) An employer is required to give break times during working hours for at least 45 minutes when working hours exceed six hours, and for at least one hour when working hours exceed eight hours.
- vi) Under the Work-Style Reform Laws, an employer is required to exert efforts to secure certain intervals between the end-of-work time for a day and the start-of-work time for the next day. This amendment came into force on April 1, 2019.
- vii) An employer is required to give workers at least one day off per week; however, this rule does not apply to an employer who provides workers with four days off or more over any four-week period.
- viii) An employer is required to grant the stipulated minimum number of days of annual paid leave to a worker in accordance with the length of service of a worker, if the worker has been employed continuously for six months and has worked at least 80 per cent of the working days during such six-month period. From April 1, 2019, the Work-Style Reform Laws require employers to designate five days of annual paid leave every year for workers who receive 10 or more days of annual paid leave so that workers can use annual paid leave more easily.
- ix) An employer must pay at least the minimum wage under the Minimum Wages Law. Minimum wages are fixed according to regulations for each district or for certain industries.
- x) Certain workers, such as those in management positions, are exempted from the statutory working-hour regulations, including rules regarding overtime hours, breaks and overtime allowances, on certain conditions. In addition, under the Work-Style Reform Laws, the statutory working-hour regulations, under certain conditions, no longer apply to workers who are engaged in work requiring special skills, the performance of which is not related to actual working hours, and earn JPY 10.75 million or more per year. This amendment came into force on April 1, 2019.

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?

As long as both the employer and the union (the collective bargaining parties) have the authority to agree on the subject terms and conditions, which must not be less favourable for the workers than the minimum standards set out in the LSA, they can agree on any terms and conditions during collective bargaining. In practice, collective bargaining agreements generally include major terms and conditions of employment such as wages and other benefits, days off, paid leave, notice periods, promotions, transfers and disciplinary procedures. The employer is not required to discuss or agree on matters concerning the company’s organisation and high-level management that are not directly related to employment conditions.

Collective bargaining usually takes place at the company or workplace level, but it can take place at the industry level as well.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees’ terms and conditions of employment?

Yes, employers can require employees to split their working time between home and the workplace on a hybrid basis if

employers change the terms and conditions of employment to adopt a “hybrid working” model, since they are required to expressly provide certain key employment terms and conditions in writing to their workers, including the place of work (please see question 1.3).

1.8 Do employees have a right to work remotely, either from home or elsewhere?

There are no laws or regulations that stipulate the employee’s right to work from home, and therefore, it could not be considered that the employees are entitled to work from home without any clear agreement (or stipulations in the work rules) with the employer. The “Guideline to promote the appropriate introduction and implementation of telework” published by the Ministry of Health, Labour and Welfare states that an employer should ensure that workers are not excluded from the eligibility to work from home because of differences of type of employment, such as a regular employee or non-regular employee.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The LUA defines “labour unions” as organisations or federations of unions formed voluntarily by and composed mainly of workers for the main purposes of maintaining and improving working conditions and raising the economic status of the workers; however, the following groups are not “labour unions”:

- i) a group that admits persons who represent the interests of the employer, including directors and workers in supervisory positions;
- ii) a group that receives the employer’s financial assistance in paying the organisation’s operational expenditures;
- iii) a group whose purposes are confined to mutual aid service or other welfare services; and
- iv) a group whose purposes are principally political or social movements.

A union is not required to file any application with authorities to be recognised as a “labour union”, but it is required to file evidence with the Labour Relations Commission and demonstrate that all the requirements described above are satisfied when it takes legal action, including applications for examination of cases of unfair labour practice.

2.2 What rights do trade unions have?

The establishment of a labour union and its activities are guaranteed as basic labour rights by the Constitution of Japan and the LUA, which stipulates these rights in detail. A labour union has the right to request an employer to enter into collective bargaining on any issue, provided that the issue relates to the labour union itself or the status of a worker who is a member of the union, regardless of the number of members. An employer is required to accept such a request and faithfully negotiate with the labour union; the refusal of an employer to enter into collective bargaining without proper reason can be deemed as an unfair labour practice, which is prohibited by the LUA.

In addition, the following acts of an employer are prohibited as unfair practices:

- i) discharging or discriminating against an employee due to him/her being a member of a labour union, having tried to join or organise a labour union, or having performed proper acts of a labour union;
- ii) making it a condition of employment that an employee must not join or must withdraw from a labour union;
- iii) controlling or interfering with the formation or management of a labour union;
- iv) giving financial support to defray the labour union’s operational expenses; and
- v) treating an employee in a disadvantageous manner because he/she has filed a complaint with the Labour Relations Commission.

An employer must hear the opinion of the labour union organised by a majority of the workers at a workplace concerning certain labour matters, including setting up or amending employment rules of the workplace.

Furthermore, a labour union has the right to act collectively, which includes the right to strike. The LUA gives workers who engage in proper and justifiable actions immunity from criminal and civil liabilities and protection from unfavourable treatments by their employer.

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

Industrial actions (or labour dispute actions) should be taken “properly” in order to enjoy the protection of the LUA. The LUA provides that in no case should acts of violence be construed as justifiable acts of labour unions; however, it does not provide specific rules as to what constitutes proper industrial action. Generally, courts take into account the purpose and manner of an action in deciding whether or not it was proper.

With respect to procedural requirements, many labour unions are required to conduct a vote among their members before calling a strike under their constitutions, and prior notice of a strike is sometimes required by the collective bargaining agreement between the union and the employer; however, these are not statutory requirements.

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 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?

This is not applicable, please see question 2.4.

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

This is not applicable, please see question 2.4.

2.7 Are employees entitled to representation at board level?

Workers have no statutory entitlement to representation at the board level.

3 Discrimination

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

The LSA provides that employers must not use the nationality, creed or social status of any worker to discriminate against him/her with respect to wages, working hours or other working conditions. The LSA also provides for the principle of equal wages for men and women.

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

In addition to the general rules under the LSA mentioned in question 3.1, other rules that prohibit discrimination include the following:

- i) The Employment Security Law prohibits employers from discriminating against a person by reason of any previous profession, membership of a labour union, race, nationality, creed, sex, social status and family origin.
- ii) The Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment (the “Equal Employment Opportunity Act”) prohibits discriminatory treatment based on sex in relation to the following matters:
 - a) discrimination in recruitment and employment;
 - b) assignment (including allocation of duties and grant of authority), promotion, demotion and training;
 - c) loans for housing and other similar fringe benefits as provided by ordinance;
 - d) change in job type and employment status; and
 - e) encouragement to retire, mandatory retirement age, dismissal, and renewal of the employment contract.
- iii) The Equal Employment Opportunity Act also prohibits the disadvantageous treatment of female employees due to marriage, pregnancy, childbirth and requesting absence from work that is permitted under the LSA.
- iv) When the employer solicits or recruits potential employees through advertisements on job information websites or taking other similar actions, the advertisements must not specify restrictions on age and gender of potential employees except in certain cases stipulated in the ministry ordinances under the Employment Measures Act and the Equal Employment Opportunity Act.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The Equal Employment Opportunity Act provides that employers are required to establish necessary measures in terms of employment management to give advice to workers and cope with any worker problems, and take other necessary measures so that workers do not suffer any disadvantage in their working conditions by reason of their responses to sexual harassment in the workplace or in their working environments. The measures employers are required to take under the Equal Employment Opportunity Act are more specifically explained in relevant guidelines issued by the government. In addition, according to an amendment to the Equal Employment Opportunity Act, which the National Diet passed in May 2019, any kind of mistreatment of workers who allege they have been victims of sexual harassment are prohibited.

3.4 Are there any defences to a discrimination claim?

Generally speaking, most of the rules explained in questions 3.1 and 3.2 do not require an employer to grant the same terms and conditions to all workers, and thus, if an employer successfully demonstrates that the alleged discriminatory treatment is based on justifiable grounds, the treatment may be deemed to not be discriminatory.

When a discriminatory act in question is carried out by one worker or more, and is not a company-wide problem, the court may find that the employer is not liable for the discriminatory conduct if the employer has taken adequate measures to prevent such discriminatory conduct.

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

Workers have different ways of enforcing their discrimination rights depending on the situation. These ways include filing a civil lawsuit or an application for a labour tribunal proceeding, and requesting the court or labour tribunal to:

- i) declare the treatment (such as the discriminatory dismissal, transfer or assignment order) as null and void;
- ii) order the employer to reinstate him/her (in the case of dismissal); and
- iii) order the employer to compensate him/her for any damage that he/she has suffered due to the discriminatory treatment. In Japan, a worker cannot request punitive damages but can request damages for mental suffering.

Employers can settle claims at any time before or after they are initiated.

3.6 What remedies are available to employees in successful discrimination claims?

Please see question 3.5.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Amendments to the Part-Time/Fixed-Term Employment Act came into effect on April 1, 2020, for large-sized employers, and on April 1, 2021, for small- and medium-sized employers. Under the amended Part-Time/Fixed-Term Employment Act, it is prohibited to set up unreasonable differences in treatment between regular employees and non-regular workers (i.e., part-time employees, fixed-term employees and dispatch workers) in the same company in terms of all kinds of treatment such as basic salary, bonus, allowances and leave. The “Guidelines for Prevention of Unreasonable Treatment against Part-Time Workers, Fixed-Term Workers and Dispatched Workers” and “Guidelines for the Measures, etc. concerning the Employment Management Improvement, etc. for Part-Time Workers and Fixed-Term Workers to Be Taken by Employers”, which were published on December 28, 2018, based on the Part-Time/Fixed-Term Employment Act, provides more detailed rules and examples of what kinds of differences in treatment are considered unreasonable.

In addition, non-regular employees may request their employer to explain differences in treatment between regular employees and non-regular workers and reasons for such differences, and an employer must provide such explanations upon a request from its non-regular employees.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Whistle-blower Protection Act (the “WPA”) stipulates the protection of whistleblowing. The word “whistleblowing” under this Act is stipulated as one satisfying all the following requirements:

- i) made by a worker (which means a worker as provided for in Article 9 of the LSA);
- ii) without a purpose of acquiring a wrongful gain, causing damage to others, or any other wrongful purpose;
- iii) regarding “a reportable fact” that has occurred, or is about to occur;
- iv) concerning a recipient of labour services (i.e., employer), or any person such as an officer, employee or agent of the recipient of labour services; and
- v) a report to an administrative organ with the authority.

A reportable fact includes:

- i) the fact of a criminal act that constitutes the crimes provided for in laws (including the orders based on such laws) listed in the appended table in the WPA, concerning the protection of interests such as the protection of individuals’ lives and bodies, the protection of interest of consumers, the conservation of the environment, the protection of fair competition, and the protection of citizen’s lives, bodies, properties and other interests; and
- ii) the fact, in the case where a violation of a disposition pursuant to the laws listed in the appended table in the WPA constitutes the fact provided for in item i) above, which is the ground of the relevant disposition.

The WPA restricts the dismissal, termination of dispatch and disadvantageous treatment to the whistleblowing workers in general, and such dismissal, termination of dispatch and disadvantageous treatment becomes null and void.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

In accordance with the amendments to the Act on Promotion of Women’s Participation and Advancement in the Workplace enacted on July 8, 2023, companies with 301 or more employees are required to disclose the differences in pay between male employees and female employees every year within approximately three months following the end of their financial year. Companies with 300 or less employees are currently exempt from this pay gap reporting requirement, but it may be expanded to smaller companies in the future.

Employers with 43.5 or more employees are required in principle to employ persons with disabilities at a rate of 2.3 per cent or more, and are obliged to report to the Public Employment Security Office on the status of employment of persons with disabilities as of June 1 of every year according to the Law for Employment Promotion of Persons with Disabilities, but they are not required to disclose this information publicly.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Mandatory maternity leave lasts 14 weeks in general (six weeks before childbirth, and eight weeks after childbirth). The LSA prohibits an employer from:

- i) making a female worker who is expecting to give birth within six weeks (or 14 weeks in the case of multiple fetuses) work, if she requests maternity leave; and
- ii) having a female worker work within eight weeks after childbirth (unless she has requested to work six weeks after childbirth, and a doctor confirms that returning to work has no adverse effect on her).

In addition, a worker is entitled to take childcare leave for a child of less than one year of age (or until the child turns two years old, if some requirements are met).

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

A female employee is not entitled to salary during maternity leave or childcare leave, unless her employment contract or the employment rules of her employer stipulate otherwise. However, she is entitled to the following allowances under insurance laws.

First, a female employee who gives birth is entitled to receive childbirth allowance equal to two-thirds of her daily salary from the health insurance association she has joined.

Second, a female employee who takes childcare leave is entitled to receive childcare allowance from the health insurance association she has joined, until the child turns one year old (or until the child turns one-and-a-half years old, if some requirements are met).

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

Employers are prohibited from treating a female employee in a disadvantageous manner because of maternity leave or childcare leave. Thus, an employer is generally required to enable a female employee to return to her original work after her maternity leave or childcare leave. Assigning her to a different position or reducing her wages can be deemed unlawful if either is due to her taking maternity leave or childcare leave.

In addition, a female employee who is raising an infant under one year old is entitled to time to care for the infant for at least 30 minutes twice a day, in addition to the normal rest periods.

4.4 Do fathers have the right to take paternity leave?

A male employee is entitled to childcare leave. He is entitled to only one period of childcare leave in general; however, if the first period of childcare leave ends within eight weeks from the birth of the child, he is entitled to a second one. He is not entitled to salary during such leave, unless his employment contract or the employment rules of his employer stipulate otherwise. That said, as with a female employee, a male employee is also entitled to receive childcare allowance from the health insurance association he has joined (see question 4.2).

It is worth noting that the Act on the Welfare of Workers who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (the “Childcare and Nursing Care Leave Act”) was amended in 2021 in order to allow male employees to take childcare leave more easily and to enhance the working environment for such purpose. This amendment includes the new rules that allow a male employee to take additional paternity leave of four weeks within eight weeks from the birth of the child. The amendments were enacted on a step-by-step basis from April 1, 2022.

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

An employee who is taking care of a child under elementary school age is entitled to take a day off to take care of an injured or sick child for up to five working days per fiscal year (or up to 10 working days if the worker has two or more children under elementary school age). He/she is not entitled to salary during such leave, unless his/her employment contract or the employment rules of his/her employer stipulate otherwise.

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

An employee is entitled to take a day off to take care of a family member who requires nursing care for up to five working days per fiscal year (or up to 10 working days if the worker has two or more family members requiring nursing care). This leave can be taken in half-day increments. An employee is not entitled to salary during such leave, unless his/her employment contract or the employment rules of his/her employer stipulate otherwise.

5 Business Sales

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

When a business is sold through a share transfer, no transfer will take place because there will be no change in employer.

In a business sale through an asset transfer, employees do not automatically transfer. The transferee (the buyer) and the transferor (the seller) may agree to include employment contracts in the business being sold, but if a worker refuses to consent to the transfer of his/her employment contract, the employment contract will not transfer to the transferee.

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

In a share sale, the employment conditions and status will not change. Collective agreements entered into before the share sale, and in force as of the share sale, will continue to be in force and their conditions will not change merely because of the share sale.

In an asset transfer, an employment contract can be transferred to the buyer transferee by (i) including the employment contract in the business to be sold, or (ii) having the worker resign from the transferor and enter into a new employment contract with the transferee. In the former case, the terms and conditions of the employment contract will remain the same even after the transfer, unless otherwise agreed between the transferee and the worker. In the latter case, the terms and conditions may change depending on the work rules of the transferee or the new employment contract. Collective labour agreements will not transfer, unless otherwise agreed between the transferor, the transferee and the 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?

On a business sale either by a share transfer or an asset transfer, a worker does not have any specific statutory rights regarding

information and consultation; however, generally speaking, the employer should provide sufficient information and faithfully consult with the workers when asking them to consent to the transfer. There is no statutory requirement regarding the time necessary for the process.

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

A business sale by itself will not justify the dismissal of employees, and thus, the general rules on dismissals apply to dismissals in connection with a business sale (see question 6.3).

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

An employer cannot freely change the terms and conditions of employment in connection with a business sale. If an employer would like to change the terms and conditions of individual employment contracts, they are required to obtain the consent of the workers. If they would like to make changes to the work rules that are disadvantageous to the workers, justifiable reasons for the changes are 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?

Yes. An employer is required to provide at least 30 days' advance notice to the employee, or to pay the average wage the employee would earn for a period of not less than 30 days *in lieu* of notice ("Payment *in lieu* of Notice"). The number of days for the advance notice can be reduced by the number of days for which the employer pays the average wage.

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 employees to serve "garden leave" if the employer pays wages to the employees during that 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 employer may only terminate or dismiss an employee on grounds that are objective, justifiable and reasonable, and any termination or dismissal that is not on those grounds is invalid and deemed an abuse of the rights of the employer. In general, the reasons can be:

- i) incapacity (due to health or performance-related reasons) and lack of qualification;
- ii) misconduct;
- iii) operational necessity; or
- iv) a request from a labour union based on a union shop agreement.

Japanese courts strictly interpret the requirement of an "objective, justifiable and reasonable" ground. Usually, a dismissal is

deemed lawful only where: the cause of dismissal is of a significant degree; there is no other way to avoid the dismissal; and there is almost no factor on the employee's side that could be taken into consideration in favour of the employee.

In cases of dismissal due to business reasons of the employer, the following general requirements have been formulated by Japanese courts in determining the validity of the dismissal:

- i) necessity of labour reduction, such as financial deterioration of the employer;
- ii) necessity in selecting dismissal over other available measures (for example, whether the employer could have avoided dismissal by using other means such as soliciting for early retirement);
- iii) appropriateness of the selection of the employee being dismissed; and
- iv) appropriateness of the dismissal procedure (for example, whether the employer provided sufficient explanation and opportunities for consultation).

If an employee does not dispute the validity of the dismissal, the dismissal will become effective. If the employee disputes the validity of the dismissal, however, he/she would ultimately be considered to have been duly dismissed only if the court determines that the above-mentioned criteria have been met.

If a collective labour agreement requires an employer to obtain the consent of a labour union to dismiss 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, there are categories of employees who enjoy special protection against dismissal. An employer is prohibited from dismissing the following categories of employees:

- i) an employee during a period of absence from work for medical treatment with respect to work-related injuries or illnesses or within 30 days after his/her recovery; and
- ii) a female employee during a period of absence from work before and after childbirth, which is taken in accordance with the LSA or within 30 days thereafter.

In addition, an employer is not entitled to dismiss an employee on any of the following grounds:

- i) nationality, creed or social status;
- ii) being a labour union member or having performed justifiable acts of a labour union;
- iii) sex and, for a female worker, marriage, pregnancy, childbirth or having taken leave from work before and after childbirth;
- iv) having taken childcare leave or family care leave under the Childcare and Nursing Care Leave Act;
- v) having reported the employer's breaches of employment protection laws to the relevant government agencies;
- vi) having sought the advice of, or filed an application for mediation by, the head of the Prefectural Labour Offices; and
- vii) having reported a violation in accordance with the WPA.

Also, an employer cannot dismiss a part-time employee who is considered to be equivalent to an ordinary employee only due to the reason that he/she is a part-time 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?

Please see questions 6.3 and 6.9.

Employees are not entitled to compensation on dismissal. However, an employer is generally required to make Payment *in lieu* of Notice (see question 6.1). In addition, since the validity of a dismissal is strictly examined by Japanese courts if disputed, employers often provide employees with a severance payment to facilitate voluntary resignation. The amount of severance pay varies significantly with each company; however, in many cases, it is calculated based on the employee's length of service.

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

As a general rule, advance notice of termination (see question 6.1) is required. In addition, any termination procedures stipulated under the employment rules or collective labour agreements must be followed.

It is also desirable to notify the employee of the reasons for the dismissal and provide him/her an opportunity for self-vindication. Further, if so requested by the employee, an employer is required to provide him/her, without delay, with a certificate that certifies the period of employment, the type of work of the employee, the employee's position, the wages, and the cause of retirement (if the cause for retirement is dismissal, the reason for the dismissal must also be provided).

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 the employer for declaratory judgment (determining that the dismissal is void and invalid) or a decision to confirm his/her position as an employee, by filing a petition for labour tribunal proceedings, provisional injunction or litigation.

If the court (in the case of provisional injunction or litigation) or the labour tribunal (in the case of labour tribunal proceedings) determines 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 (so-called "back pay") with interest. In principle, if the dismissal is judged to be invalid and the employee is reinstated, the employee cannot claim for damages. However, if any communication or action by the employer in relation to the dismissal is considered to be a tortious act, a claim for damages may be admitted.

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

Yes, employers can settle claims 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, an employer does have additional obligations when dismissing a number of employees at the same time. In the case of any of the following dismissals, the employer must notify the competent public job-placement office of the dismissal of:

- i) 30 or more employees within one month;
- ii) five or more employees who are aged 45 years or older within one month; or
- iii) an employee with a disability.

With respect to dismissals due to business reasons of the employer, please see question 6.3.

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 mass dismissals by filing a petition with a court or a labour tribunal.

If the four criteria discussed in question 6.3 are not satisfied, the dismissal will be considered null and void, in which case the employer must reinstate the dismissed employees and provide back pay (see question 6.7).

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

In a typical case, restrictive covenants include non-compete clauses, non-solicitation clauses and confidentiality clauses.

7.2 When are restrictive covenants enforceable and for what period?

Generally speaking, a non-competition covenant is considered a restriction on the free choice of employment, which is considered a basic human right in Japan, and thus deemed invalid and unenforceable except where there are reasonable grounds (under case law). Based on court precedents, when deciding the validity and enforceability of non-competition covenants, courts take into consideration whether:

- i) there is a clear non-competition clause in the employment contract or the work rules;
- ii) there is a necessity for the employer to have the non-competition covenant;
- iii) the restriction is necessary and reasonable in scope; and
- iv) the employee is sufficiently compensated for the restriction.

With respect to factor ii), if the worker's position is close to top management or the worker deals with very important or sensitive confidential information of the company, it is generally understood that there is a necessity for the employer to impose a non-competition covenant on the worker to protect their legitimate interest. With respect to factor iii), generally speaking, the period and scope of restriction in relation to geographical area and business categories are considered. With respect to factor iv), generally speaking, if the employer does not give financial benefits to compensate the employee for a non-competition covenant, courts tend to decide that this factor would not be satisfied. In some cases where the employee receives a high salary, courts have decided that factor iv) has been satisfied, since the compensation for the non-competition covenant was included in the basic salary, even though the company did not grant compensation specifically for the non-competition covenant.

With respect to a non-solicitation obligation, there are no major court precedents or well-established views regarding the validity and enforceability of a non-solicitation covenant, but there are a few precedents where courts have determined that a former worker's solicitation of his/her former employer's existing workers constitutes tort and ordered the worker to compensate the former employer where the solicitation was carried out in a manner that is not socially acceptable.

If a worker has agreed to a confidentiality covenant or confidentiality obligations are included in the work rules regarding certain confidential information of the employer, the worker must abide by that covenant. If a confidentiality covenant does

not limit its scope in relation to geographical area, the covenant is generally considered as being effective even outside Japan.

A confidentiality covenant without any duration may be considered as unnecessarily and unreasonably restrictive and, therefore, the court may interpret that the covenant is valid only for a limited time.

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

There is no statutory requirement that an employer must provide workers with financial compensation in return for covenants, but the provision of financial compensation is an important factor in deciding whether a covenant is valid (see question 7.2).

7.4 How are restrictive covenants enforced?

Covenants are normally enforced through a provisional remedy. A provisional remedy (preliminary injunction) is a temporary remedy that is granted by the court before deciding on the merits to avoid substantial damage or imminent danger to the petitioner. The court will order a provisional remedy only if there exists:

- i) a right that needs to be preserved; and
- ii) a necessity to preserve that right.

Unlike in a decision on the merits (main lawsuit), the level of proof for provisional remedy is merely *prima facie*.

An employer may also claim for damages suffered due to the former worker's breach of a covenant.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employees' data, insofar as it falls within "personal information", is protected under the Act on the Protection of Personal Information (the "APPI"), its Enforcement Ordinance and related guidelines. An employer is obliged to comply with the APPI as a "personal information-handling business operator" in dealing with employees' personal information. The obligations of a personal information-handling business operator under the APPI include the following:

- i) undertaking necessary and appropriate measures to safeguard personal information;
- ii) not using personal information except to the extent necessary for the purposes disclosed to the individual subjects;
- iii) not disclosing personal information to any third party (subject to certain exemptions); and
- iv) conducting necessary and appropriate supervision over employees and contractors.

The first significant amendment to the APPI entered into force on May 30, 2017. Under the amended APPI, in providing personal information of an employee to a third party in a foreign country, the employer is obliged to:

- i) obtain the employee's consent in advance of the provision to a third party in a foreign country; or
- ii) ensure that the third party in the foreign country has a system for continuously taking actions equivalent to those that a personal information-handling business operator must take in handling personal information, pursuant to the provisions of the APPI.

Without taking the above-mentioned measures, the employer is prohibited from transferring employees' personal information to a third party in a foreign country.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

The APPI generally entitles an individual to demand a personal information-handling business operator to disclose the retained personal information that can identify him/her. Thus, an employee has the right to know what kind of personal information is held by the employer, unless there is a reason (the list of which is stipulated in the APPI) for the employer not to disclose the retained personal information.

It is generally understood that an employer may refuse to disclose, for example, details of a personnel evaluation, as it may seriously interfere with them implementing their business properly.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, an employer may carry out background checks, insofar as it acquires personal information of job applicants lawfully.

Under the APPI, an employer must notify or make public the purpose for which it intends to use the personal information they have acquired, when acquiring personal information (except in some cases, including where, judging from the circumstances, it can be said that the utilisation purpose is clear). Also, an employer is prohibited from acquiring sensitive personal information (such as information regarding race, ethnicity, and criminal history) of a job applicant without his/her consent. In practice, an employer usually requires a job applicant to submit a filled-in template CV that contains questions regarding personal information, including criminal records. Such acquisition and use of personal information of the job applicant by the employer would be deemed lawful and valid because the applicant is deemed to have given his/her consent when he/she submitted the CV to the employer, and, given the circumstances in which the CV was submitted, it can be recognised that the utilisation purpose is clear.

While criminal records are held by the police and employers do not have the means to check them directly, a typical template CV enables an employer to obtain and utilise such information legally for the purpose of background checks.

On a separate note, the ancillary guidelines to the Employment Security Law, as a general rule, restrict an employer's acquisition of some kinds of sensitive personal information of job applicants, including race, ethnicity, opinions and creed, or history of union memberships.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

The email accounts, telephones and computer systems belong to the employer and should be used only for business operations in general. From this perspective, as a general rule, such equipment can be monitored if the monitoring is carried out for a business necessity. However, in carrying out the monitoring, an employer must take the following measures below regarding the personal information of employees.

When a personal information-handling business operator has an employee handle personal information, it must exercise

necessary and appropriate supervision over that employee to ensure control of the security of personal information. This supervision may include things such as monitoring the employee's actions online, or video monitoring the employee.

The Personal Information Protection Commission, the Japanese data protection supervisory authority, recommends that an employer who wants to monitor employees should preferably take certain measures, including:

- i) communicating the purpose of the monitoring to the employees in advance;
- ii) clearly identifying the manager responsible for managing the monitoring;
- iii) drawing up internal rules regarding monitoring and communicating them to the employees in advance; and
- iv) auditing the monitoring programme to ensure that it is being carried out appropriately.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

An employer can control and restrict an employee's personal use of social media in the workplace, as employees are obliged to devote themselves to performing their work at the workplace. The employer, however, may not control or restrict an employee's personal use of social media outside the workplace, except in limited circumstances; for example, where an employee intends to leak business secrets or defame the company.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are no restrictions on how employers use AI in the employment relationship.

9 Court Practice and Procedure

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

There are two main venues that have jurisdiction to hear employment-related complaints:

- i) an ordinary court, consisting of one or three qualified judges; and
- ii) a labour tribunal consisting of one qualified judge and two laypersons who have specialised experience in labour relations.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

At an ordinary court, once an action is brought, it will go through the submission of pleadings, oral proceedings and the examination of evidence. In these proceedings, conciliation is not mandatory before a complaint can proceed.

On the other hand, proceedings at the labour tribunal are usually held for up to three hearings to hear the allegations of both parties and examine evidence. In these proceedings, conciliation is mandatory before a decision can be rendered by the tribunal if there is a possibility for the case to be resolved by settlement.

In both proceedings, the employee must pay a fee to the court to submit a claim or a petition.

The amount of the fee is based on the amount demanded by the employee in his/her claim or petition.

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

It takes approximately 12 months (on average) for an employment-related complaint before an ordinary court to be decided. If the complaint is brought before the labour tribunal, deliberations can take anywhere from 75 days to 90 days in general.

9.4 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 a labour tribunal can be appealed. If a case that was pending before a labour tribunal is appealed, it will automatically move to an ordinary court. The average deliberation period at the appellate court is approximately six months.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The Labor Standards Act (“LSA”) is the main source of employment law that governs the essential areas of employment law, including labour contracts, wages, work hours and recess, treatment of women and minors, safety and health, termination, etc. The LSA applies to all businesses or workplaces where not fewer than five employees are regularly employed, unless otherwise stipulated in the relevant Presidential Decree as also applying to those with fewer than five employees.

Additionally, a range of specific statutes also govern the pertinent areas, such as the: Minimum Wage Act; Act on the Guarantee of Employees’ Retirement Benefits; Act on Equal Employment Opportunity and Work-Balance Assistance Act (“Equal Employment Act”); Act on the Protection of Fixed-Term and Part-Time Employees (“Fixed-Term Employees Act”); Act on the Protection of Temporary Agency Workers (“Temporary Agency Workers Act”); Trade Union and Labour Relations Adjustment Act (“Trade Union Act”); and Act on the Promotion of Employees’ Participation and Cooperation (“Workers Participation Act”).

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

Article 2(1) of the LSA defines ‘employee’ as ‘a person, regardless of the kind of occupation, who offers labour to a business or a workplace for the purpose of earning wages’. The specific statutes further distinguish employees into different categories, such as: employees with no fixed term; fixed-term employees; part-time employees; and temporary agency 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?

While the LSA does not mandate that employment contracts be formalised in writing, it obliges employers to furnish the following details in writing upon forming employment contracts: wages (detailing the constituent elements, calculation methods, and payment procedures); agreed working hours; holidays; and entitlements to annual paid leave. Consequently, it has become standard practice to execute employment contracts through written agreements that specify this essential information.

1.4 Are any terms implied into contracts of employment?

The LSA dictates that employment agreements setting forth terms and conditions that do not meet the LSA’s stipulated standards will be considered void, with the LSA’s provisions taking precedence. Moreover, employers and employees must adhere to any relevant collective agreements or rules of employment (“ROEs”), even if these are not explicitly mentioned in the employment contract.

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

The LSA outlines the essential minimum employment terms and conditions that employers are required to observe, including the following: maximum work hours per week; restrictions on overtime; mandated recess hours; regulations for annual paid leave; and holidays. Additionally, other statutes, such as the Minimum Wage Act and the Act on the Guarantee of Employees’ Retirement Benefits, provide further details on mandatory minimum standards.

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 cases where a collective agreement is in place, any ROEs or employment contract terms that conflict with the collective agreement will be deemed null and void. Terms and conditions of employment, including key aspects, such as wages, working hours, and paid leave, can be negotiated through collective bargaining.

Typically, these negotiations occur at the company level, regardless of whether the employees belong to a broader trade union organisation.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees’ terms and conditions of employment?

A work-from-home system (including a hybrid system) can be implemented by amending individual employment contracts, the ROEs, or the collective agreements.

Unless explicitly stated in the employment contract that the workplace is fixed at a specific location and cannot be altered without consent, employers have the flexibility to mandate employees to divide their work time between home and the office.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

While it is difficult to say that employees possess a right to work remotely in the sense of demanding this working condition, remote work can be facilitated following the procedure outlined in response to question 1.7.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Article 2 of the Trade Union Act defines ‘trade union’ as ‘an organisation, or associated organisations of workers, formed in a voluntary and collective manner upon the workers’ initiative for the purpose of maintaining and improving their working conditions and enhancing their economic and social status’.

It further stipulates that ‘an organisation shall not be regarded as a trade union in the following cases:

- an employer, or other persons who always act in the interest of the employer, are allowed to join;
- most of its expenditures are paid for by the employer;
- its activities are only aimed at mutual support, self-improvement, and other welfare undertakings;
- those who are not workers are allowed to join; or
- its aims are mainly directed at political issues.

Additionally, Article 12 of the Trade Union Act stipulates the formal requirements for establishing a trade union: any person wishing to establish a trade union must submit a report detailing the relevant matters, along with the bylaws, to the Minister of Employment and Labor. Upon receipt of the report certificate, the trade union is considered to have been established from the time the Minister of Employment and Labor received the establishment report.

2.2 What rights do trade unions have?

Recognised trade unions are entitled to various rights, including the right to collective bargaining, the right to conclude collective agreements, the right to engage in industrial actions, and immunity from civil and criminal claims for legitimate industrial actions.

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

In accordance with the Trade Union Act and relevant Supreme Court rulings, industrial actions must meet the following requirements to be considered legitimate:

- The entity initiating the action must be eligible to represent the workers in collective bargaining.
- The goal of the action must be to foster autonomous negotiations between labour and management for the improvement of working conditions.
- The action should be initiated only after the employer has refused collective bargaining in response to workers’ specific demands for better working conditions. Also, unless there are special circumstances, the action must proceed with the approval of the union members through a vote of consent and by reporting the occurrence of a labour dispute.

- The means and methods employed must be in harmony with the employer’s property rights and must not constitute an act of violence, fulfilling all the necessary conditions.

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?

According to Article 4 of the Workers Participation Act, all businesses that have 30 or more regular employees shall establish a labour-management council (“Council”).

The Council’s main functions are as follows:

- Matters subject to consultation: mainly related to production and personnel management matters such as productivity enhancement and gain sharing, improvement of personnel management systems, etc.
- Matters subject to Council resolution: establishment of basic plans for the education and training of workers, establishment and management of welfare facilities, establishment of a welfare fund, matters not resolved by the grievance handling committee, and establishment of various labour-management joint committees.
- Matters to be reported to the Council: overall management, quarterly production plans and results, manpower plans, and economic and financial conditions of the company.

The Council shall consist of an equal number of representatives from both the employer and the employees, with each side having between three and 10 members. For the employee representatives, if a majority-established trade union exists, its representative will participate as an *ex officio* member, and the trade union will designate additional members. If no such union exists, employee representatives must be elected through a direct and secret ballot. On the employer’s side, the business representative serves as an *ex officio* member, with the remaining members designated by this representative.

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?

Please refer to the part discussing matters subject to Council resolution, as outlined in the answer to question 2.4.

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

A trade union, often predicated on a contentious relationship with the company, differs fundamentally from a Council, which is based on the premise of collaboration between the employer and employees. However, since the representatives and appointees of a trade union established by a majority serve as members of the Council – as outlined in the response to question 2.4 – the union may use the Council as a platform to address disputes before officially initiating collective bargaining or industrial actions.

2.7 Are employees entitled to representation at board level?

Current legislation does not provide employees with the right to be represented at the board level within private corporations. In contrast, according to the Act on the Management of Public Institutions, a board of a public enterprise shall include at least one employee representative as a non-standing director.

3 Discrimination

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

Employees are protected against discrimination because of gender, nationality, religion, social status, marital status, pregnancy (the LSA, the Equal Employment Act), age (the Act on the Prohibition of Age Discrimination in Employment), employment status (the Fixed-Term Employees Act, the Temporary Agency Workers Act), or disabilities (the Act on Employment Promotion and Vocational Rehabilitation of Persons with Disabilities).

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

Numerous laws explicitly forbid direct discrimination, which occurs when an employer treats an employee unfavourably on grounds such as gender or employment status, without a reasonable cause.

Indirect discrimination, characterised by employer policies that disproportionately disadvantage a specific group of employees, is also prohibited under several specific laws and, more broadly, by constitutional principles.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The Equal Employment Act requires the employers to take the following actions:

- provide annual training on preventing sexual harassment;
- thoroughly process and investigate any complaints of sexual harassment;
- implement protective measures for victims, which may include altering their work location or granting paid leave; and
- apply suitable disciplinary measures against those found guilty of harassment, which could involve reassigning their work location or other disciplinary actions.

3.4 Are there any defences to a discrimination claim?

Discrimination can be deemed justified if it is based on a reasonable cause. To establish this, an employer must demonstrate that (1) the discrimination was necessary, taking into account various factors, including the business's overarching goals and the nature and scope of the work involved, and (2) both the manner and extent of the discrimination are appropriate.

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

Employees have the right to challenge discrimination by requesting a correction order from either the Labor Relations Commission ("LRC") or the National Human Rights Commission ("NHRC"), or by pursuing damages through a civil court.

Employers can resolve claims amicably at any stage, whether before formal proceedings begin or after they have started, but prior to a decision being made by the LRC, NHRC, or court.

3.6 What remedies are available to employees in successful discrimination claims?

The LRC has the authority to issue correction orders to address discrimination. These orders can range from suspending the discriminatory practices and enhancing working conditions to mandating appropriate compensation for affected employees. Furthermore, if the LRC determines the discrimination was deliberate or recurrent, it has the discretion to mandate compensation up to three times the actual damages incurred.

If a civil court finds the discrimination to be unlawful, it will award monetary compensation.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

The Fixed-Term Employees Act and the Temporary Agency Workers Act explicitly prohibit discriminatory treatment against atypical workers, ensuring they receive equal protection and rights in the workplace.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Public Interest Whistleblower Protection Act safeguards individuals who expose actions harmful to the public interest, including, but not limited to, issues affecting public health and safety, environmental conservation, consumer rights, fair competition, and the general welfare. Identities of whistleblowers are kept confidential, and they also have the option to report such activities anonymously through legal representatives, ensuring their identities remain confidential. Additionally, they are entitled to request protective measures to safeguard their well-being and prevent retaliation.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

In general, employers are not required to disclose information regarding their employees. However, the Framework Act on Employment Policy requires employers with 300 or more regular employees to report the current employment status of their workforce.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Under the LSA, the mandated minimum duration for maternity leave is 90 days in total, which extends to 120 days in the case of multiple births. Of this leave, at least 45 days must be taken post-childbirth, or 60 days for multiple births.

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

During maternity leave, a woman is entitled to several rights and benefits. This includes paid leave for the initial 60 days,

or 75 days in the case of multiple births. Additionally, she is protected against dismissal both during her maternity leave and for a period of 30 days following its conclusion.

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

Upon the conclusion of maternity leave, an employer is required to reinstate the employee either to her original position or to an equivalent role that offers the same level of wages as before the leave commenced.

4.4 Do fathers have the right to take paternity leave?

Under the Equal Employment Act, fathers are entitled to 10 days of paid paternity leave.

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

Employees who have children aged eight or younger, or who are in the second grade of elementary school or below, are eligible for up to one year of childcare leave. While this leave is unpaid, employees can apply for parental leave benefits to receive some financial support during this period.

Additionally, employees are entitled to family care leave of up to 90 days to take care of their grandparents, parents, spouses, parents of spouses, children or grandchildren in cases of disease, accident or senility.

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

Employees can request for reduction of working hours (15–30 hours per week) for reasons of childcare or family care. The reduction in working hours can be applied for a period of up to one year.

5 Business Sales

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

When a company undergoes a share sale, the employment status of an employee remains unchanged since the employing entity does not alter.

In the event of an asset transfer, should the asset in question be critical to the company's operations to the extent that the transfer amounts to a 'business transfer', the employment relationship is seamlessly transferred to the new owner. Employees have the right to dissent to this transfer.

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

In a business transfer, where the employment automatically shifts from the seller to the buyer, all existing employee rights, as outlined in employment contracts, ROEs or collective agreements are transferred to the new owner without changes.

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 the Workers Participation Act and other applicable laws, employers are required to communicate in good faith any decisions related to mergers or other significant business management changes to their employees. Nevertheless, there are no legal penalties prescribed for failing to fulfil this obligation.

If such right is included in a collective agreement, the employer must abide by it.

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

The dismissal of employees must be based on just cause, even in cases where there is a special agreement between the parties to the business transfer to exclude part of the employment from the transfer. The business transfer alone does not constitute a just cause.

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

No. Employees who move to the buyer in a business transfer are guaranteed to keep their existing terms and conditions of employment from before the transfer, unless there is an agreement to the contrary.

6 Termination of Employment

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

Employers are obligated to issue at least a 30-day notice prior to dismissing an employee. Should they neglect to provide such notice, they must compensate the employee with an amount equal to a minimum of 30 days of their regular wages. However, employers are relieved from this requirement under the following circumstances:

- the employee has been in continuous service for less than three months;
- the employer is unable to sustain business operations due to a natural disaster or other unavoidable reasons; or
- the employee has deliberately inflicted significant harm to the business, as defined in the Ordinance of the Ministry of Employment and Labor.

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?

Although Korean employment laws do not specifically mention 'garden leave', employers may still be justified in implementing it, provided the leave is paid and for a period deemed reasonable.

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?

Under the LSA, an employer with five or more regular employees cannot dismiss employees without just cause. The courts maintain a stringent interpretation of what qualifies as 'just cause' for dismissal.

Consent from a third party is not required before an employer can dismiss.

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

The requirement for just cause in dismissals extends across all employee categories. While no group of employees is entirely immune from dismissal, specific scenarios do afford a degree of protection. For instance, women are safeguarded from dismissal during their maternity leave, as well as for a 30-day period after its completion.

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 has the right to dismiss an employee only for just cause. Whether dismissal due to reasons related to the individual employee is just has to be evaluated individually.

For dismissals due to management reasons to be deemed justifiable, they must meet the following criteria:

- there must be an urgent business necessity;
- the employer must exhaust all possible measures to avoid dismissal;
- the selection of employees for dismissal must be based on reasonable and fair criteria;
- the employer must provide at least 50 days' notice prior to the planned dismissal date and engage in sincere consultations with the trade union or the leader of the employees.

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

Under the LSA, an employer is required to give a 30-day written notice prior to dismissing an employee or offer payment instead. The written notice must include the reasons for dismissal and the effective date of the 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 can bring a wrongful termination claim to the LRC. If the claim is successful, the LRC will order the employer to reinstate the employee and compensate with back pay.

An employee may also pursue civil litigation to seek a declaratory judgment confirming the dismissal's nullity.

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

Employers may settle claims either before or after these claims are initiated. Any agreements made in advance that waive an

employee's right to seek reinstatement or financial compensation are considered unenforceable.

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

An employer may dismiss a number of employees at the same time for management reasons. However, such dismissal is only justified under certain circumstances. Please refer to the answer to question 6.5.

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 instances of mass dismissals, affected employees have the right to contest their termination as wrongful by lodging a claim with the LRC or through civil litigation. Upon a favourable outcome at the LRC, the employer is required to reinstate the employees and compensate them with back pay.

Should the employer not adhere to the LRC's reinstatement order, the LRC has the authority to levy financial penalties as a means to enforce compliance. Additionally, persistent non-compliance with the final order may lead the LRC to initiate criminal proceedings against the employer.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Non-compete and non-solicitation covenants are deemed valid provided they are not excessively restrictive. Additionally, confidentiality agreements are also acknowledged and enforceable.

7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants, such as non-compete agreements, are, in principle, valid and enforceable. However, if such covenants excessively restrict an employee's rights or unduly limit free competition, they are deemed invalid. The validity of restrictive covenants is determined on a case-by-case basis.

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

Although financial compensation is not a legal requirement, it is one of the factors the court takes into account when determining whether a covenant is reasonable.

7.4 How are restrictive covenants enforced?

Restrictive covenants can be enforced through injunctions, and employers can seek damages for violations of such covenants. In cases where an employee breaches confidentiality agreements concerning trade secrets, the employer may bring criminal charges against the employee under the Unfair Competition Prevention and Trade Secret Protection Act.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employee data is protected in accordance with the Personal Information Protection Act (“PIPA”), which is the core legislation regarding protection of personal data. The PIPA prescribes various restrictions on data controllers for collecting, using and transferring personal information. According to the PIPA, an employer may transfer employee data to other countries with express consent of the employee.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

In accordance with the PIPA, employees have the right to access and obtain copies of their personal information held by their employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Pre-employment screenings of potential employees are allowed, provided they are conducted with the necessary consents in compliance with the PIPA. However, criminal background checks are restricted.

8.4 Are employers entitled to monitor an employee’s emails, telephone calls or use of an employer’s computer system?

Employers are permitted to monitor an employee’s email, telephone calls, and computer usage, provided they have obtained the employee’s consent beforehand.

8.5 Can an employer control an employee’s use of social media in or outside the workplace?

An employer has the right to take disciplinary action against an employee if their use of social media is deemed to significantly violate the obligation of good faith outlined in the employment contract. Furthermore, if an employee’s social media activities are directly connected to business operations and could potentially harm the business’s reputation, the employer may also implement suitable punitive measures.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee’s performance or productivity)?

While there is no distinct legislation directly addressing the

use of AI by employers within the employment relationship at present, the manner in which AI is utilised may still infringe upon existing legal frameworks, such as the PIPA, depending on the specifics of its application.

9 Court Practice and Procedure

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

Employment-related complaints can be adjudicated by district courts, which may classify them as civil, criminal, or administrative matters, based on the nature of the complaint. Additionally, certain types of employment disputes, including issues like wrongful termination and discriminatory treatment, may initially be addressed by the LRC.

In employment-related cases, a district court is typically presided over by a single judge. On the other hand, the panels of the LRC consist of representatives from three groups: workers; employers; and the public interest, ensuring a balanced perspective on the issues at hand.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Employment-related complaints are processed similarly to other court cases. The procedures followed by the LRC also resemble those of court procedures. Conciliation is not a prerequisite for a complaint to advance. Filing a complaint with the LRC does not require any fees. However, initiating court cases entails filing fees and other court-related expenses.

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

Typically, it takes between two to three months for the LRC to reach a decision on a case. In contrast, court cases generally require more time to conclude, with the duration varying based on the case’s complexity.

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

If a party does not prevail in a regional LRC case, they are entitled to appeal the decision to the central LRC. This appeal process usually requires an extra two to three months for a decision to be made. Subsequently, the party has the opportunity to take their appeal to the judiciary system.

Regarding court cases, the losing party has the right to appeal the initial verdict to the High Court. Should the need arise, they can make a further appeal to the Supreme Court for a final decision.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The primary sources of employment law in Malaysia stem from legislation including, but not limited to the:

- (1) Employment Act 1955 (“**Employment Act**”).
- (2) Industrial Relations Act 1967 (“**Industrial Relations Act**”).
- (3) Employment (Termination and Lay-Off Benefits) Regulations 1980.
- (4) Employees’ Provident Fund Act 1991 (“**EPF Act**”).
- (5) Employees’ Social Security Act 1969 (“**SOCSSO Act**”).
- (6) Employment Insurance System Act 2018 (“**EIS Act**”).
- (7) Trade Unions Act 1959 (“**Trade Unions Act**”).
- (8) Occupational Safety and Health Act 1994 (“**OSHA**”).
- (9) Anti-Sexual Harassment Act 2022 (“**ASHA**”).

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

All employees are protected by the provisions of the Employment Act. However, employees who earn a monthly income of more than RM4,000 are not legally entitled to overtime pay and termination benefits.

Minors below the age of 18 are further protected under the Children and Young Persons (Employment) Act 1966.

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

As a general rule, Section 10 of the Employment Act stipulates that written contracts are required for any employee(s) who works for more than one month. In the absence of a written contract, the employee must demonstrate that there exists an oral contract (*Tan Seng Wong v Ludwig Air Health Sdn Bhd* [2010] 2 MELR 791).

1.4 Are any terms implied into contracts of employment?

Yes, terms may be implied by law or by custom. Examples of implied terms of employment include, but are not limited to the:

- (1) obligation of mutual trust and confidence between an employer and employee;
- (2) duty of an employee to obey all legal and reasonable orders of the employer;

- (3) duty of an employee to avoid situations where a conflict of interest may arise;
- (4) duty of an employee to act in good faith and fidelity;
- (5) duty of an employer to provide work to an employee;
- (6) duty to act in the best interest of the employer; and
- (7) duty of an employer to provide a safe working environment to an employee.

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

The Employment Act sets down several minimum terms and conditions that employers must observe, namely:

- (1) Notice of Termination (Section 12).
Either party to an employment contract must give notice of termination, the length of such notice to be determined by the agreement. However, the minimum length of notice required depends on the length of employment, as follows:

Length of Employment	Notice Period
Less than two years	Four weeks
Two to five years	Six weeks
Five years or more	Eight weeks

- (2) Maternity Leave Entitlement (Section 37).
Female employees shall be entitled to 98 days paid maternity leave in respect of each confinement.
- (3) Rest Day Entitlement (Section 59).
Employees shall be allowed one rest day per week.
- (4) Work on Rest Day (Section 60).
In the event an employee is required to work on his rest day, he shall be entitled to the following:

Rest Day Work	Rate of Pay for Employees Employed on Weekly/Monthly Basis	Rate of Pay for Employees Employed on Daily/Hourly Basis
Half-day work (within normal hours of work)	Half-day’s wages at the Ordinary Rate of Pay	One-day’s wages at the Ordinary Rate of Pay
Full-day work (within normal hours of work)	One-day’s wages at the Ordinary Rate of Pay	Two-days’ wages at the Ordinary Rate of Pay
Work in excess of normal working hours	2x the Hourly Rate of Pay	2x the Hourly Rate of Pay

- (5) Hours of Work and Overtime Pay (Section 60A).
An employee's normal hours of work shall not be more than eight hours per day, or 45 hours per week, and employees shall not be expected to work more than five consecutive hours without a break of 30 minutes or more. In the event an employee is required to work in excess of his normal hours of work, he shall be entitled to overtime pay of not less than one and a half times his Hourly Rate of Pay.
- (6) Holiday Entitlement (Section 60D).
Employees are entitled to paid holidays on any day appointed as a public holiday including, but not limited to, National Day, Birthday of the Yang di-Pertuan Agong, Workers' Day, and Malaysia Day.
In the event an employee is required to work on a paid holiday, they shall be entitled to compensation as follows:

Holiday Work	Rate of Pay
Within normal hours of work	2x the Ordinary Rate of Pay
In excess of normal hours of work	3x the Hourly Rate of Pay

- (7) Annual Leave Entitlement (Section 60E).
Employees are entitled to paid annual leave. The minimum entitlement is as follows:

Length of Employment	Annual Leave Entitlement
Less than two years	Eight days
Two to five years	12 days
Five years or more	16 days

- (8) Sick Leave Entitlement (Section 60F).
On the condition that employees provide a medical certificate by a registered medical practitioner, employees are entitled to minimum paid sick leave as follows:

Length of Employment	Sick Leave Entitlement
Less than two years	14 days
Two to five years	18 days
Five years or more	22 days

- (9) Paternity Leave Entitlement (Section 60FA).
Married male employees are entitled to seven consecutive days of paid paternity leave in respect of each confinement for up to five confinements.

Employers must further comply with the provisions as set out in the EPF Act, SOCSO Act, and EIS Act where applicable.

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?

Trade unions, upon receiving recognition (see question 2.1), may negotiate all terms and conditions of their employment, save for the following:

- Promotion.
- Transfers.
- Appointment of employees.
- Termination of employees.
- Dismissal and reinstatement of employees.
- Assignment or allocation of duties to employees.

Collective bargaining can take place at company level and industry level, and may take place between:

- a trade union representing employees and a trade union representing employers; or
- an in-house union with its employer.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Employers can require their employees to conduct their work outside of the workplace, including working from home. Employers may include such terms in the agreement should they so wish; however, no changes to the terms and conditions of employment are required by law.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Section 60Q of the Employment Act entitles employees to apply for a flexible working arrangement, including remote work. However, the employer has the prerogative to allow an employee to work remotely, subject to the business needs and exigencies.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The recognition of trade unions is regulated by the Trade Unions Act and the Industrial Relations Act. Pursuant to Section 10 of the Trade Unions Act, applications for registration of trade unions shall be:

- made to the Director General, and the application shall be signed by seven members of the union.
- accompanied by such prescribed fees; and
- accompanied by a statement containing the particulars of its members, the name of the trade union, the address of its head office, and the titles, names, ages, addresses and occupations of the officers in the trade union.

Further, Section 9 of the Industrial Relations Act imposes a restriction, namely that any trade union whose majority consists of employees who are in a managerial capacity, executive capacity, confidential capacity or security capacity may not seek recognition.

2.2 What rights do trade unions have?

Trade unions are a separate legal entity that are entitled to rights and privileges afforded to it under the Trade Unions Act and the Industrial Relations Act. Upon successful registration, trade unions may:

- bargain with employers collectively on the terms of employment;
- bring proceedings under its name against third parties;
- be sued or prosecuted under its name; and
- take industrial action, such as strikes for the wellbeing of its members.

Registered trade unions are also entitled to protections against civil legal proceedings for any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party.

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

Industrial action, such as strikes, pickets and lock-outs are

regulated by the Trade Unions Act. For instance, pursuant to Section 25A of the Trade Unions Act, trade unions shall not declare a lock-out or shall not go on strike without first obtaining the consent by secret ballot of at least two-thirds of its total number of members who are entitled to vote.

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 Malaysia.

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 Malaysia.

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

This is not applicable in Malaysia.

2.7 Are employees entitled to representation at board level?

There is no entitlement for employee representation at board level.

3 Discrimination

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

The Employment Amendment Act 2022, which came into effect on 1 January 2023, added a new provision under Section 69F, ‘*Discrimination in Employment*’, which grants the Director General the authority to inquire into and decide any dispute between an employee and employer in respect of workplace discrimination. Whilst there is no exhaustive list of prohibited/unlawful discrimination, any employee who feels that he has been discriminated against is entitled to request an inquiry from the Director General.

In the event an employee believes that he has been dismissed on discriminatory grounds, he will have recourse to an unfair dismissal claim (see section 6).

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

Article 8 of the Federal Constitution provides that all persons are equal before the law and there shall be no discrimination against citizens on the grounds of religion, race, descent, place of birth or gender in the appointment to any office or employment under a public authority. However, the applicability of Article 8 in the workplace is exclusively for public sector employees only.

Specific forms of discriminations have also been prohibited, such as the:

- (1) Persons with Disabilities Act 2008 – employers are required to provide persons with disabilities with access to employment, opportunities and remuneration on an equal basis to persons without disabilities.

- (2) Industrial Relations Act – prohibits discrimination against any person in regard to employment, promotion, or any condition of employment or working conditions on the ground that he is/is not a member of a trade union.
- (3) Employment Act – prohibits against the termination of an employee on the basis of her pregnancy.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Section 81H of the Employment Act provides that an employer shall at all times exhibit, conspicuously at the workplace, a notice to raise awareness on sexual harassment.

With the recent enactment of ASHA, which is an Act to, amongst others, raise awareness and prevent the occurrence of sexual harassment, we expect to see an increase in workplace rules and regulations relating to sexual harassment.

3.4 Are there any defences to a discrimination claim?

Defences include, but are not limited to, defences premised on lack of prejudice or business needs.

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

The employee may:

- (1) report the matter to the Director General as a trade dispute, which may then be referred to the Industrial Court (pursuant to Sections 18 and 26 of the Industrial Relations Act);
- (2) terminate their employment contract on the ground of breach of the implied term of mutual trust and confidence by the employer; and/or
- (3) refer the matter to the Director General for an inquiry (pursuant to Section 69F of the Employment Act).

Employers may settle such claims prior to or after the initiation thereof.

3.6 What remedies are available to employees in successful discrimination claims?

In the event of a successful trade dispute claim, employees may be entitled to a restitution of the rights/benefits that they had been deprived of.

In a successful claim for unfair dismissal, the employee would be entitled to back wages from the date of termination of employment to the date of the final hearing in Court, up to a maximum of 24 months back wages.

Where the employee refers the matter to the Director General for an inquiry and the Director General makes an order therein, the employer’s failure to comply with the order will result in a fine of up to RM5,000 or a daily fine of RM1,000.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

‘Atypical’ workers are not entitled to any additional protection. However, pursuant to the Employment (Part-Time Employees)

Regulations 2010, the basic entitlements for a part-time employee may differ and are often less than that of a full-time employee, for instance:

(1) Annual Leave:

Length of Employment	Annual Leave Entitlement (Part-Time)	Annual Leave Entitlement (Full-Time)
Less than two years	Six days	Eight days
Two to five years	Eight days	12 days
Five years or more	11 days	16 days

(2) Sick Leave:

Length of Employment	Sick Leave Entitlement (Part-Time)	Sick Leave Entitlement (Full-Time)
Less than two years	10 days	14 days
Two to five years	13 days	18 days
Five years or more	15 days	22 days

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

Section 7 of the Whistleblower Protection Act 2010 states that whistleblowers shall be protected against detrimental action, which includes disciplinary action or prosecution of the whistleblower. Whilst employers are not mandated to abide by Section 7 of the Whistleblower Protection Act 2010 (unless it is an 'enforcement agency' pursuant to the said Act), it is best practice for employers to apply whistleblowing policies and procedures in its workplace.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Pursuant to Bursa Malaysia's Circular, dated 22 July 2014 [SR/TAC(pt)/LD11/14], listed corporations must disclose in their annual reports the diversity policy for their workforce in terms of gender, ethnicity and age. Unlisted corporations are not required to publish their diversity portfolio.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Pursuant to the Employment Amendment Act 2022, which came into effect on 1 January 2023, female employees shall be entitled to maternity leave of not less than 98 consecutive days.

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

Pursuant to Section 37(2) of the Employment Act, women are entitled to receive their maternity allowance or monthly wages during the period of their maternity leave.

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

Women have the right to resume work as if there had been no

break in employment upon return from maternity leave. Unless agreed upon in the terms of employment, there are no additional legal rights afforded to women who return to work from maternity leave.

4.4 Do fathers have the right to take paternity leave?

A male employee whose wife has given birth is entitled to take seven consecutive days of paternity leave from the date of birth.

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

There are no other parental leave rights prescribed by statute.

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

Employees are not automatically entitled to flexible work arrangements. However, under Section 60P of the Employment Act, employees are entitled to apply to their respective employers in writing, for a flexible working arrangement.

5 Business Sales

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

In a business sale by way of an asset transfer, employees do not automatically transfer to the buyer.

In a business sale by way of a share sale, employees do not automatically transfer to the buyer *per se* as the hiring entity/ employer on paper remains the same entity, but the composition of the owner of the said hiring entity changes.

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

Pursuant to Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980, all existing employee rights would transfer on a business sale, including recognition of previous years of service. This is because, in a business sale by way of an asset transfer, an employer is required to offer the employees a new contract on terms that are '*no less favourable*' than the existing terms and conditions of employment.

Typically, a business sale will not affect the collective agreements unless agreed to otherwise (by both the trade union and 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?

Whilst there are no statutory provisions mandating information and consultation rights on a business sale, it is best practice for an employer to provide information on a business sale to employees of a company.

If a business sale/change of business ownership will lead to the termination of employment, employers must notify its employees of the impending termination of employment in

accordance with their notice period. Failure to inform the employees of an impending change in business ownership does not, in itself, attract any sanctions, but may result in an allegation of bad faith/unfairness if an employee deems that they have been terminated by virtue of a change of business ownership.

There are no obligations to consult employees prior to a business sale, but prior notification is considered best practice.

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

Yes, an employee may be dismissed in connection with a business sale.

Pursuant to Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980:

- (1) a company who purchases a business (“**purchaser**”) is free to choose whether it wants to continue to employ the employees of the business. If yes, the purchaser shall offer the employees employment under terms and conditions that are no less favourable to the employees (as compared to the employment terms and conditions prior to the sale);
- (2) if the purchaser chooses *not* to offer to continue to employ the employees, the contract of service of the employees shall be deemed as terminated; and
- (3) consequently, the employer selling the business (“**vendor**”) shall be liable for the payment of all termination benefits payable under Regulation 6 of the Employment (Termination and Lay-Off Benefits) Regulations 1980, as follows:

Length of Employment	Termination/Lay-Off Benefits
Less than two years	10 days’ wages
Two to five years	15 days’ wages
Five years or more	20 days’ wages

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

Yes, employers are free to change the terms and conditions of employment in connection with a business sale as long as the following conditions are met:

- (1) the new terms and conditions of employment are no less favourable than those under which the employee was employed before the business sale; or
- (2) the employees consent to the said change.

6 Termination of Employment

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

Section 12 of the Employment Act stipulates that notice of termination must be given and shall not be less than the following, depending on the employee’s period of employment:

Period of Employment	Notice Period
Less than two years	Four weeks
Two to five years	Six weeks
Five years or more	Eight weeks

However, an employer may dismiss an employee without notice on grounds of misconduct.

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 garden leave during their 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?

Employees are protected against dismissal that is without just cause and excuse, i.e. unfair dismissal. Section 20 of the Industrial Relations Act provides that an employee who considers himself as being dismissed without just cause or excuse can make a representation in writing to the Director General for reinstatement.

An employee may also be treated as being dismissed if an employer conducts himself in a manner that fundamentally breaches the root of the employment contract, i.e. constructive dismissal. If an employee views himself as constructively dismissed, he may also make a representation in writing to the Director General for reinstatement.

Unless otherwise agreed between an employer and a third party, no consent is required from third parties prior to dismissal.

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

Pursuant to Section 41A of the Employment Act, an employee that is pregnant and/or suffering from an illness arising out of her pregnancy cannot be terminated except on grounds of wilful breach of contract, misconduct or closure of the employer’s business.

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 may dismiss an employee on the following grounds:

- (1) Reasons Related to the Individual Employee:
 - (a) poor performance; and
 - (b) misconduct.
- (2) Business-Related Reasons:
 - (a) closure of business; and
 - (b) retrenchment.

For the purposes of calculating compensation, employers may refer to Regulation 6 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 (see question 5.4 above).

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

For dismissals on grounds of poor performance, whilst there are no exhaustive procedural guidelines, employers are encouraged to practice fair procedure and due process (*Robimi Yusoff v Alfa Meli Marketing Sdn Bhd & Anor* [2001] 6 CLJ 177), which includes, but is not limited to, implementation of a Performance Improvement Plan (“PIP”) in the following manner:

- (1) investigations should be conducted to ascertain the underlying reasons for the employee's poor performance;
- (2) provide the employee particulars of his shortcomings and provide guidelines for improvement;
- (3) determine a reasonable standard of performance;
- (4) provide the employee with a warning of the possibility or likelihood of dismissal from his service if his performance does not improve;
- (5) provide consistent on-going feedback, coaching and training, discussions and supervision to assist the employee to improve his performance; and
- (6) upon completion of the PIP, the employer may exercise its prerogative to dismiss the employee on the grounds of poor performance if the employee's performance maintains below satisfactory levels.

For dismissal on grounds of misconduct, employers are required to conduct a due inquiry (i.e. the right to be heard and to defend himself from any allegations) prior to dismissing an employee. The right to be heard and defend oneself does not necessarily have to be an oral right and can be written, e.g. by way of a notice to show cause. This is to ensure that the employee is given the opportunity to be heard if he is alleged to have committed a misconduct.

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

In the event an employee believes that he has been unfairly dismissed, he may exercise his right to:

- (1) claim for reinstatement and back wages within 60 days of dismissal. If the employer fails to demonstrate that the dismissal was with just cause and excuse, the employee will be entitled to reinstatement (or compensation *in lieu* of reinstatement, which is calculated at the rate of one month's salary for each year of service) and back wages from the date of dismissal to the date of the award, up to a maximum of 24 months back wages; or
- (2) institute civil legal proceedings against the employer for breach of contract, where the remedies are ordinarily limited to payment of notice period.

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

Yes. When an unfair dismissal representation is lodged at the Industrial Relations Department, employees and employers must go through a conciliation stage whereby an Industrial Relations officer attempts to resolve the matter amicably. Should this fail, the unfair dismissal representation will be referred to the Industrial Court where parties are free to amicably resolve the matter at any time.

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

Dismissal of a number of employees at the same time can be referred to as mass or collective dismissal. Where the collective dismissals arise out of retrenchment or business closure, employers must give prior notice to the Labour Department at least 30 days before the termination date pursuant to Section 63 of the Employment Act.

Further, employers should take cognisance of the Last In First Out ("LIFO") Principle and the Code of Conduct for Industrial Harmony as a procedural guideline when conducting collective 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 a mass dismissal, the enforcement of rights by employees are applied in the same manner as in individual dismissals. The consequences in the event of failure to comply with its obligations are also the same as in individual dismissals.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Section 28 of the Contracts Act 1950 prohibits any form of restraint of trade, thus rendering restrictive covenants in employment contracts void and unenforceable.

7.2 When are restrictive covenants enforceable and for what period?

There are no restrictive covenants that are enforceable in Malaysia. However, employers may enforce a breach of confidentiality.

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

This is not applicable in Malaysia.

7.4 How are restrictive covenants enforced?

See question 7.2 above.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Data Protection in Malaysia is governed by the Personal Data Protection Act 2010 ("PDPA"). An employer, who is a data user, is required to comply with the provisions of the PDPA, such as:

- (1) obtaining the consent of employee(s) when collecting personal data;
- (2) obtaining explicit consent of employee(s) when collecting sensitive personal data;
- (3) not disclose/share personal data of an employee with third parties, such as associate companies or sister companies without the consent of the said employee;
- (4) ensure that adequate security measures are in place to protect the information of its employee(s);
- (5) securely destroy personal data of an employee whenever such data is no longer required for the purpose of which it was processed. If an employer wishes to retain the personal

data for future use, fresh consent must be obtained from the employee. This should be read in line with Section 61 of the Employment Act, which requires employers to keep information registers of its employees for a period of not less than six years;

- (6) enable employees to be given access to their information in order to facilitate the updating processes; and
- (7) take all necessary measures to ensure that the personal data is accurate, complete and up to date.

An employer must take extra care in ensuring that the use and retention of employee data is compliant with the PDPA. Employers are not allowed to transfer the data of an employee freely (be it locally or to other countries) without the consent of the employee.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, they do. Employers are to ensure that there is a system in place that allows employees to be given access to their personal information.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, employers are entitled to carry out pre-employment checks on prospective employees with the consent of the prospective employee.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Yes, if the computer system used belongs to an employer, the employer is entitled to monitor an employee's work-related emails and telephone calls.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

An employer may implement terms and conditions or policies to control an employee's use of social media in or outside the workplace. If an employee consents to abide by the terms and conditions of employment, which often includes handbooks and workplace policies, an employee would be required to comply with the same.

For example, in *Mohd Hafizul Abdul Rahim v. Malaysia Airlines Berhad* [2021] 1 ILR 579, the employee was dismissed from service, as he was found to be posting comments on his Facebook page that tarnished the company's reputation. The employee's act of posting defamatory comments on his Facebook page was a breach of the company's HR and Corporate Policy.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

No, there are presently no restrictions on how employers use AI in the employment relationship in Malaysia.

9 Court Practice and Procedure

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

The Labour Court and Industrial Court have the jurisdiction to hear employment-related complaints.

The Labour Court's jurisdiction is in respect of monetary claims, such as claims for unpaid wages by employees. On the other hand, the Industrial Court's jurisdiction is in respect of representations of unfair dismissal, which includes constructive dismissal. The Industrial Court also has the jurisdiction to hear and determine trade union disputes.

Both the Labour Court and Industrial Court comprises a one-member panel. In cases involving trade union disputes, the Industrial Court will comprise a three-member panel (comprising a Chairman of the Industrial Court, one person representing the employer and one person representing the employee).

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Employees do not have to pay a fee to submit an unfair dismissal representation at the Industrial Relations Department/claim for monies at the Labour Department.

An employee can initiate a complaint of unfair dismissal by first lodging a complaint of unfair dismissal at the Industrial Relations Department within 60 days from the date of dismissal. Thereafter, the representation will be fixed for mandatory conciliation, where the employer and employee will try to amicably resolve the matter. If conciliation succeeds, the matter ends there. If conciliation fails, the matter will be automatically referred to the Industrial Court for determination.

At the Industrial Court, an employee may opt to appoint legal counsel at their own expense.

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

The entire process from the lodgement of a complaint of unfair dismissal until the handing down of an award by the Industrial Court would take approximately one-and-a-half to two years.

9.4 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 challenge a first instance decision. All cases registered from 2021 onwards can be challenged by way of an appeal. Prior to that, all first instance decisions could only be challenged by way of a judicial review. Such appeals are usually concluded within one year.



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Messrs. Steven Thiru & Sudhar Partnership is a Firm of Advocates & Solicitors established in May 2018, with a practice focused exclusively on dispute resolution. The members of the Firm practise in a wide array of dispute resolution areas and regularly appear at all levels of the Courts in Malaysia as well as in alternative dispute resolution centres. Our Firm is also committed to serving the requirements of clients in advisory work and other pre-action matters that ensure an effective result in disputes. The Firm is comprised of a dynamic and well-regarded group of practitioners. The two Senior Partners are experienced in dispute resolution and are well-known practitioners in the profession. Mr. Steven Thiru is the 31st President of the Malaysian Bar and Mr. T. Sudhar is the past President of the Malaysian Institute of Arbitrators.

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The principal sources of law to employment relationships in Mexico are the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*), the Federal Labour Law (FLL), applicable case law and the guiding principles of law.

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

All employees are entitled to protection against dismissal, except when there is a justified ground for the termination of the employment relationship.

The FLL distinguishes the following categories of employees:

- **Trust employees.** The FLL contemplates a special category of employees in management positions and other employees in positions of trust. To determine whether employees hold positions of trust depends not only on their titles but also on their actual functions. The law defines functions of “trust” as those that generally pertain to direction, inspection, surveillance and supervision and those who perform personal services for the employer so that they are in personal/direct contact with the employer.
- **Unionised and non-unionised employees.** A unionised employee is defined as any worker who is a member of a legally incorporated union organisation.

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 mandatory in Mexico.

1.4 Are any terms implied into contracts of employment?

Pursuant to the FLL, an employment contract must provide at least the following information: (i) the employee’s complete name, nationality, age, gender, marital status and domicile, federal taxpayer number and Unique Population Code; (ii) whether the term of the employment relationship is for an indefinite term, a defined term, specific job, or initial training, and whether the employee will be subject to a probationary period or seasonal work; (iii) description of the services to be performed; (iv) place or places where the services will be performed; (v) work

schedule; (vi) salary; (vii) day and place of salary payment; (viii) the employee’s training programme; (ix) other provisions that may be agreed between employee and employer, including holidays and vacations; and (x) the designation of the employee’s beneficiaries for the payment of salaries and benefits in case of the employee’s death or disappearance caused by a criminal act.

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

The FLL provides for the following minimum benefits, which may not be waived whatsoever:

- i. **Social Security Benefits:** All employees must be registered with and contribute to the:
 - Mexican Institute of Social Security (IMSS);
 - National Workers Housing Fund Institute;
 - Retirement Savings Programme; and
 - National Fund Institute for Workers’ Consumption, which is a governmental institution that provides financial aid to employees for the acquisition of goods and services.
- ii. **Profit Sharing:** An employer is required to distribute 10% of its annual taxable income among its employees. 50% of such amount is distributed according to the employees’ salaries and 50% according to the days worked in the year. The individual amount payable per employee is capped at three months of the employee’s base salary, or the average profit sharing paid to the employee during the last three years, whichever is more favourable for the employee.
- iii. **Paid Mandatory Holidays:** The FLL requires that employees be paid for government holidays.
- iv. **Vacation Premium:** Employees are paid an extra 25% of the salary to which they are entitled during their vacation period.
- v. **Christmas Bonus:** Employees have the right to a bonus of at least 15 days of their daily base salary, which must be paid by no later than December 20 of 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?

A collective bargaining agreement (CBA) is an agreement that can be entered into between one or more labour unions and one or more employers, in order to establish the labour conditions in the company or workplace.

To fulfil its purpose, the CBA must include at least: the name and domicile of the company and union; the different workplaces

where it is applicable; whether it is for a definite or indefinite period; the work shifts, resting days, and vacations; salaries for unionised employees; clauses relating to training; and minimum bases in order to create joint committees. However, the CBA can also include any other clause agreed between the parties as long as it is not expressly forbidden.

It is important to take into consideration that due to the 2019 labour reform, in order for a union to call to strike requesting the execution of a new CBA or a benefits and salaries revision, the union must either obtain the certificate of representation (proving it has the support of at least 30% of the employees) or to be the union that currently administers the CBA. Furthermore, to be in force, its content must be approved by the majority of employees through their free, personal, secret and direct vote following a special procedure provided for in the FLL.

As a general rule, CBAs usually take place at company level, although they are also common at industry level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

On January 11, 2021, the FLL was amended to include new teleworking (remote work) regulations. These amendments establish new obligations for employers, requiring them to update or implement new policies and employment contracts, as well as to review and update their CBAs and/or internal labour regulations.

Employees are considered under a teleworking modality whenever they are working more than 40% of their work shift on a remote basis by using information and communication technology.

The change from traditional or direct work arrangement to teleworking modality must be on a voluntary basis and agreed in writing, except in cases of proven *force majeure*. In addition, when there is a change in the teleworking modality, both parties have the right to revert to the direct or traditional arrangement.

On June 8, 2023, the Official Standard NOM-037-STPS-2023 was published in the Official Gazette of the Federation, under the title Telework – Conditions of Safety and Health at Work, and sets the obligations to both employers and employees whose labour relationship is agreed upon a teleworking modality and establishes the Safety and Health conditions at the remote workplace. Its enforceability started in December 2023.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

In accordance with the teleworking modality provisions, employees are entitled to work remotely for more than 40% of their working hours from their domicile and/or agreed domicile with the employer.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Article 356 of the FLL defines a union as “the association of workers or employers for the study, advancement, and defence of their respective interests”. It follows from this definition that labour unions may not include both workers and management members.

Labour unions can be organised as follows:

- trade unions, encompassing workers of the same profession, skill or specialty;
- enterprise unions, encompassing workers employed in the same enterprise;
- industrial unions, encompassing workers who work in two or more enterprises in the same industry;
- national industry-wide unions, formed by workers employed in the same industry but located in two or more states (including Mexico City) and various trades; and
- multi-craft unions, established in municipalities that do not have 20 or more workers of the same profession, trade or specialty.

2.2 What rights do trade unions have?

In February 2017, the Mexican Constitution was amended to establish the obligation for unions to prove the representation of workers in order to request the execution of a CBA.

Additionally, in November 2018, Mexico ratified Convention 98 of the International Labour Organization (ILO) and also signed the commercial agreement with the United States and Canada, known as the USMCA (the United States-Mexico-Canada Agreement). Both of these establish provisions for freedom of association and collective bargaining, including a prohibition on any interference by employers in the establishment of workers' unions.

Moreover, on May 1, 2019, a decree amending various provisions of the FLL was published in the Official Gazette of the Federation. The reform radically changed the regulations governing union recognition and collective bargaining in Mexico. Furthermore, the reform implied a radical change in collective labour relations as, for the first time, workers were explicitly granted the right to democratically elect their union leaders through a direct, personal, free, and secret vote, to express their approval of CBAs, the possibility of choosing whether to form part of a union, and whether to pay union fees, among others.

The 2019 reform expressly establishes the obligation and procedure for unions to prove the representation of workers whenever they request the execution of a CBA or whenever they file a strike call demanding the execution of a CBA.

Trade (or craft) unions may enter into their own collective agreements, provided they represent the majority of the workers engaged in that trade within the company.

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

The FLL provides the union's right and procedure to strike (strike call), establishing its conditions, requirements and restrictions.

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 FLL does not foresee the formation of works councils. However, employers are required to establish the following joint (employee-employers) committees:

- Training Joint Committee: Approves training programmes for employees, their scope, duration, content, etc. This committee is mandatory for employers with more than 50 employees.
- Health and Safety Joint Committee: Reviews the company's health and safety measures and procedures and, if necessary, proposes improvement to the same.

- Employees' Seniority Joint Committee: Prepares and approves the list of employees with their seniority, as the support for promotions to higher positions.
- Internal Labour Regulations Joint Committee: Drafts and approves the internal labour regulations that must be filed with the competent labour authorities to make them enforceable.
- Profit Sharing Joint Committee: Prepares and approves the calculation and distribution of the annual profit sharing among employees of the company.

Almost all joint committees must be formed and incorporated by an equal number of employees and employer representatives through the drafting and execution of minutes.

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?

If a company has a union, it shall represent the unionised employees in the matters referred to in question 2.4.

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?

In Mexico, discrimination laws in labour matters are not extensively developed. The Mexican Constitution and the FLL prohibit any type of discrimination against employees. The FLL states that no worker may be discriminated against on the grounds of race, nationality, sex, age, disability, religion, migratory condition, health, sexual orientation, religion, sexual preferences, political opinion or social status.

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

Article 3 of the FLL establishes as a general principle, among other matters, that: "any distinction made against employees based on race, nationality, sex, age, disability, religion, migratory condition, health, sexual orientation, religion, political affiliation or social status is strictly prohibited."

Further, Article 3 of the FLL requires employers to "treat employees with due consideration and avoid mistreatment by word or conduct", while Article 133, Section I prohibits employers from "refusing employment (to an applicant) based on age or gender". Article 164 provides that: "women have the same rights and obligations as men."

The Federal Law to Prevent and Eliminate Discrimination prohibits any discriminatory practice that infringes on the principle of equal opportunity. The federal government's interpretation of this law must be consistent with international treaties on discrimination to which Mexico is a party.

Notwithstanding the above-stated laws and legal provisions, there are no stipulations with respect to concrete sanctions or legal actions, should the employer engage in discriminatory acts. Therefore, regardless of the existence, in paper, of these laws and provisions, the lack of enforcement thereof represents a standstill in the evolution of non-discriminatory legislation in Mexico.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Employers are required to implement a protocol, in agreement with the employees, to prevent gender discrimination, acts of violence, bullying and sexual harassment, and to eradicate forced and child labour.

3.4 Are there any defences to a discrimination claim?

In the event where an employee files a discrimination complaint, in accordance with the applicable law, the employer, and/or the person to whom the alleged discriminatory acts are attributed, will have the opportunity to present evidence and statements regarding the alleged facts.

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

Employees may file a labour claim alleging a constructive dismissal due to being subject to discrimination, abuse, violence and mistreatment with liability for the employer. Moreover, employers are required to investigate these types of conduct at the workplace. The FLL provides that employers cannot allow or tolerate any kind of discrimination and employment harassment at the workplace. Any disputes concerning employment discrimination are exempt from having to fulfil the prerequisite of the conciliation/mediation process before the Labour Courts.

Additionally, employees who allege being subject to discrimination and employment harassment may also file a complaint against the employers before the National Commission to Prevent and Eradicate Discrimination at the Workplace (CONAPRED).

3.6 What remedies are available to employees in successful discrimination claims?

The type of remedy available, or penalty imposed, depends upon the legal authority under which the victim pursues the discrimination claim. An employee alleging sexual discrimination under the FLL is entitled to receive the statutory severance. Employers who violate any of the anti-discrimination provisions shall be subject to a fine of 250 up to 5,000 times the Measurement and Update Unit (UMA) in effect.

An employee who files a complaint with the CONAPRED authorities could seek either a: (a) payment of damages; (b) public warning; or (c) public or private apology.

From a civil standpoint, Article 1916 of the Federal Civil Code (FCC) states that a person must be indemnified in cash for "moral damages" when the feelings, affections, beliefs, honour, reputation, private life, shape and physical appearance of the individual are affected, or in the consideration that others have of such person. Furthermore, the same provision assumes that moral damage exists when a person's freedom or physical or psychological integrity is violated or diminished. Despite

this assumption, in practice it is difficult to prove the essential elements of the action that causes moral damage, taking into consideration its subjectivity.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

By statute, all employees are entitled to the same protection against discrimination. However, the FLL grants extraordinary protection against dismissal to employees with 20 years of service or more.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

In Mexico, there is no specific statutory protection for employees who alert or provide information about possible breaches of the law or good corporate governance policies.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

No, on the contrary, according to the Mexican Federal Law on the Protection of Personal Data Held by Private Parties (the Data Privacy Law), any employer acting as a Private Party must guarantee the protection of any personal data under its management, since only the individual whose personal data is being managed can decide on the treatment it is given.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Working mothers are entitled to a fully paid leave of six weeks prior to their approximate delivery date and six weeks thereafter. Four of the six pre-childbirth weeks can be transferred to the post-childbirth period, at the request of the working mother and approval of the employer.

Statutory maternity leave may be extended as necessary if work is not possible because of the pregnancy or the delivery.

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

The employee’s salary during such maternity leave will generally be covered by the IMSS. However, if the employee does not comply with the requirements established by the social security law, the employer will be responsible for paying the employee’s salary during the maternity leave period.

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

During the nursing period of six months, the new mother is entitled to two additional 30-minute rest periods per day to feed the child in an adequate and hygienic place set aside by the employer. When returning from maternity leave, the employee is entitled to reinstatement, provided that not more than one year has passed since the delivery date. There is a proposed bill

to amend the nursing period from six months to two years, but it is pending approval.

4.4 Do fathers have the right to take paternity leave?

Male employees are entitled to enjoy a paid paternity leave of five days from when the child is born or, in case of adoption, as of the placement of the child. This payment is not covered by the IMSS. There is a proposed bill to amend paternity leave days from five to 20 working days.

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

Workers with children diagnosed with cancer are entitled to leave of absence. A leave certificate issued by the IMSS will be valid for up to 28 days. The IMSS may issue as many leave certificates as needed within a three-year period.

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

The FLL does not provide any type of work flexibility to employees who have the responsibility of caring for dependents; however, employers and employees may agree on paid or unpaid leave.

5 Business Sales

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

In connection with the sale of a business or transfer of undertaking, the FLL generally requires the acquiring entity to retain the selling entity’s workers, as well as to assume existing benefit liabilities, regardless of whether the benefits are privately sponsored (e.g., company-sponsored medical insurance) or legally mandated (e.g., paid vacation and vacation premium). This is known under Article 41 of the FLL as a substitution of employer.

As a corollary of this retention obligation, the acquiring entity must recognise the workers’ length of service, to ensure that changes in the legal structure or the ownership of the employer do not undermine the workers’ vested rights. If the sale of a business in Mexico is structured as a stock purchase or a merger agreement that does not affect the seller’s corporate entity, a substitution of employer does not come into play. In these cases, the buyer automatically becomes the employer of the seller’s workers.

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

Article 41 of the FLL likewise contemplates the continuity of work relations in the event of an asset sale. When the buyer or substitute employer assumes the workers’ terms and conditions of employment in effect prior to the substitution, the FLL does not require consent from, or consultation with, the workers. For a substitution of employer to apply, pre-substitution terms and conditions of employment – as established in the individual employment contract or collective agreement – must remain unaltered. If the substitute employer unilaterally implements detrimental changes to existing employment conditions, the

employee can rescind the employment relationship and demand statutory severance. During the first six months following an employer substitution, both employers remain jointly liable for labour claims.

With respect to collective agreements, in case the business is sold including assets and liabilities, the union will remain as the employee's rights representative, and continue to be a part of the 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?

Under the FLL, there is no obligation to consult employees in connection with a business sale. However, it is recommended to informally approach the union (if any) to avoid disruption with it.

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

No, employees cannot be dismissed in connection with a business sale.

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

Please see 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?

If an employer terminates the employment relationship with just cause, the employer must notify the employee of the termination and reasons for it by providing appropriate notice directly to the employee or through the competent labour authority. Employers must provide this notice to the employee within 30 days as of the date on which the employer became aware of the acts that allegedly justify 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?

Mexican legislation does not provide for garden leave.

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 may dismiss an employee only where the latter gives cause for dismissal. Under Mexican labour law, "integrity at work" is mandatory behaviour for the employee. An employee is deemed to act with integrity when the work is carried out with intense effort, care and attention, in the agreed-upon time, place and manner. "Lack of integrity" is a generic cause for dismissal.

Additionally, Article 47 of the FLL specifies kinds of conduct that are causes for dismissal.

For trust employees, Article 185 of the FLL provides that this type of employee may be terminated with cause if there is a reasonable cause for loss of confidence.

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?

In the case of employees with a seniority of 15 years or more, the termination of the employee can only be executed due to a severe cause.

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 are entitled to dismiss for reasons related to the individual employee where the employment relationship has just cause (as defined under the FLL).

In addition to termination with or without just cause, the FLL recognises that the labour relationship may be terminated for business-related reasons in the following circumstances (among others):

- by termination of the specific job or the term of the capital investment;
- by the self-evident non-profitability of the operation;
- by *force majeure* or acts of God; or
- by legally declared insolvency or bankruptcy.

If an employment relationship (for an indefinite term) is terminated "without cause", the employee will be entitled to a severance payment equivalent to:

- a. three months of aggregate salary;
- b. 20 days of aggregate salary per each year of services (*pro rata* for partial years); and
- c. seniority premium equal to 12 days of salary for each year of service rendered, with a limitation of up to twice the minimum wage in effect (*pro rata* for partial years), and mandatory fringe benefits paid in arrears as of the date of termination (e.g., outstanding vacation days, vacation premium, proportional Christmas bonus, saving fund, food coupons, etc.).

Severance payment for employees hired for a definite term in the case of termination without cause is different to that of employees hired for an indefinite term.

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

Please see question 6.1.

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

According to the FLL, employees who have been wrongfully terminated can file a complaint with the competent labour authority for: (a) the payment of statutory severance; or (b) reinstatement to the same position he held, plus back wages (which is the salary the employee is not earning during the

labour proceedings capped to one year; if the litigation is not concluded after 12 months, the plaintiff will be entitled to request 2% monthly interest over a 15-month salary base).

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

There is a conciliation stage with the relevant Conciliation Centre before taking their dispute to the Labour Courts, and if the parties reach a settlement, they must execute an agreement that will be deemed as a final judgment not subject to appeal. Also, parties may reach an agreement during the litigation process (before the final judgment is issued).

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

According to the FLL, there must be a legally permitted cause of termination that substantiates the collective dismissal. The severance payment and the subsequent procedure will be determined depending on the cause.

The first step is to determine whether the company has unionised workers and confidential employees. If it does, the working conditions of the union workers are governed by the CBA. Therefore, both the termination of the union workers and the CBA must be negotiated with the union.

The aggregate salary of union workers must include: (1) the base salary; (2) any other benefit in cash or in kind (such as life insurance, savings fund, food coupons, vacation premium, year-end bonus, etc.); and (3) any other benefit provided to the employee for services rendered.

In practice, some labour unions claim the payment of a four-month indemnity plus 20 days of aggregate daily salary for each year of services rendered, arguing that the termination of the employment relationship is a consequence of the implementation of new working procedures by the parent company. In other cases, the union claims an additional premium for the closing of industrial operations that may represent an additional percentage to the indemnity contemplated by law.

Upon conclusion of the negotiations, an agreement will be filed before the competent labour authority for the liquidation of all union workers. The above will enable the employer to freely dispose of its real estate and goods (machinery, raw materials, buildings, etc.). Additionally, it is common practice to liquidate confidential employees using the same basis as for the union workers. In some cases, those who actively participate in the closing operations will receive a “stay-on” bonus.

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?

Please see question 6.9.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Although Mexican legislation does not provide for a specific concept of restrictive covenants, they may be defined as any contract, covenant or agreement having as scope the restriction,

loss or irrevocable sacrifice of personal freedom. Mexican law does not expressly prohibit clauses or covenants of this nature during the employment relationship. In fact, if a worker engages in activities that result in competition against the employer's business during the course of employment, that conduct would constitute just cause for termination of the work relationship, even in the absence of a non-compete covenant.

Non-competes, non-solicitation of customers and non-solicitation of employees are clear examples of restrictive covenants. Execution of restrictive covenants has become more common in Mexico as a means to protect the employer's confidential information and trade secrets, as well as to ensure the companies' right to loyal competition.

7.2 When are restrictive covenants enforceable and for what period?

In principle, restrictive covenants are only “enforceable” during the employment relationship as a cause for termination and without liability on the employer. From a labour standpoint, post-employment restrictive covenants are null and void under Mexican legislation and, therefore, unenforceable; the only possibility for “enforcement” is before the Civil Courts as explained above.

Non-compete may be incorporated as one among various clauses in an individual work contract, or may take the form of an altogether separate or standalone agreement between the employer and the worker.

On the other hand, both the validity and enforceability of non-compete covenants – which seek to survive an individual's work relationship – are more difficult to ascertain. The Mexican Constitution protects its citizens' freedom to engage in lawful work. Moreover, the FLL expressly provides that work constitutes a “social right and duty” and, as such, to “preclude any person from carrying out work, or from engaging in a profession, industry or trade of choice, so long as it is lawful”, is not permitted in principle.

As a general rule, other than the self-evident requirement that the work, profession, industry or trade be considered lawful, the right to freely choose work may only be limited or denied “by resolution of competent authority when the rights of a third party are infringed, or when those of society are offended”. Notwithstanding the foregoing, pursuant to an opinion issued by a Circuit Court on Civil Matters in Mexico City, non-compete covenants are fully enforceable provided they are limited in time, geographical scope, clients and activity, products and services, and consideration is paid in exchange.

Mexican employers that require certain workers to enter into non-compete covenants must narrow down the scope of the worker's post-employment restrictions by: (a) setting limits to the duration of the covenant, such as a maximum of one year after the conclusion of the work relationship; (b) defining the type of competitive activities from which the former employee is to refrain; and (c) specifying the competitors and the geographic area or market segment in which the former worker cannot accept employment.

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

Employers must make a payment to the former worker in exchange for the commitment not to engage in direct competition with its business.

Another alternative for the parties is to agree on dividing an overall payment into periodic “instalments” after pre-defined

periods have elapsed in which the former worker has opted not to accept employment with a competitor or to engage in direct competition.

7.4 How are restrictive covenants enforced?

If the non-compete and non-solicitation agreement is declared null and void for the reasons provided in Article 5 of the Mexican Constitution, both parties can retrieve their prior status, meaning the employee will be requested to pay back any and all moneys received for performance of the obligations established in the agreement. The employer could also exercise a civil action claiming damages derived from such infringement or even take criminal action if the employee had access to confidential information and/or trade secrets while performing his duties. Note that an injunction to prevent someone from rendering services or working in a certain field or activity cannot be issued because, as mentioned above, Articles 5 of the Mexican Constitution and 4 of the FLL bar such relief.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The Data Privacy Law governs the legitimate, controlled and informed treatment of personal data to guarantee the individual's privacy and their entitlement to decide who, why and for which purposes their personal data may be processed (informational self-determination). There is a reasonable expectation of privacy in every data processing, being understood as the confidence that any person deposits in another regarding the personal data provided.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, employees have the right to access their own personal data held by the employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, in accordance with the Data Protection Federal Laws in Mexico. Note: In Mexico, criminal background checks are only allowed for certain positions (i.e., finance).

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Yes, subject to the employee's written consent and that the monitoring is carried out through a working tool (provided by the employer).

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Under the FLL, employers cannot control an employee's use of social media in or outside the workplace.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

No, Mexican legal framework does not regulate the use of AI in the employment relationship.

9 Court Practice and Procedure

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

Under the 2019 reform, the local or federal labour conciliation and arbitration boards are being replaced by Labour Courts and the Conciliation and Registration Centre at a local and federal level.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Conciliation Centres at a local level are in charge of a mandatory conciliation process before going to litigation for disputes at a local level. A Federal Conciliation and Labour Registration Centre was created, in charge of the referred mandatory conciliation process at a federal level and for the registration of unions, CBAs and internal labour regulations.

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

After the 2019 labour reform, employment-related complaints take from six to eight months to reach a conclusion.

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

Yes, an "*Amparo*" Motion (*Habeas Corpus*) may be filed against a first instance decision. Generally, it takes a six-month term to be resolved.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

In the Netherlands, sources of employment law primarily include the Dutch Constitution, (civil) law, numerous Acts, jurisprudence, labour regulations, collective labour law and collective labour agreements. Thanks to the court of labour disputes, case law has been a pertinent source of Dutch employment law. Furthermore, the EU has had a significant supplementing role due to binding legislation, complemented by the jurisdiction of the European Court of Justice.

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

Dutch employment law regulates the legal relationship between employees and employers. It is, therefore, exclusively applicable to employees with an employment contract.

In cases such as incidental labour for changing principals (freelance work), one is, in principle, not covered by employee protective laws. Furthermore, workers appointed as civil servants also do not enjoy the rights given under employment law.

Under Dutch employment law, blue-collar and white-collar employees enjoy equal 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?

In principle, Dutch employment contracts are not required to be in writing and can thus also be concluded verbally.

However, the employer is legally obliged to inform the employee on the essential terms within one month after entry into service. This information must be given in writing and includes the function of the employee, the duration of the contract (fixed or indefinite) and general provisions on social security.

Evidential value is, however, attached directly to the statement when the employee, at the employer's request, signs and returns the statement, provided that the employee considers it to be correct. The employer's failure to make the statement can later be used against the employer in proceedings concerning what was agreed between the parties.

1.4 Are any terms implied into contracts of employment?

Besides the typical provisions that all contracts of employment

shall contain, Dutch civil law obliges the parties to comply with behaviour that is to be expected from a good employee and employer.

An employer shall equally treat all work that was performed in equal circumstances. Furthermore, an employer shall generally enable and safeguard an environment for his employees to execute the labour that was agreed on. The obligations that rest on employees include being bound by discretion and loyalty towards the employer, following instructions/behavioural codes, and, incidentally, working overtime.

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

Yes. The minimum employment terms and conditions that are mandatory to follow include, but are not limited to:

- (1) a minimum age of employment (starting from 13 years old with limitations; from 18 years old – no limitations);
- (2) as of January 1, 2024, employers are required by law to pay at least the minimum hourly wage to all workers (for workers under 21, a minimum youth hourly wage, which is derived from the statutory minimum hourly wage);
- (3) a maximum of work hours per week and day (12/day, 60/week);
- (4) a minimum rest period after work (11 consecutive hours);
- (5) pregnancy and maternity leave (up to 20 weeks);
- (6) paternity/partner leave (up to six weeks: first week to be used within one month after birth; the subsequent five weeks to be used within six months after birth). Since August 2, 2022, partially paid parental leave is available (the first nine weeks of parental leave will be partially paid);
- (7) sick leave (up to two years, 70% of the wage is paid);
- (8) short-term care leave (up to two times of contractual working hours per week within 12 months);
- (9) long-term care leave (up to half the number of hours the employee works in 12 weeks);
- (10) emergency leave (varies);
- (11) notice of termination (one month in the first five years of employment, after that it is more);
- (12) paid holiday entitlement (four times the weekly number of days/hours per year);
- (13) transitional allowance (due at termination unless the employee terminates the employment unilaterally);
- (14) when an employer is required by law or the collective labour agreement to provide certain training to the employee, the employer must pay for this and the training must be possible during working hours; and
- (15) an employer may also not prevent an employee from working outside the work schedule for another employer, unless there is an objective justification for doing so.

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 vast majority of employees in the Netherlands enjoy pay and conditions that stem from collective bargaining. The Dutch Ministry of Labour registers collective agreements. Traditionally, the negotiators follow what has been agreed at the national level, including the recommendations. Agreements at industry level account for the vast majority of collective bargaining. However, big corporates have their employees covered by company collective agreements.

Terms and conditions of employment agreed through collective bargaining are prohibited to deviate from coercive law, e.g., the Dutch Civil Code and several Acts.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

According to the Working Conditions Act, an employer must include every workplace in the working conditions policy, including the home workplace. However, the employer retains his right to instruction: the right to determine how work is performed and, most importantly, where.

A “work from home contract” is an addition to the employment contract. If the employee regularly works from home, it is wise to make a “work from home agreement”. It lays down the most important agreements about working from home.

Moreover, the employer has an obligation to set up a proper home office.

When an employer is established in another country than the country of residence of the employee

Employees who live in a country other than where the employer is established and work from home are almost always liable to pay tax on (part of) the salary in the country of residence. In addition, the social security position of employees normally changes from 25% working in the country of residence to that country.

Dutch employers in such situations have to pay social security contributions and possibly tax on the employee's salary according to the legislation of the employee's country of residence. The employer is then usually required to keep local payroll records (in addition to Dutch payroll records).

Additionally, the labour law of the employee's country of residence may become applicable to the employment relationship if that country becomes the employee's “usual country of work”. Often, the employer is not familiar with foreign labour law, while it may differ considerably from Dutch law.

Tax consequences

Depending on the powers and activities performed by the employee and the qualification of the “home office” in the country of residence, there may be a permanent establishment for tax purposes. This triggers not only a local tax return obligation for the employer, but possibly also local taxation on the profits. The part of the profit on which the company pays tax varies from one situation to another and can lead to discussions with the tax authorities.

Tax consequences must be taken into consideration when agreeing to hybrid working/working from home if the employee is living in another country. In case of a tax treaty between

the country of residence and the country of work, the tax treaty determines which country has the right of taxation on (part of) the income.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Last year we reported on the Work Where You Want Act, an initiative that was supposed to regulate that the employee can request an adjustment of their place of work, such as the residential address, and the employer had to treat the request in the same way as a request for adjustment of working time or working hours.

However, completely unexpectedly, the Senate rejected the law on September 26, 2023. The Senate believes employers and employees will come to an agreement on working from home in practice. A law, according to the Senate, is not needed for that.

It is, therefore, a matter of reaching a mutual agreement on this issue. When an agreement is reached, it is advisable to prepare an addendum setting out the agreements so that there can be no doubt about them.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The Dutch Constitution guarantees the right to freedom of association and assembly. The only condition imposed upon trade unions to take part in collective bargaining agreements is legal recognition and the aim constituting the promotion of their members' interests and the closing of collective bargaining agreements. Moreover, the right to join a trade union and conclude collective bargaining agreements is laid down in various conventions of international organisations, such as the International Labour Organization.

2.2 What rights do trade unions have?

First and foremost, trade unions in the Netherlands are expected to protect and safeguard the interests of their members with regard to wage development, social security, employment protection and safe working conditions, etc.

One of the most efficient tools that trade unions have are collective bargaining agreements and their say in the establishment of such.

Furthermore, termination cases concerning more than 20 employees within the same company (collective termination) will only be approved by the court when a social plan is formulated in cooperation with a trade union.

Dutch trade unions have yearly negotiations with cabinet members and employers' organisations concerning the development of wages and social security.

Lastly, members of Dutch trade unions have a seat on the Economic and Social Council.

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

Collective bargaining agreements commonly contain a clause obligating a trade union to enter into consultation and provide its opponent with its demands before turning to action. The right to

strike in the Netherlands is based on the European Social Charter (ESC) and shall be utilised as the “*ultimum remedium*” and thus be assessed on the principles of proportionality and subsidiarity. Additionally, the strike requires a timely notice. Trade unions in the Netherlands enjoy these rights and have the competence to initiate and organise a strike on behalf of the employees.

The Dutch High Council has ruled – in accordance with the ESC – that the right to strike can only be restricted when this is necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.

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?

Companies and organisations with 50 employees or more are required to have works councils. Those with more than 10 but fewer than 50 employees are obligated to have staff representatives when a majority of the employees wish so. To exert involvement in the course of companies, works councils have been given several rights that include the right of consultation on relevant decisions, the right of assent on human resources, the right to initiative on internal matters and the right to speak at the shareholders’ meetings.

The works council is responsible for organising elections for representatives and has the option to delegate this power to an electoral commission. The works council regulation contains the electoral system, a voting procedure, a list of employees that are running and the persons entitled to vote.

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 with regard to determining, amending or withdrawing staff regulation. This includes the increase or reduction of working hours, social welfare matters (pension systems), labour conditions, holiday entitlements and sick leave.

However, the works councils’ co-determination rights are not applicable insofar as the concerned matter has been regulated in collective bargaining agreements.

Lastly, when the employer has not received the works councils’ consent, the cantonal judge (*kantonrechter*) has the right to nevertheless approve the decision.

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

While both have their respective competences, there is some common ground between Dutch trade unions and works councils.

Trade unions are a negotiating party at the foundation of a works council. The first task of the works council is setting up the Rules of Procedure. Once this has been concluded, the trade union must be offered the opportunity to be informed and heard with regard to the Rules of Procedure. This means that trade unions can make remarks and give suggestions.

Furthermore, the trade union must be provided the opportunity to nominate candidates at works council elections. These candidates may be a member of a trade union; however, this is not required.

2.7 Are employees entitled to representation at board level?

Companies with more than 50 employees are required to establish a works council. The works council ensures the representation of employees at board level and has several competences such as the right to provide advice on significant decisions and measures and the right of assent on employment condition amendments.

Companies with 10 to 50 employees are required to establish a works council or staff representation when the majority of employees would demand so. When the employees of such a company have not established either, the employer is obligated to initiate staff meetings. The staff meeting has the right to advice on several matters. Please see question 2.4 above.

3 Discrimination

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

The Act on Equal Treatment is one of the main sources for the enforcement of discrimination prohibitions and equal treatment in the Netherlands. This Act prohibits discrimination on grounds such as race, religion and belief, political affiliations, gender, pregnancy, sexual orientation, nationality and civil/marital status.

The Dutch Civil Act obligates employers to ensure a working environment free of discrimination. In principle, distinctions based on the aforementioned grounds are prohibited and would only be permitted when underlined by an objective justification.

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

Dutch law differentiates between direct and indirect distinctions.

Direct distinction is based on the “suspected” trait (such as gender, religion, race). Discrimination by employers by direct distinction is always unlawful, unless there is an objective justification or the law prescribes otherwise.

Indirect distinctions are based on a trait that is theoretically neutral but would practically coincide with a certain population group. Indirect distinctions are lawful when based on an objective justification. The distinction would need to serve a legitimate aim, reached by proportionate and necessary measures.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Employers are obliged – under the Working Conditions Act – to implement a working conditions policy to ensure that sexual harassment is prevented or, if that is not possible, at least limited as much as possible. To be able to do this properly, organisations are required to map all occupational health risks, including sexual harassment, in the risk inventory and evaluation (RI&E). The action plan, which is based on the RI&E, must include what the company is going to do to prevent the identified risks. The employees concerned must be informed about the risks and measures taken by the company. The employer must demonstrably carry out all these actions. A general prohibition of sexual harassment is included in the Dutch Civil Code. This is understood to mean “any form of verbal, non-verbal or physical behaviour with a sexual connotation that has the purpose or effect of compromising the dignity of the person, in particular when a threatening, hostile, abusive, degrading or

hurting situation becomes created". On that basis, it is possible for a victim to claim damages from the offender through the courts or to enforce other measures on the employer.

Moreover, a bill to make access to trustees mandatory for employers with more than 10 employees is now before the Senate. This proposal requires employers to appoint a confidential advisor, thus reducing undesirable behaviour in the workplace and creating a safe working environment for all employees. The proposal also provides for the possibility of appointing an external person as a confidential advisor; this may be a way out, especially for small organisations that cannot arrange this internally. Furthermore, the bill regulates some basic tasks of the confidential advisor and strengthens the legal status of the confidential advisor in organisations.

If adopted, the bill would oblige employers with at least 10 employees to provide staff with access to a confidential advisor.

3.4 Are there any defences to a discrimination claim?

As mentioned before, the defence to a discrimination claim must be an objective justification. The distinction must meet four criteria: the aim must be *legitimate*; the means to reach the aim must be *appropriate*; the means are proportional to the aim; and the measure taken is *necessary* (a less invasive distinction is impossible).

When the distinction is objectively justified, a Dutch court or the Netherlands Institute for Human Rights will rule that a prohibited distinction is not in question.

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

A complaint regarding discrimination can be filed at the Netherlands Institute for Human Rights. The complaints procedure is partially in writing and verbal. The complaint must be filed in writing. Once the Institute has collected enough information and heard the (candidate) employer, the formal inquiry (hearing) will take place. Within eight weeks after the hearing, the Institute will render a verdict. While the verdict is not legally binding, employers must follow the judgment in the vast majority of cases.

For a legally binding judgment, the civil court needs to be involved. The civil judge is obligated to consider the ruling of the Institute. The claim usually consists of compensation for material and immaterial damage.

The court will often attempt to move both parties towards a settlement. When this fails, the court will give their verdict in writing after approximately four weeks. Both parties have the right to appeal against the decision of the court.

3.6 What remedies are available to employees in successful discrimination claims?

The most common remedy that is available to employees is compensation for material as well as immaterial damage as a consequence of the discrimination. Furthermore, the employee in question has the right to reintegration into the organisation or in their function under the same working conditions.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

All employees – even with a fixed-term contract – are generally provided with the same protection and enjoy equal rights.

However, employees such as those who are pregnant, a member of a works council or an individual on sick leave enjoy additional protection with regard to termination of contracts. Furthermore, employees with an open-ended contract can count on added protection when exchanging their contract for a fixed-term contract.

It is compulsory to make an offer to on-call workers who have worked on an on-call basis for 12 months. This offer must be based on the average number of hours worked in the previous 12 months. The on-call worker then has one month to accept this offer. The Collective Labour Act SZW 2021 stipulates when this fixed scope of work must take effect if the on-call worker accepts this: at the latest, on the first day after two months have elapsed after the 12 months for which the average working hours have been calculated.

Adequate pension scheme for payroll employees

Since January 1, 2021, payroll employees have been entitled to the same basic pension scheme as staff in equivalent positions or to an alternative that meets a number of requirements. This means, in a number of cases, that the payroll company has been obliged to set up a pension scheme since 2021. The Balanced Labour Market Act (*Wet arbeidsmarkt in balans* – WAB) has appointed a number of minimum conditions for this:

- No waiting period or threshold period before pension accrual starts.
- A provision for both a retirement pension and a survivor's pension.
- The collective employer's contribution amounts to at least 15.4% of the pension base sum of the payroll employees who are entitled to a pension scheme.
- The costs of the pension scheme are borne by the payroll company but can be passed on to the hirer.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Act requires employers with 50 employees or more to draw up a procedure for reporting (a suspicion of) an abuse to his employer. The employer investigates the abuse and, if necessary, takes measures. The law stipulates that at least the following must be included in the whistle-blower procedure: (i) how the internal report is handled; (ii) when there is an abuse (based on the legal definition); (iii) to which officer an internal report must be made; (iv) that the report is handled confidentially if the reporter indicates that he wants it to be treated as confidential; and (v) that the employee can trust a consultant to seek advice. The employer is also obliged to inform all employees in writing or digitally about the points mentioned above, the circumstances under which they can make a report externally, and about the legal protection in the event of a report. Also note that the works council has the right of consent to the internal reporting scheme. It is advisable to involve the works council as early as possible in the realisation of the scheme.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

In the Netherlands, on March 7, 2019, the bill "Equal Pay for Women and Men Act" was introduced. The initiative bill aims to put an end to unequal pay between men and women. Companies with more than 50 employees are required to provide information

on gender-based pay differences in comparable positions to the works council and in the annual report. A certification system is to be established, making it mandatory to report salary data for employees every three years. Companies with over 250 employees must obtain a certificate demonstrating equal pay for men and women. In cases of unequal pay, the employer is given the opportunity to rectify the situation. Failure to do so may result in fines. However, it is important to note that the initiative bill has not been adopted by the House of Representatives yet.

The EU, however, has tackled this issue with the EU Directive on Pay Transparency, which was published in the EU Official Journal on May 17, 2023. Under this directive, EU companies will be required to exchange information on how much they pay women and men for work of equal value. EU companies must take action if the gender pay gap within their company exceeds 5%. The new directive also includes provisions for compensation for victims of wage discrimination and sanctions, including fines, for employers who violate the rules.

For the Netherlands, this means that the legislation will be in effect no later than 2026.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Maternity leave prior to the predicted due date in the Netherlands lasts six weeks. Following childbirth, maternity leave lasts 10 weeks. Thus, the right to paid maternity leave makes up for a total of 16 weeks.

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

As an employee, one has the right to maternity benefits while on leave. Self-employed pregnant women can apply for special benefits at the Institute for Employee Benefit Schemes. Furthermore, an employer is not permitted to terminate the contract of a pregnant woman. This includes the period of 16 weeks during and an additional six weeks after the maternity leave.

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

Up until six months after childbirth, the woman has the right to extended breaks, appropriate resting areas and no obligation for overwork or nightshifts.

When the work has an unacceptably high safety risk for the pregnant woman, the employer is obligated to offer different temporary work. Whenever this appears impossible, the woman has the right to sickness benefits.

Furthermore, as of August 2022, the Dutch Government has introduced nine weeks of partially paid parental leave. The aim of this extension is to give both partners the opportunity to spend time with their child in the first year after birth. In addition, the leave can ensure a more equal division of work and care tasks between parents. During these nine weeks, parents are entitled to benefits of up to 70% of the maximum daily wage. The collective agreement or employment contract, however, may stipulate that employers supplement the paid parental leave benefit.

4.4 Do fathers have the right to take paternity leave?

In January 2019, a new Act granted fathers/partners in the

Netherlands five paid days of “childbirth leave” that ought to be used within the first four weeks after the childbirth. Besides these five days, from July 1, 2020 onwards, the Act also ensures an additional five weeks of partner leave to be utilised in the first six months after childbirth. During these five weeks, partners have the right to a benefit amounting to 70% of the wage. Please see question 4.3 above, where partially paid parental leave is discussed.

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

The right to parental leave in the Netherlands consists of 26 times the number of hours the parent works a week, comprising 1,040 hours within a working week of 40 hours. The right to parental leave can only be enjoyed when the child is under the age of eight years old. See questions 4.3 and 4.4 above where partially paid parental leave is discussed.

The person entitled to parental leave has the right to keep their own position with the working hours as stated in the employment contract. In principle, the parent is free to decide how and when to take their leave of absence. The employer must respect the distribution of hours the employee wishes to have, save for cases where this would severely harm the company.

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

The Work and Care Act allows employees to request from their employer a temporary adjustment of the working hours. After the leave of absence, the employee is entitled to work on adjusted hours for a period of one year unless another period has been agreed on.

Furthermore, the Act on Flexible Work – only applicable to employers with more than 10 employees – ensures employees who have been in service for over six months – under certain formalities – the right to work part-time. An employer can only decline the request to work part-time in the case of overriding interests that could negatively affect the company on financial, safety and/or organisational grounds.

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 transfer of the undertaking or when an autonomous part of the business gets transitioned to a buyer, the employee gets automatically transferred. The employee’s legal position towards the transferor remains similar towards the buyer.

The undertaking is transferred when the buyer is considered to be the one who ensures the continuation of the business. Moreover, there must be an economical entity that has its “identity” maintained. An economical entity shall be seen as a set of organised resources, intended to execute a (primary) economic activity. Whether the identity is maintained depends on several criteria: the nature of the concerned business; the transition of fixed assets and compliant registers; the duration of a potential disruption; and lastly, the similarities between the business activities before and after transfer. When ruling whether the identity has been maintained, Dutch courts are not obliged to base their judgment merely on the aforementioned criteria.

When only shares are subject to the transaction, the employee does not automatically transfer to the buyer but stays employed by the same legal entity. This is equally applicable to share mergers.

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

In the event of a business transfer, the rights and obligations of an employee arising from the employment contract will transfer from the transferor to the buyer. Consequently, not only do employees keep their position, but also the wage, overtime compensation, travel allowance, bonuses and secondary labour conditions as agreed upon in the contract are safeguarded.

With regard to collective agreements, the existing one stays applicable. Depending on the collective agreement that was applicable at the business of a buyer, this could result in different collective agreements that are applied within a business. Economical, technical or organisational interests can form a ground to permit unilateral amendments to 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?

Based on the law, the works council has a right of advice with respect to, among other things, intended resolutions to take over or merge. The employer must inform the works council about the possible consequences this decision will have for the employees. The employer has the obligation to submit the proposed decision to the council in writing and to request advice at such a time that the advice can have a substantial influence on the decision to be taken.

If the decision taken by the employer is not in accordance with the advice of the works council, the council can go to court. This also includes the case in which the works council was not consulted by the employer where it should have been consulted.

The works council can also go to court if facts or circumstances, had they been known to the works council at the time of issuing the advice, would have caused the council not to issue that advice as it was issued.

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

Business sales do not form a ground for the transferor or the buyer to dismiss employees. The transfer brings the employees to the service of the buyer by operation of law.

Transfer of an undertaking is a delicate area, which needs proper attention by a trusted employment lawyer.

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

In the event of a business sale, employees keep their rights and obligations. Generally, employers aim to treat their existing and transferred employees equally. This is permitted, as long as the transferred employees do not regress in terms of employment conditions. Therefore, the employees are guaranteed to at least have their current wage, bonuses, leave entitlements, labour years, etc., secured.

The conditions can be changed to their benefit, but a “comparison of entire packages” before and after, which can lead to worse conditions on certain topics and the improvement of others, is not permitted.

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 who wishes to terminate his employees' contract must take notice of termination into account. The notice of termination must be given in writing and starts once the notification has reached the recipient.

Collective bargaining agreements contain provisions on the notice of termination. When no period has been laid down, the legal term is applicable. The longer an employee has been in service, the longer the notice of termination. This varies from a notice period of one to four months.

The notice period can be extended by agreement between employee and employer, and concluded in writing. Shorter notice periods are only permitted when this is laid down in a collective bargaining agreement.

Be aware that a termination notice, even if containing the correct notice period, does not terminate the employment. Very strict procedural rules must be observed.

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 cannot unilaterally require employees to serve a period of garden leave. The employee needs to explicitly agree upon the leave, including additional arrangements concerning costs and compensations.

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?

Besides the legal notice of termination, certain categories of employees can be entitled to protection against dismissal and termination benefits. Furthermore, Dutch law knows a general prohibition on termination of the employment contract. This prohibition forces an employer to obtain written consent by an employee or the Employee Insurance Agency (UWV). With the UWV's consent, the employer may receive a permit for dismissal that enables the employment contract to be terminated.

The UWV or the cantonal court will adopt a “preventive test” to assess whether there is a reasonable cause for the dismissal or a possibility for reinstatement. Grounds for dismissal could constitute structural incapacity to work, prudential reasons, labour conflicts or inadequate performance.

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

Several categories of employees enjoy special protection against dismissal under Dutch law.

During sickness and pregnancy (and maternity leave), an employee is protected against dismissal. An employee who has a seat on a works council is also protected against dismissal. As discussed in section 3 above, an employment contract cannot be terminated when influenced by discriminatory distinctions.

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 Dutch Civil Code prescribes that employers can dismiss employees when there is a reasonable ground and reinstatement of the employee – albeit through schooling in another suitable position – is impossible within a reasonable term.

A reasonable ground could be constituted by prudential reasons (loss of jobs), long-term incapability, frequent absence with unacceptable consequences, malfunctioning, conscientious objections, disrupted employment relationship or other grounds. Ultimately, an employer is entitled to dismiss employees for one ground or a cumulation of grounds both for individual and business-related reasons.

Both permanent and temporary employees can be entitled to be compensated in the event of a dismissal, also known as the “transition compensation”. Employees are entitled to transition compensation starting from the first day of their employment. The amount of compensation is based on the monthly salary and the number of working years.

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

Individual dismissals in the Netherlands require a procedure either at the cantonal court or the UWV, an autonomous administrative authority that is commissioned by the Ministry of Social Affairs and Employment. The question of where the case gets brought before depends on the ground for dismissal.

An employer must apply for a dismissal permit at the UWV when the cause for dismissal was either formed due to business-related reasons or long-term incapability. When the application is completed, the UWV will notify the employee and provide a copy of the request for a dismissal permit. The defence of an employee needs to be known in writing within 14 days. Typically, the UWV handles the application in no more than four weeks.

In the event of dismissal due to reasons relating to the individual employee, the application for a dismissal permit can be submitted at a cantonal court. The application must be in writing and supported by a reasoned opinion. After the cantonal judge has informed the employee of the application, he can file a statement of opposition. Subsequently, both parties are invited by the court for an oral hearing. Whether or not the contract will be terminated depends on the “seriousness of the reasons”.

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

The decision to terminate the employment contract shall become null and void when it is manifestly unreasonable. This includes situations where: a statement of reasons is missing; the dismissal is based on “sham recovery” or false declarations; the consequences of dismissal are too severe for the employee; or the employer has not sufficiently taken the disproportionality between his interests and the negative consequences for the employee into consideration. The remedy for a successful claim must constitute financial compensation that is in accordance with the nature and severity of the employers’ shortcoming.

The UWV also expects employers to aim towards reinstatement within the business before dismissing the employee. In principle, the reinstatement is limited to the business establishment where the employee is working.

In the event of dismissal by mutual termination agreement, the employee has a two-week reflection period to reverse the decision. Furthermore, when a dismissal by mutual agreement has not been concluded in writing, it is invalidated by operation of law.

Lastly, when the dismissal is based on the grounds as mentioned in question 6.4 above, the employer will not obtain a permit to dismiss the employee by either the UWV or the court.

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

Under Dutch dismissal law, the parties can mutually conclude a termination agreement. In fact, in many cases employers prefer to settle because of the limited amount of reasonable dismissal grounds.

Both employer and employee are free to choose whether payment is involved in the termination agreement. Furthermore, the aforementioned “transition compensation” is a common clause in termination agreements. The criteria dictating whether an employer is obliged to provide a transition compensation are mentioned in question 6.5. Employees have a right to 14 days of reflection to rescind the agreement in writing.

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

In the event of mass redundancy, the employer must act in compliance with the Collective Redundancy Notification Act. The obligations prescribed by this Act are triggered when the employer aims to dismiss at least 20 employees functioning in the same working area within a period of three months, based on prudential grounds. The UWV and the trade unions with members working under the employer must be notified on the intention of dismissing the employees. Furthermore, the trade unions, as well as the works councils, must be consulted on the plans. The employment agreement cannot be terminated within a month after having notified the relevant parties.

When the employer does not act in accordance with the rules prescribed for mass redundancy, the termination agreement will be void.

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?

Non-compliance with the obligations as prescribed by law – for example, the Collective Redundancy Notification Act – by the employer allows the cantonal court to void the termination agreement. Instead of voiding, the employer has the right to request an equitable remuneration. The equitable remuneration does not interfere with the employees’ right to the “transition compensation” when the employment has lasted for at least two years.

The employee must request an annulment or an equitable remuneration within two months after the day he reasonably could have been or was aware of the employer breaching their obligations, and no later than six months after terminating the employment agreement or initiating the termination agreement.

As of January 1, 2021, small businesses with no more than 24 employees have the possibility to apply for compensation for paid transition allowances if the business is terminated due to retirement or death of the employer. This is subject to a number of conditions, e.g., that the UWV/cantonal court has given permission for at least one employee to terminate the employment contract through company closure, and that the gross transition allowance has been paid in full in or after January 2021.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Dutch law knows three basic types of restrictive covenants.

The first one is the non-compete obligation, which binds a party to refrain from competing with someone else (other than their employer) for a specific period within a certain geographical area.

On June 2, 2023, the Dutch Government announced that it wants to tighten and reform the regulation of the non-compete by means of a legislative amendment in order to make it serve its true purpose: safeguarding legitimate business interests.

Proposed legislative amendments include the following:

- Limiting the duration of non-compete clauses by law.
- Mandating that these clauses be geographically specific, justified, and clearly defined within contracts.
- Requiring employers to substantiate the significant business interests justifying the inclusion of non-compete clauses in permanent contracts (a requirement already in place for temporary contracts).
- Obliging employers to compensate employees when enforcing non-compete clauses, with compensation set as a legally determined percentage of the employee's most recent salary. This measure aims to encourage employers to carefully consider the inclusion and enforcement of these clauses.

The bill, however, has yet to be drafted and then sent to the Senate and House of Representatives. The date of possible entry into force for this bill, too, is therefore unknown for the time being.

An agreement for non-recruitment restricts marketing and recruitment activities by one person in a business deal. The party refrains from requesting employees or clients from another.

Lastly, a non-disclosure agreement (NDA) restricts communication. The party agrees to not share confidential or sensitive information, such as trade secrets, proprietary processes or other specific activities/information relating to the business.

7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants are enforceable when the employee is a legal adult and the restrictive covenants must be agreed in writing, they must be for a specific period (usually no longer than one year), and within a certain geographical area. The validity and enforceability of restrictive covenants are very limited for temporary employment agreements.

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

The employer is not required to provide the employee with financial compensation in return for covenants. The employer is required to provide financial compensation if he wants to terminate the employment.

7.4 How are restrictive covenants enforced?

Restrictive covenants can be enforced by means of legal action. The court, at the request of the employee, has the competence

to annul covenants by virtue of the inequitable disadvantage that it causes. *Vice versa*, the employer can request an injunction if the employee disregards the restrictive covenant. The judge aims to balance the employers' interests (i.e., maintenance of clients) with those interests of the employees (i.e., free choice of employment).

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

In accordance with the European Convention on Human Rights, everyone has the right to respect for his private and family life, his home and his correspondence. Case law has shown that this article includes protection against employers.

With the EU's General Data Protection Regulation (GDPR), implemented in May 2018, employees' rights and protections regarding personally identifiable information is considerably expanded. Employers are required to provide their employees with information about their personal data processing in a transparent, concise and comprehensible manner that is easily accessed using clear language. Data can only be lawfully processed if and to the extent that it is either compliant with the initial purpose for which it was collected, in the legitimate interest of the business, or necessary to perform the employment contract. In fact, all personal data that has been collected must be deleted once the data is no longer needed for the original purpose. Processing personal data, such as ethnicity, political views, genetic information and sexual orientation, is prohibited. The GDPR further requires employers to have their employee's consent for processing data. The consent must be freely given, specific, informed and unambiguous.

Since all the Member States in the EU ensure equal protection on personal privacy under the GDPR, personal data can be transferred freely within the EU. In cases of the transfer of personal data within the EU, the GDPR does not impose any additional requirement with regard to the direct applicability of the GDPR. Nevertheless, when a controller engages a processor, the relationship between data controller and data processor must be governed by an agreement and is subject to the minimum criteria laid down under the GDPR in these circumstances. Only when the European Commission has decided that a third country guarantees an adequate level of data protection, or appropriate protection measures have been taken, or in single cases, is it permitted to transfer the data. Appropriate measures include Binding Corporate Rules, Standard Contractual Clauses by the European Commission, approved codes of conduct or legally binding instruments between authorities.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employers are obligated to keep a personnel file for their employees. Employees shall have the right to obtain confirmation from the employer as to whether or not personal data concerning him is being processed, and, where that is the case, access to the personal data, which includes the following information:

- (a) the purposes of the processing;
- (b) the categories of personal data concerned; and
- (c) the recipients or categories of recipient to whom the personal data have been or will be disclosed.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Screenings are only lawful when the employer has obtained an official authorisation. Screening an employee can only be carried out under the conditions as set forth in the GDPR.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Under the GDPR, employers are not justified in monitoring employee's emails, telephone calls or the use of an employer's computer system without having a legitimate aim and enhancing the proportionality to reach this aim. In ordinary circumstances, the privacy of the employee will prevail over the employer's interest when the use of the internet is monitored or logged. Only when there is a reasonable suspicion of misconduct will the employer be entitled to observe or track what employees do with their internet connection, but only for a limited period of time and if you meet the requirements of the privacy legislation. The conditions for the monitoring of employees are set out in the GDPR and the GDPR Implementation Act (*Uitvoeringswet AVG*).

For example, you must be able to substantiate why the monitoring of your employees is necessary and that this business interest outweighs the infringement of your employees' privacy. What is and what is not permitted can differ per case and per sector.

Covert monitoring of employees

Covert (deceitful) monitoring of employees is normally not permitted. As an employer, you must comply with a number of additional conditions for clandestine monitoring, in addition to the conditions for "normal" monitoring.

A clear internet and e-mail protocol is desirable because it provides guidance in determining whether or not there is a violation.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Employees can expect a "reasonable level" of privacy for the maintenance of personal affairs and networks at their worksite as long as this does not interfere with or disproportionately harm business interests, such as costs, security risks, public relations and labour disputes.

The employer may only monitor what employees do on social media if he has a legitimate reason for it and the monitoring is necessary.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

The EU has reached a preliminary political agreement in Brussels on the AI Act. These are European requirements and frameworks for artificial intelligence. With this, the proper development of AI – focusing on economic opportunities as well as safeguarding public values – in the EU and the Netherlands gets a major boost.

The political agreement also includes agreements on what constitutes "high-risk AI systems" and what requirements are imposed on them. Also, certain types of undesirable AI will soon be prohibited, such as social scoring or manipulative AI techniques. Providers of chatbots in web shops, deepfake techniques or generative AI systems, such as the popular ChatGPT, must ensure that it is clear to people that they are talking to an AI or that the content has been created by AI. AI systems with no or little risk to humans do not need to meet additional requirements. These include AI systems for customer services, inventory management or low-risk data, for example.

The agreement still needs to be approved by all EU Member States and the entire European Parliament. The law will enter into force after two years.

9 Court Practice and Procedure

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

When complaints related to the employment agreement or other employment-related disputes are in question, the District Court for civil law (*rechtbank*) corresponding to the location where the labour was normally executed has the competence to handle the case.

In first instances, cases concerning employment will be handled by a single, cantonal judge. The Court of Appeal consists of a panel with three counsellors while the Dutch High Council has her cases handled and judged on by five members of the civil law division.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

While conciliation and mediation are widely used remedies, they are not a formal requirement before a complaint can proceed at a legal institution.

The complaint can proceed by means of a formal submission. The submission contains the grounds on which the complaint is based, together with all the ancillary claims. The defendant will commonly submit a statement of defence after which the verbal hearing will follow.

Besides the compensation for legal assistance, the costs that come with procedures must be paid. This concerns a standing charge that the Registrar (Clerk of the Court) charges for the procedure.

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

Dependant on whether the case is brought before the court of first instance or the UWV, 95% of the cases are decided within three months – in the first instance.

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

The first instance verdict, decision or judgment is open for appeal. An appeal must be filed within three months (four weeks in case of summary proceedings). The appeal procedure takes approximately four to six months.



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She is an experienced corporate and commercial litigator, has an expert qualification in employment law, is an international ADR-certified mediator and specialised in cross-border business transactions. As Managing Partner of ACG International, Edith can combine all these skills and expertise for the benefit of her international clients.

Edith is the first female Chairperson for the NICCT and is helping build a stronger Netherlands-India corridor.

As a public speaker, she has shared her knowledge on various international conferences.

Aside from her professional career, Edith engages in many charitable and social organisations using her professional expertise, not only helping others but also empowering them in their endeavours. Edith is set on sharing her knowledge and empowering the young generations of professionals by way of mentoring and giving guest-lectures at universities across Europe.

In addition, as of 2023, Edith has been appointed as member of the Task Force Future of Work, Skilling and Mobility under the Business 20 (B20 (of the G20 2023)) – meeting with approximately 100 esteemed professionals from around the world specialised in the field of employment.

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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 as follows:

- (a) the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the “Constitution”);
- (b) the Labour Act, Chapter L1, Laws of the Federation of Nigeria (“LFN”) 2004 (the “Labour Act”);
- (c) the Federal laws enacted by the National Assembly (Nigeria’s national legislative houses) and the State laws enacted by the House of Assembly (the State legislative authority) of each State that relate to labour and employment, pension, and workplace compensation, including the following:
 - Employees’ Compensation Act 2010.
 - HIV and AIDS (Anti-Discrimination) Act 2014.
 - Immigration Act 2015.
 - Industrial Training Fund Act, Chapter 19, LFN 2004 (as amended).
 - National Health Insurance Authority Act 2022.
 - National Housing Fund Act, Chapter N45, LFN 2004 (as amended).
 - Pension Reform Act 2014.
 - Trade Disputes Act, Chapter T8, LFN 2004.
 - Trade Unions Act, Chapter T14, LFN 2004, as amended by the Trade Union (Amendment) Act 2005 (the “TUA”).
 - National Minimum Wage (Amendment) Act 2019.
 - National Industrial Court Act 2006.
 - Factories Act, Chapter F1, LFN 2004.
 - Finance Act 2021.
 - Personal Income Tax Act, Chapter P8, LFN 2004 (as amended by the Personal Income Tax (Amendment) Act 2011).
 - Discrimination against Persons with Disabilities (Prohibition) Act 2018.
 - Lagos State Special Peoples Law 2011.
 - Nigerian Oil and Gas Industry Content Development Act 2010.
 - Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry 2019 (the “Staff Release Guidelines”), issued further to the provisions of the

Petroleum (Drilling and Production) Regulations 1969 (as amended), made pursuant to the Petroleum Act, Cap P10, LFN 2004 (now the Petroleum Industry Act 2021 (the “Petroleum Act”)).

- Nigeria Data Protection Regulation 2019 issued by the National Information Technology Development Agency.
- Nigeria Data Protection Act 2023 (the “NDPA”).
- Business Facilitation (Miscellaneous Provisions) Act 2022;
- (d) decisions of the Nigerian courts – case laws; and
- (e) international conventions, treaties and protocols relating to labour, employment, workplace, industrial relations or matters connected therewith that have been ratified by Nigeria.

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

There are, from a legal perspective, two broad categories of employees in Nigeria: “Workers”, who are defined under the Labour Act as those “who are generally employees who perform manual labour or clerical work”; and “Employees” who perform administrative, executive, technical or professional functions (referred to as “Non-Workers”). The Labour Act, which is the principal legislation that regulates the employment of persons in Nigeria, prescribes the minimum terms and conditions of employment and is limited in its scope as it applies only to Workers. The terms and conditions of employment of Non-Workers are primarily subject to the terms of their respective contracts of employment. The other laws, which regulate the employment of persons in Nigeria, do not make a distinction between different categories of 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?

Although the Labour Act recognises that an employment contract could be oral or written, express or implied, section 7 of the Labour Act requires every employer to issue a written contract to the employee within three months of the commencement of the

employment relationship. With respect to Non-Workers, there is no statutory requirement for their employment contracts to be in writing. It is, however, advisable that contracts be made in writing for ease of reference and clarity of the employment terms.

1.4 Are any terms implied into contracts of employment?

Yes. Some of the implied terms in contracts of employment include the employer's duty to provide work to employees and to provide a safe place of work.

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

Yes. The Labour Act prescribes the minimum terms and conditions of employment that employers must comply with in relation to Workers. These minimum terms include giving the employee a written statement outlining details of the employment, including the nature of the employment, the appropriate notice period, the rates of wages and calculation thereof and the manner and periodicity of payment of wages, terms and conditions relating to hours of work, holiday and holiday pay, sick leave requirements and any provisions for sick pay, and maternity leave for female Workers, 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?

The use of collective bargaining agreements ("CBAs") is very common in sectors where the employees are members of trade unions. Collective bargaining usually takes place at the industry level between the recognised trade union of the relevant sector and the employers' association. It is, however, not uncommon for the CBA to indicate that certain matters (usually matters not covered in the CBA) may be negotiated at the company level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Yes, employers can require employees to split their working time between home and the workplace on a hybrid basis. However, this is subject to the terms of their respective contracts of employment. Where the contracts of employment do not contain terms on the adoption of such hybrid work, it is advisable that the contracts of employment be amended by the mutual agreement of the parties, to provide for the same.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

An employee's right to work remotely, either from home or elsewhere, is subject to the terms of their respective contracts of employment, as it is usually part of the contract of employment that the employer may require the employee to work at any location that the employer may direct. In the wake of the pandemic, therefore, employers are advised to include provisions relating to remote working in the contracts of employment.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

We have assumed that the word "recognition" here means the act of an employer acknowledging a trade union for the purposes of collective bargaining. The TUA primarily governs the activities of trade unions in Nigeria. The TUA makes recognition of registered trade unions obligatory for an employer. In relation to collective bargaining, the TUA provides that all registered trade unions with members in the employment of an employer shall constitute an electoral college so as to elect members who will represent their unions in negotiations with the employer.

2.2 What rights do trade unions have?

The rights of trade unions in Nigeria include:

- (a) to negotiate the terms and conditions of employment with employers on behalf of employees who are members of the trade union;
- (b) to embark on industrial strike action; and
- (c) to engage in peaceful picketing.

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

Yes. The TUA prohibits trade unions from carrying out a strike or lock-out, or engaging in any conduct in contemplation or furtherance of a strike or lock-out, unless:

- (a) the trade union is not engaged in the provision of essential services;
- (b) the strike or lock-out is in relation to a labour dispute that constitutes a dispute of right;
- (c) the strike or lock-out concerns a dispute arising from a collective and fundamental breach of contract of employment or collective agreement on the part of an employee, the trade union or an employer;
- (d) the provisions for arbitration in the TUA have first been complied with; and
- (e) a simple majority of all registered members voted to go on 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?

We do not have the concept of works councils under Nigerian law.

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. Please refer to our response to question 2.4.

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

This is not applicable. Please refer to our response to question 2.4.

2.7 Are employees entitled to representation at board level?

There is currently no general statutory right that entitles employees to be represented at board level.

3 Discrimination

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

Yes. The Constitution prohibits discrimination against Nigerian citizens on the basis of their community, ethnic group, place of origin, sex, religion, political opinion or the circumstances of their birth. In addition, the HIV and AIDS (Anti-Discrimination) Act 2014 prohibits employers from discriminating directly or indirectly against employees on the basis of their HIV status or HIV-related illness. The Discrimination against Persons with Disabilities (Prohibition) Act 2018 prohibits discrimination against persons with disabilities. The Lagos State Special Peoples Law 2011, which only applies in Lagos State, also prohibits discrimination on the basis of an employee's disability.

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

All forms of discrimination, including discrimination based on sex or disability, whether direct or indirect, are prohibited.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

We do not currently have any special rules relating to sexual harassment. The National Industrial Court of Nigeria (Civil Procedure) Rules 2017 (the "NICN Rules"), however, provide for the category of acts that constitute sexual harassment. The Lagos State Criminal Law also makes sexual harassment a criminal offence. While there is no statutory requirement for training, an employer that becomes aware of sexual harassment in the workplace is required to take administrative action to investigate and address it; otherwise, the employer may be liable for breaching the duty of care owed to the employee. In the case of *Ejike Maduka vs. Microsoft & Ors* NICN/LA/492/2012, the court held that the refusal of the employer to conclude investigations of the alleged case of sexual harassment made the employer liable for the acts of harassment against the employee.

It is also advisable that employers develop a workplace policy on sexual harassment. The policy should clearly indicate acts that constitute sexual harassment, provide a mechanism for employees to report such actions, the procedure for investigating any allegations and the consequences of breaching the provisions of the policy. In addition, it is recommended that training on this topic be conducted periodically for all employees.

We should also mention that Nigeria recently ratified the Violence and Harassment Convention 2019 – ILO Convention No. 190 (the "Convention"). The Convention, among other things, seeks to ensure that employers and Workers and their organisation, and relevant authorities, are provided with guidance, resources, training or other tools, in accessible formats as appropriate, on violence and harassment in the world of work, including gender-based violence and harassment.

3.4 Are there any defences to a discrimination claim?

As most discrimination claims are initiated within the context of wrongful termination of employment claims, an employer may be able to defend itself by proving that the termination of the employee's contract was carried out in accordance with the terms of his/her employment contract and any applicable law.

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

In Nigeria, the most common avenue available to employees to enforce their rights (including discrimination rights) in an employment relationship is by initiating an action in the National Industrial Court of Nigeria (the "NICN") – the court vested with original exclusive jurisdiction in respect of all labour and employment matters in Nigeria. The NICN Rules provide that where a Claimant alleges workplace discrimination, such Claimant shall state the grounds of the alleged workplace discrimination, including grounds of ancestry, religion, gender, marital status, family situation, etc. Employers are able to settle claims at any time before or after they are initiated until the final judgment of the court is delivered.

3.6 What remedies are available to employees in successful discrimination claims?

Where a claim of discrimination is successfully proven, the remedy available to employees in most cases is compensation for wrongful or unfair termination. The court may also award damages to the employee.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No, atypical Workers do not have any additional protection.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

We do not have a specific or comprehensive law that regulates whistleblowing requirements. We do, however, have sector-specific legislation on this issue. Under the Whistleblowing Guidelines for Pensions 2008 (the "Pencom Guidelines") issued by the National Pension Commission (the "Pencom" – the body responsible for the regulation of the pension industry in Nigeria), pension fund administrators and pension fund custodians are obliged to not victimise any employee that blows the whistle. If they do victimise the employee, the Pencom Guidelines would employ appropriate regulatory tools to offer redress to the affected employee. Some of the protections offered to employees under the Pencom Guidelines include prohibition from dismissal, suspension or termination of the employee's appointment, or the demotion or redeployment of the whistleblower, without the prior consent of the Pencom. The employer is also prohibited from denying promotions, salary increases or training to such employees and must obtain the approval of the Pencom before implementing any adverse salary/incentive review that would impact the whistleblower.

In the banking sector, the Central Bank of Nigeria's Guidelines for Whistleblowing for banks and other financial institutions in Nigeria 2014 (the "CBN Guidelines") offer protection to whistleblowers who disclose concerns, provided the disclosure is made (a) in the reasonable belief that it is intended to show malpractice or impropriety, and (b) to an appropriate person or authority. The CBN Guidelines require banks and other financial institutions ("OFIs") to treat all whistleblowing disclosures in a confidential manner and to keep the whistleblower's identity confidential. The banks and OFIs are prohibited from subjecting a whistleblower to any detriment and if the employee suffers any detriment by reason of the disclosure, such employee shall be entitled to compensation and/or reinstatement. Where the employee is to be compensated, the employee's entitlement shall be computed as if he/she had attained the maximum age of retirement or had completed the maximum period of service, in accordance with his/her conditions of service.

The Investment and Securities Act 2007 (the "ISA") further provides that no employer shall subject an employee to any detriment by an act or any deliberate failure to act on the ground that the employee has made a disclosure in accordance with the provisions of the ISA.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

There is no statutory requirement for employers to publish information on the gender, ethnicity, disability pay gap, salary or other diversity information of their employees. Information relating to ethnicity, tribe or race of employees are classified as sensitive personal data under the NDPA. Such information can only be processed based on the specified conditions stipulated in the NDPA. One of such conditions is where the employee has given consent to the publishing of the information.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

The Labour Act provides that a pregnant female Worker is entitled to six weeks of leave before the expected delivery date and another six weeks after the delivery. In relation to Non-Workers, employers tend to use the provisions of the Labour Act as a benchmark for determining an employee's maternity entitlement; however, the specific duration of the maternity leave is determined by the provisions of the Non-Worker's contract of employment.

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

The Labour Act provides that a female Worker who has been in employment for a period of six months or more immediately before the maternity leave shall be entitled to at least 50% of her salary during the duration of the maternity leave. There is no corresponding provision in relation to Non-Workers and the benefits accruing to a Non-Worker is subject to the provisions of her contract of employment.

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

The Labour Act provides that any employee nursing her child is

to be permitted half an hour, twice a day during working hours, to nurse her child.

4.4 Do fathers have the right to take paternity leave?

The Labour Act does not make any provisions for paternity leave and any employee entitlement in this respect will be subject to the terms and conditions of such employee's contract of employment. The Federal Government of Nigeria has approved a 14-day paternity leave for male employees in the Federal Civil Service. Some State Governments (Enugu and Lagos States) also offer paternity leave to male employees in the service of the State Governments. The paternity leave in Enugu State is for three weeks, while that of Lagos State is for two weeks and only applies in respect of the first two children of such male employee.

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

No, there are no other parental leave rights that employers are required to observe.

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

The Labour Act does not contain any provisions to this effect and any employee entitlement in this respect will be subject to the terms and conditions of such employee's contract of employment.

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 transfer automatically in the context of an asset sale, as the consent of each employee is required in order to transfer from one employer to another. Where the employee is a Worker, in addition to obtaining such Worker's consent, the contract pursuant to which the Worker is transferred to the new employer must be endorsed by an authorised labour officer. A labour officer is a public officer serving in the Ministry of Labour and Employment who is authorised by the Minister of Labour and Employment to act as an authorised labour officer, for the purposes of the Labour Act.

In relation to a share sale, other than the changes to the beneficial ownership of the shares of the employer, the employer remains the same. There is, therefore, no requirement to transfer the employees or to obtain their consent to the share acquisition.

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

In an asset sale, where the employment contracts are novated to the buyer, all the rights of the employees under the existing contracts of employment transfer to the buyer. The buyer may also elect to engage the services of the employees directly, in which case the contracts of employment between the seller and the employees are terminated, and the buyer, thereafter, enters into new contracts with the employees.

In the same manner as the novation of employment contracts, collective agreements may also be novated to the transferee

entity on the same terms and conditions. Alternatively, the existing collective agreement may be terminated, and a new collective agreement negotiated with the new employer.

In a share sale, employees continue to be employed by the same employer and their rights under the terms and conditions of their employment contracts do not change. CBAs also continue to run in this circumstance as the identity of the employer does not change.

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 is generally no statutory requirement for employers to mandatorily inform or consult employees or their representatives before making any business decisions unless such consultation is specifically required by the terms of the employees' employment contracts. In practice, however, employers would usually notify employees of a proposed business transfer.

In the context of a share sale, as the employer on record does not change, there is no requirement to inform the employees of the share sale.

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

In responding to this question, it is important to distinguish between the use of the term "dismissal" and the term "termination of employment". Under Nigerian law, the term "dismissal" typically refers to the termination of a contract of employment due to the employee's misconduct, and this may be carried out summarily without notice and without payment *in lieu* of notice. Where the employer merely brings the employment relationship to an end, not owing to any fault of the employee, this is referred to as a "termination of employment". A termination must be carried out in accordance with the provisions of the employee's contract of employment and any applicable severance payments, and accrued benefits must be paid to the employee.

In the context of an asset sale, therefore, employees are unlikely to be dismissed, but their contracts of employment may be terminated where the transferee entity chooses not to employ them or where the employees refuse to give their consent to the transfer of their employment contracts to the buyer. In this case, such employees will be entitled to receive any applicable severance payments in addition to the accrued but unpaid terminal benefits from the transferor entity.

In a share sale, the buyer (i.e., the new employer) may decide to terminate the employment of certain employees. This must be carried out in accordance with the terms of their respective employment contracts, and any applicable severance payments, contractual payments and terminal benefits must be paid to such employees.

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

Generally, an employer can only vary the terms and conditions of an employee's contract of employment with the consent of the affected employee.

In an asset sale, where the transfer of the employees is effected by means of a termination of the existing contract and the re-employment by the new employer, the new employer may propose changes to the terms of employment on which it engages 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, employees must be given notice of termination of their employment or salary *in lieu* of such notice.

In relation to Workers, the minimum notice periods to be given to the employees pursuant to section 11 of the Labour Act are:

- one day, if the length of service is up to three months;
- one week, if the length of service is up to two years;
- two weeks, if the length of service is up to five years; and
- one month, if the length of service is five years or more.

Parties may, however, agree to longer notice periods in their contracts of employment. Sections 11 (6) and (9) of the Labour Act also permit either party to an employment contract to terminate the contract by paying the other party's salary *in lieu* of notice.

With respect to Non-Workers, the applicable notice period is determined by the terms of their respective contracts of employment.

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 concept of "garden leave" is not recognised under the provisions of the Labour Act. An employer and an employee may, however, agree to such an arrangement under the terms of a contract 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?

Employees may challenge their dismissal by initiating an action at the NICN. An employee is treated as having been dismissed when his/her contract of employment is terminated for cause. Grounds that constitute cause for dismissal include criminal acts, gross misconduct, sexual harassment, etc.

Also, an employer who holds an oil mining lease, licence or permit (or an interest therein) issued under the Petroleum Act or under regulations made pursuant to the Petroleum Act, and desires to terminate the employment of an employee, is required under the Staff Release Guidelines to obtain approval from the Minister of Petroleum Resources (the "Minister") through the erstwhile Department of Petroleum Resources (the "DPR", now the Nigerian Upstream Petroleum Regulatory Commission) for the release of any such employee. The Staff Release Guidelines define "staff release" as the removal of a worker in a manner that permanently separates the said employee from the employer, which includes dismissal, release on medical grounds, redundancy, etc. The DPR will conduct an inquiry into the circumstances of the proposed staff release and make a decision on whether to convey the Minister's approval or otherwise. The Staff Release Guidelines stipulate a penalty, not exceeding the sum of US\$250,000, for failure to comply with the Staff Release Guidelines.

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

Yes, under section 54 (4) of the Labour Act, employers are

prohibited from terminating the contract of any female Worker who is absent due to maternity leave, or who remains absent from her work for a longer period as a result of illness that arose out of her pregnancy or confinement and renders her unfit for work.

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 general position is that Nigerian employers are entitled to terminate a contract of employment at any time and without stating the reason or cause for doing so, provided that the appropriate notice of termination is given to the employee or the employee is paid a salary *in lieu* of such notice. The NICN has, however, indicated that the best practice, in accordance with international standards, is that an employer must state the reason(s) for terminating an employee's contract.

Where an employee is dismissed for reasons relating solely to the individual employee, the employee's entitlement to compensation is subject to the provisions of his/her contract of employment. Typically, an employee is entitled to receive any accrued contractual payments, such as accrued salaries, until the effective termination date and such other payments that may be due to the employee, under the terms of his/her employment contract.

Where the termination is for business-related reasons, such termination may be treated as being a redundancy. The Labour Act defines the term "redundancy" as "an involuntary and permanent loss of employment caused by an excess of manpower". Typically, in the event of a redundancy, a Worker is entitled to the following payments at the termination of his/her employment:

- (a) agreed redundancy or severance payment;
- (b) salary *in lieu* of contractual notice (if the company elects not to give the contractual notice);
- (c) accrued salary up until the effective termination date;
- (d) monetary value of any accrued but unutilised annual leave entitlement as at the effective termination date;
- (e) any accrued but unpaid incentives awards or bonuses (if applicable);
- (f) any other payments due to any of the employees, under any of the company's employment and operational policies, such as redundancy or gratuity payments; and
- (g) reimbursement of any out-of-pocket expense incurred by any employee in connection with the performance of his/her duties prior to the effective termination date.

There is no corresponding statutory obligation for Non-Workers in relation to the computation of redundancy payments, and whether they would be entitled to receive any redundancy payments is subject to the terms of their respective contracts of employment. Non-Workers are, however, entitled to the payments listed in (b) to (g) above.

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

If the dismissal is not for cause, it would be termed a termination and an employer is required to comply with the terms of the contract, including the notice requirements under the contract.

Where the dismissal is for cause, such as for misconduct, then prior to dismissing the employee, the employer must have offered the employee an opportunity to defend himself/herself. If a disciplinary tribunal is constituted, the tribunal must be independent and impartial and must comply with the rules of natural justice and the principles of fair hearing. Where the

allegations are of a criminal nature, the same burden of proof applies as in criminal cases (i.e., the allegation must be proved beyond a reasonable doubt).

For employers in the oil and gas sector, please refer to our response to question 6.3.

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

If an employer terminates an employee's contract of employment without following the procedure laid out in the contract, the employee could initiate an action for wrongful termination. If the employee is successful, the NICN has been known to award significant damages to such an employee and in some cases has ordered the employer to reinstate the appointment of the affected employee.

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

Employers can settle claims before or after they are initiated, but this must be done before the judgment of the court is entered in respect of the claim.

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

If the employees to be dismissed are Workers under the Labour Act, and the dismissals are not connected to the conduct of the employees, such dismissals would usually be regarded as a redundancy, and the employer must:

- (a) inform the trade union or Workers' representative concerned of the reasons for and the extent of the anticipated dismissal;
- (b) adopt the principle of "last in, first out", subject to a consideration of the factors of relative merit, skill, ability and reliability; and
- (c) use its best endeavours to negotiate payments and entitlements.

There is no corresponding statutory requirement for Non-Workers.

For employers in the oil and gas sector, please refer to our response to question 6.3.

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 relation to Workers, if the employer does not comply with its statutory obligation, this could be a ground on which the Workers may challenge the validity of the mass dismissals. If the Workers initiate an action, this will delay the disengagement process until the completion of the action. There is a likelihood that if the Workers are members of a trade union, the officials of the trade union will initiate an action on behalf of the Workers.

With respect to Non-Workers, if any of the Non-Workers are members of a trade union, the officials of the trade union are likely to initiate an action challenging the process.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Under Nigerian law, restrictive covenants are *prima facie* unenforceable; however, the courts may enforce such covenants if they are reasonable with reference to the interest of the parties concerned and the general public, and if there is a proprietary interest that is sought to be protected. In deciding the question of reasonableness, the courts will take into account the nature of the business, trade or occupation, the area over which the restraint is to be imposed and the length of time for which it is to continue. Restraint of trade covenants of 12 months or less are usually enforceable in practice. We should, however, mention that section 68 (1)(e) of the Federal Competition and Consumer Protection Act 2018 permits a covenant in restraint of trade of not more than two years.

7.2 When are restrictive covenants enforceable and for what period?

Please see our response to question 7.1 above.

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 covenants. The employer may, however, agree to provide financial compensation in return for the employee's agreement to be bound by the covenants. Nigerian courts are also more likely to uphold the covenants against the employee if the employee receives compensation in exchange for his/her consent to be bound by the covenants.

7.4 How are restrictive covenants enforced?

A party that wishes to enforce the terms of a restrictive covenant would initiate an action in court for this purpose.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Section 37 of the Constitution guarantees and protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. The provisions of this section are very wide, and employers are deemed to be caught by it and are, therefore, required to respect the employee's right to privacy. With respect to the transfer of employee data outside Nigeria, the NDPA prescribes minimum data protection standards for all organisations or persons that control, collect, store or process the personal data of Nigerian citizens. The NDPR provides that personal data cannot be transferred outside Nigeria except where such transfer is carried out with the approval of the Nigeria Data Protection Commission (the "NDPC"). One of the exceptions to the requirement to obtain the NDPC's consent for the transfer of personal data is where the data subject (in this case, the employee) consents to

the transfer of his/her personal data after being notified that adequate provisions for the protection of the personal data exist in the country to which the data is sought to be transferred.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, an employee has a right to obtain copies of any personal information held by his/her employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

There are no prohibitions against pre-employment checks; however, an employer that intends to carry out such checks must ensure that it does not do so in a manner that breaches the employee's constitutional right to privacy. In practice, this requires an employer to obtain the consent of the prospective employee before carrying out such background checks.

The HIV and AIDS (Anti-Discrimination) Act 2014, however, prohibits employers from carrying out HIV and AIDS tests on employees or prospective employees without the prior consent of such persons.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Employers may monitor work emails in order to ensure compliance with the policies of the workplace and any applicable laws and regulations. It is, however, advisable that employees are expressly informed that the monitoring is taking place.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

An employer may prescribe rules around the use of social media in the workplace and may implement systems that prevent employees from accessing and/or using social media with the employer's resources while in the workplace.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are no legal restrictions that apply to the use of artificial intelligence by employers during employee recruitment or during the course of the employee's employment.

9 Court Practice and Procedure

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

The NICN has exclusive original jurisdiction over employment-related complaints and cases. Appeals from decisions of the NICN go to the Court of Appeal and the decision of the Court of Appeal, on any appeal arising from any civil jurisdiction of the NICN, is final. Appeals from decisions of the NICN in

respect of criminal cases can, however, be made to the apex court of Nigeria, the Supreme Court. The NICN is composed of a President and such number of Judges of the NICN as may be prescribed by an Act of the National Assembly. For the purpose of exercising its jurisdiction, the NICN is duly constituted if it consists of a single Judge or no more than three Judges as the President of the NICN may direct.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The NICN Rules provide for the practice and procedure to be adopted at the proceedings before the NICN, which is in line with the common law adversarial judicial system that is practised in Nigeria.

Under the NICN Rules, a Judge of the NICN may refer any matter initiated at the NICN to the Alternative Dispute Resolution Centre (the “Centre”), established within the NICN premises, for amicable settlement through conciliation or mediation. The Centre shall endeavour to conclude the mediation or conciliation process within 21 working days from the date the process commences, with the possibility of an extension of no more than 10 working days. Where parties are unable to settle their disputes through the mediation or conciliation process, the NICN would hear the matter in accordance with the NICN Rules.

Parties to a matter before the NICN are required to pay the applicable filing fees as stated in the NICN Rules when commencing or defending a matter at the NICN.

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

The NICN Rules seek to create a system for the speedy dispensation of justice and fast-tracking proceedings at the NICN. This notwithstanding, cases could typically be concluded between eight months and two years from the date on which the matter was filed at the NICN.

9.4 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 the decision of the NICN. Prior to 2017, there was uncertainty on whether there was a general right of appeal against decisions of the NICN. The Supreme Court, however, resolved this uncertainty on 30 June 2017 in the case of *Skye Bank Plc vs. Victor Anaeem Iwu*, where it held that parties could appeal any decision of the NICN to the Court of Appeal. An appeal could be concluded within two to four years from the date on which the appeal is lodged at the Court of Appeal, but it is not unusual for an appeal to the appellate court on any matter, including employment law-related matters, to take a longer period to be concluded.



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Udo Udoma & Belo-Osagie is a full-service law firm that was established over 38 years ago to facilitate corporate and commercial business in Nigeria, across Africa and other jurisdictions in the world across its 20 practice areas. Our firm's founding and core philosophy is that legal advice should be of the highest possible standard, accessible, commercially-oriented and consistently sound on principle. As a firm, we have developed a reputation for enabling a wide range of transactions, including those that are new to Nigeria, for generating innovative and practical legal solutions and for facilitating transactions and resolving disputes, including those that are complex or unusual in our market, within a relatively short space of time.

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Norwegian labour law is governed by mandatory legislation, including the:

- Working Environment Act (**WEA**) (*arbeidsmiljøloven*).
- Civil Service Act (*statsansattelloven*).
- Holiday Act (*ferieloven*).
- National Insurance Act (*folketrygdloven*).
- Compulsory Occupational Pensions Act (*obligatorisk tjenestepensjonsloven*).
- Defined Contribution Pensions Act (*innskuddspensjonsloven*).
- Defined Benefit Pensions Act (*foretakspensjonsloven*).
- Personal Data Act (*personopplysningsloven*).
- Equality and Anti-Discrimination Act (*likestillings- og diskrimineringsloven*).
- Occupational Injury Insurance Act (*yrkesskadeforsikringsloven*).
- Mandatory Wages Act (Act relating to the duty to pay wages during a temporary lay-off) (*permitteringslønnsloven*).
- Home Office Regulation (*hjemmekontorforskriften*).
- Regulation on the Employer's Access to E-mailboxes and Other Electronically Stored Material (*forskrift om arbeidsgivers innsyn i e-postkasse og annet elektronisk lagret materiale*).

Further, individual employment agreements and collective agreements play a crucial role alongside statutory regulations.

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

The WEA applies universally to all “employees”, encompassing both temporary and permanent, part-time and full-time employees. Not covered by the term “employee” are contractors, including self-employed individuals, consultants, freelancers, and individuals in political or organisational positions of trust.

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 written employment agreement is mandatory for all types of positions, including temporary and part-time, with the employer being responsible for compliance. The WEA outlines minimum requirements for the contents of the employment agreement. It must be executed promptly, within one month of employment commencement, or immediately for relationships lasting less than a month or in connection with the hiring-out of labour.

1.4 Are any terms implied into contracts of employment?

Employers and employees share a mutual duty of loyalty. Employees are obligated to faithfully support the legitimate interests of the employer and refrain from actions that subvert or undermine them. Both actions and omissions can violate this duty, though more is needed for omissions to be deemed a violation.

Further, a non-statutory management prerogative applies to employment relationships. The management prerogative gives the employer the right to organise, manage, distribute, and control the work of the employee within the framework of mandatory legislation, the employment agreement and any collective agreement, as well as general standards of objectivity.

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

Yes, particularly in legislation such as the:

- **WEA**, which sets several minimum requirements for employment relationships, covering aspects like the establishment of employment, occupational health and safety, whistleblowing, termination provisions, working hours, protection against discrimination, and more.
- **Holiday Act**, which stipulates 25 annual vacation days with provisions on holiday pay and the timing of holidays.
- **National Insurance Act**, which secures social rights such as sickness and parental benefits.

There is no general minimum wage for all sectors and workers in Norway. Nevertheless, minimum wages have been introduced in certain sectors in the general application of collective agreements. The following sectors have generally applicable collective agreements: construction; cleaning workers; hotel, restaurant and catering; the maritime construction industry; agriculture and horticulture; fish processing enterprises; electricians; freight transport by road; and passenger transport by tour bus.

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?

Many Norwegian businesses, often large labour and employer associations, operate under collective agreements negotiated at specific intervals. These agreements, which cover one or more industries, regulate various aspects of employment relationships, with a particular focus on wages and working hours.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

For new hires, the parties can agree on such hybrid solutions. In existing employment relationships, it depends on the contractual basis. The Home Office Regulation governs work performed from the employee's home. Please note that a separate, written agreement on homework is required in addition to the employment agreement when working from home.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

No. Work from the employee's home requires a written agreement pursuant to the Home Office Regulation.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade unions, which are defined by law, safeguard employees' interests and have constitutional protection, ensuring freedom of association for both employees and employers.

2.2 What rights do trade unions have?

Trade unions can demand negotiations on collective agreements and may engage in industrial action against an employer or employer organisation.

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

Trade unions can initiate strikes or other industrial actions in case of a disagreement with an employer or employer organisation about future working conditions not covered by a collective wage agreement or to replace a previous agreement. Strikes or other industrial actions must, however, comply with the peace obligation enshrined in a collective agreement or the Labour Disputes Act.

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?

Companies with more than 100 employees, under the Main Agreement (*hovedavtalen*) between the Confederation of Norwegian Enterprise (NHO) and Norwegian Confederation of Trade Unions (LO), must create a works council, promoting collaboration for efficient production and employee well-being. The election process for council representatives is stipulated in the Main Agreement. Moreover, Norwegian law requires companies with more than 1,000 employees, and a minimum of 150 employees in each of at least two EEA countries, to assist in establishing a European Works Council.

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?

Unless the works council's area of work is specified in an agreement, matters significantly affecting employees and working conditions must be presented to the council for input before the management makes a decision in that regard. After receiving an opinion from the works council, the management promptly addresses the matter and informs the works council of the decision in the next meeting. The works council, however, does not have a co-determination right.

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

According to the Main Agreement, works councils must also be established in companies with fewer than 100 employees if one of the parties requests it and the parties' main organisation agrees.

The works council does not manage salary or working time issues or disputes about the interpretation of collective wage agreements or employment agreements.

2.7 Are employees entitled to representation at board level?

Employees in companies with over 30 employees are entitled to board representation in the absence of a corporate assembly (*bedriftsforsamling*). For companies exceeding 200 employees, it is mandatory to appoint employee representatives to the board, provided there is an agreement to forego a corporate assembly.

3 Discrimination

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

All employees are protected against discrimination based on gender, age, pregnancy, care duties, leave of absence, ethnicity, religion, beliefs, disability, sexual orientation, gender identity, gender expression, political views, and trade union membership.

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

Discrimination is defined as:

- **Direct discrimination:** Treating an employee less favourably than someone else in a comparable situation based on protected grounds.
- **Indirect discrimination:** Applying a seemingly neutral provision, criterion, or procedure that may disproportionately disadvantage people of protected groups, unless it serves a legitimate purpose with appropriate and necessary means.
- **Inadequate accessibility:** Disadvantaging an employee with a disability through a failure to implement accessibility measures.
- **Harassment:** Conduct violating an employee's dignity based on various discrimination grounds.
- **Sexual harassment:** Unwanted sexual attention that has the purpose or effect of being offensive, intimidating, hostile, degrading, humiliating or bothersome.

- **Instructions to discriminate:** Issuing orders or instructions to discriminate.
- **Contribute to discrimination:** Physically or psychologically contributing to discrimination.

The Equality and Anti-Discrimination Act also prohibits reprisals.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The WEA requires employers to prevent and address sexual harassment in the workplace. Though not mandatory, training is crucial for prevention. Employers should have clear guidelines, established procedures, and a confidential system for reporting harassment.

3.4 Are there any defences to a discrimination claim?

The employer must demonstrate that any differential treatment was either not based on any of the protected grounds (see question 3.1 above) or must be assumed to be justified, necessary, and proportionate.

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

Employees can enforce anti-discrimination rights through various measures, including:

- **Lodging a complaint with the Equality and Anti-Discrimination Ombud (LDO):** Seeking guidance and assistance from the LDO, which can investigate, offer advice, and bring cases before the Discrimination Tribunal if necessary.
- **Legal assistance:** Consulting an attorney specialised in labour or discrimination law for guidance and representation in discrimination cases. Regarding settlements, parties can often reach agreements outside the court system, either before or after involving the Discrimination Tribunal or the court. Settlements may involve financial compensation, employer actions, or mutually agreed-upon forms of redress.

3.6 What remedies are available to employees in successful discrimination claims?

Employees succeeding in discrimination claims may access various remedies, including:

- **Financial compensation:** Compensation for economic loss, covering lost wages or future earning potential due to discrimination.
- **Damages:** Compensation for non-economic harm, addressing physical or mental suffering, emotional distress, or loss of quality of life resulting from discrimination.
- **Legal costs:** Employees may demand that the other party covers legal costs incurred during the case.
- **Right to reinstatement or compensation:** In certain cases, an employee wrongfully terminated due to discrimination may have the right to reinstatement or compensation for lost employment opportunities.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Employment terms for fixed-term and part-time positions must not be less favourable than those for other types of employment unless there is a valid and justified reason. Key protections and rights for “atypical” workers include:

- **Equal treatment:** The WEA ensures fair treatment and non-discrimination for atypical employees compared to permanent staff.
- **Working conditions:** The WEA establishes minimum requirements for conditions like working hours, and the work environment, applying to atypical employees as well.
- **Contractual rights:** Employees on fixed-term contracts or substitutes have rights under the WEA and their individual employment contracts.
- **Protection against unfair termination:** Part-time or temporary contract workers are protected from unfair termination as per the provisions of the WEA.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The WEA contains specific rules governing whistleblowing and employee concerns about misconduct in the workplace. Key points include:

- **Right to whistleblowing:** Employees can report issues of concern, including breaches of legislation, written ethical guidelines in the undertaking or ethical norms on which there is broad agreement in society, or other serious issues affecting the work environment or company reputation.
- **Prohibition of retaliation:** Employers cannot retaliate against whistleblowing employees, including actions such as termination or harassment.
- **Protection of whistleblower’s identity:** Employers must safeguard the identity of whistleblowers unless explicit consent is given.
- **Whistleblowing procedures:** Employers must establish clear and effective procedures for handling reports on reprehensible conditions in a safe and confidential manner.

Adhering to these rules fosters a secure working environment, allowing employees to report concerns without fear of retaliation. These provisions aim to protect employees and cultivate a culture of transparency and integrity in Norwegian businesses.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

There is no legal mandate for employers to disclose gender, ethnicity, or disability pay gaps. Applicants, if feeling unfairly bypassed, can request written details about the chosen candidate. Employees suspecting wage discrimination can demand information on wage levels and criteria for comparison.

However, in all public entities, and in private enterprises that regularly employ at least 50 employees (or at least 20 employees when one of the labour parties in the organisation demands it), the employer within their organisation shall account for the actual state of gender distribution in the workplace and what they do to fulfil the duty related to gender equality and other related obligations in that regard. The said information must be included in the annual report or any other publicly available document (to be referred to in the annual report).

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Parents in Norway are entitled to a total of 12 months of parental leave in connection with childbirth. During this period, parents are entitled to parental benefits, which replaces salary (*cf.* question 4.2 below). The 12-month parental leave includes a maternity leave quota of 15 weeks (with the first six weeks taken immediately after childbirth), a paternity leave quota of 15 weeks, a three-week period before the due date for the mother, and a joint period of 16 weeks to be allocated between the parents as they please.

In addition to these 12 months, where parental benefits replace salary, each parent is entitled to an additional 12 months of unremunerated leave for each childbirth, to be taken immediately after the first year of leave. Parents are not entitled to parental benefits during this additional 12-month period.

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

During maternity leave in Norway, employers are not obligated to provide salary. Instead, parental benefits from the Norwegian Labour and Welfare Administration (**NAV**) (partly) replace income during this period. Parental benefits from NAV are limited to an annual amount equivalent to six times the National Insurance basic amount (6G), i.e. NOK 711,720 as of May 1st, 2023. Employers may choose to cover the excess amount for employees earning more than 6G, but there is no legal requirement to do so.

The total period of parental benefits in connection with childbirth is 49 weeks with 100 per cent coverage or 59 weeks with 80 per cent coverage. Any additional leave (*cf.* question 4.1) does not provide a basis for salary or parental benefits.

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

Employees have the right and duty to return to their employer and position following parental leave. Nursing mothers can request paid time off for breastfeeding, up to one hour per workday when the child is under one year old. This applies to workdays of seven hours or more, with certain employees possibly entitled to two hours through a collective bargaining agreement.

4.4 Do fathers have the right to take paternity leave?

Yes, fathers are entitled to two weeks of unpaid leave in connection with childbirth or adoption. They also have a paternity leave quota of 15 weeks as well as a joint period of 16 weeks, as further described in question 4.1. Employers are not obliged to pay salary during paternity leave. Instead, the employees are entitled to parental benefits from NAV (*cf.* question 4.2).

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

An employee caring for a child under 12 years of age is entitled to parental leave and sickness benefit for up to 10 days for the child's illness. If responsible for more than two children, the entitlement is up to 15 days. For a chronically ill or disabled

child under 16 years of age, parental leave and sickness benefit can extend to 20 days. Single parents receive sickness benefit at double the daily rate.

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

An employee in Norway has the right to reduce their working hours for health, social, or welfare reasons, as long as it does not significantly inconvenience the employer. After the agreed period, the employee has the right to return to their previous 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?

In the event of a business sale resulting in a change of employer, employees automatically transfer to the acquiring company. However, an individual employee has the right to object to the transfer of the employment relationship to the new employer, and under certain conditions also has the right to remain employed with the transferring company.

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

Employees are safeguarded by the WEA during a business sale or transfer. In general, employees move to the acquiring company with their existing employment contracts, preserving rights like seniority and 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?

During a business sale, employers must inform and consult employees before the sale, as laid down in chapter 16 of the WEA. A breach of the information obligation will lead to postponement of the employee's 14-day deadline for exercising the right of reservation. Depending on the circumstances, the process will typically take at least three to four weeks.

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

Employment contracts may not be legally terminated due to the transfer *itself*.

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

No. Employees retain their existing employment terms, including wages and working hours, during a business transfer.

Exceptions include pension rights, where the new employer may apply its existing pension schemes instead. Regarding collective agreements, the new employer generally inherits them, but may choose to opt out. This requires a written declaration to the trade union within three weeks of the transfer.

The transferred employees are nevertheless entitled to retain the individual terms of employment that follow from the collective agreement by which the former employer was bound. This applies until the collective agreement in question expires or until a new collective agreement is entered into that is binding to the new employer and the transferred 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?

Employees must receive notice of termination either in person or by registered letter. The starting point in the WEA is a one-month mutual notice period. Collective or individual agreements may stipulate longer notice periods. A shorter notice period presupposes an agreement concluded between the employer and the employee's elected representatives at undertakings bound by a collective agreement. The WEA stipulates longer notice periods for those employed for more than five years. The notice period runs from the month following receipt. Dismissal without notice (summary dismissal) is possible if the employee is guilty of a gross breach of duty or other serious breach of the employment agreement.

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 can offer the employee exemption from the duty to work ("garden leave") but cannot deprive the employee of the right to work or require the employee to serve a period of garden leave during the notice period. However, the parties can reach a settlement; for example, in a negotiation meeting, which includes a garden 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?

The employer must have "objective grounds" for dismissal with notice. The dismissal must be justified in circumstances related to either the employee, the employer, or the company. Dismissal without notice (summary dismissal) presupposes that the employee has been guilty of a gross breach of duty or other serious breach of the employment agreement. In accordance with Norwegian law, an employee is considered to be dismissed when the employment relationship is terminated by the employer or when significant changes are made to the employee's position, causing it to lose its fundamental character.

No consent from a third party is required prior to serving a notice of termination.

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

An employee who is on sick leave cannot be dismissed if the dismissal is based on absence caused by sickness and less than 12 months have passed since the absence caused by sickness began. The same applies to pregnant employees and employees who are on leave for compulsory or voluntary military service.

For employees who are on maternity leave, parental leave for childcare or parental leave, dismissal does not take effect until the end of the leave period.

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 will generally be entitled to dismiss an employee:

1. If the employee is guilty of a gross breach of duty or other serious breach of the employment agreement (summary dismissal/dismissal without notice), or if the employee is lacking competence despite training or guidance. In the event of a summary dismissal, the employee is not entitled to salary or benefits during the notice period.
2. Due to economic downsizing with objective employee selection.

If there are objective grounds for the dismissal and the dismissal is made in accordance with procedural rules, salaries and benefits are paid during the notice period and no additional compensation is owed.

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

Initially, the employer must meet with the employee to discuss the possibility of a dismissal, including stating the reasons for a possible dismissal, hearing the employee's perspective on the matter, and considering improvement proposals. The formal and final decision on dismissal must not be made until after this meeting. The written notice must specify reasons, the termination date, and outline the employee's rights regarding the notice period, compensation, and other relevant matters. The notice letter must be delivered in person or 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?

If an employee disputes the dismissal grounds or procedures, the employer can request negotiations with the employer, or take legal action for unlawful dismissal. Reinstatement is possible if the court deems the dismissal unjust. Unjust dismissals may warrant compensation for financial losses. During a dispute, the employee can, as the main rule, remain in the position, except in summary dismissal cases (cf. question 6.5 (1)).

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

Yes, employers can settle claims with employees both before and after they are formally initiated. Settlements can be reached at any stage of the dispute resolution process.

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

For mass dismissals (at least 10 employees within 30 days without being warranted by reasons related to the individual employees), employers must follow specific procedures:

- The employer must consult employee representatives or unions in advance.
- The employer must notify NAV and relevant unions, detailing affected employees, reasons, and selection criteria, etc.
- When selecting the employees for collective dismissal, the employer must use objective, fair, and non-discriminatory criteria.
- The employer must notify the affected employees about the dismissals, reasons, and selection 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?

Employees can take legal action against the employer if they believe the employer did not fulfil its obligations during the mass dismissal process. Any breach of the procedural rules may result in the dismissals being deemed unjustified.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

There are several post-termination restrictions that may apply. These include confidentiality agreements, non-compete clauses, non-solicitation of customers, and non-solicitation of employees.

7.2 When are restrictive covenants enforceable and for what period?

The WEA does not restrict confidentiality agreements. Non-compete clauses are limited geographically and by business activities and are limited to one year after dismissal (from the end of the notice period or from the date of the summary dismissal). Non-solicitation of customers applies for one year after dismissal and for customers the dismissed employee has dealt with during the last year prior to the dismissal. Recruitment clauses are generally not enforceable except during business transfer negotiations, lasting up to six months post-negotiation. The WEA places no restrictions on recruitment clauses between employers and employees.

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

A non-compete clause must offer compensation up to eight times the National Insurance basic amount (8G) in the last 12 months. As of May 1st, 2023, the National Insurance basic amount comes to NOK 118,620. For salaries between eight and 12 times the National Insurance basic amount (8–12G), compensation may be limited to 70 per cent, with no requirement beyond 12G. Deductions, up to half, can apply for other income during the non-compete period. Top executives may waive protection through a written agreement in exchange for a severance package.

7.4 How are restrictive covenants enforced?

Violation of a non-compete clause may lead to a claim for damages or enforcement of contractual penalties. The penalty,

agreed upon in advance, is often a percentage of the total contract amount per day or month.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The EU General Data Protection Regulation (GDPR) has been adopted in Norway and implemented in the Personal Data Act. This Act supplements the GDPR in areas where the Regulation allows national rules. Employee privacy rights significantly impact the employment relationship, safeguarding personal integrity and ensuring lawful handling of personal data. Key aspects include:

- **Privacy:** Employees have the right to personal integrity, protecting private correspondence and activities outside work-related tasks.
- **Data Protection:** Employers must handle personal data securely and lawfully, restricting collection, storage, processing and sharing.
- **Monitoring and Control:** Employees are protected against disproportionate workplace monitoring and control, with the right to be informed about such practices.
- **Right to Information:** Employees have the right to know what data is collected, how it is used, and their rights regarding personal data.

Legally obtained and processed employee data can be transferred within the EU/EEA, subject to valid legal purposes and security measures. The GDPR strictly regulates transferring employee data to non-EU/EEA countries. Employers must exercise caution in sharing employee data internationally, implementing well-documented and justified access rights.

In addition, the Regulation on the Employer's Access to E-mailboxes and Other Electronically Stored Material limits an employer's right to access emails and other electronically stored material of its employees, as further described in question 8.4.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

The employee is entitled to receive a written, machine-readable copy of their stored personal data from the employer. This copy should include all relevant personal data about the employee specifically, excluding information about other individuals or unrelated matters present in the same document, file or system.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Employers in Norway are restricted in conducting pre-employment checks, including criminal record checks, which are permissible only when necessary to evaluate an employee's suitability for a position, particularly in cases where security or reliability is a key consideration. The Personal Data Act and the WEA govern the use of personal data in employment relationships, emphasising that such checks must be necessary and proportionate for assessing suitability. Additionally, employers are required to obtain consent from the concerned employee before conducting such checks, adhering to guidelines from the Norwegian Data Protection Authority (*datatilsynet*) and relevant legislation to ensure compliance with privacy requirements.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Employers in Norway have restricted rights to monitor their employees' communications and computer system usage. Such monitoring is governed in the Regulation on the Employer's Access to E-mailboxes and Other Electronically Stored Material. Monitoring is permitted only when necessary to protect the employer's legitimate interests and when explicit information about the monitoring measures has been provided to employees. Generally, such monitoring is restricted to cases of ensuring system security, investigating serious breaches, or meeting legal requirements. Employers must generally (with some limited exceptions) inform employees about planned monitoring, specifying its purpose and scope, and typically seek employees' input before implementing such measures.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

As a main rule, the answer is no. Employers can monitor employees' social media use only when there is a clear and justified reason. This may be justified if the use negatively impacts the work environment or the employer's reputation. However, such monitoring must adhere to privacy legislation, be proportionate, and be based on the employer's specific needs.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

Employers using AI in the workplace must adhere to privacy legislation and the WEA. In AI-driven recruitment, accuracy and non-discrimination are crucial, with transparent automated decision-making and the right for candidates to appeal. AI for performance monitoring should be necessary and proportionate, respecting employees' privacy rights. Transparent communication and clear guidelines on data handling are essential.

9 Court Practice and Procedure

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

Employment-related complaints are typically addressed by District Courts. For disputes related to collective agreements, the specialised Labour Court handles issues like validity,

interpretation, and breaches. The Labour Court also addresses and adjudicates disputes concerning liability for damages arising from breaches of agreements and unlawful work stoppages (*cf.* the Labour Disputes Act § 9 and § 34).

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The plaintiff initiates the legal process by sending a written notice to the defendant, followed by a writ of summons. The court then schedules proceedings in collaboration with the parties, often via a case management conference. Civil disputes are usually resolved in a main hearing, with settlement options explored. In certain cases, disputes must go via the conciliation board (*forliksrådet*) before reaching the District Court. Disputes related to termination, dismissal, temporary employment, hiring or suspension shall not be handled by the conciliation board.

Plaintiffs are required to pay a court fee (R). As of January 1st, 2024, R amounts to NOK 1,277. The entry fee is R 5 and includes the first day of the main hearing. The fee is increased by R 3 for each court day up to and including day five. From day six, the fee is increased by R 4. If the case has been processed by the conciliation board, the payment is reduced by NOK 1,404 (R 1.1), which corresponds to the fee for bringing a case before the conciliation board.

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

The main hearing in a District Court typically occurs four to six months after filing a summons, with longer durations in Oslo compared to other districts. In the Labour Court, the main hearing is usually scheduled within six to 10 months after filing a writ of summons.

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

Decisions from the District Court can be appealed to the Court of Appeals, and further appeals can be made to the Supreme Court. Typically, the main hearing in the Court of Appeals takes place four to six months after the appeal.



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The practice areas of the firm encompass antitrust and competition law, asset management, private equity, venture capital, capital markets, climate and environmental law, company law, corporate governance, compliance, anti-corruption investigations, construction law, data protection, dispute resolution, litigation, employment law, pensions, energy law, EU and EEA regulations, state aid, financial regulation, financing, fisheries, aquaculture,

infrastructure, insurance, intellectual property rights (IPR), mergers and acquisitions, marketing, offshore construction, offshore wind power, property transactions, property development, public procurement, public regulation, administration, restructuring, insolvency, ship contracts, maritime and transport law, tax and technology and digitalisation services.

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The Labour Code of the Philippines (“**Labour Code**”) is the primary source of employment law. The Constitution provides guidance and is supplemented by numerous employment-related legislations, decisions/rulings by the Philippine Supreme Court, and the administrative issuances of the Department of Labor and Employment (“**DOLE**”).

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

The following types of employees are protected:

- Regular employees: (i) by nature of the work or those who are engaged to perform activities that are usually necessary or desirable in the usual business or trade of the employer; and (ii) by years of service or those who have rendered at least one year of service, whether continuous or broken, with respect to the activity in which they are employed. They enjoy security of tenure and all the protections afforded by law.
- Project employees are those whose employment has been fixed for a specific project or undertaking, the completion or termination of which has been determined at the time the employee is engaged and thus, the period of engagement is coterminous with the project. They enjoy security of tenure for the duration of the project.
- Seasonal employees are those who perform work that is seasonal in nature and are employed only for the duration of a season.
- Casual or temporary employees are those engaged to perform a job, work or service that is merely incidental to the business of the employer, or only for a definite period made known to the employee at the time of engagement. They are entitled to most statutory benefits, except retirement pay and service incentive leave pay, among others.
- Fixed-term employees are not common and are not expressly recognised in the Labour Code. Jurisprudence recognises their validity under specific circumstances. They are entitled to contractual benefits and enjoy security of tenure for the duration of the contract.
- Probationary employees are those who are made to go on a trial period before regularisation. They enjoy security of tenure during the probationary period and may not be dismissed except for just or authorised cause or when they fail to qualify as regular employees. Probationary employment shall not exceed six 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?

Only in some cases. The terms of employment must be in a record that the government inspectors may review. Some cases require a written contract, such as for the employment of a domestic helper, for working children in public entertainment or information, and in trilateral job contracting.

1.4 Are any terms implied into contracts of employment?

Yes, the Labour Code provides for minimum terms and conditions of employment. Terms may also be implied by law or by custom, such as an employee’s duty to serve an employer with fidelity, honesty and good faith, obeying all legal and reasonable orders of the employer.

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

Yes. These terms and conditions pertain to: minimum wage; overtime pay; night shift differential; service incentive leave; statutory leave (maternity, paternity, solo parent, etc.); rest day; premium payment for a special holiday or rest day work; holiday pay; separation pay; and retirement 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?

Both economic (e.g., salary increases) and non-economic (e.g., union security clauses) terms and conditions of employment may be agreed through collective bargaining. Collective bargaining takes place at the company level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees’ terms and conditions of employment?

An employer and its employees may agree on the specific terms of a hybrid work arrangement. The Telecommuting Act and its implementing rules and regulations allow an employer in the private sector to offer a telecommuting programme to its employees on a voluntary basis and upon such terms and

conditions as may be agreed upon by the employer and its employees. In no case shall the terms and conditions of employment of the telecommuting employees be less than the minimum labour standards set by law. The employer must also provide the telecommuting employees with relevant written information in order to adequately apprise them of the terms and conditions of their employment and their responsibilities during a hybrid working arrangement.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Employees do not have an inherent right to work remotely. The implementation of a telecommuting arrangement falls within the employer's exercise of its management prerogative and is subject to a voluntary agreement between the employer and its employees.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

A union may or may not be registered with the DOLE. The recognition or registration of unions is governed by DOLE Department Order No. 40-03 (February 17, 2003) as amended.

2.2 What rights do trade unions have?

Registered unions have the right to engage in collective bargaining and collective action such as strikes. Unregistered unions cannot collectively bargain nor petition for a certification election.

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

Yes, a union may declare a strike only if it is a legitimate labour organisation – i.e., it is registered with the DOLE. If it is the sole and exclusive bargaining agent, it may declare a strike in cases of bargaining deadlock or unfair labour practices. If it is not a sole and exclusive bargaining agent, it may declare a strike but only on grounds of unfair labour practices committed against its members.

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, employers are not required to set up works councils. They are, however, encouraged to organise labour management councils ("LMCs"). Representatives to such councils are elected by at least a majority of all employees in the establishment.

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?

Only in the case that the management has entered into an

agreement with the LMC granting the latter co-determination rights. Otherwise, the law only encourages prior consultation (as opposed to prior agreement) with the LMC.

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

A union is a labour organisation in the private sector organised for collective bargaining and for other legitimate purposes. Meanwhile, LMCs are encouraged to be formed for the mutual aid and protection of its members or for any legitimate purpose other than collective bargaining.

2.7 Are employees entitled to representation at board level?

No, there is no entitlement for employee representation at the board level.

3 Discrimination

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

Yes, employees are protected against certain types of discrimination. Legislation provides the basis for the protection.

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

In general, it is unlawful to discriminate with respect to terms and conditions of employment on account of: (1) sex; (2) age; (3) marital status; (4) pregnant status; (5) solo parent status; (6) disability; (7) mental health condition; (8) ethnicity; (9) actual, perceived or suspected HIV status; (10) having tuberculosis; (11) having hepatitis B; (12) having cancer or being a cancer survivor (who is considered a person with disability); and (13) union membership.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The Anti-Sexual Harassment Act of 1995 (Republic Act No. 7877) mandates employers to formulate and adopt policies to prevent or deter the commission of acts of sexual harassment, among others.

The Safe Spaces Act (Republic Act No. 11313) imposes the duty on employers or other persons of authority, influence or moral ascendancy in a workplace to prevent, deter or punish the commission of acts of gender-based sexual harassment in the workplace.

3.4 Are there any defences to a discrimination claim?

The ability to invoke a *bona fide* occupational qualification ("BFOQ"), where the particular requirements of the job would justify the same, is a possible defence to a discrimination claim. A BFOQ would be valid, provided it reflects an inherent quality reasonably necessary for satisfactory job performance.

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

The employees may file a complaint in order to enforce their discrimination rights. The employer may settle claims at any stage of a claims proceeding.

3.6 What remedies are available to employees in successful discrimination claims?

Monetary awards or the payment of damages are the usual remedies in discrimination claims. If the discrimination results in illegal dismissal, the employee may be awarded reinstatement (or separation pay *in lieu* of reinstatement), full back wages and damages. The employees may also pursue a criminal case for violation of special laws prohibiting discrimination.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

The discrimination laws stated above apply equally to all types of employees. There is no additional protection given to atypical workers.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Philippines does not have a whistleblower protection law; however, there may be immunity/rewards available to whistleblowers or people who give certain information to the government under certain laws (e.g., in relation to taxes or graft and corruption).

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

There is no law requiring the publication of diversity information in the workplace. Employers are, however, enjoined to ensure the promotion of gender equality and diversity in the workplace through the implementation of policies and programmes for such purpose.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Employees are generally entitled to 105 days of maternity leave with pay.

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

A woman has the right not to be terminated from employment solely due to her pregnancy or by reason of her availment of the maternity leave benefits under the law. She has the right to extend her maternity leave for an additional 30 days without pay. She also has the right to assign up to seven days of her leave benefits to the child's father or, in his absence, to a relative

within the fourth degree of consanguinity or to her partner who is sharing the same household with her.

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

Female employees who avail of the maternity leave benefit shall be assured of security of tenure and the right to return to her former position without loss of any seniority rights.

4.4 Do fathers have the right to take paternity leave?

Yes. Pursuant to the Paternity Leave Act (Republic Act No. 8187), a male employee is entitled to paternity leave benefits of not less than seven days up to the first four deliveries of his legitimate spouse.

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

Aside from maternity and paternity leave benefits, the Solo Parents' Welfare Act (Republic Act No. 11861) entitles solo parent employees, who have rendered service for at least six months, to parental leave of not more than seven working days every year to perform parental duties and responsibilities where physical presence is required.

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

There is no law in the Philippines that generally grants employees the right to work flexibly to provide care to dependents. The Solo Parents' Welfare Act permits the employer to grant a flexible working schedule to solo parents.

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 sale transaction, employees do not automatically transfer to the buyer without the consent of the employees. The employee must be terminated by the original employer and then hired by the buyer-employer. In a share sale transaction, there is no transfer of employees to speak of.

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

The sale of a business may be carried out by either an asset sale or by a share sale. An asset sale precludes an employee from invoking previously obtained rights against the original employer. In a share sale, no change occurs. The collective bargaining agreements remain valid and enforceable unless there are specific changes of control provisions found in the collective bargaining 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?

Where termination of employment will follow a business sale, employees must be notified 30 days ahead of their termination. The DOLE must be notified of the termination 30 days ahead of it as well. Failure to notify may give rise to liability for damages.

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

Yes, if the business sale is via an asset sale transaction, on the ground of redundancy or permanent cessation of business.

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

Yes, if there has been a lawful termination of employment by the seller of the affected business employees and the payment to them of separation pay. In case the sale of business is through a share sale transaction, the new owner of the business may not change the terms and conditions of employment to the prejudice of 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, employees must be given notice of termination. Just cause terminations are communicated to the employee via a notice of decision after observance of due process. Authorised cause terminations require written notices to the affected employees and the DOLE at least 30 days before the effective date of 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?

"Garden leave" is not provided for as such in the Philippines. It may be similar to placing an employee on leave with pay but that is not a Philippine law requirement.

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 be validly dismissed only after compliance with both substantive and procedural due process requirements of law. Substantive due process refers to having a valid ground for dismissal, while procedural due process refers to the procedural requirements leading to dismissal. Notice to the employee and/or the DOLE may be required for the dismissal to be valid. There is no consent requirement.

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

There are no categories of employees who enjoy special protection against dismissal for just or authorised causes under the Labour Code. An employer, however, is prohibited from terminating employment based on an employee's race, gender, political belief, religion, association and other special conditions. Hence, certain groups of employees (e.g., women, the disabled, union members, or employees with HIV, hepatitis B, and tuberculosis) may not be terminated solely on account of their gender or condition.

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 employer may dismiss employees only for just or authorised causes under the Labour Code. The just causes for terminating employment include the following:

- (a) serious misconduct or wilful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
- (b) gross and habitual neglect by the employee of his duties;
- (c) fraud or wilful breach by the employee of the trust reposed in him by his employer or duly authorised representative;
- (d) commission of a crime or offence by the employee against the person of his employer or any immediate member of his family or his duly authorised representatives; and
- (e) other causes analogous to the foregoing (i.e., abandonment of work, gross immorality or gross incompetence).

On the other hand, the following are the authorised causes under the law:

- (a) installation of labour-saving devices;
- (b) redundancy;
- (c) retrenchment;
- (d) closure or cessation of business; and
- (e) disease.

In a just cause termination, the dismissed employee is not entitled to any separation pay. For termination due to authorised causes, the employee is generally entitled to payment of separation pay.

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

Yes. For termination due to just causes, the employer must inform the employee in writing of the charges upon which termination may ensue and provide opportunity for the employee to explain. The employer must call an administrative hearing to give the employee further opportunity to be heard and to present his or her evidence, with the assistance of a lawyer or representative. If the explanation is unsatisfactory, the written notice of the decision follows, leading to termination of employment. For termination due to authorised causes, the employer must serve written notices to the displaced employee and the DOLE at least 30 days before the effective date of termination and must pay the displaced employee severance pay computed in accordance with law.

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 file a case for illegal dismissal. A successful

claim may result in an award for reinstatement without loss of seniority rights and full back wages, inclusive of allowances and other benefits computed from the time the employee's compensation was withheld from him up to the time of his actual reinstatement. Moral and exemplary damages and attorney's fees may also be awarded. In some cases, separation pay may be awarded *in lieu* of reinstatement. The employer may appeal the decision to the National Labour Relations Commission ("NLRC") and then to the Court of Appeals and the Supreme Court.

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

Employers may settle claims of the employees at any time before or after a formal complaint is filed. An amicable settlement or compromise of a labour case is possible at any time before the finality of the decision in the case.

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

No. There are no additional or special obligations arising from the fact that the dismissal will affect many employees other than those already discussed at question 6.6 above.

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 who are the subject of mass dismissals have the same recourse and remedies available to employees, in general, as those who have been unjustly terminated from employment. Since employers have no special obligations in the case of mass dismissals, liability for unlawful termination is the same as those discussed at question 6.7 above.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Non-compete clauses have been ruled to be valid in certain situations by the Supreme Court. Those Court rulings may be inferred to be applicable to non-solicitation clauses, given their similarity in nature and purpose.

7.2 When are restrictive covenants enforceable and for what period?

Most cases cite the intrinsic reasonableness of the restriction in each case, rather than by any fixed rule. Courts may consider the following factors in determining enforceability, examining whether the restrictions: (a) are limited as to time, trade and place; (b) are not greater than necessary to afford a fair and reasonable protection to the employer; (c) do not create an undue burden on the employee; (d) are not injurious to public welfare; and (e) are reasonable from the standpoint of public policy.

There is no maximum duration provided for the enforceability of the said clauses under Philippine law and jurisprudence. The determination of whether or not the period is reasonable depends on the particular facts and circumstances in each case.

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

Case law suggests that the employer should provide some form of consideration to the employee in return for the covenant. It has been argued that the employment itself and the compensation/benefits resulting therefrom are reasonable consideration for the restriction.

7.4 How are restrictive covenants enforced?

Restrictive covenants may be enforced by an action for injunction with damages.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The Data Privacy Act of 2012, its implementing rules and regulations, and the circulars issued by the National Privacy Commission from time to time apply to employee data that fall under the definition of personal information and sensitive personal information. The employer's ability to "process", referring to any operation or set of operations performed upon data such as collection, recording, organisation, storage, updating or modifying, retrieval, consultation, use, consolidation, blocking, erasure, or destruction of data, is restricted. The data subject's consent is required to perform any act of data processing, including the transfer of that data to other countries.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, employees as data subjects are entitled to obtain copies of any personal information that is held by their employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, case law permits this.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Case law permits the monitoring of emails and the use of computer systems, subject to the following considerations: (a) the employee's relationship to the item seized; (b) whether the item was in the immediate control of the employee when it was seized; (c) whether the employee took actions to maintain his privacy in the item; and (d) the presence of a policy regulating the use of office computers. For telephone calls, monitoring or listening into and recording of calls would require the consent of the parties in the call.

8.5 Can an employer control an employee’s use of social media in or outside the workplace?

Employer regulation of an employee’s usage of social media in the workplace is permitted. Regulation outside of the workplace is not as clear.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee’s performance or productivity)?

There is currently no legislation in place that specifically regulates the use of AI in recruitment or in monitoring an employee’s performance. If the use of AI in the employment relationship will entail the processing of the employee’s personal information, it must comply with the provisions of the Data Privacy Act.

9 Court Practice and Procedure

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

The NLRC or the Secretary of Labor and Employment has jurisdiction over employment-related complaints. The relevant tribunals for hearing complaints are:

- The NLRC, which is a quasi-judicial agency that handles appealed cases from the Labour Arbiters. The NLRC is composed of a Chairman and 23 members.
- The Bureau of Labour Relations, which is led by a Director and handles appealed cases from decisions of Mediator-Arbiters on intra/inter-union disputes.
- The National Conciliation and Mediation Board, which is an agency attached to the DOLE, principally in charge

of the settlement of labour disputes using conciliation, mediation and promotion of voluntary approaches. An Executive Director heads this Board, which has attached Voluntary Arbitrators and Conciliator-Mediators.

- The Department of Migrant Workers hears and decides complaints and reports involving violations of recruitment laws, rules and regulations, and terms and conditions for the grant and use of a licence to recruit workers for overseas employment.

Decisions of these attached agencies, and of the DOLE, can be elevated to the appellate process of the judicial system.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Conciliation-mediation is generally mandatory before a complaint can proceed. There is no fee assessed on an employee for filing a claim or complaint.

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

It usually takes around one to two months from the submission of a matter for resolution for a decision to be issued at the initiatory level. The appellate process takes longer.

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

Appeals from first instance decisions are possible. Appeals take one to two months to be resolved at the first appellate level. From the first appellate level, further appeals are possible, up to the Supreme Court, which may take up to five years.



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SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) is one of the largest law firms in the Philippines. It has offices in Makati City, the country's business and financial centre, as well as Cebu City, Davao City and the Subic Bay Freeport Zone. It is a full-service law firm and was founded in 1945.

The firm offers a broad and integrated range of legal services, including those in the following fields: mergers and acquisitions and special projects, banking, finance and securities, corporate services and general commercial law, employment law and immigration, litigation and dispute resolution, tax and intellectual property.

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Sofia Barros Cortez

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Employment relationships in Portugal are governed by several sources, listed below in a descending hierarchical order, where the higher source typically prevails over the lower sources:

- (i) international sources, notably: (i) international conventions ratified by Portugal; and (ii) EU legislation;
- (ii) local law, notably the Labour Code (approved by Law no. 7/2009, of 12 February);
- (iii) collective bargaining agreements (“CBAs”); and
- (iv) repeated labour practices not contrary to good faith.

In addition, the employment relationship is also governed by the terms and conditions agreed in the individual employment contract and other ancillary agreements (if any).

A CBA may prevail over the law unless stated differently by the latter (i.e., either the law determines it is imperative or that it will only yield to a CBA provision that is more beneficial to the employee).

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

Employment law applies to the relationship established by an employment contract, i.e., the contract whereby an individual undertakes to provide a paid activity to another person, being subject to the latter’s authority and direction.

Furthermore, employment law provisions regarding personality rights, equality and non-discrimination and occupational health and safety, as well as the collective labour regulation instruments in force within the same professional sector of activity and geographical area, also apply to situations where a person provides a professional activity to another person, without legal subordination, as long as it is considered economically dependent of the latter.

In addition to the above, employment law further distinguishes between (i) standard employment contracts and special types of employment contract, subject to specific rules (e.g., term contracts, part-time work, domestic service), and (ii) standard employees and special categories of employees that are granted additional protection (e.g., student-workers, pregnant, postpartum or lactating employees, or employees with a disability or chronic illness).

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

As a rule, employment contracts are not subject to any special form unless otherwise provided by law. However, some employment contracts, such as the following ones, must be in writing:

- (i) term employment contracts;
- (ii) employment contracts with foreign employees (depending on the country);
- (iii) multiple employer employment contracts;
- (iv) part-time employment contracts; and
- (v) management employment contracts.

In any case, employers must inform employees of all relevant aspects of the employment contract, including a set of mandatory information foreseen in the law, within seven or 30 days (depending on the type of information) of the beginning of the execution of the contract and in writing.

1.4 Are any terms implied into contracts of employment?

Unless the parties agree to specific terms and conditions, the employment contract is governed by statutory provisions, CBAs, internal regulations and/or labour practices.

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

Yes, minimum employment standards are set by the law and the CBAs.

The national minimum wage (EUR 820 for 2024), limits on work time (eight hours per day and 40 hours per week) and the minimum duration of annual leave (22 days) are examples of minimum work conditions set by law.

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?

CBAs benefit from a broad leeway to set the terms and conditions of employment (without prejudice to question 1.1 above).

Industry-level CBAs are more common, but company-level agreements are also possible.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Under the law, hybrid arrangements qualify as telework. As a rule, a telework arrangement requires both parties' written agreement to be implemented.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

As stated, remote work requires the consent of both parties. There are, however, some cases where the employee is entitled to demand from the employer to work remotely, namely employees with children up to eight years old or, regardless of age, children with a disability, chronic illness or oncological disease.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade unions become legal entities following the publication of their bylaws by the services of the Labour Ministry.

2.2 What rights do trade unions have?

Trade unions are, amongst others, entitled to:

- (i) negotiate CBAs;
- (ii) summon employees' meetings at the workplace;
- (iii) distribute information regarding the union's activities and other matters relevant to the employees;
- (iv) represent their members at a company level, including in dismissal and lay-off proceedings;
- (v) be informed and consulted on several matters, such as the evolution of the company's activity, the evolution of employment in the company and decisions that alter working conditions; and
- (iv) call and conduct a strike.

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

The Labour Code provides the legal framework for strikes, governing the following aspects, amongst others:

- (i) the strike's notice and term;
- (ii) employees' representation and picketing; and
- (iii) minimum services.

CBAs may also include provisions that condition the trade union's right to strike, namely no-strike clauses or peaceful means of conflict resolution before it is declared.

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 cannot set up works councils in any situation. Only employees have the right and the initiative to form a works council.

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 is required to consult with the works council on several aspects, including:

- (i) Drafting of internal regulations.
- (ii) Change of professional categories and promotion.
- (iii) Definition and organisation of work schedules.
- (iv) Relocation of the company or its establishments.
- (v) Any measure that may result in a substantial reduction in the number of employees, deterioration of working conditions or changes in the work organisation.
- (vi) Formal proceedings, such as transfers of undertaking, lay-offs and dismissals.
- (vii) Dissolution or application for insolvency of the company.

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

Trade unions and works councils exercise their rights separately and independently. However, in practice, it is common for these organisations to overlap, namely through common members or appropriation of functions of the works council by the trade unions, when the former does not exist.

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?

Employment law protects employees against discrimination based on any grounds, listing, only as examples, lineage, age, gender, sexual orientation, gender identity, marital status, family situation, economic situation, education, social origin or condition, genetic heritage, reduced capacity to work, disability, chronic illness, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological beliefs and trade union membership.

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

Both employees and candidates are protected against discrimination, direct and indirect, in all aspects of the employment contract, from hiring to training, promotion and work conditions, including salary and termination, prohibiting any privilege, favour, prejudice, deprivation of any right or exemption from any duty.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Employers with seven or more employees are required to adopt an anti-harassment policy.

3.4 Are there any defences to a discrimination claim?

Unequal treatment can be justified if supported on objective factors that constitute a relevant and justifiable reason for the differential treatment, such as requirements for the provision of the activity or the context in which it is carried.

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

Employees can file a court action to enforce discrimination rights.

The claimant must identify the employee(s) in relation to whom he/she believes he/she has been discriminated against, after which the proof that the difference in treatment is not based on any discriminatory factor falls with the employer.

A settlement can be made either before or after the claim has been lodged and at any stage of the proceeding.

3.6 What remedies are available to employees in successful discrimination claims?

Employees who have been discriminated against are entitled to compensation for any damages to pair their conditions to the ones of other employees.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Atypical employment contracts often have specific provisions adjusting the right to equal treatment to each specific contract.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The EU whistleblowing directive has been introduced into the Portuguese legal system by Law no. 93/2021, which establishes obligations for companies on the implementation of reporting channels and procedures and prohibits any retaliation against whistleblowers.

Additionally, Law no. 83/2017, regarding the prevention of money laundering and financing of terrorism, also establishes rules to protect employees who report infractions on these matters.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

The following examples apply:

- (i) The employer must display information about the rights and duties of the employee in terms of equality and non-discrimination in an appropriate place in the company.
- (ii) Companies must keep a database of recruitment procedures for five years, which must include the following information, broken down by sex: invitations to fill posts; job vacancy adverts; number of applications for curricular assessment; number of candidates present at pre-selection interviews or awaiting admission; results of admission or selection tests; and social balance sheets (in order to analyse the existence of possible discrimination against).

- (iii) Companies must report, on an annual basis, the number of disabled employees at their service and this information is included in the annual report on the company’s social activity.

Companies must elaborate and present a plan of assessment and evaluation of the existing pay gaps, if notified by the Labour Inspection Authority for that purpose.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Upon the birth of a child, both parents are entitled to an initial parental leave of 120 or 150 consecutive days following childbirth, which can be shared between them.

However, the mother must take 42 consecutive days of leave following childbirth and can take up to 30 days before the childbirth.

The duration of the initial parental leave can be increased in the event of (i) 30 consecutive days or two periods of 15 consecutive days of leave taken exclusively by each parent, (ii) multiple births, (iii) postpartum hospitalisation, and (iv) premature birth.

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

The initial parental leave does not entail the loss of any rights, except for remuneration, and is considered as effective provision of work. The parent’s loss of salary is compensated by an allowance paid by Social Security.

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

Upon returning to work, the mother may have the following rights:

- (i) up to two breastfeeding or bottle-feeding breaks per day, each lasting a maximum of one hour;
- (ii) exemption from overtime and night-time work;
- (iii) flexible working hours arrangements and teleworking;
- (iv) additional health and safety protection.

4.4 Do fathers have the right to take paternity leave?

In addition to being able to share the initial parental leave, the father is entitled to an exclusive leave consisting of (i) 28 compulsory days (consecutive or in interpolated periods of at least seven days, to be taken in the 42 days following childbirth), seven of which must be taken immediately after childbirth, and (ii) seven optional days at the same time as the mother’s exclusive duration of initial parental leave.

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

In addition to the initial parental leave, employees have other parental-related rights, notably:

- (i) Justified absences before (e.g., medical examinations) and after (e.g., childcare) childbirth.
- (ii) Complementary parental leave in the form of extended parental leave and/or part-time work.

- (iii) Non-discrimination, especially in terms of remuneration, attendance and productivity bonuses and career progression.
- (iv) Increased protection from dismissal.

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

Employees with a child under the age of 12 or, regardless of age, with a disability or chronic illness who lives in the same household as the employee, are entitled to work part-time or under a flexible working hours schedule.

5 Business Sales

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

Share sales do not entail the transfer of employees, since the employer, i.e., the company whose shares have been sold, remains the same.

On the contrary, an asset transfer may entail the automatic transfer of employees to the buyer if the set of transferred assets qualifies as an undertaking, i.e., a productive unit endowed with technical and organisational autonomy that retains its identity, with the objective of exercising an economic activity, either main or secondary.

If the asset transfer does not qualify as a relevant transfer of business unit, employees may only be transferred with their individual consent.

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

In the event of a transfer of undertaking, the transferred employees maintain all contractual and acquired rights, including salary, seniority, professional category and functions and social benefits.

The CBA also remains applicable for the duration of its term or for a minimum of 12 months following the transfer, unless another CBA becomes applicable in the meantime.

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 transfer of an undertaking entails a formal proceeding, which takes approximately six to seven weeks to be completed and includes the following phases:

- (i) information of affected employees, their representatives and (potentially) the Labour Inspection about the transfer and its expected impacts; and
- (ii) consultation of the employees' representatives and (potentially) the Labour Ministry's services, as a mediator.

After the consultation, each employee may individually and formally refuse the transfer, remaining in the company, or resign with cause, while already at the new company, when duly justified under the law (e.g., when the transfer causes him/her serious damage).

Failure to comply with the consultation procedure constitutes an administrative offence.

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

The transfer of an undertaking does not, in itself, constitute grounds for dismissal.

However, it does not preclude dismissals carried out under the general legal terms, namely for disciplinary or business reasons (as described at question 6.5 below).

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

The transfer of an undertaking does not, in itself, justify the change of terms and conditions of employment.

However, it also does not preclude any change of said terms and conditions, namely those that could be implemented regardless of the transfer under the general legal terms.

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 must be given notice of termination of employment in the following situations:

- (i) Dismissal during trial period
The duration of notice is seven or 30 days, depending on whether the contract lasted longer than 60 or 120 days, respectively.
- (ii) Expiry of term contracts
For fixed-term contracts, the duration of notice is 15 days, for undetermined-term contracts it is seven, 30 or 60 days, depending on whether the contract lasted up to six months, from six months to two years or longer, respectively.
- (iii) Dismissal of management employment contracts
The duration of notice is 30 or 60 days, depending on whether the contract lasted up to two years or longer, respectively.
- (iv) Dismissal for business reasons or unsuitability
The duration of notice is 15, 30, 60 or 75 days, depending on whether the contract lasted less than one year, from one to five years, or from five to 10 years or longer, respectively.

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?

As a rule, garden leave requires the employee's agreement.

Nevertheless, in the event of termination of the employment contract subject to notice period, the employer may determine that outstanding vacation entitlement is taken immediately before the termination.

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 dismissed when the employment relationship is terminated by unilateral decision of the employer, either expressly, in writing or verbally, or tacitly.

To be lawful, the dismissal must comply with the applicable legal requirements (notably, regarding justification) and procedure, but it does not, as a rule, require the consent of third parties, with the exception of the dismissal of pregnant, postpartum or lactating employees or employees in parental leave, which is preceded by a positive opinion from the *Comissão para a Igualdade no Trabalho e no Emprego*.

In the event of a dismissal, employees may:

- (i) File an injunction to preventively suspend the dismissal.
- (ii) File a court action to challenge the dismissal on the grounds provided by employment law.

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

The following categories of employees benefit from increased protection against dismissal:

- (i) Pregnant, postpartum or lactating employees and employees in parental leave (as mentioned in question 6.3 above).
- (ii) Current and former members of the corporate bodies of employees' representation structures and candidates to said positions.
- (iii) Whistleblowers and employees who reported cases of harassment.

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 may dismiss employees for:

- (1) reasons related to the individual employee in cases of misconduct that render the employment relationship unbearable, given their seriousness and consequences; and
- (2) business reasons in the following cases:
 - (i) Collective redundancy, i.e., the decision to reduce the workforce due to closure of one or more of the company's undertakings for economic, structural or technological reasons, of at least two or five employees (for companies up to 49 employees or with 50 or more employees, respectively), within a three-month period.
 - (ii) Individual redundancy, i.e., the decision to suppress a job position for the same reasons as collective redundancies, whenever the latter does not apply.
 - (iii) Unsuitability, i.e., the decision to terminate an employee unable to adjust to changes in his/her position, not resulting from the employee's own fault.

Only employees dismissed for business reasons are entitled to compensation of between 12 and 30 days of base salary and seniority payments for each year of seniority (minimum or maximum amounts may apply), as well as notice prior to termination (as described in question 6.1, point (iv) above).

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

Individual (and collective) dismissals must always be preceded by a formal procedure, which varies depending on the cause for dismissal, as follows:

Dismissal for disciplinary reasons:

- (i) Delivery of a formal accusation, indicating the company's intention to dismiss and a statement of misconduct with a detailed description of the facts charged to the employee.

- (ii) The employee may consult the disciplinary proceeding, file a defence and request additional evidentiary measures.
- (iii) The company must carry out the evidentiary measures requested by the employee, unless they are deemed obstructive or impertinent.
- (iv) Delivery of the dismissal decision with a detailed account of the reasons for the termination.

Collective redundancy dismissal:

- (i) Delivery of a written communication to the impacted employees, their representatives and the Labour Ministry's services, with the reasons for the redundancy.
- (ii) Consultation with the employees' representatives and (potentially) the Labour Ministry's services, as a mediator, to provide information and reach an agreement on the impacts of the redundancy.
- (iii) Delivery of the dismissal decision to each employee concerned, their representatives and the Labour Ministry's services with, amongst other information, a detailed account of the reasons for the termination.

Individual redundancy dismissal:

- (i) Delivery of written communication to the employee and his/her representatives with the reasons for the redundancy, the need to dismiss the employee assigned to the affected job position and the criteria for the selection of the employee.
- (ii) The employee and his/her representatives may (i) request the Labour Inspection's opinion, and (ii) issue their own opinion regarding the dismissal.
- (iii) Delivery of the dismissal decision to the employee, his/her representatives and the Labour Inspection with, amongst other information, a detailed account of the reasons for the termination.

Dismissal for unsuitability:

- (i) Delivery of a written communication to the employee and his/her representatives with, amongst other information, the reasons for the dismissal.
- (ii) The employee may request additional evidentiary measures, whose results must be informed to the employee and his/her representatives.
- (iii) The employee and his/her representatives may issue an opinion regarding the dismissal.
- (iv) Delivery of the dismissal decision to the employee, his/her representatives, and the Labour Inspection with, amongst other information, a detailed account of the reasons for the termination.

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

If a dismissal is ruled as unlawful, employees may be entitled to:

- (i) Indemnity for damages caused, including payment of salaries for the period during which the case was being settled in court.
- (ii) Reinstatement in the company.
- (iii) Compensation *in lieu* of reinstatement (if requested by the employee) to be determined by the court between 15 and 45 days of base salary and seniority payments for each year of seniority, with a minimum of three months' pay.

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

A settlement can be made either before or after the claim has been lodged and at any stage of the proceeding.

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

The dismissal of several employees within a three-month period may trigger a collective redundancy if justified on business reasons, with the requirements, procedure and effects described above.

Otherwise, several simultaneous individual dismissals are treated separately.

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 the dismissal decision in court. If a dismissal is ruled as unlawful, employees have the rights described in question 6.7 above.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Employment law does not, as a rule, admit agreements between the employer and the employee that limit the latter's freedom to work after the termination of the contract.

Nevertheless, some covenants are allowed, such as non-compete covenants.

7.2 When are restrictive covenants enforceable and for what period?

Non-compete covenants are enforceable upon termination of the employment contract and up to a period of two years following the termination, which may be increased to three years for employees who held positions of trust or had access to sensitive information.

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

For non-compete covenants to be valid and enforceable, the employee must be paid a fair compensation.

Despite employment law not specifying the amount or the criteria for the compensation, courts have understood that the compensation needs to be adequate and proportionate to the limitations imposed in order to compensate the employee's loss of income. Ultimately, the compensation amount needs to be assessed case by case.

7.4 How are restrictive covenants enforced?

The remedies for a breach of non-compete consist of (i) withholding payment of the compensation, if not yet paid, (ii) reimbursement of the compensation, if already paid, and (iii) payment of damages arising from the former employee's competing activity.

Since the burden of proof of damages falls on the company and these may be difficult to quantify, it is common for non-compete covenants to include a contractual penalty.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employee data protection is governed by the Labour Code, the GDPR (Regulation (EU) 2016/679) and Law no. 58/2019, which adapts the GDPR to Portuguese law.

Data protection affects several aspects of the employment relationship, such as recruitment, assiduity and punctuality, monitoring of work tools, control of activity and disciplinary action, all of which have to take into consideration the restrictions imposed by the employees' rights to privacy and data protection.

Due to the subordination present in the employment relationship, processing of personal data is based essentially on compliance with legal obligations, the execution of the employment contract and the legitimate interests of the employer. On the other hand, the employee's consent is only exceptionally accepted as ground for the processing of personal data.

Transfer of personal data must abide by the principles and rules of the GDPR. Transfers to third countries or international organisations can take place only if they ensure an adequate level of protection, as decided by the Commission, or if the controller or processor provides appropriate safeguards and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, employees have the right to access, rectify and delete the data processed by the employer. Additionally, employees may request the limitation of treatment and exercise their right of opposition and portability of the data and have the right to withdraw their consent.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

As a rule, the employer may not require information concerning a candidate or employee's private life, except when strictly necessary and relevant to assess their ability to perform the work.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Although companies can establish rules about the use of its IT equipment and software, the employees' right to privacy and confidentiality of personal contacts is also protected by law.

As such, monitoring is subject to restrictions, arising, amongst others, from the Portuguese Data Protection Authority's Resolution no. 1638/2013, according to which control by the company should be proportional to the restrictions to the employees' rights. For instance, monitoring should not be permanent or persecutory, but random, sporadic and follow objective criteria.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

The employer can establish rules about the use of its IT

equipment and software, including for social media purposes. In this case, control can be carried out as explained in question 8.4 above.

If employees use social media on personal equipment (e.g., a mobile phone) during working hours, control can only be exerted indirectly, insofar as it has an impact on the employee's activity.

The use of social media outside working hours is not, as a rule, relevant for the employment relationship, except when it affects employment duties not dependent on the effective provision of work, e.g., respect and loyalty, in which case it may be relevant for disciplinary purposes.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

As stated above, employees or job candidates have the right to equal opportunities and equal treatment with regard to access to employment, training, promotion or professional career and working conditions, and may not be favoured, benefited, prejudiced, deprived of any right or exempted from any duty on the grounds of any discriminatory factor. The aforementioned right also applies in the case of decision-making based on algorithms or other artificial intelligence systems.

Employees should be informed in writing of the parameters, criteria, rules and instructions on which algorithms or other artificial intelligence systems that affect decision-making on access to and maintenance of employment, as well as working conditions, including profiling and monitoring of professional activity, are based.

Works council and trade union delegates also have access to such information.

9 Court Practice and Procedure

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

Employment tribunals have exclusive jurisdiction to decide on employment-related claims. These courts are organised by sections, each headed by a judge.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The law foresees several special procedures for specific purposes (e.g., challenging a formal dismissal, work accidents or recognition of an employment relationship), each with specific phases and deadlines, as well as a common procedure, for non-specific purposes.

Despite each procedure's specificities, most include a formal conciliation phase, mediated by the judge, either at the beginning of the procedure or prior to the trial hearing.

Unless employees benefit from an exemption from court costs, they are required to pay the standard applicable court costs, whose amount depends on the amount of the claim.

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

The duration of court cases depends on multiple factors, notably if the process is urgent (as a rule, special procedures are urgent), complexity of the disputed subject and the number of parties and claims. Court cases tend to take from 18 months to four years to settle, including appeals.

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

The parties may appeal from a first instance decision, provided certain requirements are met. These requirements may be related to the matter under discussion or the value of the claims, which must be higher than EUR 5,000.

Appeals tend to take from six to 12 months to decide.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main sources of domestic employment law are the Romanian Labour Code, adopted in March 2003 and successively amended thereafter, regulating the aspects of individual labour law, and the Social Dialogue Law, adopted in December 2022, mainly regulating the aspects of collective labour law. Particular aspects may also be found in specific pieces of legislation, e.g. regulating health and safety, social security, cross-border secondment, teleworking, and protection of maternity at the workplace.

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

Any person performing work based on an employment agreement is protected by employment law. The distinctive mark for an employment agreement is work performed in a relationship of subordination, with the employer setting the direction, scope, and conditions of the work. In this relationship, the employer exercises control and supervision over the employee's tasks, ensuring that they are carried out in accordance with company policies, standards, and objectives. The employee, in turn, follows the instructions provided by the employer, adheres to designated working hours, and operates within the framework defined by the organisation.

Employees from both the private and public sectors ("*personal contractual*") are protected by employment law.

Particular types of workers protected by employment law are interim employees (hired by a temporary employment agency and placed with the client company), apprentices (with accent on the vocational training of the worker for a specific job), and entry-level trainees (for a period of six months following university graduation).

Day workers or students performing other types of internships or practice with a company do not generally fall under the protection of employment law.

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, employment contracts have to be concluded in writing and registered in the registry of employees at the latest on the day preceding the commencement of the activity.

Employment contracts have to be drafted in Romanian; bilingual forms, with a preceding Romanian version, are also accepted.

1.4 Are any terms implied into contracts of employment?

Yes, legal terms conferring the basic protection of employees are implied in the employment contracts (e.g. minimum duration of annual leave, minimum duration of notice period, breaks and rest time).

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

Yes, the legal terms conferring the basic protection of employees have to be observed by the employers irrespective of whether such terms are provided in the individual employment contract or not.

Individual employment agreements generally follow a mandatory template, with the possibility of the parties to adapt the template by adding extra clauses or by amending the existing ones to the benefit of the employee. Clauses stipulating rights inferior to the basic protection or imposing higher obligations on the employee are void and replaced *de jure* with the terms of the basic protection granted under the law.

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 also be agreed through collective bargaining, in which case they apply as basic protection to all employees falling under the scope of such collective bargaining.

Terms and conditions agreed through collective bargaining cannot be lower than the basic protection granted under the law.

As a rule, collective bargaining agreements can be negotiated at company level, a group of companies' level, industry level (sector level) and national level. Collective bargaining processes are mandatory at company level, for companies employing at least 10 employees, and at sector level.

In practice, negotiation occurs most commonly at company or a group of companies' level. Although rendered mandatory by the law at sector level, there were only two sector-level collective bargaining processes concluded successfully in 2023, specifically in the Health and Pre-university Education sectors.

A collective bargaining agreement concluded at *company level* or at a *group of companies' level* applies to all employees hired in the said companies.

A collective bargaining agreement at *sector level* applies to all employees within companies or organisations that are part of the employers' organisation that has signed the collective bargaining agreement or has adhered to it after its execution. In the situation where the number of employees within the member units of the signatory employers' organisation is greater than 35% of the total number of employees in the said sector, the application of the collective bargaining agreement registered at sector level can be extended to all units within the sector by Government decision, with the approval of the Tripartite National Council.

A collective bargaining agreement at *national level* applies to all employees in the companies or organisations for which the agreement has been concluded and that are members of the employers' organisation that has signed the collective bargaining agreement or has adhered to it after its execution.

At the present moment, there is no national-level collective bargaining agreement in place.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Teleworking or hybrid work, combining work at the workplace and remote work, is possible but only if both the employee and the employer agree. The individual employment contract shall be adapted to expressly stipulate the teleworking/hybrid work and the main terms thereof.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

The employees do not have a general right to work remotely.

Telework or remote work has to be agreed upon by both the employee and the employer. Remote work can be carried out from home or from any other place. Employers should pay particular attention to (or restrict) employees working remotely from a location in a State other than the one where they are employed, as this situation may entail tax and social security implications.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

A trade union can be founded if it assembles at least 10 employees from the same company or at least 20 employees from different companies within the same sector of activity. An employee can be member of only one trade union at the level of an employer.

A trade union gains legal personality by registration with the Court. Any subsequent amendment to the trade union statute or change in the composition of the governing body has to be authorised by the same Court.

A trade union gains enhanced power if it reaches the representativity thresholds. The representativity thresholds are provided by law, and are different for company level, a group of companies' level, sector level or national level. For instance, at company level, a trade union is representative if at least 35% of the employees in that company are members of that trade union.

The representativity thresholds are assessed and recognised by the Court.

A trade union can be constituted and recognised without any participation (or information) of the employer.

2.2 What rights do trade unions have?

Trade unions are formed to defend, support, and promote the professional, economic, cultural, artistic, sports, or social interests of employees in their relationship with the employer. To achieve these goals, unions have the right to use specific means, such as negotiations, dispute resolution procedures through conciliation, mediation, arbitration, petition, protest picketing, marches, rallies, or strikes, in accordance with the law.

Trade unions have the right to take any action, including filing legal actions on behalf of their members, at the written request of their members.

Trade unions have the right to be invited to the collective bargaining agreement process and to the meetings of the board of directors or any other similar body, for discussing issues of professional, economic, and social interest that impact employees/workers.

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

Yes, industrial action can be taken by the trade union only with the observance of the conditions and the procedure established by the law.

Trade unions are entitled to initiate collective labour disputes in the following situations:

- (i) the employer refuses to initiate negotiations for a collective bargaining agreement when there is no such agreement in place or the previous one has terminated;
- (ii) the employer organisation does not accept the demands made by employees/workers;
- (iii) the parties do not reach an agreement regarding the conclusion of a collective bargaining agreement by the date that was agreed for completing negotiations;
- (iv) in cases where, although the negotiation of a collective bargaining agreement has begun, the employer does not share the documentation required for continuing negotiations;
- (v) the employer refuses to initiate negotiations when the parties have stipulated clauses to be periodically renegotiated and the agreed-upon period for renegotiating them has expired, or if the parties do not reach an agreement on the renegotiation of clauses to be periodically renegotiated;
- (vi) in the event of non-completion of renegotiation of clauses that were invalidated, after exhausting the negotiation procedures provided by this law; or
- (vii) if the employer refuses to adhere to the collective bargaining agreement concluded at sector level.

A collective labour dispute can also be initiated in case the employer refrains from granting to its employees the rights provided in the collective bargaining agreements, if this affects:

- (i) at least 10 employees if the employer has more than 20 but less than 100 employees;
- (ii) at least 10% of employees if the employer has at least 100 but less than 300 employees; and
- (iii) at least 30 employees if the employer has at least 300 employees.

The trade union is entitled to initiate a collective labour dispute in cases where a litigation for enforcing the individual rights has begun but has not been concluded within a maximum period of 45 days calculated from the date of the first Court hearing.

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 required only in a Community-scale undertaking or a Community-scale group of undertakings, as provided in the national legislation transposing EU Directive 2009/38/EC on the establishment of a European Works Council, or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

A Community-scale undertaking is a company with at least 1,000 employees within the Member States and at least 150 employees of at least two Member States.

A Community-scale group of undertakings is a group of companies with at least 1,000 employees within the Member States, at least two group undertakings in different Member States and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State.

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 Romania.

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

This is not applicable in Romania.

2.7 Are employees entitled to representation at board level?

No. Members of trade unions have to be invited to the meetings of the board of directors, or any other similar body, for discussing issues of professional, economic, and social interest that impact employees/workers, but they do not have voting or veto rights in such meetings.

3 Discrimination

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

Yes, employees benefit from legal protection against dis-

crimination. Discrimination is prohibited on various grounds, including race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, disability, non-contagious chronic illness, HIV infection, and belonging to a disadvantaged category. Additionally, any other criteria that aim at or result in restricting or removing the recognition, use, or exercise of human rights and fundamental freedoms are also considered prohibited grounds for discrimination. This prohibition extends to various areas of public life, such as political, economic, social, and cultural domains.

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

Any form of direct or indirect discrimination is prohibited. Also, any acts of moral harassment, psychological harassment, or sexual harassment in the context of the workplace are prohibited.

Employees submitting a complaint or initiating procedures to ensure compliance with these rights are entitled to protection against any adverse treatment from the employer.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Yes, employers have specific obligations for preventing and combating any forms and acts of gender-based harassment and moral harassment in the workplace (list not exhaustive):

- establishing internal policies/codes of conduct/guides actively promoting a work environment where harassment and persecution are not tolerated and addressing the expected behavioural standards;
- introducing the provisions for the prevention and sanctioning of all forms of discrimination, as well as those concerning equality of opportunities and treatment between women and men into the internal regulations;
- prohibiting and sanctioning any actions that may lead to moral harassment in the workplace or based on gender;
- taking diligence to establish a framework of prevention and protection measures in cases of gender-based harassment and moral harassment in the workplace through employee training to raise awareness and prevent the occurrence of harassment; and
- organising annual training courses for all employees.

3.4 Are there any defences to a discrimination claim?

Yes, employers have the right to contest a discrimination allegation based on both the substance of the claim and procedural aspects. They must be able to demonstrate compliance with the principle of equal treatment between women and men.

The employee claiming to be a victim of moral harassment in the workplace must establish the factual elements of moral harassment, with the overall burden of proof resting on the employer. There is no requirement to prove the intent to harm.

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

Employees have the option of either initiating legal proceedings against their employer, submitting a complaint to the National Council for Combating Discrimination, or pursuing both procedures in parallel.

Employers can seek an amicable resolution of the complaint, either before or after it is initiated. When suggesting a settlement, employers must bear in mind that employees cannot waive their legal rights.

3.6 What remedies are available to employees in successful discrimination claims?

In a successful discrimination claim, the discriminatory measure can be invalidated and the employee may receive compensation and/or moral damages.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

“Atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) do not benefit from additional protection, but they are entitled to the same rights as typical employees and cannot be discriminated on the grounds of the “atypical” nature of their employment contract.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

In 2022, Romania transposed into the domestic legislation Directive (EU) 2019/1937, also known as the EU Whistleblower Directive.

Employers with at least 50 employees are required to establish internal reporting channels and to set up procedures for internal reporting of violations of the law and follow-up actions.

When making a report, the whistleblower employee may choose between an internal reporting channel or an external channel (made available by public authorities and institutions that have been empowered to deal with complaints about breaches of the law according to their area of competence).

To benefit from protective measures, a whistleblower must meet certain conditions (cumulatively):

- being one of the individuals making reports under the specified provisions;
- having obtained the information about legal violations in a professional context;
- having reasonable grounds to believe that the reported information about violations was true at the time of reporting; and
- having made an internal report, an external report, or a public disclosure.

Any form of retaliation against whistleblowers, threats of retaliation, or attempts of retaliation are strictly prohibited. In case retaliation does occur and is a consequence of the reported actions, the whistleblower qualifies for remedial measures.

The person assigned to address the report must keep the whistleblower's identity and any information that could reveal it confidential. The only exception is explicit consent of the whistleblower.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Under domestic law, there is currently no legal obligation for employers to publish information about their gender, ethnicity

or disability pay gap, salary or other diversity information. On the contrary, article 163 of the Labour Code stipulates that the salary is confidential, and the employer is obliged to take the necessary measures to ensure confidentiality.

At EU level, a new Directive was adopted in 2023, aiming to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Directive (EU) 2023/970, also known as the EU Pay Transparency Directive). Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the EU Pay Transparency Directive by 7 June 2026.

Under the EU Pay Transparency Directive, companies with more than 250 employees will be required to report annually on the gender pay gap in their organisation to the relevant national authority, while companies with over 150 employees (100 employees as of 2031) will have reporting obligations every three years.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

In Romania, there are two types of leave related to the birth of a child: maternity leave; and childcare leave.

Maternity leave has a duration of 126 days and can be split for periods preceding and following the birth of a child, with a minimum of 42 days to be taken after the birth date.

The childcare leave comes after the maternity leave and may last until the child turns two years old (or three years old in case of a disabled child).

The maternity leave can be taken only by the mother of the child, while the childcare leave may be taken by either of the parents or divided between them (with a two-month mandatory period to be taken by the other parent).

A similar leave of two years, maximum, can be taken by the adoptive parent in case of child adoption.

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

During the maternity leave, the mother receives a social security indemnity amounting to 85% of the average gross monthly income from the last six months out of the 12-month period that constitutes the insurance period, without exceeding 12 times the gross national minimum wage per month. The maternity indemnity is not subject to income tax nor to health insurance contribution; it remains subject to the social security contribution for pension insurance.

During the childcare leave, the beneficiary receives a monthly indemnity amounting to 85% of the average net monthly income from the last 12 months out of the 24-month period preceding the birth date. The childcare indemnity cannot be lower than RON 1,495 (approx. EUR 300), nor higher than RON 8,500 (approx. EUR 1,700). The childcare indemnity is not subject to income tax nor to other social security contributions (health or pension).

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

Upon returning from maternity leave or childcare leave, the employees have the right to return to their last position held or to an equivalent position with equivalent working conditions.

They are also entitled to benefit from any improvements in working conditions that they would have been entitled to during their absence.

4.4 Do fathers have the right to take paternity leave?

Yes, fathers have the right to a paid paternity leave of 10 working days, anytime during the eight weeks following the birth date of the child. The duration of the paternity leave is increased to 15 working days if the father has previously completed a child-care course.

During the paternity leave, the beneficiary is entitled to an indemnity equal to the salary, to be paid by the employer.

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

Yes, pregnant employees or mother employees returning from maternity leave may benefit from a maternal risk leave in case the conditions of work pose risks to their health or safety, or have implications for pregnancy or breastfeeding. The maternal risk indemnity amounts to 75% of the average gross monthly income from the last six months out of the 12-month period that constitutes the insurance period, without exceeding 12 times the gross national minimum wage per month.

A pregnant employee unable to fulfil her normal working hours due to health reasons, either her own or related to the foetus, is entitled to a reduction of her normal working hours by a quarter, while maintaining full salary.

Employees breastfeeding are entitled to two breaks during their working hours, each lasting one hour, or to the reduction of the working hours by two hours daily.

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

Yes, employees are entitled to some work flexibility if they have responsibility for caring for dependants. Specific rights/leave are provided for:

- caring for a sick child up to the age of 12, or in certain situations up to the age of 18;
- caring for a patient aged over 18 with oncological conditions, to accompany the patient to surgical interventions or treatments prescribed by the specialist doctor, up to 45 calendar days per year; and
- providing personal care or support to a relative or a person residing in the same household who requires care or support due to a serious medical issue, for a duration of five working days in a calendar 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 the event of transfers of undertakings, businesses or parts of undertakings or businesses, the employees affected by the transferred undertaking/business are automatically transferred to the buyer (transposition of the Transfer of Undertakings (Protected Employment) Directive (TUPE)). This rule has to be observed by both the transferor and the transferee, and shall principally apply in case of asset transfer or reorganisations (merger, spin-offs, etc.).

In case of share sale, there is a change of control over the employer, but the entity itself, which acts as employer, does not change. Therefore, TUPE is not applicable. Individual employment agreements and collective bargaining agreements applicable at the level of the target entity (the employer) continue to apply in accordance with their terms and conditions.

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, arising from the individual employment agreements, are transferred to the transferee in the state they exist at the transfer date.

Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective bargaining agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry thereof. The clauses of the collective bargaining agreement can be renegotiated at the transferee level, but not sooner than one year as of the transfer date.

In the situation where, following the transfer, the transferred business does not retain its autonomy, and the applicable collective bargaining agreement at the transferee's level is more favourable, the transferred employees will be subject to the more favourable collective bargaining 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?

Yes, the employees' representatives or the employees (if no employees' representatives) have to be informed, prior to the business sale, of the:

- date or proposed date of the transfer;
- reasons for the transfer;
- legal, economic and social implications of the transfer for the employees;
- measures envisaged in relation to the employees; and
- working and employment conditions.

Both the transferor and the transferee have to inform their respective employees, with at least 30 days in advance of the proposed date of the transfer.

Employers who fail to inform and consult the employee are liable to a fine, but this does not affect the validity of the transfer.

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

No, the business sale cannot constitute a ground for dismissal.

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

No, transferees are obliged to respect the terms and conditions of employment agreed with the transferor and transferred in the context of the business sale to the transferee.

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 in case their employment is terminated for reasons of reorganisation (job abolition), professional inadequacy or the physical and/or mental inability of the employee. The duration of the notice period is a minimum of 20 working days, and can be longer if so provided in the individual employment agreement or the applicable collective bargaining agreement.

Employees have to be given a notification of termination in case their employment is terminated by the employer during or at the end of the probation period. In this case, the employees do not benefit from a notice period, but the notification of termination has to be communicated to them at the latest in the last day of the probation 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?

The concept of “garden leave” is not regulated in Romania. However, in certain circumstances, the employer may request the employee not to report to work during the notice period or during the period leading up to the termination of the contract or to a disciplinary procedure. It is crucial, in this regard, for the employer to carefully weigh their legitimate interests against the employee’s right to work and remuneration.

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 causes and dismissal procedures are strictly regulated. Employers intending to proceed with dismissals have to observe the causes when the dismissal is permitted and the procedure established by law for each type of dismissal.

Dismissals can be challenged in Court and they will be annulled if carried on without observing the conditions and/or procedures established by law.

In principle, the employer can proceed with dismissals without having to obtain the consent of a third party. An information and consultation procedure is required in case of mass layoffs.

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

Yes. The employees in the following situations enjoy special protection against dismissal:

- during medical leave;
- during suspension of activity due to quarantine measures;
- during pregnancy (if the pregnancy has been duly notified to the employer);
- during maternity leave and during childcare leave;
- during the period of benefiting from the insertion incentive (in case of early interruption of the childcare leave);
- during leave for caring for a sick child, or during paternity leave or caregiver leave;

- during annual leave; and
- trade union leaders or employees’ representatives, throughout the entire term of their office, cannot be dismissed for reasons related to the performance of the mandate they have received from the employees.

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 can dismiss an employee for reasons related to that employee in the following situations:

- (a) in case the employee has committed a serious offence or repeated violations of the rules of labour discipline, as a disciplinary sanction;
- (b) in the event that the employee is placed in preventive detention or house arrest for a period longer than 30 days;
- (c) in the event that medical expertise authorities find that the employee is no longer physically and/or mentally fit for the work; and
- (d) in the event the employee does not meet the professional requirements of the job.

An employer can dismiss an employee for business-related reasons; in this case, the employer has to eliminate the employee’s job from the organisational chart and the elimination must be effective and have a real and serious cause.

The law does not provide for any compensation for the employees in case of dismissal. Compensation can be provided in the individual employment agreements or in the collective bargaining agreements.

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

Yes, the employer has to observe specific procedures and time-line depending on the cause of the 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 dismissed can challenge the dismissal in Court. In case the claim is successful, the dismissal is invalidated and the employer is obliged to pay damages amounting to the salaries the employee would have been entitled to since his or her dismissal. If the employee is also asking to be reinstated, the Court would automatically grant the reinstatement if it finds that the dismissal is void.

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

Employees cannot renounce their legal rights; any settlement of claim must take into account this legal restriction.

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

Yes, dismissing a large number of employees at the same time may qualify as a mass layoff. Mass layoffs occur when the employer dismisses, within a period of 30 days, for business-related reasons:

- (a) at least 10 employees, if the employer has more than 20 employees and less than 100 employees;
- (b) at least 10% of employees, if the employer has at least 100 employees but less than 300 employees; and
- (c) at least 30 employees, if the employer has at least 300 employees.

An employer who resorts to mass layoffs is required to follow specific procedures, notify and consult with employee representatives or trade unions, and inform, in advance, the labour authorities.

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 affected by a mass dismissal can either challenge the dismissal in Court via an individual claim or seek assistance from the trade unions or employees' representative to ensure their rights are protected.

If the Court finds that the dismissal does not have a real and serious cause or that the procedure or timeline has not been observed, the dismissal will be invalidated and the employee will have right to specific remedies (damages, reinstatement, moral damages).

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The Labour Code expressly regulates two restrictive covenants: the confidentiality undertaking; and the non-compete undertaking. The parties may agree on additional restrictive covenants (non-solicitation, non-disparagement, protection of know-how, etc.) provided they do not impose unreasonable restrictions on the employee's right to work.

Restrictive covenants are usually inserted in employment agreements entered into with employees in top management or employees working in sensitive markets.

7.2 When are restrictive covenants enforceable and for what period?

The restrictive covenants are enforceable after employment termination. The non-compete undertaking cannot last more than two years, and cannot be enforced in case of dismissal for business-related reasons.

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

A monthly financial compensation of at least 50% of the average monthly salaries must be provided to the employee for the duration of the non-compete undertaking.

However, it is important to note that this requirement specifically applies to non-compete clauses. For other restrictive covenants, such as confidentiality or non-solicitation clauses, the law does not mandate a specific financial compensation. In these cases, the parties involved are free to negotiate and agree upon the terms and conditions, including any financial compensation, when drafting and finalising the employment or contractual agreement.

7.4 How are restrictive covenants enforced?

It is important for employers to ensure that their restrictive covenants are well drafted, enforceable, and aligned with the labour laws. If this is the case, the restrictive covenants can be typically enforced through legal means. This may include:

- negotiation or settlement outside the Court;
- asking for an injunction relief to prevent the employee from continuing the prohibited activities outlined in the restrictive covenant;
- filing a lawsuit against the employee for breach of contract or violation of the specific terms of the restrictive covenant;
- claim for the reimbursement of the financial compensation paid in consideration of the restrictive undertaking that was breached; and
- claim for damages for any losses incurred due to the breach.

Liquidated damages clauses establishing, in advance, the amount of the damages to be paid by the employee are not admissible.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employers must take into account the legislation regarding the protection of personal data in relation with their employees. Processing of employees' data falls under the scope of the General Data Protection Regulation (GDPR) and the employer has to observe all applicable provisions to ensure compliance with the principles outlined in the GDPR, as follows:

- lawfulness, fairness and transparency;
- purpose limitation;
- data minimisation;
- accuracy;
- storage limitation;
- integrity and confidentiality; and
- accountability.

Privacy policies have to be put in place and the employers must keep a record of processing activities under its responsibility.

Sharing an employee's personal data with external third parties requires assessment of the legal basis for the transfer, the purpose of transfer and the compliance of the third party with GDPR requirements. A data processing agreement or a contractual agreement containing safeguards for the protection of the transferred data might also be required.

Cross-border sharing or transfer of data depend on the level of protection ensured in the State of destination. Employers must ensure that data transfers to a non-EU country take place only where an adequate level of protection is ensured, and that the data shared remains minimally necessary for the intended purposes.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, obtaining copies of any personal information that is held by the employer is part of the right of access of the employee as data subject.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Processing of personal data relating to criminal convictions and offences is restricted under the GDPR and can be carried out only under specific circumstances, such as when under the control of an official authority or when authorised by law, and appropriate safeguards for the rights and freedoms of data subjects are in place.

In light of the above, the employers can conduct criminal record checks for candidates or positions where the law explicitly allows or requires such checks, or when there is a need to maintain a clean criminal record or when the employer is authorised by law to carry out such checks.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Employers are allowed to implement internal procedures to monitor the employees' emails, telephone calls or use of an employer's computer system, but there are certain conditions and limitations that must be observed to ensure compliance with data protection principles. The following must be considered (list not exhaustive):

- **Legal Basis:** Employers must have a lawful basis for processing employee data. This may include the necessity of processing for the performance of the employment contract, compliance with legal obligations, consent, or legitimate interests pursued by the employer.
- **Transparency:** Employers are required to inform employees about the monitoring activities. This includes providing clear and accessible information on the purposes of monitoring, the types of data collected, and the potential consequences for employees.
- **Proportionality:** Monitoring activities must be proportionate to the intended purpose. Excessive or intrusive monitoring that goes beyond what is necessary may infringe on employees' privacy rights.
- **Specific Policies:** Employers should establish clear and specific policies regarding the monitoring of electronic communications. Employees should be made aware of these policies, and they should have the opportunity to review and acknowledge them.
- **Employee Consent:** In some cases, employers may rely on employee consent as a legal basis for monitoring. However, obtaining valid consent can be challenging, and the GDPR sets a high standard for consent, requiring it to be freely given, specific, informed, and unambiguous.
- **Necessity for the Employment Relationship:** Monitoring should be necessary for the employment relationship. Employers should assess whether there are less intrusive means to achieve the same purpose.
- **Sensitive Data:** Special categories of personal data, such as health information, may be subject to stricter requirements. Employers need to be particularly cautious when processing sensitive data and ensure they have a valid legal basis.
- **Data Subject Rights:** Employees have rights under the GDPR, including the right to be informed, the right of access, and the right to object to certain types of processing. Employers must respect and facilitate the exercise of these rights.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Employers can create and enforce policies that regulate employees' use of social media during working hours and on company-owned devices.

When it comes to employees' social media activities outside working hours and away from the workplace, employers' control is limited.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

If an employer intends to use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity), it shall be transparent about it and inform the employees and/or candidates about the existence of an automated decision-making process and about the logic involved, as well as about the significance and the envisaged consequences of such processing for the data subject.

Under the GDPR, the employees have the right not to be subject to a decision based solely on automated processing, including profiling, that produces legal effects concerning him or her or similarly significantly affects him or her. If an AI tool is in place, the employer shall implement suitable measures to safeguard the employees' rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the employer, the right to express his or her point of view and the right to contest the decision.

9 Court Practice and Procedure

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

Employment-related disputes fall, in first instance, under the jurisdiction of the tribunal based on the domicile or headquarters of the claimant. Appeals fall under the jurisdiction of the Courts of appeal.

In first instance, the panel for employment-related disputes consists of one judge and two judicial assistants. The judicial assistants participate in deliberations with advisory voting and sign the decisions. If they have a separate opinion, they have to outline it.

In appeal, the panel consists of two judges. If they do not reach an agreement on the decision to be pronounced, the case is retried by a dissenting panel, including a third judge in the trial panel.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The employment-related dispute mostly follows the general procedure for civil disputes, with some particular points specific to labour litigation:

- no judicial fee (irrespective of whether the claim is lodged by the employee or the employer);
- the burden of proof lies with the employer;
- requests should be processed on an expedited basis;

- the summoning is considered legally fulfilled if notified with at least 24 hours before the Court hearing;
 - decisions rendered in first instance are enforceable by law, even if an appeal is lodged; and
 - the deadline for appeal is 10 days from the date of communication of the decision.
- Conciliation is not mandatory.

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

In first instance, an employment-related dispute takes on average, nine to 18 months from the date of the lodging of the claim.

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

First instance decisions are subject to appeal and appeal only; no appeal in cassation is available.

The appeals are usually resolved in fewer hearings, but a significant gap of time may elapse between the date of the first instance decision and the date of the first appeal hearing.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

There are three types of sources of employment law in Senegal:

- The international source, corresponding to all international conventions on labour law ratified by Senegal.
- The State source, corresponding to legislative and regulatory texts, the main of which are the Labor Code and its application texts.
- The conventional source, consisting of the National Collective Interprofessional Agreement (CCNI) and sectoral collective agreements, specific to each branch of activity.

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

The types of workers protected by labour law are staff representatives, pregnant workers, breastfeeding workers, women and child workers, and workers on fixed-term contracts.

The law distinguishes between:

- full-time workers;
- part-time workers;
- seasonal workers;
- daily workers;
- apprentices;
- temporary workers; and
- trainee 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?

With the exception of the indefinite-term contract, which does not require any particular formality, all other types of contracts, such as the apprenticeship contract, internship contract, trial contract, fixed-term contract, daily contract, seasonal contract and temporary work contract, must be written on pain of being reconsidered as an indefinite-term contract.

With regard to the indefinite-term contract, when it is concluded verbally, the law does not require the employer to mention certain specific information in writing.

1.4 Are any terms implied into contracts of employment?

Even if this is not expressly provided for in the contract, there

are many obligations incumbent on the worker or the employer arising under the laws and regulations in force.

As an example, the employer may not conclude more than two fixed-term contracts with the same worker, nor renew a fixed-term contract more than once.

Likewise, workers are prohibited from exercising, even outside their working hours, an activity likely to compete with their employer, even one year after the termination of the contract and within a radius of 50 kilometres.

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

Decree n° 1963-00118/MFPT/DTSS of February 19, 1963, fixing the forms and methods of establishment of the employment contract and the trial contract, provides in its article 3, mandatory terms to be mentioned in a written employment contract.

These include:

- names, first names, sex, date and place of birth, parentage, nationality, marital status, profession of the worker, domicile, head office or company, and name of the parties;
- the place where the worker must go on leave, when the place of performance of the contract is different from the place of the worker's usual residence;
- the nature and duration of the contract;
- the qualification and category of the worker;
- the job or jobs that the worker is called upon to fill;
- reference to regulatory texts and to the applicable collective agreement;
- when the worker is housed by the employer, all the details relating to the housing conditions; and
- the specific clauses agreed between the parties.

The law obliges employers to respect the legal working hours, wages, weekly rest, overtime, retirement, status of night workers, rest time of women and children as well as their work prohibited, paid holidays and transport arrangements and finally, health and 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?

In Senegal, the general conditions of employment are provided for in the CCNI signed by employers' unions as well as trade unions and applies to all sectors of activity.

- Apart from the National Collective Agreement (see question 2.4), each sector of activity is governed by its own collective agreement, which defines more specific rules applicable to its affiliates.

- These sectoral collective agreements supersede the CCNI in areas not provided for by it, or when their provisions are more favourable to workers.
- In the event of a claim from one or more employees, the latter may invite their employers to the discussion via staff representatives or corporate social dialogue committees.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Under the provisions of article L 31 of the Labor Code, contracts are entered into freely and in the forms that the parties agree to adopt. The parties can therefore provide for such a scenario when signing their contract.

In the case of a contract already in progress, such a measure will necessarily lead to a modification of the terms of the contract.

Article L 67 of the Labor Code gives the employer the possibility of modifying the contract for reasons linked to the economic situation or the reorganisation of the company.

But if this modification concerns a substantial clause, such as employment or the place of execution of the contract, it must be consented to by the worker.

Failing this, any termination of the contract resulting from such a modification without the prior agreement of the worker will be attributable to the employer.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

There are not yet specific provisions in Senegalese legislation granting workers the right to work remotely, although in practice, this has become widespread since the advent of COVID 19.

Under the aforementioned article L 67, employees will only be able to exercise such a right if it is expressly provided for by the terms of their contract or, failing that, if they make a request to their employer who accepts it.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

To be recognised:

- the trade union should have purpose of study and defence of the economic, industrial, commercial, agricultural and craft interests;
- its members must exercise the same profession, similar trades or related professions; and
- three copies of the statutes and the list of people who will be responsible for sound and direct administration must be deposited with the Regional Labor Inspectorate against a simple acknowledgment of receipt.

The receipt constituting recognition of its existence is issued by the Minister of the Interior after consulting the Minister of Labor and after reading the reports drawn up by the Labor Inspector and the public prosecutor.

2.2 What rights do trade unions have?

Trade unions have the right to:

- Go to Court.
- Acquire movable and immovable property without authorisation, free of charge or against payment.
- Exercise before all Criminal Courts all rights reserved to the civil party, in relation to facts causing direct or indirect damage to the collective interest of the profession they defend.
- Allocate part of their resources to the creation of workers' housing, the acquisition of land for cultivation or physical education for their members.
- Create, administer or subsidise certain professional works.
- Take the initiative for the creation of production or consumption companies and subsidise them.
- Make contracts or agreements with all other trade unions, companies or individuals.
- Be consulted on all disputes and questions relating to their specialty.
- If they are authorised by their statutes, to buy to rent, lend or distribute among the members all that is necessary for the exercise of their profession.
- Help for the sale of products coming exclusively from professional work, provided that the profits are not distributed.

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

The rules establishing a right for trade unions to initiate social action are mainly provided for by the provisions of article 25 of the Constitution and articles L 271 to L 276 of the Labor Code.

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 National Collective Agreement of December 30, 2019 in its article 16, and decree n° 2009-1413 of December 23, 2009 in its article 5, provide in each company with more than 10 workers, the creation of a works council.

Works councils are chaired by the employer and include, in particular, directors, heads of departments or similar, and staff representatives.

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?

There are no provisions in the aforementioned collective agreement and decree n° 2009-1413 that grant the works council powers allowing it to block employer's decisions. All that the employer is required to do is to promote the sharing of economic and social information necessary for the proper functioning of the works council.

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

Article 9 of decree n° 2009-1413 stipulates that the rights granted to works councils do not prevent the normal exercise of the mission of the staff representatives nor that of other mechanisms for concerted dialogue, such as trade unions.

2.7 Are employees entitled to representation at board level?

The law does not allow employees to be represented at the board level. In the event of complaints or suggestions, the employee representatives may, however, be received by the board. Suggestions or complaints will be acted on, only after deliberations of the board.

3 Discrimination

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

Yes, employees are protected from discrimination.

Discrimination is prohibited when it relates to:

- hiring;
- the conduct and distribution of work;
- working conditions;
- disciplinary and dismissal measures;
- professional training;
- progress;
- remuneration; and
- the granting of social benefits.

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

The types of illegal discrimination are those relating to:

- age;
- sex;
- nationality;
- ethnic, social or racial origins;
- political opinions;
- religion;
- trade union membership or activity;
- disability;
- pregnancy;
- marital status; and
- health or serological status.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Sexual harassment is not punished by the provisions of the Labor Code, but by those of the Criminal Code; in particular, in its article 319 *bis*. Similarly, the National Collective Agreement provides, in its article 21, that the signatory parties undertake to promote and realise the right for everyone to enjoy a working atmosphere free from violence and harassment.

However, as far as we know, there are no mandatory training requirements for sexual harassment.

3.4 Are there any defences to a discrimination claim?

When an employer is accused of discrimination by an employee, he must prove by any legal means that the measure that he has taken against the employee is not based on discrimination.

The strength of his arguments will be assessed on a case-by-case basis and according to the circumstances in which the said measure was taken.

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

Employees who consider themselves victims of discrimination can appeal to the Labor Inspectorate or bring the case to the competent Court for dispute resolution.

It is possible for employers to find an amicable solution to the dispute, when they are directly seized of the problem by the staff representatives or by the employee, at the level of the Labor Inspectorate for a conciliation, and even at the level of the Tribunal once claims have been already initiated.

3.6 What remedies are available to employees in successful discrimination claims?

It depends on the nature of the discriminatory measure taken by the employer against the employee, and on the circumstances in which it was taken.

Following Act n° 2022-03 of April 14, 2022, any discriminatory measure can be declared null and void, and the employer condemned to restore the worker in his rights under penalty by day of delay, which will be fixed by the judge, without prejudice of payment of wages when that measure was related to the worker's dismissal.

The employer may also be condemned to pay damages, the amount of which also depends on the judge's own conviction.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

"Atypical" workers do not enjoy additional protection in the area of discrimination. If they feel they are discriminated against, they will have to go through the same channel as full-time workers.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

Article 103 of the National Collective Agreement provides the right for any worker to inform his direct hierarchical superior and the Labor Inspector of any situation that he considers to present a serious, imminent danger for his life and his health.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

As per regulations in force in Senegal, any information likely to cause discrimination among employees is prohibited.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

The duration of maternity leave is 14 weeks, including six weeks before delivery and eight weeks after. This period may be extended by three weeks in the event of duly-noted illness resulting from pregnancy or childbirth.

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

During the period of maternity leave, the woman can:

- terminate her employment contract without notice and without paying severance pay;
- have the right to prenatal allowances and maternity allowances;
- benefit from daily maternity leave allowances; and
- apply for an extension of maternity leave by being laid off without any remuneration.

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

Upon her return from maternity leave, the mother:

- is entitled to a one hour paid breastfeeding break per working day, up to 15 months after the birth of the child;
- has the right, during this breastfeeding period, to terminate her employment contract without notice and without payment of severance pay;
- must return to the same position upon return to work; and
- should not, if she works in agricultural, commercial or industrial companies, and within three weeks following her return, push or drag any load.

4.4 Do fathers have the right to take paternity leave?

Fathers are entitled to one day of paternity leave.

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

Regarding other parental leave rights that employers must observe, the employer:

- cannot dismiss a woman during her maternity leave;
- cannot employ a complainant during this period; and
- is prohibited from recruiting another employee to work for the woman on maternity leave.

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

Under article L 148 of the Labor Code, mothers are entitled to one additional day off per year, for each dependent child under 14 years of age.

Decree n° 10844 of December 17, 1956, regulating the paid annual vacation, provides in its article 9 that the employed women or apprentices are entitled to an additional vacation of:

- two days per dependent child if they are under 21 years of age on the last day of the reference period; or
- two days per dependent child from the fourth if they are over 21 on the last day of the reference period.

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 business sale, the employees are automatically transferred to the buyer, as all the contracts in force on the day of the sale remain between the new employer and the staff.

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

Workers maintain the continuation of the initial activity of the company, the benefit of seniority and the advantages already acquired in the service of the first employer.

With regard to collective bargaining agreements, it was judged by the Supreme Court of Senegal in a judgment of July 10, 1963, that they only bind their signatories and cannot subsist following a business sale, in the absence of current employment contracts.

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?

As far as we know, there is no law in Senegal that provides for information and consultation rights for employees on a business sale.

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

Dismissals made by the first employer with a view to the transfer of the company are null and unfair (Supreme Court, 2nd section, May 22, 1963).

However, there is no obstacle for the new employer to carry out the reorganisation of the services, which often results in restructuring and, therefore, layoffs.

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

If the change is due to the reorganisation of the company, and if it relates to substantial modifications to the employment contract, the employer must first inform the worker.

If the latter refuses, the termination of the employment contract will be considered to be at the initiative of the employer.

6 Termination of Employment

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

Workers with indefinite-term contracts must receive it.

The length of notice depends on the category of worker concerned:

- one month for workers and similar employees;
- two months for supervisors and the like; or
- three months for executives and similar.

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?

With regard to the provisions of articles L 52 of the Labor Code and 75 of the National Collective Agreement, the employer is obliged to grant the worker, during the notice period, a period of two days of absence per week for the search of a new job.

Therefore, in principle, nothing prevents the employer from asking the worker not to come to 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 dismissal must be justified by:

- a legitimate reason (serious misconduct or gross negligence); or
- an economic reason relating to a reorganisation of the company or to an economic difficulty thereof.

Dismissal for economic reasons, as well as dismissal of one or more staff representatives, must obey a specific procedure provided for by the provisions of articles L 61 and following, and L 214 and following, of the Labor Code.

A worker is considered as dismissed when his dismissal letter is notified to him by the employer for one of the reasons mentioned above.

In the event of dismissal for economic reasons, the employer is required to communicate the list of workers to be dismissed to the staff representatives if there are any, and to collect their suggestions.

The dismissal of one or more staff representatives cannot take place without obtaining the prior consent of the Labor Inspector. Otherwise, the dismissal is considered null and void.

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

Employees benefiting from special protection against dismissal are the staff representatives whose dismissal cannot take place without the prior approval of the Labor Inspector, even in the event of gross negligence.

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?

Dismissal reasons related to the employee are:

- Gross negligence.
- Serious misconduct.
- Illness or accident at work rendering the employee unfit and medically proven by a medical certificate drawn up by a certified doctor.
- Substantial changes to the employment contract not accepted by the worker.
- Professional insufficiency.

Dismissal for business-related reasons are:

- Economic reasons.
- Cessation of activity.
- Closure following an administrative decision or dissolution of the company.

Employees with at least 12 months of service in the company and who have not committed gross negligence are entitled to severance pay calculated on the basis of a percentage of the total monthly salary for the last 12 months according to the following methods:

- 25% for the first five years of service;
- 30% for the period from the sixth to 10th year; and
- 40% for years beyond the 10th year.

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

If the worker is not a staff representative, the employer is first required to send an explanation letter to the worker, who has 48 hours at the earliest to respond.

If, after receiving the reply, the employer considers that the reasons put forward by the workers are not sufficient, he notifies him of his dismissal letter and possibly his employment certificate.

In the event of the dismissal of a staff representative, the employer sends a request for authorisation to the Labor Inspector and then informs the staff representatives of the dismissal.

The Labor Inspector has a period of 15 days from the filing to make his decision, and 30 days in the event of an expert appraisal.

Failure to reply within this period is equivalent to authorisation. The decision of the Labor Inspector must be reasoned, notified to the employer and the concerned staff representative, and is final.

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

The complaints generally brought before the Labor Court include, among others:

- Damages for wrongful dismissal.
- Compensatory leave indemnity.
- Compensatory notice allowance.
- Severance pay.
- Compensation for non-affiliation to social institutions like the Social Security Fund (CSS) and Pension Institute (IPRES).
- Compensation for non-delivery of a work certificate.
- Salary arrears.

The various remedies available to the worker are:

- Referral to the Labor Inspector for conciliation.
- Referral to the Court by a request containing his various complaints.

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

The settlement of the dispute can be done at the company level, before the Labor Inspector, or at the Court level during the conciliation hearing, or during the litigation phase.

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

The employer is required to:

- convene a meeting with the staff representatives to give them the list of workers to dismiss and gather their opinions (he can make the dismissal at the end of the meeting);
- submit the same list and the minutes of the meeting to the Labor Inspector within one week; and
- respect the priority for hiring workers dismissed for economic reasons within two years, for the category concerned.

The employer is not, however, bound to such a procedure in the event of an amicable departure protocol freely and fairly negotiated with the concerned worker(s).

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 violation of their rights, workers can either summon the Labor Inspector or the Court to have their rights restored.

Any dismissal made without this prior procedure, mentioned in question 6.9, is unfair.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The two most common types of restrictive clause are the:

- non-competition clause; and
- confidentiality clause.

7.2 When are restrictive covenants enforceable and for what period?

Regarding the non-competition clause, it can be exercised both during the contract and within one year of termination, and over a radius of 50 kilometres around the workplace.

Concerning the confidentiality clause, the law does not provide for a time or geographic limit for its implementation.

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

Senegalese law does not provide for financial compensation in return for the signing of a restrictive clause.

7.4 How are restrictive covenants enforced?

When the employer is aware of the violation of a restrictive clause, he can summon the Labor Court to put an end to it, or even ask for compensation for the damage suffered.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Collection of employees' personal data must be subject to their prior consent under provisions of Act n° 2008-12 of January 25, 2008, on the protection of personal data. The employee's consent is not required if the processing of his personal data is necessary for:

- compliance with a legal obligation of the employer;
- the execution of a public interest mission;
- the execution of a contract to which the person concerned is a party or the execution of pre-contractual measures taken at his request; or
- protecting the fundamental rights and interests of the concerned employee.

An employer can only transfer employee's data to another country if that State ensures a sufficient level of protection of the privacy, fundamental freedoms and rights of individuals with regard to the processing of the data.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

With regard to articles 58 and 59 of the Personal Data Protection Act of January 25, 2008, employees have the right to obtain copies of any personal data collected by the employer, either at the time of their recording or, if their communication is planned, at the latest during the first communication.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

The employer can carry out pre-employment checks on employees, but these checks should only allow an adequate profile to be sought for the position in view.

Regarding criminal record checks of an employee, only public authorities, companies managing public services acting within the framework of their legal powers and auxiliaries of justice for the strict missions entrusted to them by law, are entitled to process relating to offences or criminal convictions.

In practice, however, employers do not hesitate before recruiting to ask workers to provide them with a copy of their criminal record.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

An employer is prohibited from setting up a system allowing him to intercept or monitor the emails, calls or private messages of his workers.

If the monitored or wiretapped devices belong to him and must, in principle, be used only in the context of work, he may, for safety reasons or for the quality of work, set up such a system, but after having informed workers in strict compliance with the Personal Data Protection Act.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

The employer cannot control an employee's use of social media in the workplace, as it is personal.

However, it may prohibit this from being done with work equipment, at the workplace and during working hours.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

To our knowledge, there is no legal provision in force in Senegal authorising the use of AI by employers in the context of an employment relationship and providing for the related restrictions.

9 Court Practice and Procedure

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

The Labor Courts are competent to hear any individual or

collective dispute between a worker and his employee born on the occasion of work.

The Labor Court includes a:

- president;
- permanent worker assessor;
- full-time employer assessor; and
- clerk.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

In the event of a dispute, the complainant has three options:

- Referral to the staff representative or his deputy for internal dispute resolution.
- Referral to the Labor Inspector for an amicable settlement.
- Direct referral to the Labor Court in case of failure of the conciliation procedure at the level of the Labor Inspectorate.

The conciliation procedure is mandatory.

The referral procedure to the Labor Inspector or the Tribunal is free of charge.

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

The duration of the settlement of employment-related complaints varies depending on the complexity of the cases.

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

It is indeed possible to appeal a decision of first instance, by declaration to the Court registry, within 15 days from the delivery of the contradictory judgment or rendered by iterative default. In the event of a default judgment, the appeal is made within 15 days of service.



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Our lawyers have won the trust of national and international institutions and companies, advising and assisting them in all phases of set-up, monitoring, negotiation and due diligence.

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Lim Chong Kin

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The Employment Act 1968 (“**EA**”) is the main legislation governing employment in Singapore. The common law may also apply in various situations.

Other sources of employment law include, but are not limited to, the following:

- Child Development Co-Savings Act 2001 (“**CDCSA**”).
- Employment of Foreign Manpower Act 1990.
- Retirement and Re-employment Act 1993 (“**RRA**”).
- Work Injury Compensation Act 2019.
- Workplace Safety and Health Act 2006 (“**WSHA**”).

Guidelines and advisories on employment-related issues are regularly issued by the tripartite partners of the Tripartite Alliance for Fair and Progressive Employment Practices (“**TAFEP**”), namely the Ministry of Manpower (“**MOM**”), the National Trades Union Congress and the Singapore National Employers Federation. Although these guidelines and advisories are strictly not legally binding, employers who do not abide by them may face scrutiny from the MOM and have their work pass privileges curtailed.

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

The EA generally covers all employees, but does not cover the following:

- seafarers;
- domestic workers; and
- statutory board employees or civil servants.

Part IV of the EA, which sets out rest days, hours of work and other conditions of service, only applies to the following categories of employees (“**Part IV Employees**”):

- workmen (doing manual labour) with a basic monthly salary not exceeding S\$4,500; and
- employees who are not workmen but are covered by the EA with a basic monthly salary not exceeding S\$2,600.

Part IV of the EA does not cover all managers or executives, regardless of their salaries.

Guidelines and advisories issued by TAFEP are generally applicable to all employees and employers.

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 can be in writing, verbal, expressed or implied. However, the MOM recommends that employment contracts be in writing to minimise disputes on the agreed terms and conditions. In practice, employees are typically employed under written employment contracts.

Further, employers must issue a written record of key employment terms (“**KETs**”) to all employees covered under the EA who enter into an employment contract on or after 1 April 2016 and are employed under that contract for 14 days or more.

The KETs include:

- The employer’s full name and trade name.
- The employee’s full name.
- The job title.
- A description of main duties and responsibilities.
- The first day of employment.
- The duration of employment.
- Working arrangements, such as the daily working hours, number of working days per week and rest days.
- The salary period.
- The basic rate of pay.
- The fixed allowance.
- The fixed deduction.
- The payment period for overtime pay (if different from the salary period).
- The rate of overtime pay.
- Other salary-related components, such as bonuses and incentives.
- Leave entitlement.
- Medical benefits.
- The probation period.
- The notice period for dismissal or termination.

The MOM also strongly encourages that the employee’s place of work should be included, especially if this differs from the employer’s address.

1.4 Are any terms implied into contracts of employment?

The EA states that every term of an employment contract that is less favourable to an employee than any of the conditions of service prescribed by the EA is illegal, null and void to the extent that it is so less favourable. Thus, the conditions of service prescribed by the EA are implied in an employment contract if the terms in the contract are less favourable to an employee or where the contract is silent on such points.

At common law, there is some judicial recognition by the Singapore High Court that an implied duty of mutual trust and confidence exists. However, it is unclear whether the apex court will endorse the same view. Where applicable, such an implied duty of mutual trust and confidence may include more specific duties such as:

- a duty not to act in a corrupt manner that would clearly undermine the employee's future job prospects;
- a duty not to unilaterally and unreasonably vary the employment contract's terms;
- a duty to redress complaints of discrimination or provide a grievance procedure;
- a duty not to suspend an employee for disciplinary purposes without proper and reasonable cause;
- a duty to enquire into complaints of sexual harassment;
- a duty to behave with civility and respect;
- a duty not to reprimand without merit in a humiliating circumstance;
- a duty not to behave in an intolerable or wholly unacceptable way; and
- a duty of fidelity, i.e. a duty to act honestly and faithfully.

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

Yes. Employers of Part IV Employees must abide by the conditions set out in Part IV of the EA relating to the following:

- Minimum number of rest days.
- Maximum hours of work.
- Minimum overtime pay.
- Eligibility for retrenchment benefits in certain circumstances for Part IV Employees who have worked for the employer for at least two years.

The EA also prescribes the minimum number of days of paid public holidays, annual leave and sick leave that all employees covered under the EA are entitled to.

Employers shall also refrain from implementing incentive schemes that are tied to statutory sick leave utilisation. Since 1 January 2023, employers with incentive schemes that consider statutory sick leave utilisation face enforcement action. For illustration, the following incentive schemes are disallowed:

- Providing incentives to employees for not taking any statutory paid sick leave for any period of time.
- Offering the encashment of unused statutory paid sick leave.
- Using the number of paid sick leave days taken as "demerit points" during appraisal and promotion.

However, employers may provide incentives for not taking no-pay leave, offer flexible benefits (e.g. covering medical treatment) that are encashed at the end of the year if unused, and/or provide incentives for hitting key performance indicators (e.g. an incentive for handling at least X calls per month, incentive for selling Y quantity of products).

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?

Over the past 15 years, there have been about 350 to 480 certified collective agreements per year. Either the employer or the trade union can initiate the collective bargaining process by serving a notice to the other party.

Bargaining typically takes place at the company level. That said, in certain industries, such as the banking industry, industry

unions conduct negotiations with several major employers while taking into consideration their respective circumstances.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

Employers may require employees to split their working time between home and the workplace on a hybrid basis. As an employee's working arrangements are a key employment term, employers seeking to implement the same should seek the employee's consent before implementing such arrangements.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

At present, employees do not have a right to work remotely. However, the tripartite partners comprising the MOM, the National Trades Union Congress, and the Singapore National Employers Federation have strongly encouraged employers to continue offering flexible working arrangements ("FWAs") to employees and to promote FWAs as a permanent feature of the workplace in order to help employees achieve better work-life harmony and promote a more engaged and productive workforce.

The upcoming Tripartite Guidelines on Flexible Work Arrangements, which will be introduced by 2024, will make it a requirement for employers to fairly and properly consider FWA requests by employees. In the same vein, employers shall retain the prerogative to assess and decide on FWA requests based on their business and operational needs.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Before a trade union can represent its members in collective bargaining, it must be accorded recognition by the employer.

The rules relating to trade union recognition are stated in the Industrial Relations (Recognition of a Trade Union of Employees) Regulations. A trade union may serve on an employer a claim for recognition.

An employer shall, within seven working days after the service of the claim, either give recognition to the trade union or notify the MOM in writing of its reasons for disputing the claim.

If the MOM has been notified, the MOM may, in its discretion, take a secret ballot in which the employees may vote for the purposes of determining whether the majority of the employees are members of the trade union. If the results of the secret ballot show that the majority of the employees are members of a trade union, the employer must give recognition to that trade union within three working days of receiving the results.

2.2 What rights do trade unions have?

Trade union rights are set out in the Industrial Relations Act 1960. A trade union that has been accorded recognition by an employer may set out proposals for a collective agreement in relation to any industrial matter and invite the employer to negotiate with a view to arriving at a collective agreement.

However, trade unions may not negotiate on the following matters:

- Promotion.
- Transfer of an employee within the organisation that does not adversely affect the employment terms.
- Employment of any person in the event of a vacancy arising.
- Termination by reason of redundancy or reorganisation.
- Dismissal and reinstatement of an employee in certain circumstances.
- Assignment or allocation of duties consistent with the employment terms.

According to the Trade Unions Act 1940 (“TUA”), no legal proceedings may be brought against any registered trade union or any officer or member of such registered trade unions with reference to any act carried out in furtherance of a trade dispute unless and only on the grounds that:

- the act induces some other person to break an employment contract; or
- it interferes with the trade, business or employment of some other person or with the right of another to dispose of his capital or labour as he wills.

Further, a suit against a registered trade union or any of its officers or members with reference to any tortious act by or on behalf of the trade union would not be entertained by any court.

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

The TUA prohibits a registered trade union from commencing, promoting, organising or financing any strike or any form of industrial action affecting its members without obtaining the consent of the majority of the members affected by a secret ballot.

Further, a registered trade union with a majority comprising non-executive employees is not permitted to commence, promote, organise or finance any strike or industrial action in relation to any trade dispute between members who are executive employees represented by the trade union and their 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?

No, employers are not required to set up works councils in Singapore.

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?

Please see our response to question 2.4.

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

Please see our response to question 2.4.

2.7 Are employees entitled to representation at board level?

There are no express statutory provisions entitling employees to be represented at board level.

3 Discrimination

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

Yes. The RRA prohibits employers from dismissing any employee below the age of 63 (or the prescribed minimum retirement age) on the ground of age. The Minister for Manpower can prescribe a minimum retirement age and re-employment age of up to 65 and 70, respectively.

Employers cannot terminate the services of female employees who are absent due to their maternity leave benefits under the EA or the CDCSA. Further, female employees who have served their employer for three months or more and who are dismissed without sufficient cause or on the ground of redundancy or restructuring would be statutorily entitled to all maternity leave payments (but for the termination notice) that they would have been entitled to receive as part of their maternity benefits.

The following general protections against discrimination may also apply in the employment context:

- The Tripartite Guidelines on Fair Employment Practices (“**Fair Employment Guidelines**”) stipulate that employers must recruit and select employees on the basis of merit such as skills, experience or ability to perform the job, regardless of age, race, gender, religion, marital status and family responsibilities or disability. The Prime Minister announced in his National Day Rally Speech on 29 August 2021 that the government intends to enshrine the Fair Employment Guidelines into law.
- Further, according to the Tripartite Guidelines on Wrongful Dismissal, dismissing an employee on the basis of the aforementioned grounds is also considered wrongful.
- There is also some judicial recognition of the implied duty of mutual trust and confidence between employer and employee, which may require the employer to redress complaints of discrimination.
- The Tripartite Committee on Workplace Fairness (“**Committee**”) was formed in July 2021 to study policy options to strengthen workplace fairness. The Committee has published its final recommendations in the Workplace Fairness Final Report in 2023 (“**Workplace Fairness Report**”), where the Committee has, amongst other things, recommended to enact legislation that provides legal protection against workplace discrimination (“**Workplace Fairness Legislation**”).

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

Please see our response to question 3.1. As an example, using age, gender, race, religion, nationality or marital status as a selection criterion without a valid reason would generally be considered discriminatory.

Further, the Committee has recommended in the Workplace Fairness Report that discrimination should be defined in the new Workplace Fairness Legislation as making an adverse employment decision because of any protected characteristic, which includes the following: (i) age; (ii) nationality; (iii) sex, marital status, pregnancy status, caregiving responsibilities; (iv) race, religion, language; and (v) disability and mental health conditions (“**Protected Characteristics**”).

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Employers are required under the WSHA to take reasonably practicable measures to ensure workplace safety and health. In this regard, the Tripartite Advisory on Managing Workplace Harassment (“**Harassment Advisory**”) issued by TAFEP considers that harassment and other psychosocial risks should be included in the overall workplace health and safety risk management of the organisation.

The Harassment Advisory also provides guidance on what employers can do to manage the risk of sexual harassment in the workplace. Employers should abide by the following principles:

- Zero-tolerance.
- Leadership commitment.
- Everyone plays a part.
- Holistic management.
- Early prevention.
- Confidentiality.
- Neutrality.
- Non-retaliation.
- Accountability.

Employers are also encouraged to develop a harassment prevention policy, provide information and training on workplace harassment, and implement reporting and response procedures.

More generally, victims of sexual harassment may seek protection orders under the Protection from Harassment Act 2014.

3.4 Are there any defences to a discrimination claim?

In relation to the recruitment of employees, the Fair Employment Guidelines suggest wording that employers may adopt to avoid a discrimination claim. Generally, a discrimination claim is unlikely to succeed if an employer recruits on the basis of merit such as skills, experience or ability to perform the job and/or has a valid reason for stipulating certain selection criteria. For example, if the job requires the applicant to perform religious functions, the employer may state so and use religion as a selection criterion.

In relation to the dismissal of employees, if an employer decides to provide a reason for dismissal, a true valid reason such as redundancy would be a defence against a claim against wrongful dismissal on the grounds of discrimination.

In terms of religious organisations, the Committee has recommended in the Workplace Fairness Report to allow religious organisations, i.e. places of worship (e.g. church, mosque, temple) and religious entities with a solely religious purpose/function (e.g. bodies that organise, administer, or provide training on, religion and religious affairs), the discretion to make recruitment and employment decisions based on religion and appropriate religious requirements (i.e. conformity with religious beliefs and practices). While such organisations will be able to rely on religion and appropriate religious requirements as a valid defence if it is a genuine and reasonable job requirement, the Committee agreed that religious organisations should not be allowed to discriminate based on other Protected Characteristics where there is no religious basis to do so.

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

In relation to discriminatory hiring, presently, a job applicant may file a complaint with TAFEP online.

In relation to wrongful dismissal, an employee may file a wrongful dismissal claim with the Tripartite Alliance for Dispute Management (“**TADM**”) within one month from the last day of his or her employment. If the wrongful dismissal cannot be resolved at the TADM, it will be referred to the Employment Claims Tribunal (“**ECT**”).

Managers and executives dismissed with notice or salary *in lieu* of notice may only file a wrongful dismissal claim if they have served their employer for at least six months.

Employers may settle claims before they are initiated. Claims may also be settled via mediation facilitated by the TADM.

When the Fair Employment Guidelines are enshrined into law, the government also intends to create a tribunal to deal with workplace discrimination, such as discrimination based on nationality, age, race, religion and disability.

In relation to resolving grievances and disputes with respect to discrimination, the Committee has recommended in the Workplace Fairness Report to require employers to put in place proper grievance handling processes so that aggrieved employees and their employers can try to resolve disputes amicably within the firm in the first instance. Similar to salary and wrongful dismissal claims, the Committee has recommended that TAFEP shall continue to serve as the first port of call outside the firm for workers who experience discrimination. Under the new Workplace Fairness Legislation, the Committee has also recommended that claims of workplace discrimination in respect of the Protected Characteristics will undergo compulsory mediation at the TADM first, with adjudication at the ECT as a last resort.

3.6 What remedies are available to employees in successful discrimination claims?

If the ECT decides that a dismissal is wrongful, the employer may be ordered to either reinstate the employee to his or her former job and pay the employee for any income loss due to the wrongful dismissal or pay the employee a sum of money as compensation.

More generally, employers that do not comply with the Fair Employment Guidelines may have their work pass privileges curtailed. The MOM will also hold culpable key decision makers such as the CEO, chief HR Officer or line managers responsible and may name such officers publicly or revoke their work passes if they are foreigners.

The Committee has recommended in the Workplace Fairness Report that remedies at the ECT will be limited to monetary compensation and reinstatement to the job for end-of-employment claims. The Committee has recommended for the ECT to be allowed to order a compensation amount up to (a) S\$5,000 for pre-employment (recruitment) claims, and (b) S\$20,000 for non-union members and S\$30,000 for union-assisted claims in recognition of the role of unions in the claims process for (i) in-employment (e.g. promotion), and (ii) end-of-employment (e.g. dismissal) claims. These amounts mirror the ECT’s current limits for wrongful dismissal claims.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No, atypical workers do not have any additional protection.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

In the context of workplace harassment, the Harassment

Advisory stipulates that employers should create a safe environment for reporting and ensure that whistle-blowers will not be penalised. This can include providing multiple reporting channels, anonymous reporting channels and creating a safe environment for employees to speak up about their concerns.

In relation to EA violations, employees may lodge an anonymous report on such violations with the MOM.

Further, the Prevention of Corruption Act 1960 provides that no witness shall be obliged or permitted to disclose the name or address of any informer or state any matter that might lead to his or her discovery.

The Committee has recommended in the Workplace Fairness Report to prohibit employers from retaliating against those who report cases of workplace discrimination or harassment so as to provide assurance to those who face workplace discrimination or harassment. This may be done through enforcement action against employers who engage in retaliatory behaviour.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

No, there is no requirement for employers to publish information on their employees' gender, ethnicity, disability or other diversity information. Employers are also not subject to any pay gap/salary transparency obligations.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Based on the CDCSA, the duration of maternity leave depends on the citizenship of the child and other criteria.

An employee is eligible for 16 weeks of maternity leave if:

- the child is a Singapore citizen; and
- she has been employed by that employer for a continuous period of at least three months before the birth of her child.

If the child is not a Singapore citizen or an employee has not been employed for at least three months, an employee covered under the EA is nonetheless entitled to 12 weeks of maternity leave.

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

Please see our response to question 4.1 for details on maternity leave entitlement.

Where the child is a Singapore citizen and the mother is entitled to 16 weeks of maternity leave, she must be paid at her gross rate of pay for 16 weeks.

Where the child is not a Singapore citizen, a working mother who is entitled to 12 weeks of maternity leave must be paid at her gross rate of pay for the first eight weeks of leave if she:

- is covered under the EA;
- has been employed by that employer for a continuous period of at least three months;
- currently has fewer than two children; and
- has given sufficient notice.

Further, employers are not permitted to dismiss an employee while she is on maternity leave.

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

A working mother is entitled to six days of paid childcare leave per year if:

- the child is a Singapore citizen;
- the youngest child is below seven years old; and
- the employee has been employed by that employer for a continuous period of at least three months.

If the child is not a Singapore citizen and the rest of the criteria above are satisfied, a working mother would be entitled to two days of paid childcare leave.

4.4 Do fathers have the right to take paternity leave?

Yes. An employee is entitled to two weeks of paid paternity leave if:

- the child is a Singapore citizen;
- the employee is lawfully married to the child's mother between conception and birth; and
- the employee has been employed by that employer for a continuous period of at least three months.

Government-paid paternity leave will be doubled from two to four weeks for eligible fathers of children born on or after 1 January 2024.

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

Each parent is entitled to six days per year of childcare leave until the child turns seven years old, regardless of the number of children. Childcare leave is capped at 42 days for each parent.

Working fathers may, subject to the wife's agreement, apply to share up to four weeks of his wife's maternity leave if:

- the child is a Singapore citizen;
- the child's mother qualifies for government-paid maternity leave; and
- the father is lawfully married to the child's mother.

Working parents are also eligible for six days of unpaid infant care leave per year if:

- the child is a Singapore citizen;
- the child is below two years of age; and
- the employee has been employed by the employer for a continuous period of at least three months.

A mother of an adopted child is also entitled to 12 weeks of paid adoption leave if:

- the adopted child is below the age of 12 months at the point of the formal intent to adopt;
- the adopted child is a Singapore citizen or one of the adoptive parents is a Singapore citizen and the child becomes a Singapore citizen within six months of the adoption;
- the mother has been employed by that employer for a continuous period of at least three months; and
- the adoption order is passed within one year from the formal intent to adopt.

Further, from 1 January 2024, unpaid infant care leave will be increased by an additional six days per parent per year for each eligible parent. This means that each parent will have 12 days of unpaid infant care leave per year, in the child's first two years.

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

The EA does not entitle employees to work flexibly. However,

employees may be contractually entitled to do so depending on the provisions of the employment contract or employee handbook.

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 EA provides that a transfer does not operate to terminate the employment contract between any person employed by the transferor and that such employment contract will have the effect as if originally made between the employee and the transferee.

A “transfer” includes the disposition of a business as a growing concern and a transfer affected by sale, amalgamation, merger, reconstruction or operation of law.

The following are not transfers:

- Transfer of assets only.
- Transfer of shares.
- Transfer of operations outside Singapore.
- Outsourcing of supporting functions.
- An incoming service provider taking over an outgoing service provider during competitive tendering.

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

Please see our response to question 5.1. An employee’s contractual rights in the original employment contract with the transferor remain the same following the transfer. The corresponding employer’s obligations will be transferred to the new employer.

The new employer is required to take over the previous employer’s rights, powers, duties and liabilities that are part of any agreement with the employees’ union before the 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 have the right to:

- be notified of the transfer and the matters relating to the transfer;
- have no break in employment during the transfer;
- be given the opportunity to consult their employer; and
- preserve the original terms of the employment contract.

To enable consultations to take place, employers are required to:

- notify the employees or their union of the transfer and the implications of the transfer within reasonable time;
- inform the employees about the terms of the transfer in order for them or their union to hold consultations with the company;
- ensure there is no break in employment during the transfer; and
- ensure that the terms of employment are not less favourable after the transfer.

Either party may refer any disagreements relating to the transfer to the Commissioner for Labour, which may delay or prohibit the transfer of the employee, or order the transfer of the employee on terms that are considered just.

It is an offence for any employer who enters into a contract of service or collective agreement contrary to the above requirements.

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

Both the employer and employee have the right to terminate the employment with notice if they are unable to agree to the new terms.

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

New employers must keep the same terms of employment for the transferred employees unless the transferred employees agree to a change of the terms.

6 Termination of Employment

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

According to the MOM’s website, a termination letter is mandatory. Any notice of termination, either by the employee or employer, must be in writing.

It is generally possible to terminate a contract without waiting for the period of notice to end by paying the employee compensation *in lieu* of notice, which is money equivalent to the salary that the employee would have earned during the required notice period.

The notice period should be found in the employment contract. For employees covered by the EA who enter into the employment agreement on or after 1 April 2016 and are employed for a continuous period of 14 days or more, a written record of the notice period must be given to the employees. In the absence of an agreement between the employer and the employee, the following notice periods stipulated in the EA will apply:

Length of employment	Notice period
Less than 26 weeks	One day
26 weeks or more but less than two years	One week
Two years or more but less than five years	Two weeks
Five years or more	Four weeks

Where the EA does not apply, and in the absence of an express termination notice clause, common law generally requires that reasonable notice be given before terminating the employment relationship. What is considered to be reasonable is determined on the facts of the case.

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 prescribed right for the employer to require the worker to be put on garden leave. Employment agreements may specifically provide for this. If not provided for in the employment agreements, employers may generally put an employee on garden leave if the employee continues to be paid his or her entitlements and salary.

However, the period of garden leave should not be so long as to render the employee’s skills obsolete. For certainty, it would be advisable for the employer to clearly set out its right to put the employee on garden leave in the employment agreement.

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 bring a claim for wrongful dismissal. Please see our response to question 6.7 for more details.

According to the MOM's website, an employee is dismissed when his or her employment agreement is terminated in the following circumstances:

- With notice from the employer.
- With salary *in lieu* of notice from the employer.
- Without notice from the employer on the grounds of misconduct or otherwise.
- Where the employee resigns involuntarily.

There is generally no requirement to obtain the permission of or to inform a third party before being able to validly terminate the employment relationship, unless the termination of the employment relationship is due to retrenchment, or a collective agreement requires the employer to notify and/or consult the trade union in advance.

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

Employers cannot terminate the services of female employees who are absent due to their maternity leave benefits under the EA or the CDCSA.

The RRA also prohibits employers from dismissing any employee below the age of 63 (or the prescribed minimum retirement age) on the ground of age. Employers must offer re-employment to eligible employees who turn 63, up to age 68. If the employer is unable to offer that employee a position, the employer must transfer the re-employment obligation to another employer, with the employee's agreement, or offer the employee a one-off Employment Assistance Payment ("EAP").

The EAP is a one-off payment equivalent to three-and-a-half months' salary subject to a minimum of S\$6,250 and maximum of S\$14,750. For employees who have been re-employed for at least 30 months since age 63, a lower EAP amount of two months of salary could be considered, subject to a minimum of S\$4,000 and maximum of S\$8,500.

In addition to the EAP, employers are encouraged to provide outplacement assistance to help employees find alternative employment.

At present, the minimum retirement age is 63 and re-employment age is 68.

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 not required to provide a reason for dismissal if the employee is terminated in accordance with the notice provisions of his or her employment contract.

If an employer wishes to provide a reason for termination, certain categories of reasons will trigger the application of relevant rules. For example, dismissal for reasons related to the individual employee such as misconduct or poor performance requires the employer to conduct due inquiry. Further, dismissal for business-related reasons such as redundancy may trigger notification requirements, among others.

An employer who terminates *in lieu* of notice must compensate the employee with a salary that the employee would have earned during the required notice period.

An employer who terminates an employee on the grounds of misconduct would generally not be required to provide compensation if a case of misconduct can be established after due inquiry.

An employer who terminates an employee due to redundancy may be required to provide retrenchment benefits depending on the provisions of the employment contract or collective agreement. If there is no contractual provision, such retrenchment benefits should be negotiated between employer and employee. While retrenchment benefits are not mandated by law, the MOM strongly encourages employers to adhere to the advisories and provide retrenchment benefits to help affected employees while they search for employment. The prevailing norm is to pay a retrenchment benefit varying between two weeks to one month of salary per year of service, depending on the financial position of the company and taking into consideration the industry norm.

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

Generally, there is no statutorily prescribed procedure if the employment is terminated by notice or salary *in lieu* of notice. It is common for employment agreements to prescribe a termination notice period, and how notice may be given to the employee. In this regard, the employer should ensure that the employee is terminated and given notice (or salary *in lieu* of notice) in accordance with the employment agreement.

Some additional considerations that an employer may take into account include:

- Collective agreements may require the trade union to be notified/consulted in the event of a dismissal.
- If an employee covered under the EA has committed an act of misconduct, the employer should conduct an inquiry before deciding whether to dismiss the employee.
- If the employee is a foreigner holding a work pass, the employer should cancel his or her work pass and seek tax clearance from the Inland Revenue Authority of Singapore.
- Employers who have a business registered in Singapore and at least 10 employees are required to notify the MOM of all retrenchments regardless of the number of employees affected within any six-month period. This notification requirement may also be triggered if an individual dismissal occurs during the same time as a retrenchment exercise mentioned in our response to question 6.9 below.

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 termination by either submitting a mediation request to the TADM before filing a claim in the ECT for wrongful dismissal or bringing a civil action in the courts.

The normal measure of damages that the employee may recover against the employer for wrongful termination is the amount the employee would have earned during the notice period, less than the amount he could reasonably be expected to earn in other employment. Depending on the circumstances of the termination, there may also be reputational consequences for the employer.

In relation to claims brought to the ECT, the ECT may:

- require an employer to reinstate an employee who has been wrongfully dismissed and to pay the employee his or her loss of wages from the date of dismissal to the date of reinstatement;
- require an employer to pay compensation to any employee who has been wrongfully dismissed; or
- dismiss the claim.

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

Yes, they 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?

An employer with businesses registered in Singapore with at least 10 employees must notify the MOM within five working days of the employee receiving notification of his or her retrenchment if the employer retrenches any employee. The requirement to notify the MOM of retrenchment applies to permanent employees, as well as contract employees with full contract terms of at least six months. A failure to notify within the required period is an offence and the employer may be liable on conviction to penalties, including a fine not exceeding S\$5,000 and to other potential penalties. Guidance relating to this requirement is set out in the MOM's Tripartite Guidelines on Mandatory Retrenchment Notifications.

The Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment provides that employers should carry out the following before retrenching:

- research on government assistance schemes to support the restructuring;
- obtain employment facilitation for employees;
- consider available alternatives such as redeployment, temporary layoffs (subject to some mandatory conditions), and implementing a shorter work week;
- take a long-term view of manpower needs;
- consult with the relevant trade unions if employees are unionised;
- not discriminate against employees and instead make selections based on objective factors such as the ability to contribute to the company's future business needs;
- treat affected employees with dignity and respect; and
- consider having a longer retrenchment notice period (i.e. in excess of that provided for under the EA) for all affected employees.

If employers still wish to implement their retrenchment exercise, they are advised to communicate their intentions early to their employees and before public notice of the retrenchment is given.

Other additional considerations include whether employees should be given retrenchment benefits. Employees with two years of service or more are eligible for retrenchment benefits. In this regard, employers should refer to the provisions in any collective agreement or employment agreement and consider the prevailing norms on the *quantum* of retrenchment benefits.

Employees with less than two years of service could be granted an *ex gratia* payment.

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?

Please see our response to question 6.9 – an employer with at least 10 employees must notify the MOM, within five working days of the employee receiving notification of his or her retrenchment, of all retrenchments regardless of the number of employees affected. A failure to notify within the required period is an offence and the employer may be liable on conviction to penalties, including a fine not exceeding S\$5,000 and to other potential penalties. Guidance relating to this requirement is set out in the MOM's Tripartite Guidelines on Mandatory Retrenchment Notifications.

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7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Generally, non-compete and non-solicitation clauses in respect of employees, businesses and suppliers have been recognised under Singapore law. Please see our response to question 7.2 for more details.

7.2 When are restrictive covenants enforceable and for what period?

Any restrictive covenant imposed by the employer that acts as a restraint of trade is *prima facie* unlawful and unenforceable unless the employer is able to show that:

- there is a legitimate interest to be protected by the restrictive covenant; and
- the restrictive covenant is reasonable in the interests of the parties and the public.

The restrictive covenant should not be wider than necessary to protect the legitimate interest of the employer.

In determining its enforceability, the courts would consider all the circumstances of the case, including, but not limited to: the nature of the interests sought to be protected; the period of restraint; the geographical restriction; as well as the seniority of the employee in question. The burden of proof is on the employer who is seeking to rely on such restrictive covenants to establish that the restrictive covenants are reasonable.

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

It is not strictly necessary to provide employees with financial compensation in return for restrictive covenants. However, employers do make such provisions to increase the reasonableness of such restrictive covenants and the likelihood of enforceability.

7.4 How are restrictive covenants enforced?

Employers may commence legal proceedings and seek an injunction or other appropriate remedies to enforce restrictive covenants.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The Personal Data Protection Act 2012 (“PDPA”) governs the collection, use and disclosure of personal data by organisations. Generally, employers must seek the employee’s consent before collecting, using and disclosing an employee’s personal data. That said, under the PDPA, the collection of personal data from employees that is reasonable for the purpose of managing or terminating the employment relationship, and the use or disclosure of such personal data for consistent purposes, would not require the consent of their employees.

Section 26 of the PDPA provides that organisations must not transfer personal data to other countries except if the transfer is carried out in accordance with the requirements prescribed under the PDPA to ensure that organisations provide a standard of protection to personal data transferred as such that is comparable to the protection under the PDPA.

According to the Advisory Guidelines on Key Concepts (revised 17 May 2022), employers may transfer personal data overseas if they have taken appropriate steps to ensure that the overseas recipient is bound by legally enforceable obligations to provide a comparable standard of protection.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Section 21 of the PDPA generally permits an employee to request that the employer provide him or her with personal data about him or her that is in the possession or under the control of the employer unless certain exceptional circumstances apply. For example, an employee does not have a right to obtain such copies of personal data if the provision of such data could reasonably be expected to:

- threaten the safety or health of another individual;
- cause immediate or grave harm to the safety or health of the employee;
- reveal personal data about another individual;
- reveal the identity of the individual who has provided personal data about another individual; or
- be contrary to national interest.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Employers may carry out pre-employment checks on prospective employees.

Where personal data of the employee is publicly available or is collected for an evaluative purpose including the purpose of determining the suitability and eligibility of an individual for employment, the employer may collect such information without the employee’s consent.

8.4 Are employers entitled to monitor an employee’s emails, telephone calls or use of an employer’s computer system?

Employers may collect personal data from their employees if it is reasonable for the purpose of managing or terminating their employment relationships without consent. That said, employers are expected to keep their employees updated about the new purposes for which an employee’s personal data is collected, used and disclosed without their consent. Such purposes may include monitoring how the employee uses company computer network resources.

Employers would generally need to seek consent for purposes that are not related to the management or termination of the employment relationship.

8.5 Can an employer control an employee’s use of social media in or outside the workplace?

There are no legal provisions prohibiting an employer from restricting an employee’s use of social media in or outside the workplace. An employer may institute employment policies regarding social media use by its employees. Please see our response to question 8.4 for more details.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee’s performance or productivity)?

There are no legal provisions restricting how employers use AI technologies in the employment relationship, provided that employers comply with the relevant obligations under the PDPA. Please see our response to questions 8.3 and 8.4 for more details.

9 Court Practice and Procedure

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

The ECT, State Courts and Supreme Court have jurisdiction to hear employment-related complaints. Only claims not exceeding

S\$20,000 may be heard by the ECT. The claim limit is S\$30,000 for employees who go through the Tripartite Mediation Framework or mediation assisted by their recognised unions. The ECT usually comprises District Judges from the State Courts of Singapore. According to the Employment Claims Act 2016, an ECT is presided over by a tribunal magistrate appointed by the President on the recommendation of the Chief Justice, or a tribunal magistrate designated by the Presiding Judge of the State Courts.

The State Courts and Supreme Court consist of Judges, registrars and judicial commissioners from the Singapore judiciary, among others.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Parties may either bring a claim before the Singapore courts or the ECT. The ECT is an expeditious and affordable avenue to resolve salary-related disputes and wrongful dismissal disputes.

Before bringing a claim to the ECT, an employee must first register their claims at the TADM. Only disputes that cannot be resolved after mediation at the TADM may be referred to the ECT.

For a claim amount of S\$10,000 or less, the employee must pay a S\$10 registration fee for mediation at the TADM and S\$30 for filing the claim at the ECT. For a claim amount of more than S\$10,000, the employee must pay a S\$20 registration fee for mediation at the TADM and S\$60 for filing the claim at the ECT.

There is no mandatory conciliation process for claims brought before the Singapore courts.

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

There are no stipulated timelines. The duration will depend on the complexity of the claim.

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

The party who wishes to make an appeal from an ECT order must apply to the District Court for leave (permission) to appeal within seven working days after the date of the order. Once leave is given, the party can file an appeal to the General Division of the High Court. A filing fee of S\$100 is payable for the leave to appeal application, and a filing fee of S\$600 is payable for filing a notice of appeal to the General Division of the High Court.

If the claim is brought before the State Courts or the General Division of the High Court, whether an appeal requires the leave of court is subject to the general rules of civil procedure.

Depending on the complexity of the case, an appeal may last between several months to over a year.



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Drew & Napier is consistently recognised as a leader in the employment field. We represent clients in every aspect of employment practice, including employment, benefits, ethics and governance issues, and in transactional, advisory and contentious work.

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Apart from the sources of employment law established in Article 1.1 of the Spanish Civil Code (the law, custom and the general principles of law), Article 3.1 of the Spanish Workers' Statute ("WS") sets forth the following:

- The legislation and regulations of Spain.
- The applicable collective bargaining agreement.
- The will of the parties as set out in the employment contract.
- Local and professional customs and practices.

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

Spanish employment law protects, *inter alia*: minors; members of works councils and workers' legal representatives; disabled workers; workers affiliated with a trade union; workers facing discrimination based on birthplace; racial or ethnic origin; religion; ideology; sexual orientation; gender; convictions or opinions; age; illness or health conditions; serological status and/or genetic predisposition to suffer diseases or disorders; language; socioeconomic situation or any other personal, social, economic or political condition or circumstance; workers on leave/in periods of suspension of employment contracts (due to maternity, adoption or guardianship, amongst others); pregnant workers who have requested leave or are already on leave; workers who are victims of gender violence who have exercised or are exercising their legal rights to reduce or rearrange their work time, change their workplace (geographical mobility) or suspend their employment relationships; and workers who have returned to work at the end of periods of suspension of their contracts.

Workers are distinguished by type of contract, professional category, occupational group, seniority, and salary.

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 Article 8.1 of the WS, contracts may be concluded either in writing or verbally, as long as neither of the parties request otherwise. Nevertheless, pursuant to Article 8.2, employment contracts must be in writing in certain cases (e.g. contracts of workers hired in Spain to work for Spanish companies abroad for more than four weeks, part-time contracts, fixed-discontinuous

contracts or pre-retirement substitution contracts, amongst others). Should this requirement not be fulfilled, the contract shall be presumed to have been concluded for an indefinite period of time and on a full-time basis, unless proven otherwise.

In any event, whenever a probation period, an agreement to remain with the employer for a certain period of time, or a supplementary-hours agreement is established, this must be done in writing pursuant to Articles 14.1, 12.5 a and 21.4 of the WS.

As regards any other specific written information, according to Royal Decree 1659/1998, of 24 July, implementing Article 8.5 of the WS ("RD 1659/1998"), workers must be provided with certain essential information in writing whenever such information has not been previously provided to them or it is modified (e.g. identity of the parties, date of commencement of employment, category, occupational group, salary, working hours, holidays and collective bargaining, amongst others).

1.4 Are any terms implied into contracts of employment?

Pursuant to Article 5 of the WS, there are certain basic obligations every worker must observe. These include compliance with the specific obligations of his/her job, orders and instructions given by the employer and measures adopted by the company for the prevention of occupational risks. In addition, he/she may not compete with the company's activity.

Notwithstanding the above, according to Article 4 of the WS, employers must also observe certain obligations regarding certain basic rights that every employee possesses (see question 1.5 below).

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

As indicated in question 1.4 above, every employer must observe specific obligations regarding certain basic rights every worker possesses. These include the right to: punctual payment of salary; information, consultation and participation within the company; freely form unions or participate therein; collective negotiation; strike; and take legal action against the company based on his/her contract.

Furthermore, the minimum working employment terms and conditions to be respected by the employer are those set out in the legislation described in reply to question 1.1.

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 establish, whether fully or in part,

more specific or improved terms and conditions already set forth in the WS.

Bargaining usually takes place at an industry level (normally every sector has its own collective bargaining agreement), but it can also take place at the company level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

According to Article 5 of Law 10/2021, of 9 July, on remote work ("Law 10/2021"), remote work is voluntary for the employee and for the company. An employee's refusal to work remotely may not be a reason for termination of the employment relationship or substantial modification of his/her working conditions. However, in accordance with Article 7 of Law 10/2021, the parties may establish the ratio and distribution corresponding to working in-person or remotely, if applicable, by way of a collective bargaining agreement or another type of agreement.

Law 10/2021 applies to employment activities performed remotely for at least 30 per cent of the working day in a reference period of three months or the equivalent proportional percentage depending on the duration of the employment contract. Pursuant to Law 10/2021, companies are obliged to sign a remote work agreement with workers in these situations; such agreement must be drafted in accordance with Article 7 of such law.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

As mentioned in question 1.7, remote work is not an employee's right. It is the decision of the employee and the company.

Notwithstanding the above, Article 34.8 of the WS establishes that workers are entitled to request to carry out their work remotely in order to exercise their right to work-life balance. In the case where workers have children, they are entitled to make such a request until their children reach age 12. Likewise, this right also applies to those workers who have care needs with respect to children over the age of 12, the spouse or unmarried partner of workers or relatives by consanguinity up to the second degree, as well as other dependents when they live in the same domicile, and who for reasons of age, accident or illness are unable to look after themselves, provided that the circumstances on which their request is based are shown to exist.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade union recognition in Spain is closely linked to the fundamental right of freedom of association stipulated in Article 28 of the Spanish Constitution. This right includes the right to form trade unions and for employees to join one of their choice, as well as the right of trade unions to form confederations and form or join international trade union organisations.

2.2 What rights do trade unions have?

According to Article 2.2 of the Organic Law on Freedom of Association ("LOLS"), trade unions possess the rights therein

contained (e.g. drawing up their bylaws and regulations, organising their internal administration and setting up confederations and international organisations, amongst others).

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

Yes, such rules are established in Articles 8–11 of LOLS.

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?

According to Article 63.1 of the WS, works councils may be set up in workplaces with 50 or more workers. Their composition would differ according to the number of workers at the company (Article 66.1 of the WS). Hence, it is not compulsory for the companies to have statutory workers' representatives. If companies reach a certain number of workers, workers are entitled to have statutory workers' representatives, which can be either staff representatives (companies with less than 50 workers and more than 10 workers) or works councils (companies with 50 or more workers).

As to their rights, pursuant to Article 64 of the WS, works councils must be informed and consulted by the business owner with regard to the matters that can affect workers, the company's situation and the evolution of the company (e.g. the company's economic situation, anticipation of new recruits and staff restructurings, etc.). As for their obligations, works councils must monitor compliance with existing labour standards, health and safety conditions, and the equality principle, amongst others.

Both staff delegates and works council members are elected by the workers themselves by means of a free, personal, secret, and direct vote. The election process varies depending on whether staff representatives or works councils are concerned.

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's decisions are not bound by third-party consent since these are a part of its managerial power. Nevertheless, the works council has the right to issue a report prior to the employer's execution of decisions in certain circumstances established in Article 64.5 of the WS (e.g. staff restructurings, reductions in working hours, merger processes and total or partial relocation of installations, etc.).

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

The rights of trade unions and works councils are the same. In other words, regardless of the type of workers' representatives within the company, they are entitled to the same rights.

2.7 Are employees entitled to representation at board level?

No. Under Law 41/1962, of 21 July, establishing the inclusion of an employees' representative in the management body of the company, employees used to be entitled to board-level representation. Since its repeal, employees are entitled to representation within the company, although not at board level.

3 Discrimination

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

Yes, they are. Pursuant to Article 17.1 of the WS, no employee can be discriminated against based on his/her circumstances or conditions. This would violate the worker's fundamental rights (Article 14 of the Spanish Constitution).

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

Under Article 17.1 of the WS, discrimination based on birthplace, disability, gender, racial or ethnic origin, religion, conviction or opinion, ideology, sexual orientation, gender identity, age, affiliation with a trade union, or following legal action taken against the company, amongst others, is prohibited and considered unlawful.

Law 15/2022, of 12 July, on equal treatment and non-discrimination, broadened the scope of what is considered discrimination under Spanish law. It includes discrimination on the grounds of diseases or health conditions, serological status and/or genetic predisposition to suffer diseases or disorders and any other social, economic, or political condition or circumstance.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

According to Article 48 of Organic Law 3/2007, of 22 March, for effective equality between women and men ("LO 3/2007"), companies must promote working conditions aimed at preventing sexual harassment and establish specific procedures for its prevention and channels for complaints made by sexual harassment victims. Therefore, the implementation of a protocol against sexual and gender-based harassment is mandatory for all companies, regardless of the number of employees.

In this regard, measures such as the creation and dissemination of codes of conduct, information campaigns or training actions may be established. These measures must be negotiated with the workers' statutory representatives.

Furthermore, according to Article 45 of LO 3/2007, companies with 50 or more workers must draw up and enforce equality plans, which must contain, amongst other aspects, adequate sexual harassment prevention measures. These equality plans must be available to the workers' statutory representative or, if none exists, to the employees themselves.

3.4 Are there any defences to a discrimination claim?

Yes, a legal claim can always be fought. In this case, the company could argue the fairness of the decision or measure taken *vis-à-vis* the employee filing a discrimination claim, alleging that such measure has nothing to do with the employee's circumstances or conditions but with a legitimate cause. Therefore, the decision or measure would not entail any discrimination.

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

Employees can enforce their discrimination rights through a

special fundamental rights procedure established in Article 177 of the Law Governing Labour Jurisdiction ("LRJS").

As to a possible settlement, once the claim in question has been filed and the procedure arising from it initiated, the parties can always reach an agreement before the judge hands down a ruling.

3.6 What remedies are available to employees in successful discrimination claims?

In these cases, pursuant to Article 182 of the LRJS, a judge will: (i) declare null and void an employer's unlawful actions regarding its employee; (ii) order the cessation of such actions, as well as the reinstatement of the employee to his/her post; and (iii) order payment of the corresponding compensation when requested with the discrimination claim. The exact amount of compensation sought may or may not be pleaded; this will depend on the complexity of the case. In complex cases, Spanish case law establishes that the judge will determine *quantum*.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Workers with part-time and fixed-term contracts have no additional protection compared to full-time and permanent-contract workers (Articles 12.4 d and 15.6 of the WS). As for temporary agency workers, they have the same rights as the rest of the workforce in the company at which they provide services.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

Companies may not discriminate against whistle-blowers or employees for raising concerns regarding corporate malpractice (see question 3.2 above), as this could amount to discrimination under Article 17.1 of the WS.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Pursuant to Article 5 and 6 of Royal Decree 902/2020, of 13 October, on equal pay for women and men and Article 28.2 and 28.3 of the WS, the employer is obliged to keep an annual remuneration register with the average and mean values of salaries, ancillary salary payments and fringe benefits of its workforce, broken down by gender and distributed by professional group, category or position of similar or equal value. However, this register is not made public. Workers have the right to access this annual remuneration register. In companies with 50 or more employees, where the average and mean remuneration of workers of a given gender is 25 per cent, or more, higher than that of the other gender, the employer must include a statement in the register that the difference is not related to the workers' gender.

This annual remuneration register only covers gender. Therefore, there is no obligation to monitor such differences on the grounds of ethnicity or disability.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Pursuant to Article 48.4 of the WS, maternity leave lasts 16

weeks, six of which must be taken immediately after childbirth, on a full-time basis and without interruption in order to ensure the protection of the mother's health. In the event of a multiple birth, these 16 weeks may be extended by two weeks for each additional child.

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

During maternity leave, women are entitled to a subsidy equivalent to 100 per cent of the corresponding regulatory base (Article 179 of the General Social Security Law, the "LGSS"). They also have the right not to be dismissed; any such dismissal could be considered null and void (Articles 53.4 and 55.5 of the WS).

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

A woman has the right to benefit from any kind of improvements to working conditions that occurred while she was on maternity leave (Article 48.9 of the WS). She is also entitled to leave of one hour per day for the purposes of breastfeeding until the child is nine months old (Article 37.4 of the WS), as well as a reduction of her workday until the child reaches 12 (Article 37.6 of the WS). The workday may be reduced by a maximum of one-half and a minimum of one-eighth, with a proportionate decrease in salary. Furthermore, in 2023, new unpaid parental leave totalling eight weeks has been included in the WS. This leave, which applies until the child reaches the age of eight, may be split into several (shorter) leaves or taken all at once, on a part-time or full-time basis.

4.4 Do fathers have the right to take paternity leave?

Yes, they do. According to Article 48.4 of the WS, such leave lasts 16 weeks, six of which must take place immediately following childbirth, on a full-time basis and without interruption in order to comply with the caretaking duty stipulated in Article 68 of the Spanish Civil Code.

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

Yes, those stipulated in Article 37.3 f (leave to attend prenatal examinations and childbirth preparation techniques; in cases of adoption, guardianship for the purpose of adoption or foster care, attendance at the required information and preparation sessions), Article 37.4 (breastfeeding), Article 37.5 (children born prematurely or who are hospitalised following childbirth) and Article 37.6 (reduction of workday until the child reaches 12 years age) of the WS. For new unpaid parental leave, implemented in 2023, please see question 4.3 above.

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

Yes, they are. Should they have a child under 12 or care for a dependent disabled person or relative (up to the second degree of consanguinity or affinity), they are entitled to a reduction in their workday pursuant to Article 37.6 of the WS, subject to the limits and consequences established therein (see question 4.3 above).

Regarding the right to request changes to the working day, Article 34.8 of the WS establishes that workers may request adjustments to the length and distribution of the working day, the organisation of working hours and the form of provision, including as regards working remotely, to ensure the effective enjoyment of their entitlement to a work-life balance. Where workers have children, they may make this request until their children reach the age of 12. Likewise, this right will also be enjoyed by those who have care needs with respect to children over 12 years of age, the spouse or common-law partner of workers as well as relatives up to the second degree of consanguinity and other dependents when, in the latter case, they live in the same domicile and, for reasons of age, accident or illness, are unable to take care for themselves, provided that they prove the circumstances on which their request is based.

Employees are entitled to unpaid leave in the cases stipulated in Article 46 of the WS (e.g. to care for their children, in cases of adoption, guardianship prior to adoption or foster care, or to care for a relative).

5 Business Sales

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

Firstly, it should be noted that a share sale itself does not entail a transfer of undertaking. As for asset transfers, as long as there is a transfer of a production unit (as defined in Spanish case law), a "company succession" exists under Article 44 of the WS, provided that certain requirements are met. In such cases, employees will be automatically transferred to the buyer.

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

Pursuant to Article 44.1 of the WS, provided that a business sale amounts to a company succession, the new employer will be subrogated into the position of its predecessor as regards labour and social security rights and obligations. In any event, Article 44.3 of the WS stipulates that both the former and the new employer will be jointly and severally liable, during a three-year period, for employment obligations arising prior to the transfer that have not yet been fulfilled.

As regards collective agreements, these will continue to prevail until their expiration date or the date on which new ones substitute them.

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?

Pursuant to Article 44.6 of the WS, the workers' statutory representatives must be informed of the date, grounds, consequences and measures to be implemented *vis-à-vis* the employees. In the case of implementing labour measures as a result of a business sale, a consultation period must be initiated in this regard with the workers' statutory representative. Failure to fulfil this obligation is considered a serious violation (Article 9.2.c of the Law on Labour Violations and Penalisations) and may be punished with a fine ranging from EUR 7,501–EUR 225,018 (Article 40.1.c of the aforementioned law).

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

Employees may not be dismissed due to a business sale *per se*, since this is not a valid ground for the termination of an employment contract (Article 44.1 of the WS).

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

No. Any change in this regard must take place for other reasons and, in any case, always bearing in mind that (i) a substantial change in working conditions (as defined in Article 41 of the WS) must not be incurred, and in the event such changes take place, and (ii) a consultation period must be initiated (Article 44.9 of the WS).

6 Termination of Employment

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

These answers depend on the type of dismissal and the provisions of the applicable collective bargaining agreement. Should an employee be dismissed for disciplinary reasons, no notice of termination is required (unless the collective bargaining or the employment contract stipulate otherwise). If dismissal is on objective grounds, according to Article 53.1 c of the WS, employers must give 15 days' notice of termination to the employee in question.

In the event that no notice is given, or it is less than required, the company must include payment *in lieu* of such notice in the worker's severance pay.

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; however, the employer must pay the employee all amounts due up to the date on which the dismissal becomes effective (Article 49.2 of the WS).

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?

Dismissals may be declared fair (no compensation being payable in the case of a disciplinary dismissal, compensation of 20 days' salary per year of service under Article 53.1 b of the WS being payable in the case of dismissal on the grounds of redundancy), unfair (compensation of 33 days' salary per year of service under Article 56.1 of the WS being payable or, alternatively, the reinstatement of the worker, with payment of unpaid salary under Article 56.2 of the WS), or null and void (protection consisting of the immediate reinstatement of the worker, with payment of unpaid salary up to the date thereof pursuant to Article 55.6 of the WS). No third-party consent is required.

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

Yes (see question 1.2). In the case of trade union members, pursuant to Article 55.1 of the WS, the company must give the relevant union representatives a prior hearing. If the employee to be dismissed is the workers' statutory representative or union representative, a procedure will be initiated in which, in addition to the interested party, the other representatives, where applicable of the union, etc. to which the employee belongs, will be heard (Article 55.1 of the WS). Employees are also entitled to choose between being reinstated or paid the statutory compensation established in Article 56.1 of the WS, should the dismissal be declared unfair.

In any event, representative committee members, union delegates and workers' statutory representatives all benefit from certain guarantees under Article 68 of the WS (e.g. priority regarding remaining employed when dismissals occur and initiation of a procedure in the case of penalisation for serious or severe misconduct, amongst others).

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 carry out a disciplinary dismissal under any of the employee-related circumstances stipulated in Article 54 of the WS (e.g. continued, voluntary decrease in work performance, lack of discipline or disobedience, repeated and unjustified absences from work, or lack of punctuality, etc.) as well as those established in the applicable collective bargaining agreement. The company may also carry out a dismissal on objective grounds for any of the reasons stipulated in Article 52 of the WS (e.g. inadequate performance or incompetence, lack of adaptation, etc.); in this case, the company is obliged to pay compensation of 20 days' salary per year of service.

An employer is entitled to dismiss for business-related reasons if economic, productive, technical or organisational causes exist. In this case, the company is entitled to carry out (i) an objective dismissal, if the number of employees affected does not meet the thresholds of Article 51 of the WS (Article 52 c of the WS), or (ii) a collective dismissal (Article 51 of the WS). Both objective and collective dismissals imply an obligation to pay compensation of 20 days' salary per year of service.

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

The employer must provide the employee with a letter of dismissal, a document stating the amounts due up to the effective date of dismissal (Article 49.2 of the WS) as well as a so-called "company certificate" (*certificado de empresa*).

In case of an objective dismissal, in addition to the aforementioned documents, the company must pay the employee compensation of 20 days' salary per year of service.

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

See question 6.3. Employees may claim the dismissal is unfair; if successful, the company must choose between payment of

compensation of 33 days' salary per year of service or reinstatement of the employee. Employees may also claim the dismissal null and void; if successful, the company must proceed to immediately reinstate the employee and pay any unpaid salary until the date of reinstatement.

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

Yes, see question 3.5. Settlements are always possible before judgment is handed down.

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

If the number of employees affected by the dismissal exceeds the thresholds of Article 51 of the WS, employers must follow the procedure established for 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?

There is a consultation period in which the employees' statutory representative negotiates their rights with respect to the company. If the employer fails to initiate this consultation period or to follow the procedure stipulated in Article 51 of the WS, the collective dismissal could be declared null and void.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Under Article 21 of the WS, three types of restrictive covenants are recognised: (i) post-contractual, non-compete agreements (which may only be entered into if the employer has an actual industrial or commercial interest to protect and the worker is being duly compensated in exchange of him/her complying with such non-compete); (ii) agreements to remain with the employer for a certain period of time; and (iii) employment exclusivity agreements.

7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants (ii) and (iii) in the preceding question are enforceable while the contract is in force. As for covenant (i), this kind of agreement is enforceable once the contract is no longer in force. Non-compete agreements may not last more than two years for technicians and six months for other workers (Article 21.2 of the WS). In agreements to remain with the employer for a certain period of time, such time may not exceed two years (Article 21.4 of the WS).

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

Pursuant to Article 21.2 of the WS, employees must be properly compensated for entering into these kinds of agreement.

7.4 How are restrictive covenants enforced?

If the employee fails to comply with the terms of an agreement, the employer may take legal action.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

According to Article 13 of the EU General Data Protection Regulation ("GDPR"), whenever obtaining private data, the party responsible for its processing (the employer) must: inform the person concerned (the employee) about certain matters, including the purpose of processing the data; provide the legal basis for the processing; state whether or not the data will be transferred to other countries; give the period of time during which the data will be kept; and state the data subject's rights to access and correct/complete data, oppose processing, eliminate the data held by the employer, block certain processing activities as well as the data subject's right to portability.

The employer may only transfer the personal data of the employee to other countries when the Commission considers the safeguards of such countries to be adequate (Article 45 of the GDPR). According to Article 46 of the GDPR, if the Commission fails to decide the matter, the employer may only transfer data when the destination country offers adequate safeguards and provides the person concerned with enforceable rights and effective legal remedies. If the destination country does not offer such safeguards, the derogations set forth in Article 49 of the GDPR must be taken into account.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Pursuant to Article 15.3 of the GDPR, employees have the right to obtain copies of any personal information held by their employer, in its capacity as the party responsible for the processing of their data.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Generally speaking, the courts have ruled that pre-employment checks shall not take precedence over the right to privacy (European Court of Human Rights). Furthermore, case law considers such checks and the exclusion of a candidate as a result of the information obtained therein as discriminatory acts that directly infringe Article 14 of the Spanish Constitution and Article 4.2 c of the WS.

There are specific exceptions to this general rule for jobs in certain sectors (e.g. jobs involving minors, private security employees, board members of financial institutions, etc.).

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

According to Article 20.3 of the WS, the employer is entitled to implement certain measures that can in some way assist the company to verify and ensure employee compliance with

obligations and duties. However, these measures may not exceed certain limits (e.g. the employee's right to privacy). Recent case law of the European Court of Human Rights and the Spanish Supreme Court establishes that employers may take such measures with respect to correspondence and other communications provided that they take the following into account: (i) the need to inform employees beforehand of this possibility at the company, the measures adopted for such purpose and their implementation; (ii) the extent to which monitoring affects employee privacy; (iii) the need for a real and legitimate reason for the monitoring; (iv) the existence or lack of alternative, less intrusive means; (v) how the company will use the results of the monitoring; and (vi) the provision of safeguards for employees throughout the process.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

As a continuation of the preceding question, pursuant to Article 20.3 of the WS, an employer may indeed control an employee's use of social media during the working day to verify employee compliance with obligations and duties. Employers should remind staff that any tools provided by the company are work tools and not for personal use or leisure. Nevertheless, such control may not exceed certain limits (see question 8.4 above).

Regarding social media content (publications or references by employees in social media), employees are free to use their social media as they see fit except when publications, references, etc. directly affect the company. In this latter case, employers may adopt any legally established measures it deems appropriate within the scope of their disciplinary power depending on the extent of the impact on the company.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

Yes. In these cases, the employer must:

- inform the worker of the existence of automated decisions affecting him/her, including the preparation of profiles;
- inform the workers' representatives regarding the parameters, rules, and instructions on which artificial intelligence algorithms or systems are based that affect decision-making that may have an impact on working conditions, access to and maintenance of employment, including the preparation of profiles; and
- promote the use of artificial intelligence in an ethical, trustworthy, and fundamental rights-compliant manner, in particular by following EU recommendations in this regard.

9 Court Practice and Procedure

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

According to the Spanish Organic Law on the Judiciary (Articles 53 *et seq.*), the courts and tribunals with jurisdiction to handle

labour matters are as follows: the Labour Courts (*Juzgados de lo Social*); the Labour Chamber of the High Court of Justice (*Tribunal Superior de Justicia*); the Labour Chamber of the National High Court (*Audiencia Nacional*); and the Labour Chamber of the Supreme Court (*Tribunal Supremo*). With the exception of the Labour Courts, in which a single judge presides over each court, these courts are presided over by panels of senior judges (*magistrados*).

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The applicable procedure differs depending on the legal action brought. Procedures include the order for payment procedure (Article 101 of the *Ley Reguladora de la Jurisdicción Social* or "LRJS"), the ordinary procedure (Articles 80 *et seq.* of the LRJS), as well as the procedure for the protection of fundamental rights (Article 177 *et seq.* of the LRJS).

Pursuant to Articles 63 *et seq.* of the LRJS, conciliation is mandatory. Certain cases stipulated in Article 64 of the LRJS are the exception to this requirement. These include: procedures that first require attempting to solve the matter using administrative channels; cases concerning social security; challenges to collective dismissal by the workers' statutory representative; cases concerning holidays; geographical mobility; substantial modification of working conditions; suspension of the contract; challenges to collective agreements; protection of fundamental rights and public liberties; challenges to conciliation agreements; and labour actions to protect against gender violence, etc.

Employees do not need to pay any fee of any kind to submit a claim.

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

Timelines vary depending on the type of claim. Orders for payment procedures must be decided within 10 days from admission of the claim in question (Article 101b of the LRJS). In general terms, ordinary procedures must be decided within five days from date of the hearing (Article 97.1 of the LRJS). Fundamental rights procedures must be decided within three days from the hearing date (Article 181.3 of the LRJS).

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

Yes, appeals may be filed against these decisions pursuant to Articles 190 *et seq.* of the LRJS. It is quite difficult, however, to predict the time they will take. For example, it can take from 20 days to more than a month for a court even to allow an appeal to proceed.



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Sweden

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Sweden is generally governed by the civil law tradition. Within employment law, Swedish legislation aims (in some ways) to resemble that of other Nordic countries. EU law has, with few exceptions, been rapidly implemented into the Swedish legal system. The main sources of national employment law are found in the Swedish Constitution, statutes, authority provisions, case law, collective bargaining agreements, individual employment contracts and employer decision-making.

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

The law protects employees equally. Hence, there is no legal difference between blue-collar and white-collar employees and, e.g. the Employment Protection Act (1982:80) protects employees in the public and private sectors equally.

The following categories of employees do not enjoy employment protection through the Employment Protection Act:

- employees in managerial positions, such as a managing director of a limited liability company;
- employees employed in the employer's household;
- employees who are members of the employer's family; and
- employees who are employed in sheltered employment, with public financial support.

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, an employer shall inform the employee of the most important terms and conditions of employment. The scope of this written information has recently been extended as Sweden implemented Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union. Information regarding a specific fixed-term employment shall already be provided by the employer when the parties enter into the employment contract. Other information shall be provided within seven days or within a month from commencement of employment.

Normally, this written employer information is provided in a written employment contract.

1.4 Are any terms implied into contracts of employment?

The duty of loyalty is implied in all contracts of employment. The duty is mutual, whereby the employer shall safeguard the employer-employee relationship in various ways and the employee shall avoid any conflict of interest that could reasonably be demanded, considering the employee's position, etc.

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

There are minimum employment terms and conditions set forth in, for example, the following acts:

1. The Employment Protection Act: This act is, in principle, mandatory to the benefit of the employee, e.g. providing for notice periods, type of employment, protection from unfair dismissals, time bars and remedies. It should be noted, however, that significant changes to the Employment Protection Act were made with full effect since 1 October 2022. Employer organisations and trade unions may, to a certain extent, agree on deferring provisions in central collective bargaining agreements.
2. The Annual Leave Act (1977:480): This act entitles employees to a minimum of 25 vacation days per year. The act also includes principles on the calculation of vacation pay and vacation pay *in lieu* of vacation. Employer organisations and trade unions may, to a certain extent, agree on deferring provisions in central collective bargaining agreements.
3. The Working Hours Act (1982:673): This act limits the working hours and defines the minimum rest period and maximum number of overtime hours.
4. The Sick Pay Act (1991:1047): This act regulates an employee's right to sick pay.

There is no legislation on minimum pay in Sweden.

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 Swedish labour market is, to a wide extent, regulated by collective bargaining agreements in which terms and conditions are set out in detail.

Collective bargaining agreements exist both at industry and company level; however, bargaining takes place foremost at industry level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

No, as that would require an individual agreement or, possibly, a collective bargaining agreement.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

No, as that would require an individual agreement.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The recognition and formation of trade unions is guaranteed and protected by constitutional law. Freedom of association is guaranteed for both employees and employers.

2.2 What rights do trade unions have?

The main function of trade unions is to safeguard the interests of their members, i.e. the employees, when it comes to the work environment, employment protection, wage development, etc. The means to achieve the greatest influence for their members is to agree on collective bargaining agreements and to achieve high coverage on the labour market for these agreements.

Employers bound by a collective bargaining agreement shall consult with the local trade union prior to taking any decision of importance relating to either the organisation as such (business-related changes) or to the terms and conditions of individual employees (individual changes). Also, employers not bound by a collective bargaining agreement have a duty to consult with the trade unions in certain situations.

In the line of business, the employer further has a duty to continuously inform the local trade union on business development, finances, etc.

The local trade union representatives are chosen by members of that specific trade union.

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

Constitutional law and the Co-Determination in the Workplace Act (1976:580) provide trade unions with a far-reaching right to take 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?

There is no such requirement. However, in accordance with EU Directive 2009/38/EC, an employer shall, under certain circumstances, assist and facilitate the setting up of a European Work Council.

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?

With regard to works councils, the question is not relevant from a Swedish perspective. However, employers have a duty to consult with the trade unions in various situations prior to taking decisions.

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

This is not relevant in Sweden.

2.7 Are employees entitled to representation at board level?

For privately held limited liability companies bound by a collective bargaining agreement and with at least 25 employees, the local trade union has a right to decide upon and appoint two employee representatives on the board of directors. Where the number of employees exceeds 1,000, employees have a right to three representatives.

3 Discrimination

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

Employees are protected against discrimination, which is prohibited on the grounds of gender, age, transgender identity, sexual orientation and ethnic origin, as well as religion and disability.

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

Discrimination is defined as:

1. **Direct discrimination:** When someone is disadvantaged by being treated less favourably than how someone else is treated, has been treated or would have been treated in a comparable situation and the disadvantage is associated with any of the protected grounds.
2. **Indirect discrimination:** When someone is disadvantaged by the application of a provision, criterion or procedure that appears neutral but that may put people of any of the protected grounds at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.
3. **Inadequate accessibility:** When a person with a disability is disadvantaged through a failure to take measures for accessibility.
4. **Harassment:** Conduct that violates a person's dignity and that is associated with one of the following grounds of discrimination: sex; gender identity or expression; ethnicity; religion or other belief; disability; sexual orientation; or age.
5. **Sexual harassment:** Conduct of a sexual nature that violates someone's dignity.
6. **Instructions to discriminate:** Orders or instructions to discriminate against someone in a manner referred to in points 1–4.

The Discrimination Act also prohibits reprisals.

Further, the Parental Leave Act (1995:584) prohibits unfavourable treatment of an employee who intends to or has taken out parental leave according to the act.

A separate act prohibits discrimination of part-time employees as well as fixed-term employees.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Employers are responsible for taking active measures aimed at preventing discrimination, including sexual harassment and promoting equal rights and opportunities in the workplace. More precisely, an employer shall establish policies and routines to prevent sexual harassment. The policies and routines shall, on a regular basis, be evaluated and, if needed, amended. If an employer employs more than 25 employees, the active measures must be documented.

3.4 Are there any defences to a discrimination claim?

The employer has the burden of proof in establishing the equal treatment of employees. Thus, the employer must be able to show that the reasons for differential treatment have been objectively justified.

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

If the employee is a member of a trade union, the trade union may raise claims on behalf of the employee. If not settled, the trade union may bring the claims before the Labour Court.

If the employee is not a member of a trade union, or if the trade union for any reason chooses not to represent the employee, the employee may report the alleged discrimination to the equality ombudsman (DO). The DO will make an investigation and potentially raise claims on behalf of the employee. If not settled, the DO may bring the claims before the Labour Court.

Finally, the employee may bring claims for alleged discrimination before the District Court.

The parties may settle the case by way of a settlement agreement.

3.6 What remedies are available to employees in successful discrimination claims?

The employee may claim damages mainly for injury to feelings and, under certain circumstances, for financial loss. Further, discriminating terms of a contract may be declared null and void.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Less favourable employment terms than those applicable to other employment relationships may not, without proper and justified cause, be applied to fixed-term and part-time employment relationships merely on the basis of the duration of the employment contract or working hours. Information on vacancies must be provided in a way that ensures that part-time and fixed-term employees, as well as temporary agency workers of the user company, have the same opportunity to apply for these jobs as permanent or full-time employees.

If the employer, hiring its employee as a temporary agency worker to a user company, is neither bound by a collective agreement nor required to observe a generally applicable collective agreement in its employment relationships, the provisions of the collective agreement applicable to the user company must at least be applied to the employment relationship of the temporary agency worker.

A temporary agency worker is entitled to benefit from the employee benefits and services offered by the user company to its employees on the same conditions as the employees of the user company, unless a difference in treatment can be justified on objective grounds.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

The Swedish Whistleblowing Act is the result of the implementation of Directive (EU) 2019/1937 on the protection of persons reporting on breaches of Union law (Whistleblower Protection Directive). The Whistleblowing Act covers both the private and public sectors, entails a stronger protection for whistleblowers and requires, *inter alia*, employers with 50 or more employees to implement internal procedures and channels for the reporting of, and following up on, irregularities. Said whistleblowing procedures are intended to provide safe channels for whistleblowers to report irregularities.

The Whistleblower Act protects employees and other individuals (e.g. board members, consultants and jobseekers) from retaliation prompted by reporting any irregularities in a work-related context. If an employee is subject to reprisals by the employer, as a consequence of the employee's whistleblowing, the employer may be obliged to pay damages to the employee.

Following a whistleblowing procedure, personal data (e.g. sensitive personal data such as accusations of crimes) will be processed. Thus, an employer must ensure that its whistleblowing procedure complies with the data protection requirements set out in the General Data Protection Regulation (GDPR).

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

No, employers are not required to publish such information.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Maternity leave is defined as seven weeks of consecutive leave just before giving birth and seven weeks just after giving birth. Two weeks are mandatory in connection with giving birth. Maternity leave is also guaranteed for breastfeeding.

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

The employer has no duty according to law to pay anything to the employee during the maternity leave. The employee normally receives parental benefits through the social security system. By way of collective bargaining agreements, many employers, however, have an obligation to provide parental pay.

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

The employee has the right to return to her employer and her position. If her position is no longer available, she shall be offered another equivalent position in accordance with her employment contract.

4.4 Do fathers have the right to take paternity leave?

Male employees have a right to paternity leave in connection with a child's birth or adoption (10 days). During these 10 days, both parents can stay at home with their child and receive parental pay benefits via the social security system.

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

According to the Parental Leave Act, employees have a right to leave in order to take care of their child during the first 18 months from birth or adoption (until the adopted child turns eight, unless next of kin adoption), a right to reduce working hours until the child is eight years of age, and further a right to temporary leave in order to take care of a sick child (until the child is 12 years of age). During the first 18 months from a child's birth, the parents are entitled to 480 days of parental pay benefits via the social security system. Apart from 90 days each, the parents can divide the days between them.

Many collective bargaining agreements contain provisions on supplementary parental pay.

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

Please see question 4.5 above.

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 sale leads to a change of employer, the employees automatically transfer to the buyer. However, an individual employee has a right to oppose the transfer and stay employed with the seller.

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

Any individually accrued rights, such as vacation, will transfer to the buyer. The terms and conditions of employment according to the collective bargaining agreement, which the seller is bound by, transfer to the buyer for a period of 12 months. Occupational pension vehicles do not 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?

Both the seller and buyer have a duty to consult the relevant

trade unions. The consultation process normally takes between two and four weeks. Should the employer fail to consult, the trade union may claim damages.

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

Employment contracts may not be legally terminated on the grounds of the transfer itself.

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

Harmonisation of conditions of employment according to collective bargaining agreements can be made by way of agreement with the relevant trade unions. If this is not possible, the buyer may not legally change the terms and conditions of employment based on the seller's collective bargaining agreement during the first 12 months following the transfer. Other changes in individual employment contracts require either mutual agreement between the employer (buyer) and the employee or termination of the employment contract with the purpose of changing the terms and conditions. The employer shall have objective grounds for termination.

6 Termination of Employment

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

In relation to employment until further notice, an employer shall serve a written notice of termination (dismissal with notice), regardless of the reason therefor. The notice period according to law can vary between one to six months depending on the length of service. The employee may, unless otherwise agreed, give notice observing a one-month notice period.

Collective bargaining agreements often provide for notice periods other than those according to law.

In the case of a serious breach of contract from the employee's side, the employer shall serve a written notice of immediate dismissal (dismissal without notice).

In relation to fixed-term contracts, the employer normally shall notify the employee that the employment will terminate on a given date.

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, under certain circumstances, especially when the employee him/herself has given notice of termination, unilaterally release the employee from the duty to perform work during the notice period. When the parties agree on a mutual separation, it is also common to agree on garden leave.

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 employer shall have objective grounds for dismissal with notice and legal grounds for summary dismissal (without notice).

There are no circumstances where the employee is treated as being dismissed; rather, it is the measures taken by the employer that constitute a dismissal.

No consent from a third party is required prior to serving a notice of termination.

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

Employees with reduced ability who have enjoyed certain adjustments of work, and employees on parental leave, enjoy special protection in connection with dismissal due to redundancy. The local trade union has a right to protect its elected local representatives under certain circumstances in relation to redundancy dismissals.

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 will be entitled to dismiss an employee for the following reasons:

1. If the employee acts in breach of the employment contract, which in turn causes damage to the employer, and the employee is aware of his/her breach of employment, the employer may have objective grounds for dismissal with notice due to personal reasons. Typically, the employer shall take measures in order to assist the employee in improving his/her behaviour and/or performance in order to avoid dismissal.
2. Dismissal for business-related reasons (redundancy) is normally seen as based on objective grounds. However, the employer has a duty to consult with trade unions prior to such dismissal and shall under certain circumstances also apply the last-in-first-out principle when serving notice.

Notwithstanding the reasons for the employer serving notice of termination, the employer shall consider possible redeployments prior to serving the actual notice.

If the employer has objective grounds for dismissal, salaries and other employment benefits shall be paid during the notice period. No other compensation is due.

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

Dismissal due to personal reasons shall typically be preceded by other measures from the employer, such as a warning or performance improvement plan. If such measures do not precede a dismissal, the breach of contract should be of a very severe nature. Every dismissal due to personal reasons shall be subject to a thorough legal review in order to avoid the most obvious risks. Prior to serving a notice of termination, the employer shall notify the employee of the considered termination and, if the employee is a member of a trade union, the trade union shall be notified as well. The employee/trade union has a right to demand consultations on the considered termination.

In relation to dismissals due to business-related reasons (redundancy), an employer bound by a collective bargaining agreement shall consult with the trade union prior to taking the decision leading to restructuring. Who to dismiss is also a topic for consultation with the trade union.

Regardless of the reasons for dismissal, there are formal requirements of the written notice to be handed 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?

The employee can either claim damages for injury to feelings or financial loss, or claim the dismissal as null and void.

The damages for injury to feelings are between EUR 13,000–19,000. Financial damages range from six to 32 months' pay, depending on length of service.

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

Yes, the parties may agree on settling the claims before or after they are initiated, as long as the court has not delivered its ruling.

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

If more than five employees will be dismissed due to redundancy during a period of 90 days, the employer has a duty to notify the Swedish Public Employment Service.

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?

Swedish employment law makes no distinction between mass dismissals and other dismissals; rather, the law defines dismissal due to redundancy without regard to the number of employees concerned.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The most common post-termination restrictions are confidentiality, non-competition, non-solicitation and customer protection.

7.2 When are restrictive covenants enforceable and for what period?

The possibilities for an employer to enforce a non-competition clause are rather restricted. Typically, only key employees should be subject to such restrictive covenants. These are enforceable after the employee's own dismissal, dismissal with notice from the employer due to personal reasons and dismissal without notice. It is common to enforce such restrictions for a period of between six and 12 months. Employers bound by collective bargaining agreements may have other restrictions to take into consideration.

Non-solicitation and customer protection clauses are widely used for a period ranging between six and 18 months. Case law indicates that such non-solicitation clauses normally should not restrict the employee for more than six months after termination.

Confidentiality undertakings range from six months onwards and may not have any time limitation at all.

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

Normally, the employer will have to pay 60% of the employee's salary during the time under which a non-competition clause is valid.

The employer does not have to pay any compensation for confidentiality, non-solicitation and normally not for customer protection clauses either.

7.4 How are restrictive covenants enforced?

Restrictive covenants are normally combined with a contractual penalty. Such contractual fines normally range from four to six months' salary.

If the restrictive covenants are not combined with a contractual penalty, the employer can take the matter to court and request compensation from the employee due to the breach. Violation of a non-competition obligation results in an obligation to pay damages for verifiable damage.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The GDPR has been implemented in Sweden and is supplemented by the Swedish act (2018:218). The employer-employee relationship is generally considered an imbalanced relationship in which the employer wields more power than the employee. This means, e.g. that an employer in most cases cannot rely on consent as a legal basis for the processing of employee personal data (consent has to be freely given between balanced parties and provided voluntarily). In its role as a data controller for the processing of its employees' personal data, the employer must remember to be transparent and informative about which processing activities are carried out by the controller and any other parties that the employer may share personal data with.

Legally obtained and processed employee personal data can be transferred to other countries within the EU/EEA provided there is a valid legal purpose and basis for such transfer and that necessary security measures have been implemented. Transfer of employee personal data to a country outside EU/EEA (third countries) is strictly regulated in the GDPR. Employers need to be particularly careful with over-sharing personal data about employees within an international corporate group, and well-documented and justified access rights must be put in place.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, employees have a right to receive a copy, in a machine-readable format from the employer, of the personal data currently held by the employer. What is important to note is that this does not give the employee a right to receive a copy of the entire document/file/system where the personal data is held. The copy must include all personal data held that relates to the employee at hand but not any other information that may be included in the same document/file/system, such as information about other individuals or matters.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

In principle, it is possible to carry out pre-employment checks in Sweden; however, there are strict and detailed rules regarding who will have access and what will be accessed, e.g. criminal records and financial status. Only authorities in Sweden are allowed to carry out processing of personal data relating to criminal convictions and offences covered by the GDPR. Other organisations than authorities must have a lawful basis in regulations or special decisions to be able to process such personal data. It is possible to seek permission from the Swedish Authority for Privacy Protection to process personal data relating to criminal convictions and offences for a specific purpose and under certain strict circumstances.

If the employer carries out business within schools or the childcare industry, the employer is obliged to check criminal records. Other employers can decide to implement procedures where they ask the job seeker to retrieve a criminal record and show the employer. Typically, these matters can be handled with a manual process of the information where the employee provides the employer with an extract from the Swedish police authority (unopened envelope), which is destroyed or handed back to the employee after reading, i.e. no automated processing of the criminal record extract takes place covered by the GDPR.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Yes, it is possible for employers, to a certain extent, to monitor an employee's emails, telephone calls, or use of their computer systems, especially if the employer has a policy clearly stating what is being monitored, as well as how and why. The obligations on transparency and information under the GDPR must also be met.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Employers may only control an employee's private use of social media if the employee, by use of social media, acts in breach of his/her employment contract, e.g. the duty of loyalty. It is advised to provide clear instructions to employees on what is expected by the employer when using social media platforms in or outside their workplace. If an employee administers social media services as part of his/her work duties, he/she must be aware of which actions must be taken prior to carrying out the processing of personal data, such as communicating with other users and sharing photos of individuals.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are no specific restrictions.

9 Court Practice and Procedure

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

Employment-related complaints are heard by District Courts

with a composition of one to three judges and the Labour Court with a composition of three to seven members. In the standard seven-member court, there are three neutral members, two members representing the interests of the employer and two representing employee interests. The chairman and vice chairman are found among the neutral members of the court.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

An employment-related civil case becomes pending when a written application for a summons is filed by the plaintiff to the competent District Court or Labour Court. After that, a summons is issued where the defendant is requested to respond to the demands. Generally, the proceeding continues to an oral preparation in a preparatory hearing, and after that to a main hearing.

Conciliation is not mandatory, but the possibilities for settlement are commonly explored throughout the process.

The District Courts collect a fee (EUR 280) from the plaintiff for submitting a claim. The Labour Court collects no such fee.

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

The main hearing in a District Court is scheduled between 12 to 18 months after a summons is filed.

The main hearing in the Labour Court is normally scheduled within 12 months after a summons is filed.

9.4 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 District Court decision. Such appeal is directed to the Labour Court, which will first take a decision on the merits on a leave to appeal within two to six months.

In many employment-related disputes, the Labour Court is the first and final court settling the matter.



Annika Elmér has over 20 years' experience specialising in employment and labour law and is highly respected for her sensible and business-related/accepted way forward in managing their human capital. Her experience covers all aspects of employment law and HR-related matters with a strong focus on performance management, dispute resolution, posting of workers, agency work and leadership related to employment law. Annika acts regularly as legal counsel in courts and arbitration, as well as being appointed arbitrator in labour disputes.

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main sources of employment law are the Swiss Code of Obligations (SR 220), the Labour Act (SR 822.11), the Gender Equality Act (SR 151.1), the Participation Act (SR 822.14), the Employment Service Act (SR 823.11) and the Posted Workers Act (SR 823.20).

Depending on the industry, collective bargaining agreements or standard employment contracts may apply.

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

Employees who have lodged a complaint of discrimination under the Gender Equality Act to a superior or a court, as well as work council members, benefit from an accrued protection against dismissal.

The Labour Act, which regulates mainly health protection, working time and rest periods, provides for specific protection for some employees (e.g. pregnant women, breastfeeding mothers and younger employees). Moreover, it does not apply (or only partially) to some types of employees (e.g. senior executives, travelling salesmen).

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

As a rule, contracts of employment do not have to be in writing.

If the employment contract is not in writing, the employer must inform the employee in writing of some specific information (e.g. name of the parties, employment start date, functions, salary).

Some deviations from statutory law are valid only if agreed in writing (e.g. change of the duration of the notice period).

1.4 Are any terms implied into contracts of employment?

Yes. Most of them are contained in the Swiss Code of Obligations. Some of the statutory provisions are mandatory. Other provisions are dispositive, i.e. they only apply if there is no agreement to the contrary between the parties.

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

Statutory law provides for several minimum terms and

conditions (e.g. employees older than 20 years old are entitled to four weeks of holidays per year).

Federal law does not provide for minimum wages. Some cantons have implemented a minimum salary (Jura, Neuchâtel, Geneva, Ticino, Basel-City). Collective bargaining agreements or standard employment contracts may also provide for minimum wages.

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 agreements are concluded between employers or employers' associations and trade unions. They usually contain the minimum conditions to be observed in individual employment contracts (e.g. minimum wages, notice period, etc.).

Collective bargaining agreements are usually concluded at the industry level. Some collective bargaining agreements were declared mandatory for the entire industry by the Swiss Federal Council.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

As a rule, the employer is not entitled to unilaterally change the employee's place of work in the absence of a corresponding provision in the employment contract. Hence, the employees' terms and conditions of employment must be amended.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

No. However, the parties can contractually agree on remote work.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade unions must have legal capacity, must be independent from the employer and from other third parties, must aim by statutes at improving their members' working conditions, and membership must be voluntary.

2.2 What rights do trade unions have?

Trade unions have the right to participate in the negotiations of a mandatory social plan with an employer (see below question 6.9), provided the employer and the trade unions are party to a collective bargaining agreement.

A trade union is entitled to adhere to an existing collective bargaining agreement under certain conditions (e.g. the trade union must be sufficiently representative and behave fairly).

Collective bargaining agreements may confer specific rights to trade unions.

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

Trade union's right to take industrial action (e.g. strikes or lock-outs) is a constitutional right. Specific requirements must be met to avoid unauthorised collective action (e.g. it must aim at getting specific work conditions that can be subject to a collective bargaining agreement).

The parties to a collective bargaining agreement are required to maintain peace and to refrain from industrial action on matters regulated by the applicable 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?

In businesses with at least 50 employees, the employees may request to appoint a work council. The number of members of the work council must be at least three. Elections are general and free.

Work councils have consultation rights in some areas (e.g. mass dismissals, business transfers) and co-determination rights in some rare cases.

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?

Co-determination rights are rare. One of the co-determination rights areas is the selection of the provider of the mandatory pension scheme and the termination of the affiliation contract with such provider.

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

Trade unions and work councils have each their own rights.

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?

Employees are protected against discrimination based on the duty of the employer to protect and respect its employees' personality.

An employer's decision contravenes the prohibition on discrimination only insofar as it demonstrates a disregard for the affected employee's personality and harms him/her. To such extent, and provided it is not justified by any objective reason, any kind of discrimination is prohibited by law (e.g. discrimination based on sexual orientation, religion).

The Gender Equality Act prohibits discrimination against an employee on the basis of his/her gender.

International agreements concluded between Switzerland and the EU/EFTA Member States prohibits discrimination by a Swiss employer against employees from another contracting party based on their citizenship with regard to employment and working conditions.

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

Any type of discrimination may be found unlawful if it infringes the employee's personality rights and is not justified by any objective reason (see above question 3.1).

In principle, an employee can only be discriminated if he/she is placed in a less advantageous position than a large number of other employees.

The Gender Equality Act provides that employees must not be discriminated against on the basis of their gender (e.g. due to marital status, pregnancy).

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Based on their general duty to protect their employees' health and personality, the employers are required to take all adequate and reasonable measures necessary to prevent sexual harassment in the workplace.

The relevant measures are not defined by statutory law and depend on the actual circumstances. The State Secretariat for Economic Affairs recommends implementing, in particular, the following measures:

- Employers should issue an internal policy describing, namely, unauthorised behaviours, possible steps employees can take in case of sexual harassment and offers of support.
- Employers should appoint an impartial and trustworthy person, in or outside the company, to support the victims.
- In case of complaint, the employers must clarify the situation immediately or conduct an internal investigation.

3.4 Are there any defences to a discrimination claim?

The main defence is demonstrating that the distinction between employees is based on objective grounds.

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

Employees must file a claim before the court.

Employers can settle claims before or after they are initiated. Most of the claims are settled by the parties during the conciliation process or in an out-of-court agreement.

3.6 What remedies are available to employees in successful discrimination claims?

In most cases, the employee can claim for a financial compensation. The employee can also request the court to prohibit a threatened discrimination, stop an existing one or make a declaratory judgment to acknowledge the discrimination.

If the termination of the employment agreement follows a complaint of discrimination under the Gender Equality Act by the employee to a superior or the initiation of proceedings in this respect, the employee may request his/her reinstatement.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Statutory law does not offer any additional protection to part-time employees or employees under a fixed-term contract.

Temporary agency workers are protected by specific provisions contained in the Employment Service Act.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

There is no specific provision in Switzerland regarding whistleblowers.

Pursuant to case law, employees must first report misconduct internally to the employer. If all means of internal report have been exhausted without any reaction from the employer, the employee may disclose the issue to the relevant authorities. As a last resort, in case of failure of the authorities to take any action and provided there is an overriding public interest, the employee may make the misconduct public.

Employers are not required to establish a whistleblowing system, but it is best practice to do so.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Employers with at least 100 employees must perform an internal equal pay analysis and inform the employees about the results of the analysis. The analysis must be repeated every four years until an analysis demonstrates that equal pay requirements are met. Employers that do not comply with the equal pay analysis obligations are not subject to sanctions.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Female employees are entitled to 14 weeks of maternity leave paid by the federal loss of earnings insurance, provided certain conditions are met (see below question 4.2). In Geneva, employees are entitled to two additional weeks paid by the cantonal loss of earnings insurance (i.e. 16 weeks in total).

Pursuant to the Labour Act, female employees must refrain from working during the first eight weeks following childbirth.

They can work from the ninth to the 16th following childbirth, provided they agree to do so.

Under certain conditions, maternity leave may be extended by up to 56 days if the newborn child stays in hospital for at least two weeks.

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

During the maternity leave, female employees are entitled to federal loss of earnings insurance indemnities amounting to 80% of their average salary before birth, but not more than CHF 220 per day (amount as of 2024), provided that the insurance eligibility requirements are met.

Depending on circumstances, the employer may be required to pay the difference between the amount of the loss of earnings insurance indemnities and 80% of the actual average salary before birth during a certain period.

Cantonal provisions, individual employment agreements and collective bargaining agreements may provide for more generous arrangements.

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

Maternity leave has no impact on the terms of the employment contract. Unless otherwise agreed between the parties, the employee will have the same rights and obligations as before her leave.

Pursuant to the Labour Act, breastfeeding mothers may request special arrangements during the first year following childbirth (e.g. paid breaks for breastfeeding).

4.4 Do fathers have the right to take paternity leave?

Fathers, as well as the biological mother's wife in case of same sex marriage, are entitled to two weeks' other parent's leave. The leave must be taken within six months of the date of birth. It can be taken in one block or in separate days.

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

Upon placement of a child under the age of four years for adoption, the prospective parent is entitled to two weeks of adoption leave under certain conditions.

Employees are entitled to paid leave for the time they are caring for a child with health problems. Such leave is limited to three days per event and no more than 10 days per year.

If an employee's child's health is seriously impaired by illness or accident, the employee is entitled to a care leave of a maximum of 14 weeks within 18 months under certain conditions.

In the event of the mother's death within 14 weeks following the child's birth, the other parent is entitled to 14 weeks' leave. In the event of the death of the father or the mother's wife within six months following the child's birth, the mother is entitled to an additional two weeks' leave.

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

See question 4.5 with regard to care leave.

5 Business Sales

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

On business transfer by way of an asset deal, employees automatically transfer to the buyer.

In case of share deal, there is no impact on the employment relationship since the employer remains the same.

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

The employment relationships existing at the time of transfer are automatically transferred to the buyer with all rights and obligations.

Employees can object to the transfer. If an employee objects, the employment contract ends at the end of the statutory notice period, but not earlier than on the transfer date.

If the transferred employment relationships are governed by a collective bargaining agreement, the buyer is obliged to abide by it for one year, unless such collective employment agreement ends earlier. In some cases, mandatory bargaining agreements apply.

There is no transfer in case of share deal.

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 the employee representative body or, if there is none, the employees themselves in good time before the transfer is carried out, of the reasons for the transfer and the legal, economic and social implications for the employees.

Consultation of the employee representative body or, if there is none, the employees themselves is required if measures are being contemplated as a result of the transfer (e.g. amendments to the employment contracts, redundancy). As a rule, the duration of the consultation period should not be shorter than two weeks.

Statutory law does not provide any specific sanction for the violation of the duties to inform and consult. Therefore, an affected employee may only claim for damages if he/she can prove that he/she suffered from a prejudice due to the violation by his/her employer of its duties of information and consultation.

In case of a merger, demerger or transfer of assets under the Merger Act (SR 221.301), the employees can request a judge to block the registration of transaction in the Commercial Register for as long as the consultation requirements have not been properly complied with.

There is no information or consultation requirement in case of share deal.

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

The employer is not entitled to terminate the employment contract for the sole purpose of circumventing automatic transfer regulations. However, a business transfer is not an obstacle to terminations as long as they are based on an entrepreneurial justification (e.g. economic or organisational measures).

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

Employees must be consulted before any decision is made in this respect (see above question 5.3).

Changes in terms and conditions of employment in connection with a business sale are subject to the same rule as usual changes in terms and conditions of employment, i.e. the parties must agree on an amended employment contract or the employer must proceed with a “termination amendment” (*Änderungskündigung*).

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 be given notice of termination.

As per statutory law, the notice period is seven calendar days during the probation period (i.e. the first month of employment), one month to the end of a month during the first year of employment, two months to the end of a month from the second to the ninth year of employment, three months to the end of a month thereafter.

Parties can agree on a different notice period in writing, but this cannot be shorter than one month net, except during the probation period.

The employer can dismiss the employee 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, an employer can place an employee in garden leave during the notice period.

In very specific and limited cases, the employee is entitled to work during the notice period so as not to lose value on the labour market (e.g. professional athletes).

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 the notice of termination has been validly issued by the employer. No consent from a third party is required.

After the probation period, the employer is not entitled to give notice of termination during protected periods. Protected periods are exhaustively defined by the Swiss Code of Obligations (e.g. during the pregnancy of an employee and the 16 weeks following birth, while the employee through no fault of his/her own is partially or entirely prevented from working by illness or accident for a limited period of time depending on his/her seniority).

A notice of termination issued during a protected period is null and void.

Swiss employment law is based on the contractual freedom principle, which means that no special reason is required for a dismissal to be lawful. However, a dismissal must not be based on abusive grounds.

Dismissal is deemed abusive if it is issued for specific reasons listed non-exhaustively in the Swiss Code of Obligations (e.g. if the termination is due to an inherent personal quality of the employee or because the employee asserts claims under the employment relationship in good faith).

In addition, case law has defined other circumstances where a notice of termination can be found abusive (e.g. a serious violation of personality rights in the context of a dismissal).

Even if a dismissal is considered abusive, it will effectively terminate the employment. Abusive dismissal may result in a claim for punitive compensation equivalent to up to six months' salary.

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

The dismissal of a member of a work council is presumed abusive, unless the employer is able to demonstrate that he/she had a justified reason for termination.

Employees who have raised a complaint of discrimination under the Gender Equality Act to a superior or a court can only be dismissed with justified reason.

There are no additional categories of employees who enjoy special protection against dismissal. Nevertheless, depending on circumstances, employees may benefit from a protected period (see above 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?

No special reason is required for a dismissal to be lawful, but it must not be based on abusive reasons (see above question 6.3).

In principle, employees are not entitled to any statutory compensation on dismissal.

One provision prescribes that employees of at least 50 years old with at least 20 years of service are entitled to a severance payment from two to eight months of salary. Nevertheless, if the employee receives or will receive benefits from a pension fund, these benefits may be deducted from the severance amount insofar as they have been financed by the employer. As a result, this provision almost never applies in practice.

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

Statutory law does not impose any specific procedure to be followed in relation to individual dismissals. The individual employment agreements may, however, provide for a specific rule in this regard (e.g. notice must be in writing).

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

Claims arising out of an employment agreement fall due at the end of the employment agreement. Hence, the employee may bring any claim in this respect (e.g. overtime, untaken holidays).

In case of abusive dismissal, the employee can additionally claim for an indemnity of up to six months of salary.

In case of unjustified immediate dismissal, the employee can claim for an indemnity of up to six months of salary and for a

compensation corresponding to the remuneration he/she would have received until the end of the notice period.

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

Yes. However, the employee is principally not entitled to waive mandatory rights arising out of the employment contract during the employment relationship and during one month following the end of the employment relationship without sufficient compensation.

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

In case of mass dismissal, the employer must consult the employee's representative body, if any, or the employees collectively before any final decision on the dismissal is made. The employer must also notify the cantonal labour law office.

Mass dismissal procedures apply if, within a period of 30 days, it dismisses at least 10 employees in a business with 21–99 employees, 10% of the employees in a business with 100–299 employees, or at least 30 in a larger business.

In addition, the employer must negotiate a social plan if it has at least 250 employees and it intends to terminate at least 30 employees within a 30-day time period.

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 the employer has not consulted the employees before the mass dismissal, the affected employees are entitled to an indemnity of up to two months' salary.

As long as the employer has not notified the cantonal labour law office about the contemplated mass dismissal, the end of the employment relationships is delayed.

If no agreement is reached regarding the content of a mandatory social plan, it must be submitted to an arbitral tribunal.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Post-employment non-compete covenants are recognised by statutory law.

According to case law, non-solicitation clauses are subject to the same statutory requirements as non-compete covenants.

7.2 When are restrictive covenants enforceable and for what period?

Non-compete covenants are enforceable provided that the following conditions are met:

- the clause is agreed in writing and duly executed by the parties;
- the employee has knowledge regarding the employer's clientele or manufacturing and trade secrets;
- the use of such knowledge might cause the employer substantial harm; and

- the clause is appropriately restricted with regard to place, time and scope.

The restraint prohibiting competition automatically lapses if the employer terminates the contract without a justified reason or if the employee resigns for a justified reason attributable to the employer.

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

No. However, a financial compensation will increase the chances of the clause to be considered proportionate.

7.4 How are restrictive covenants enforced?

Breach of the non-compete clause results in liability to compensate for damages.

Due to the difficulty of proving any actual harm, a penalty clause is usually agreed between the parties. The judge can reduce the amount of the penalty if it is excessive.

Employers may demand cessation of the infringement provided they have expressly reserved the right to do so in writing.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The employer may handle data concerning the employee only to the extent that such data concern the employee's suitability for his/her job or are necessary for the performance of the employment contract. The employer must also abide by the principles set forth in the Data Protection Act (e.g. it must be proportionate).

The Data Protection Act requires disclosure by the employer of all countries to which personal data may be transferred. This applies whether the transfer is to other corporate group companies or to third parties. If personal data is transferred to or made available in a country that does not ensure an adequate level of data protection, the employer must take suitable measures to ensure that the data receives an adequate level of protection.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees are entitled to request a copy of their personal data processed by the employer.

The employer may only refuse under limited conditions, in particular if the request for information is obviously unjustified and does not serve the purpose of data protection. In such case, the employer must indicate why it is refusing.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Pre-employment checks are permissible if they are relevant to the proposed work, subject to proportionality requirements. Criminal and credit checks are common if the employee is working in a position of trust (e.g. senior executives).

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

The Labour Act prohibits the use of control and monitoring mechanisms for the purpose of monitoring the behaviour of employees at the workplace. Nevertheless, such mechanisms are allowed if they are used for other purposes (e.g. security, performance optimisation).

Prior to any monitoring, the employer should issue an acceptable use policy and a monitoring policy. The employer should first monitor compliance with acceptable use policy on an anonymous basis. If such monitoring evidences a violation of the policy, the employer can carry out a monitoring identifying the responsible employees. However, systematic surveillance of internet use to monitor the behaviour of employees is prohibited.

Save under specific conditions, recording of telephone calls without the participants' agreement is a criminal offence.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

An employer is entitled to control the use of social media in the workplace provided that it is strictly necessary for the performance of the employment agreement (e.g. ensure the proper use of the IT infrastructure). However, the employer does, in principle, not have any legitimate interests to control the use of social media during the employees' free time.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

General data protection principles also apply to AI.

In addition, the Data Protection Act provides for specific requirements regarding automated individual decisions, i.e. decisions that are based exclusively on automated processing and that have a legal consequence or a considerable adverse effect on the data subject. The employer must inform the employee about any automated individual decision and the employee may ask to express his/her point of view and/or that the automated individual decision be reviewed by a natural person.

9 Court Practice and Procedure

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

Each canton is free to organise itself. In some cantons, employment-related claims must be filed before a labour court. In other cantons, they must be filed before ordinary courts.

Labour courts are typically composed of lay judges representing both the employers and the employees. Ordinary courts are often composed of one or three professional judges.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

A conciliation hearing must mandatorily be held before a claim can be filed with the court, except if the claim is based on the Gender Equality Act.

If no agreement is found between the parties during the conciliation hearing, the claimant has three months to file his/her claim with the court. There are usually one or two exchange of briefs. Then, hearings are held to hear the parties and witnesses, if any.

There are no court costs if the claim is based on the Gender Equality Act or if the amount in dispute does not exceed CHF 30,000. Some cantonal laws provide for a higher threshold (e.g. CHF 75,000 in Geneva).

In other cases, court costs are calculated based on the amount in dispute and the complexity of the case. They may vary depending on the place of jurisdiction. In principle, the losing party has to bear the court costs. Depending on the place of jurisdiction, the losing party must also compensate for the other party's attorney's costs.

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

If the amount in dispute does not exceed CHF 30,000, first instance proceedings usually last approximately six months. In other cases, it generally takes between one and two years to be decided.

9.4 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 before the second instance court. The appeal must be lodged within 30 days.

The second instance court may appoint hearings, but it usually decides on the basis of the case files. The second instance proceedings usually take approximately one year.

The parties may appeal against the second instance decision before the Federal Supreme Court, provided that the amount in dispute reaches CHF 15,000. The appeal must be brought within 30 days.

Proceedings before the Federal Supreme Court are usually in writing. The Federal Supreme Court examines legal issues and usually bases its findings on the facts as they were established by the lower courts.

The proceedings before the Federal Supreme Court usually last approximately one year.



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main source of employment law is legislation. Other rights are included in contracts of employment.

Historically, much of UK employment law has derived from European law. When the UK left the EU, most European employment law was converted into domestic law and, as such, employment rights generally remained unchanged. However, over time the law is beginning to diverge from European requirements.

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 family-related leave or 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 and workers must be provided with a written statement of particulars, including: the names of the employer and the employee/worker; job title; when continuity of employment began; pay rates and payment intervals; place and hours of work and information about working patterns; holiday entitlement; sick pay; other paid leave; disciplinary and grievance policies; notice and probationary period provisions; training entitlements; 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 their employer while they remain 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 up to a maximum of 12 weeks.

A national minimum wage of £11.44 per hour (from April 2024 for workers aged 21 or over; lower rates apply to younger workers) and a maximum average working week of 48 hours apply to most workers. Minimum wage rates increase in April each year. 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?

According to government statistics, in 2022 around 39.6 per cent of UK jobs, but only 20.7 per cent of jobs in the private sector, were covered by collective agreements.

In the private sector, collective bargaining takes place almost exclusively at company or workplace level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

In principle, if an employer wants to change an employee's place of work to require them to work remotely for some or all of their time, that would be a change to the contract of employment and need the employee's agreement. In practice, most hybrid arrangements allow employees to work from home for a certain amount of time on a voluntary basis, so contractual changes are not required.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Employees do not have a formal right to work remotely, but employees are entitled to make a flexible working request, which could include asking to work remotely (see question 4.6).

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 per cent 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 per cent 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. Minimum service level requirements may apply during strikes in some essential public services, including health, education and transport.

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 two per cent 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 currently no general 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, sexual orientation or marriage or civil partnership status ("protected characteristics"). They are also protected against certain types of 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" (PCP) that puts people who share a protected characteristic at a particular disadvantage. If employers can justify a 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.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

Sexual harassment is treated as a type of discrimination (see question 3.2). In addition, from October 2024, employers have

a formal duty to take reasonable steps to protect employees from sexual harassment in the workplace. The Equality and Human Rights Commission can enforce the duty.

3.4 Are there any defences to a discrimination claim?

An employer is vicariously liable for the acts of its employees, and is liable if one employee discriminates against another in the course of employment. An employer can avoid liability if it can show that it has taken all reasonable steps to prevent the discrimination occurring.

3.5 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 settlement agreement is entered into that 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.

3.6 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 £1,100 and £56,200 (with the most exceptional cases capable of exceeding £56,200) depending on how serious the discrimination was and how long it lasted. The compensation range increases in line with inflation in April each year. 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.

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Part-time workers have the right not to be treated less favourably (on a *pro rata* basis) than those who work full-time.

Fixed-term employees have the right not to be treated less favourably than comparable permanent employees. The use of successive fixed-term contracts is limited to four years, unless the use of further fixed-term contracts is justified on objective grounds.

Temporary agency workers are entitled to the same basic working conditions (in respect of pay and working time requirements) as employees once they have been engaged for 12 weeks and are also entitled to access collective amenities and facilities provided by the hirer.

3.8 Are there any specific rules or requirements in relation to whistleblowing/ employees who raise concerns about corporate malpractice?

An employee or worker is protected as a whistleblower if they

make a “protected disclosure”. The disclosure must be about a qualifying subject matter (such as breach of a legal obligation) and made to an appropriate person (such as an employer or regulator). Employees and workers must not be subjected to a detriment for making a protected disclosure and it is automatically unfair to dismiss an employee for doing so (see question 6.4). There is no qualifying period of service for an employee to claim they have been dismissed for making a protected disclosure and unfair dismissal compensation is uncapped.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Employers with 250 or more employees have to report annually on their overall gender pay and bonus gender pay gap, the proportion of men and women across pay quartiles, and the proportion of men and women who receive a bonus. The information must be reported to the government and published on the employer's website. The government encourages employers to provide similar information about their ethnicity pay gap, but this is not mandatory.

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 (SMP), which is currently paid at a rate of 90 per cent of normal pay for the first six weeks, followed by a flat rate of £184.03 per week (proposed rate from April 2024) (or normal weekly pay if lower) for a further 33 weeks. Some employers offer enhanced company 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 that 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 £184.03 per week (proposed rate from April 2024). Some employers offer enhanced company paternity pay.

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 18 weeks' unpaid leave to care for a child under the age of 18, 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, up to five days' unpaid leave to provide care for an ill, disabled or elderly dependant (from April 2024), and a right to two weeks' parental bereavement leave, paid at a rate of £184.03 per week (proposed rate from April 2024) upon the death of a child aged under 18.

The right to shared parental leave allows a woman to bring her maternity leave to an end early. Either parent can take the balance of any leave and pay as shared parental leave before the baby is a year old. Similar rights apply to adoptive parents.

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

Employees are entitled to request flexible working, regardless of their reasons for doing so. Employers must consider requests reasonably. There is no right to have a request granted and employers can reject requests for a number of business reasons. The penalty for failing to follow the correct procedure is fairly low (a maximum of £5,144 since April 2023) but the employer could also face discrimination (particularly 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 often 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 may 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. Special rules apply to small employers or if fewer than 10 employees will transfer.

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?

Dismissals because of a transfer 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 under 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?

Changes to terms and conditions because of a transfer are only permitted 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 must 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 they do not intend to be bound by the terms of the contract (for example, they have 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 two years' service are protected

against unfair dismissal. An employee is treated as dismissed if their employer terminates their contract (with or without notice), if they are employed on a fixed-term contract that expires, or if they resign 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, including: reasons related to pregnancy or maternity or family leave; reasons related to health and safety; acting as an employee representative or taking part in trade union activities or protected industrial action; making a protected disclosure; making a flexible working request; or seeking to enforce rights as a part-time or fixed-term employee. There is no qualifying period of employment to bring such claims.

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 £643 from April 2023) for each year of service, with certain age-related discounts and uplifts. The maximum statutory redundancy payment is £19,290. 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 they are at risk of dismissal, giving them 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 two years’ 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 £643 per year of service from April 2023, with permitted age-related discounts and uplifts, to a maximum of £19,290). 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 £105,707, or 12 months’ pay if lower.

There is no qualifying period of service for a claim of automatic unfair dismissal (see question 6.4) and unfair dismissal compensation for whistleblowing and health and safety dismissals is uncapped.

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. 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 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 45 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. The employer must also notify the Department for Business & Trade of 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?

If an employer fails to inform and consult on a collective redundancy, claims can be brought in the Employment Tribunal. If the claim is successful, the Employment 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 12 months, depending on the seniority of the employee and the nature of the interest to be protected. The

government intends to impose a maximum duration of three months on non-compete restrictions, but there is no timetable for this to be introduced.

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

Employees do not currently 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 covenant, 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 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employers must comply with the UK General Data Protection Regulation (UK GDPR), as supplemented by the Data Protection Act 2018 (DPA), when processing employee data. In particular, data must be processed fairly and lawfully, for specified and lawful purposes, and adequate security measures must be in place. Employees must be given detailed information about how their data is used. There are restrictions on transferring data outside the UK unless adequate protection for the data is in place. The Information Commissioner can impose fines of up to £17.5 million (or four per cent of worldwide annual turnover if greater) for serious breaches of the UK GDPR.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees are entitled to make a subject access request. Employers then have one month to tell the employee whether their personal data is being processed, provide other specified information such as the purposes for which data is processed and to whom it is disclosed, and to provide a copy of all personal data that is held. Employers can extend this period to three months if the subject access request is complex. Employers can refuse to respond to requests or charge an administrative fee for providing information in response to requests that are "manifestly unfounded or excessive".

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Employers can carry out pre-employment checks, but it is good practice to limit this to checking information provided by the candidate. More detailed vetting may be appropriate where the role entails risks to the employer, clients, customers or others. Criminal record checks can be made through the Disclosure and Barring Service in relation to specified roles. Different levels of disclosure are available depending on the nature of the job applied for, with more detailed disclosures available where candidates will

be working with children or vulnerable adults. The employer must comply with the UK GDPR and DPA requirements when conducting pre-employment checks and must satisfy a condition in the DPA if it wants to conduct criminal records checks.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Monitoring may be permissible if there is a good reason for it and it is a proportionate response to the problem it seeks to address. An employer will normally need to conduct a data protection impact assessment that satisfies UK GDPR requirements to judge whether monitoring is justified. If electronic communications are being intercepted, the employer will also need to make sure that it complies with the Investigatory Powers Act.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Misuse of social media in or outside the workplace may amount to misconduct, which an employer can deal with in the normal way through its disciplinary procedure. Whether a dismissal is fair will depend on the damage or potential damage to the employer's reputation, whether the employer has a clear policy on the issue, and whether dismissal is proportionate (as well as whether a fair procedure has been followed).

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are no specific rules regulating the use of AI in the employment relationship. Under the UK GDPR, employers can only take decisions based on automated processing (for example, in connection with recruitment decisions) in limited circumstances and if there are appropriate safeguards in place, including the right to obtain human intervention in a decision. If an automated system discriminated against someone because of a protected characteristic, it would be possible for them to bring a discrimination claim in the usual way.

9 Court Practice and Procedure

9.1 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. Many claims (including claims of unfair dismissal) are now heard by an Employment Judge sitting alone.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Employees normally must refer disputes to ACAS for pre-claim conciliation. If pre-claim conciliation is not successful, claims

can be lodged with the Employment Tribunal. Generally, claims must be lodged within three months of the matter complained of, with extensions to allow pre-claim conciliation to take place.

The parties must exchange documents and witness statements, and there is a hearing to decide the complaint. Employees are not required to pay a fee to submit a claim in the Employment Tribunal.

It is relatively rare for the losing party to be ordered to pay the other party's costs.

9.3 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 Employment Tribunal. However, at the moment there are long delays in hearing cases in some areas and the Tribunal system is dealing with a backlog of cases.

9.4 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 to the Employment Appeal Tribunal, which is a specialist Appeal Tribunal that normally comprises a judge sitting alone. In cases of particular importance, the judge may sit with lay members with practical experience of employment relations. Appeals typically take nine to 12 months. There are no fees for submitting a claim to the Employment Appeal Tribunal.



Stefan Martin provides practical and strategic advice in relation to any employment issue a business is likely to face, using over 25 years' experience to guide employers through some of their most sensitive employee-related challenges. He concentrates on issues that carry a material reputational and/or financial risk, or that involve making sensitive judgment calls. Much of his practice has an international dynamic, taking the lead on managing and co-ordinating cross-border projects and issues in multiple jurisdictions for multinational corporations. Clients appreciate his 'unflappable', 'calm and highly astute' manner and 'clever and tactical' thinking in what are often highly pressurised situations. Described as 'shining in both the contentious and transactional arenas', Stefan handles an extensive array of matters, acting for a longstanding client base focused on financials and well-known corporates. Stefan represents respondents in complex Employment Tribunal cases and in High Court claims that often include allegations of whistleblowing and discrimination or that involve advising on the enforcement of restrictive covenants. He handles high-profile cases at first instance and at appellate level has a great deal of experience advising clients on board level and senior executive issues. Stefan's transactional practice spans mergers, acquisitions, joint ventures and restructurings and he has particular knowledge advising on the employment aspects of outsourcing deals, often on an international basis. He is a natural communicator, able to explain how complex legal theory relates to a given audience in a commercial and practical way.

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Federal, state and local governments all have the power to implement statutes governing labour and employment. The primary federal employment laws are: Title VII of the Civil Rights Act; the Americans with Disabilities Act; the Equal Pay Act; the Fair Labor Standards Act; the Family and Medical Leave Act (“FMLA”); the Immigration Reform and Control Act; the National Labor Relations Act (“NLRA”); the Occupational Safety and Health Act; the Pregnancy Discrimination Act; and Executive Order 11246. In addition to statutory law, case law is a significant source of employment law.

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

Workers are generally protected against discrimination on the basis of race, colour, religion, sex, sexual orientation, pregnancy, national origin, age, disability, genetic information, retaliation, union activity and gender identity. Employees are separated into categories, such as at-will employment, union-based employment, hourly worker, or salaried worker.

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 not a legal requirement. Employers do have to provide by law certain information, such as workers’ rights and benefit information.

1.4 Are any terms implied into contracts of employment?

Generally, a duty of good faith and fair dealing is implied.

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

Employers are required to pay every worker a federally-mandated minimum wage. State laws vary and many states give additional required employment conditions, such as family leave, sick leave and mandatory breaks. In addition, most workers are entitled to job-protected family 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?

Collective bargaining is industry-specific and not all industries have unions. In industries that are heavily unionised, bargaining often occurs at company level; however, in certain circumstances it is industry-wide.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees’ terms and conditions of employment?

Since the Covid-19 pandemic, many workplaces have begun offering hybrid work arrangements. These arrangements are workplace specific. There is no requirement to change the terms and conditions of employment.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

Employees do not have a right to work remotely. Remote-work arrangements are individualised and vary between employers.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The NLRA governs labour relations and provides for union recognition when the majority of employees vote for the union. These elections take place with secret ballots. In addition, the employer may recognise a union when the majority of employees have signed authorisation cards.

2.2 What rights do trade unions have?

Unions have the right to organise, collectively bargain, represent employees in disputes with their employers, and strike in certain circumstances.

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

The NLRA, as interpreted by the National Labor Relations Board ("NLRB") and federal courts, governs the right to strike. Collective bargaining agreements also may outline when taking industrial action is appropriate. A strike is typically allowable under the NLRA for either unfair labour practices or an economic 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?

There are no "work councils" in the U.S.

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 the U.S.

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

This is not applicable in the U.S.

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?

Employees are protected against discrimination based on race, colour, religion, sex, sexual orientation, pregnancy, national origin, age, disability, genetic information, retaliation, union activity and gender identity.

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

Discrimination is unlawful based on the categories set forth in question 3.1 in all circumstances. In addition, employees are protected from sexual harassment at their workplaces.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

There is no federal law requiring mandatory training specific to sexual harassment. However, many states and localities have instituted mandatory anti-harassment training. The Equal Employment Opportunity Commission ("EEOC") has issued guidelines regarding harassment prevention training to ensure that all employees are aware of their rights and responsibilities. In sexual

harassment claims, federal courts have ruled that in order to avoid punitive damages and to raise certain affirmative defences, employers must show proof of anti-harassment training.

In New York, recent rules have limited the scope of confidentiality clauses in settlement agreements relating to sexual harassment claims.

3.4 Are there any defences to a discrimination claim?

Yes. If an employer can establish that the contested employment action had a legitimate, non-discriminatory basis, the employer will not be found liable for discrimination. There is also a general *bona fide* occupational qualification defence. Some states and localities provide additional affirmative defences.

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

Employees can enforce their rights by filing a discrimination charge with the EEOC or a state or local agency. An employee can sue in state or federal courts. Employers may settle claims before they are initiated or during the litigation process.

3.6 What remedies are available to employees in successful discrimination claims?

Typical remedies include an injunction, compensatory damages (back and front pay), liquidated damages, punitive damages, court costs and attorneys' fees. In some cases, attorneys' fees are statutorily mandated to be paid by the employer.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Generally, temporary workers are provided the same protections as permanent workers.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

Both federal and state laws specifically protect whistleblowers against employer retaliation for their whistleblowing activities and allow for whistleblowing lawsuits.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

The EEOC requires private employers with 100 or more employees and federal contractors with 50 or more employees to report the number of individuals they employ by sex, race and ethnicity to the EEOC. However, these reports are not required to be made available to the public.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Under the FMLA, eligible employees are afforded up to 12 weeks

of unpaid, job-protected leave per year. The FMLA requires that the employee's health benefits be maintained. Some state and localities have expanded employee rights. For example, in July of 2023, Maine instituted 12 weeks of paid family leave.

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

See response to question 4.1 above.

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

The employer must reinstate the employee to the same or equivalent position. Employers are prohibited from retaliating against employees for requesting FMLA leave, exercising their FMLA rights or interfering with the rights afforded by the FMLA.

4.4 Do fathers have the right to take paternity leave?

The FMLA is gender neutral and allows for any parent to request and take leave.

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

Under the FMLA, eligible employees may take up to 12 weeks of leave for the care of an adopted or foster child within one year of placement, for the care of an employee's spouse, child or parent with a serious health condition, or to recover from a serious health condition that prohibits an employee from performing essential job duties. Eligible employees may also take leave for any qualifying exigency arising out of the fact that the employee's spouse, child or parent is a covered military member on active duty.

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

Employees may request flexible work arrangements; however, they are not guaranteed the same 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?

The only circumstance in which employers transfer to a buyer is through a share sale, because the employing entity remains the same. Collective bargaining agreements may have additional provisions pertaining to the sale of a business.

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

In a stock sale, employee terms and conditions remain the same. In an asset sale, the buyer can set new terms and conditions. However, a legal "successor" employer will have to bargain with a union about initial terms and conditions 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?

There are no consultation rights, except a unionised employer will have to consult (bargain) with the union. There may be informational rights under the Worker Adjustment and Retraining Notification Act ("WARN Act") or a state equivalent if the sale results in a mass layoff or shutdown of an employment site.

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

In an asset sale, the buyer does not need to hire the seller's employees, but collective bargaining agreements may have certain protections. In a stock sale, the employing entity remains the same, so the employees are not dismissed.

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

See response to question 5.2 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?

At-will employees do not have to be given notice of termination. Unionised employees' notification obligations depend on the collective bargaining agreement in place. If there is an employment site shutdown or mass layoff, employees must be given 60 days' notice under the WARN 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 common in the U.S.

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?

Generally, employment in the U.S. is at-will unless an employment or collective bargaining agreement protects against dismissal under certain circumstances. All employees are protected against dismissal due to unlawful discrimination or a protected activity, such as union activity or whistleblowing. An employee is considered to be dismissed when employment is formally terminated or there is a constructive termination (the inability to continue working due to a hostile working environment). An employment agreement may have provisions for employee termination for good reason. Consent from a third party is not required before an employer can dismiss an employee.

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

Employees in protected classes may not be dismissed because

of their classification. Individual employment and collective bargaining agreements may have provisions protecting against improper 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 can dismiss an employee for individual or business reasons, as long as those reasons do not violate federal, state or local laws, and/or no agreement to the contrary exists. Upon dismissal, employees are entitled to receive their final pay and accrued benefits. If the dismissal is proper, a dismissed employee is eligible for certain continuation of healthcare benefits and if the dismissal is not for misconduct, an employee is eligible for unemployment insurance benefits.

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

There are no specific provisions, unless an employment or collective bargaining agreement contains them.

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 before an administrative agency, a court or an arbitrator if the employee believes the employer has violated a federal or local law, or an employment contract. The employee may be entitled to statutory, compensatory and/or punitive remedies.

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

Employees 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?

Under the WARN Act, certain employers have an obligation to provide 60 days' notice if there is a mass layoff or employment site shutdown.

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 WARN Act, and parallel state laws, are enforced by the courts. Employees may bring either an individual or class action civil lawsuit. An employer who violates the WARN Act by closing an employment site or ordering mass layoffs without providing adequate notice, as defined under the law, are liable for back pay and benefits for each aggrieved employee. Employers who fail to provide the required notice to the local government are subject to civil penalties.

For other employment law violations, employees may file either an individual or class action claim with the appropriate court and/or employment agency. The consequences depend on the statute that was violated.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The enforceability of restrictive covenants is determined by state law and varies depending on the jurisdiction. Restrictive covenants include non-compete agreements, non-solicitation of customers, non-solicitation of employees and confidentiality agreements. There is a continuing trend of limiting the enforceability of non-compete agreements, particularly for lower income workers.

7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants are generally enforceable in the U.S. In 2023, the Federal Trade Commission proposed a rule to ban most non-compete clauses; however, that rule has not yet become law. Individual states impose certain bans and restrictions on restrictive covenants.

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

Covenants may be supported by consideration, which may be financial or promotion or, in some jurisdictions, continuation of employment.

7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced by lawsuits, arbitrations and, in certain circumstances, continuation of employment.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

In the U.S., there are federal and state laws and regulations that regulate the collection, use and transfer of personal data of employees, as well as independent contractors and third parties. The primary federal laws that govern data protection are the: Fair Credit Reporting Act; Federal Trade Commission Act; Genetic Information Non-Discrimination Act; and Health Insurance Portability and Accountability Act. Most states have enacted some form of privacy legislation, most of which require notification of security breaches involving personal information.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

There are no federal laws requiring employers to provide employees access to their personal information; however, some states do have local laws. State laws often address who can have access to the information, how often the information can be accessed, whether copies can be made and whether third-party disclosure is permitted.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Employers are permitted to conduct pre-employment checks. Employers must comply with the Fair Credit Reporting Act and federal laws that protect applicants from unlawful discrimination when compiling background information. Most states have laws governing how employers can evaluate this information. For example, New York prohibits employers from inquiring about a prospective employee's criminal record until after a conditional offer of employment is made.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

An employer has the right to monitor its own property. Employers are entitled to monitor computers, servers and other electronic devices owned by the employer. Under the Electronic Communications Privacy Act of 1986, employers are permitted to monitor employee communications if there is a legitimate business purpose or if the employee has consented. States have also enacted regulations concerning the monitoring of employee activity.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Although an employer may limit an employee's use of social media during working hours and the way in which social media is used as it relates to the employer's business, the employer's control is limited by the NLRA and applicable state laws. The NLRA protects employee rights to engage in "protected concerted activity", which includes social media postings.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are currently no federal laws specifically regulating the usage of AI. However, some states have enacted laws surrounding employer use of AI. For example, in 2023, New York passed a law prohibiting the use of automated employment decision tools unless the tool has been audited for independent bias, and employers must provide notice of its use to potential candidates.

9 Court Practice and Procedure

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

Federal courts have jurisdiction to adjudicate employment-related cases arising out of federal employment law and employment cases where the parties are citizens of different states or are non-citizens. State courts have a broad jurisdiction to hear cases arising out of state or federal law claims. Federal agencies, such as the EEOC, Department of Labor and NLRB have jurisdiction over employment-related claims arising out of violations of federal law.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The procedures depend on the forum in which the complaint is brought. Some courts require mandatory conciliation; otherwise, it is voluntary. The EEOC is required by federal statute to attempt to resolve findings of discrimination through conciliation. If a civil lawsuit is filed, applicable fees will apply. There are no fees for filing a claim with an administrative agency.

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

There is no uniform length of time.

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

Yes, decisions are appealable. Typically, there must be a final ruling before a decision can be appealed, but interlocutory appeals are permitted in limited circumstances. There is no uniform length of time to process an appeal.



James Mahon has more than 30 years of experience as a civil and criminal litigator in federal and state courts. Jim concentrates his practice on criminal and civil tax controversies, white-collar criminal matters, and civil litigation. He represents clients facing criminal charges in federal and state courts, individuals under government investigation, and taxpayers before the Internal Revenue Service and the New York State Department of Taxation & Finance.

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Zambia



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The following are the sources of Employment Law in Zambia:

- a) The Constitution of Zambia. This is the supreme law of the land and any laws inconsistent with the Constitution are null and void.
- b) The Employment Code Act No. 3 of 2019. The Employment Code Act governs the employer and employee relationship in Zambia and provides for the skills and labour advisory committees and their functions. The Employment Code Act repealed and replaced the following Acts:
 - i) the Employment Act, 1965 – alongside all subsequent amendments thereto;
 - ii) the Employment (Special Provisions) Act, 1966;
 - iii) the Employment of Young Persons and Children Act, 1933; and
 - iv) the Minimum Wages and Conditions of Employment Act, 1982, together with all its amendments.
- c) The Industrial and Labour Relations Act, Chapter 269, Volume 15 of the Laws of Zambia. The Industrial and Labour Relations Act provides for the formation of trade unions and employers' representative organisations, including matters related to dispute resolution in employment cases.
- d) Common law. English common law and doctrines of equity are applicable in this jurisdiction. When Zambia gained independence in 1964, it inherited the English legal system and certain pieces of English legislation are still applicable to Zambia through the English Law (Extent of Application) Act, Chapter 11, Volume 2 of the Laws of Zambia. The statutes that were in force in England on 17 August 1911, as well as the Northern Rhodesia Order in Council, 1911, and the British Acts (Extension) Act, Chapter 10, Volume 2 of the Laws of Zambia, which are statutes passed after 17 August 1911, are contained in the schedule.
- e) Judicial precedent. Decisions of Superior Courts are binding on Lower Courts as they form part of the law.
- f) International law. Zambia is a signatory to the

International Labour Organisation ("ILO") 1982 Convention on Termination of Employment No. 158, whose purpose is to coordinate minimum levels of job security in the laws of the Member States.

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

According to section 98 of the Employment Code Act, the Minister of Labour and Social Security may, through a statutory instrument, state the category of employees to be protected under the Act.

The repealed Minimum Wages and Conditions of Employment Act, Chapter 276, Volume 15 of the Laws of Zambia, defined "protected person" to mean a worker whom a statutory order made under this Act applies. However, the Employment Code Act does not define a protected person.

Protected persons include cleaners, general workers, handy persons, officers orderly, guards (watch persons), drivers, typists, receptionists/telephonists and qualified clerks.

The Minister of Labour and Social Security, through the provisions of section 106 of the Employment Code Act, enacted the Minimum Wages and Conditions of Employment (Truck and Bus Drivers) Order, Statutory Instrument No. 106 of 2020 to regulate the minimum conditions of employment for bus and truck drivers.

Other persons protected under the Employment Code Act include young children and young persons. These persons are protected in the following ways:

- i) Employers are prohibited from employing a child in a public or private industrial undertaking or any branch of the industrial undertaking.
- ii) Employers are prohibited from employing a young child or young person in work that by nature constitutes a "worst form" of labour.
- iii) Employers are prohibited from employing a young person to work at night in an industrial undertaking.

The Minimum Wages and Conditions of Employment statutory instruments prescribe for minimum benefits for protected employees. However, the Minimum Wages and Conditions of Employment statutory instruments do not apply to employees working for the Government of the Republic of Zambia, a local authority, employees in management and employees whose

wages and conditions of employment are regulated through the process of collective bargaining, or employees with contracts of employment providing for conditions that are better than the prescribed minimum conditions.

It is imperative to note that both the Industrial and Labour Relations Act and the Employment Code Act do not cover the following persons:

- a) persons in the Defence Force, except locally engaged civilian employees;
- b) members of the Zambia Police Service;
- c) members of the Zambia Correctional Service; and
- d) persons in the Zambia Security Intelligence Service.

The Minister of Labour and Social Security has the discretion to exempt any person or class of persons or trade, industry or undertaking from the provisions of the Employment Code Act and the Industrial and Labour Relations Act. However, this can only be carried out after consultation with the Tripartite Consultative Labour Council.

The different types of workers are distinguished by virtue of the legislation that establishes them.

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 Code Act, under the provisions of section 22(1), makes it mandatory for a contract of employment whose duration is for a period of six months or more to be in writing. However, oral contracts are recognised by section 18 of the Employment Code Act.

With respect to employees under an oral contract of employment, the employer has a mandate to ensure that a record of the contract of employment is prepared and maintained. This is provided for under section 18 of the Employment Code Act.

1.4 Are any terms implied into contracts of employment?

Yes, unless the contract expressly prohibits any implied terms.

The implied terms under common law are applicable provided they do not contravene the provisions of the Employment Laws.

The Employment Code Act provides for some of the implied terms; for instance, an oral contract is presumed to be a contract for a period by which wages are calculated and where the wages are calculated by reference to any period of less than a day and in absence of an agreement to the contrary, the oral contract is deemed to be a daily contract.

Further, the Employment Code Act, under the provisions of section 21(1), states that an oral contract for a period of one month will be deemed to have been extended for a further period of one month subject to the same terms and conditions.

There is an implied term in the Employment Code Act regarding confirmation of an employee after a probation period: the Employment Code Act provides that where an employer does not notify the employee in writing of the confirmation, it will be presumed that the employee has been confirmed to fill the position from the date of the expiry of the probation period.

In the absence of a notice of termination clause, the following notice periods will be implied:

- a) 24 hours for a contract of employment not exceeding one month;
- b) 14 days for a contract of employment of more than one month but not exceeding three months; and
- c) 30 days for a contract of employment of more than three months, except that notice to terminate a contract of employment of more than six months shall be in writing.

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

The Employment Code Act, under sections 33 to 48 (Division 3.2) prescribes the minimum employment benefits employers should follow:

- i) employers are to pay the prescribed expenses of repatriating an employee to a place from which the employee was brought on termination or expiry of the contract of employment;
- ii) provision of transport or payment of the cost of transport to repatriate an employee entitled to repatriation;
- iii) an employee is entitled to paid public holiday;
- iv) an employee in continuous employment with the same employer is entitled to annual leave on full pay at a rate of at least two days per month;
- v) an employee who is unable to perform his normal duties due to illness or injury not occasioned by the employee's default must notify the employer of the illness or injury and proceed on sick leave on production of a medical certificate;
- vi) an employee is entitled to compassionate leave with full pay for a period of at least 12 days; and
- vii) the Minimum Wages and Conditions of Employment statutory instruments, which apply to protected employees, also provide for the same.

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 most cases, the employer's organisation and trade union will normally agree on the terms and conditions of employment for the purpose of concluding and signing a collective agreement. The bargaining is undertaken at industrial level.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

All material changes to terms and conditions of employment require consent from employees. Therefore, a change to an employee's working time between home and the workplace on a hybrid basis should be agreed with the employee. This variation must be recorded in writing and should be reflected in the employee's employment contract, e.g. appended in an addendum or supplemental agreement and that copy availed to the employee.

There are no legal barriers/consequences to a voluntary change to flexible working hours provided that employee consent is obtained and the working hours do not exceed the legal limits (set out below) for both full-time and part-time employees.

The key obligations relating to hours and breaks are:

- a maximum eight-hour working day;
- a maximum 48-hour working week;
- a rest break of at least 24 consecutive hours in every seven-day period; and
- a meal break of one hour and a rest break of at least 20 minutes or two rest breaks of at least 10 minutes each, on each working day.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

There is no regulation surrounding the location of the designated

office and/or remote working locations. An employer can, therefore, put in place any practical measures it considers reasonable to ensure an effective remote working system. These would include ensuring that any employee with a disability has all necessary equipment to carry out the work.

During the COVID-19 pandemic, most employees were urged to work remotely and the employees were only allowed to report to the office as and when it was necessary. This also brought about flexibility in work environments.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The provisions of section 7(1) of the Industrial and Labour Relations Act make it mandatory for a trade union to be registered with the Commissioner within six months from the date of formation. A trade union must possess a valid certificate of registration.

2.2 What rights do trade unions have?

The Industrial and Labour Relations Act does not wholly provide for the rights of trade unions. However, under section 5, the Industrial and Labour Relations Act provides for the rights of employees in a trade union. The following are some of the rights exercised by employees in a trade union:

- a) right to form a trade union;
- b) right to obtain a leave of absence from work in order to take part in activities of a trade union;
- c) right not to be prevented, dismissed, penalised, victimised or discriminated against or deterred from exercising the rights conferred on the employee by the Act;
- d) freedom of association;
- e) freedom to practise collective bargaining; and
- f) right to strike.

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

The Industrial and Labour Relations Act, under section 5(1)(h), grants an employee the right not to do work normally carried out by an employee who is lawfully on strike or who is locked out, unless such work constitutes an essential service.

Strikes are only lawful if they are resorted to after due process and only if they do not involve an essential service. It should be noted that the right to strike is strictly limited to parties to the dispute. This simply means that strikes over political affairs are not legitimate under the law.

Sections 78(1)(b) and 101 of the Industrial and Labour Relations Act provide as follows:

*“78. (1) Where a conciliator or board of conciliation fails to settle a collective dispute either party to the collective dispute may—
(b) conduct a ballot to settle the dispute by a strike or lockout.”*

“101. (1) No employer or other person shall take part in a lockout which is not in the contemplation or furtherance of a collective dispute to which the employer or that person is a party.”

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 form what is known as the employers' organisation. The principal objective of this organisation is to represent and promote employers' interests and regulate the relations between employers and employees or between employers and trade unions.

The following are the rights of the employers' organisation:

- a) the right to participate in the formation of, and to join, an association, as well as to participate in the lawful activities of such employers' organisation;
- b) nothing contained in any law shall prohibit any employer from being or becoming a member of any employers' organisation lawfully, or subject the employer to any penalty by reason of the employers' membership of any such employers' organisation;
- c) no person shall impede, interfere with, or coerce, an employer in the exercise of his rights under this Act;
- d) no person shall subject an employer to any form of discrimination on the ground that the employer is or is not a member of any employers' organisation;
- e) no person shall subject another person to any form of discrimination on the ground that the person holds office in an association; and
- f) no person shall impede or interfere with the lawful establishment, administration or functioning of an employer's 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?

A works council is not provided for under the Employment Laws.

In practice, what may be referred to as a works council is a works committee, which is set up by non-unionised employees, and the unionised employees form what are known as branch committees.

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

The works council is not recognised under the Employment Laws.

2.7 Are employees entitled to representation at board level?

There is no legislation providing for employee representation at board level.

3 Discrimination

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

Section 5 of the Employment Code Act places an obligation on the employer to promote equal opportunity in employment and eliminate discrimination in an undertaking.

Further, section 108(1) of the Industrial and Labour Relations Act prohibits an employer from terminating the services of an employee or imposing a penalty or disadvantage on an employee on the basis of race, sex, marital status, religion, political opinion, affiliation, tribal extraction or status.

This position of the law was confirmed by the Supreme Court of Zambia in the case of *Zambia Privatisation Agency V. James Matala (1996) S.J.*, when the Court stated as follows:

“We have no hesitation in agreeing with the Industrial Relations Court that the respondent did not prove discrimination as none of the reasons for discrimination as set out in section 108(1) had been established. As we said in the cases of Posts and Telecommunications Corporation Limited and Phiri(1) and Ngwira Vs Zambia National Insurance Brokers(2) that discrimination must come within the subject matter of section 108. In the instant case however the respondent pleaded other grounds. The court in our view was entitled to consider these grounds particularly in the light of the appellant’s answer to those grounds as set out above.”

The following are the grounds upon which discrimination is prohibited:

- a) grounds of colour, nationality, tribe or place of origin, language, race, social origin, religion, belief, conscience, political or other opinion, sex, gender, pregnancy, marital status, ethnicity, family responsibility, disability, status, health, culture, economic status; and
- b) discrimination in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment.

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

Article 23(3) of the Constitution of Zambia, Chapter 1, Volume 1 of the Laws of Zambia defines discrimination as follows:

“‘Discrimination’ means affording different treatment to different persons attributable, wholly or mainly, to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are not made subject or are accorded privilege or advantages, which are not accorded to persons of another such description.”

As stated in question 3.1 above, section 108 of the Industrial and Labour Relations Act and Article 23(3) of the Constitution of Zambia lists what form of discrimination is recognised under Zambian legislation.

In the case of *Zambia National Broadcasting Corporation Limited V. Penias Tembo, Edward Chileshe Mulenga and Moses Phiri (1995) S.J. (S.C.)*, the Court held *“that the respondents were discriminated against on grounds of their political affiliation within the meaning of section 108 of the Industrial and Labour Relations Act”*.

Discrimination may be said to be unlawful where an employer discriminates against a female employee on the grounds of her gender or marital status by denying her access to opportunities for promotion, training or any other benefits or facilities, or where the recruitment policies only privilege men despite their unsuccessful applications and interviews.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

The Employment Code Act, under the provisions of section 95(1), makes it mandatory for the employer to have an employment policy on harassment. Further, section 137 A of the Penal

Code, Chapter 87, Volume 7 of the Laws of Zambia makes it an offence for any person to practise sexual harassment in a workplace or elsewhere on a child.

3.4 Are there any defences to a discrimination claim?

There are no codified defences to a discrimination claim. However, the employer may plead any of the following defences to an alleged discrimination claim:

- a) Legitimate limitation on qualification. This will apply where certain positions in a company provide for a mandatory age group to occupy the position.
- b) Jobs or positions to be taken up by Zambian nationals. Certain jobs or positions entail that only a Zambian national is suited to occupy the position and other nationals may not be employed to take it up.
- c) Genuine occupational qualification. An employer may justify discrimination on the grounds of sex if it can be shown that being of a particular sex is a genuine occupational qualification for a position, or where doing so is a breach of health and safety legislation prohibiting the employment of women in certain occupations.
- d) Employee performance: if an employer can show a record of the employee’s insubordination that led to the employee’s dismissal.

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

Employees belonging to a trade union may first take their complaint against the employer through a trade union representing them to an organisation representing employers in the hope of settling the claims amicably.

Section 108(2) of the Industrial and Labour Relations Act permits the employee to file a complaint within 30 days of the event that led to the discrimination before the High Court under the Industrial Relations Division.

The *proviso* to section 108(2) provides for an extension of the 30-day period for a further three months, in order to allow the employee to exhaust all administration channels available.

Employers are at liberty to settle claims at any time before trial. The Courts encourage the parties to settle the matter amicably through its mediation rules incorporated in its procedure rules.

3.6 What remedies are available to employees in successful discrimination claims?

An employee who successfully pleads discrimination shall be remedied as follows:

- i) damages or compensation for loss of employment; or
- ii) make an order for re-employment or reinstatement in accordance with the gravity of the circumstances of each case.

In the case of *Post and Telecommunications Corporation Limited V. Salim Jack Phiri (1995) S.J. (S.C.)*, the Supreme Court of Zambia had the following to say with respect to the remedy of compensation and reinstatement in the discrimination claim:

“...We note that in this case the Industrial Relations Court found that there had been discrimination because two other employees had not been disciplined whereas the respondent had. We entirely agree that there was a difference between the treatment of the persons

*involved, and, as a strict matter of language, the conduct amounted to discrimination. However, the fact that one of the other parties was female and the other male makes it impossible to say that anybody was favoured or discriminated against because of his or her sex. With regard to social status, as we said in the case of Ngwira v. Zambia National Insurance Brokers, (2), this expression has nothing to do with a person's standing in the hierarchy of an employer's organisation; it refers solely to his standing in society. In this case there was no evidence that the standing in society of the respondent affected the situation one way or the other. When discrimination is referred to in the context of persons being wrongly discriminated against within the provisions of section 129 it means discrimination only in respect of those matters which are referred to in the section. **Discrimination generally can never be a ground for finding that a person has been improperly dismissed, and could never give rise to an order of compensation or reinstatement under the section.** We are satisfied in this case that there was no discrimination justifying the award of damages by the Industrial Relations Court and this ground of appeal succeeds." (Emphasis ours.)*

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Yes, atypical workers have additional protection, such as: protection against dismissal connected with maternity leave, pursuant to the provisions of section 43 of the Employment Code Act; protection from harmful work, pursuant to the provisions of section 44 of the Employment Code Act; and protection of wages, pursuant to the provisions of section 79 of the Employment Code Act.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

Yes, please see question 3.7 above.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

Generally, there is no legislation that precludes them from publishing their personal information. However, the employer may preclude employees from sharing such information within their line of work, which can be found in their HR Manual.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

The Employment Code Act, under the provisions of section 41, provides for 14 weeks' maternity leave. In the event of multiple births, the maternity leave will be extended for a further period of four weeks and reduced to six weeks in the case of a miscarriage in the third trimester.

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

A female employee who remains in employment with the same employer for a period of 24 months preceding the beginning of the leave is entitled to full pay where the maternity benefits are not payable under the contract.

The provisions of section 41(4) of the Employment Code Act states that where a female employee has more than one employer or third-party scheme from which the employee is entitled to claim maternity benefits, an employer who pays the maternity benefit is entitled to recover from the other employer or third-party scheme, as a civil debt:

- a) in the case of another employer, a contribution that shall bear a proportion to the amount of the maternity benefit paid to the employee as the number of days the employee worked for the other employer; or
- b) in the case of a third-party scheme, the reimbursement of the maternity benefit as may be prescribed.

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

On expiry of the maternity leave, the female employee is entitled to return to the job she had held before the maternity leave, or to a reasonably suitable job with terms and conditions no less favourable than those that had applied to her before the maternity leave. This is provided for under section 41(7) of the Employment Code Act.

Notwithstanding having taken her maternity leave, the female employee is entitled to annual leave as stipulated under section 41(10) of the Employment Code Act.

Further, the female employee nursing her unweaned child is entitled, each working day, to two nursing breaks of 30 minutes each, or one nursing break for an hour. It is imperative to state that the nursing break period shall be six months from the date of delivery, and the said break will not be deducted from the number of paid hours of the female employee.

4.4 Do fathers have the right to take paternity leave?

Yes, they do. This is, however, agreeable between the employer and the employee.

Paternity leave is available to an employee who remains in continuous employment with the same employer for a period of 12 months and such leave shall be for at least five continuous working days. The leave should be taken within seven days of the birth of a child and a birth record of the child should be submitted to the employer. This is provided for under section 46 of the Employment Code Act.

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

Section 40(1) of the Employment Code Act allows an employee who has worked for a period of six months or more to be entitled to leave of absence, referred to as family responsibility leave, with pay for a period not exceeding seven days in a calendar year to nurse a sick spouse, child or dependant. An employer, before granting this leave, may require the employee to produce a certificate from a medical doctor certifying that the spouse, child or dependant is sick and requires special attention.

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

As stated in question 4.5 above, an employee is entitled to work flexibly, provided a certificate from a medical doctor certifying that the dependant requires special attention is availed to the

employer. The employee should ensure that his dependants are registered with the employer or a record showing the name(s) of his dependant(s) is availed to the employer.

5 Business Sales

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

Section 28(1) of the Employment Code Act prohibits an employer from transferring a contract of employment to another without the employee's written consent, without notifying the employee's representative of the proposed transfer and without the endorsement by an authorised officer of the particulars of the transfer of the contract.

This position of the law was further stated in the case of *Lazarous Munsanje and 63 Others V. Zambian Breweries PLC, Zambian Bottlers Limited & Copperbelt Bottling Company Limited-Appeal No. 91 of 2013, MAMBILIMA, C.J.*, as follows:

"...in our view, failure to plead compliance with Section 35 of the Act means that the Court was not invited to delve into this issue. Be that as it may, the action taken by the 1st Respondent in the amalgamation process shows clearly that they were applying the provisions of Section 35 of the EMPLOYMENT ACT. Paragraph (1) of this Section requires that a written contract of employment shall not be transferred to another employer without the consent of the employee and 'the particulars thereof' should 'be endorsed upon the contract by a proper officer.' The conduct of the Respondent during the consolidation process shows that it was cognizant of the provisions of section 35 of the EMPLOYMENT ACT. As the lower Court observed, the sequence of events on record shows that the Appellants were notified of the impending consolidation by 25th February, 2010 and the mechanisms of the transfers were adequately clarified. There was evidence before the Court that an officer from the Ministry of Labour was present when the employees signed the transfer documents. Much as the Court did not specifically refer to Section 35 of the EMPLOYMENT ACT, it did not impugn the process adopted by the Respondent. The spirit of the law was complied with. In our view, silence by the Court on the applicability of Section 35 of the EMPLOYMENT ACT is a non-issue." (Emphasis ours.)

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

Pursuant to the provisions of section 28 of the Employment Code Act, the employee's rights are only transferrable when the employee consents in writing; such transfer and consent is fundamental. All the employee's accrued rights prior to the transfer of the employee's contract move with the employee during the transfer unless the employer agrees to pay the employee any outstanding liabilities due prior to the 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?

There are none.

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

An employee's contract of service shall terminate where the employee refuses to be transferred to another employer and such employee shall be entitled to a severance pay; this is pursuant to section 29 of the Employment Code Act.

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

No, they are not. Any variation to the terms and conditions of employment must be agreed between the employer and the employee. It will be considered to be a breach of contract (fundamental breach) where the employer unilaterally varies the contract.

The Supreme Court of Zambia, in the case of *National Milling Company V. Grace Simataa and Others (SCZ) JUDGMENT NO. 21. OF 2000*, stated that:

"If an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant or early retired as may be appropriate – as at the date of the variation and the benefits are to be calculated on the salary applicable."

Further, in the case of *Peter Ng'andwe and Others and Zamox Limited and Zambia Privatisation Agency S.C.Z. JUDGMENT NO. 13 OF 1999*, Chaila, J.S. held as follows:

"If an employer varies the basic conditions of employment without the consent of the employee, then the contract of employment terminates."

6 Termination of Employment

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

According to the provisions of section 53(1) of the Employment Code Act, an employee whose contract of employment is intended to be terminated is entitled to a period of notice or compensation *in lieu* of notice where the employee is not guilty of misconduct or any act that would trigger the employment relationship to terminate. Furthermore, the Employment Code Act provides for default notice periods where the contract of employment does not provide for the same.

However, while section 53(1) permits the employer to terminate the contract with compensation *in lieu* of notice, section 52 of the Employment Code Act restrains and prohibits an employer from invoking a termination clause without giving valid reasons and section 52(1) of the Employment Code Act provides as follows:

"(1). A contract of employment terminates in the manner stated in the contract of employment or in any other manner in which a contract of employment is deemed to terminate under this Act or any other law, except that where an employer terminates the contract, the employer shall give reasons to the employee for the termination of the employee's contract of employment."

There seems to be a contradiction between sections 52 and 53 of the Employment Code Act.

Where the termination is with respect to an employee's capacity, conduct, performance or operational requirements of the undertaking, the employee should be accorded an opportunity to be heard prior to the termination.

In the case of *Sarab Aliza Vekbnik V. Casa Dei Bambini Montessori Zambia Limited [2018] ZMCA 312*, the Court of Appeal held as follows:

“Section 36 of the Act has placed a requirement on an employer to give reasons for terminating an employee’s employment. Employers are no longer at liberty to invoke a termination clause and give notice without assigning reasons for the termination. What is of critical importance to note however is that the reason or reasons given must be substantiated. We recall that our duty as a court is to ensure that the rules of natural justice were complied with and to examine whether there was a sufficient substratum of facts to support the invocation of disciplinary procedures. In other words, we must be satisfied that there was no mala fides on the part of the employer. The basis of this is that the employee who is a weaker party is protected from being dismissed at the whims of the employer without any justifiable reason.”

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 specific provision in the Employment Code Act providing for garden leave. However, section 48 of the Employment Code Act may somewhat be said to encompass garden leave as it refers to forced leave. Section 48 states as follows:

*“48. (1) An employer shall, where the employer sends an employee on forced leave, pay the employee basic pay during the period of the forced leave.
(2) The Minister may, by statutory instrument, prescribe the circumstances under which an employee is required to be sent on forced leave.”*

An instance of garden leave was elucidated in the case of *Barclays Bank PLC V. Zambia Union of Financial Institutions and Allied Workers SCZ JUDGMENT NO. 12 OF 2007*, where it was stated as follows:

“There was evidence on record that the parties intended to continue with the employer/employee relationship until such time that a compulsory redundancy agreement was agreed upon, notwithstanding that the affected employees were placed on garden leave pending determination of the compulsory redundancy package.”

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?

As stated in question 6.1 above, an employee must be accorded an opportunity to exculpate himself. The principles of natural justice are applicable, *videlicet*: the right to be heard.

Furthermore, there is protection against dismissal connected with maternity leave pursuant to section 43 of the Employment Code Act, which provides as follows:

*“43. Subject to section 50, an employer shall not, as a result of an employee’s pregnancy or maternity leave:
(a) terminate that employee’s employment;
(b) impose any penalty or disadvantage the employee; or
(c) adversely change a condition of employment in respect of that employee.”*

The Employment Code Act provides for circumstances for summary dismissal and imposes an obligation on an employer to pay an employee, who has been summarily dismissed, wages and other accrued benefits up to the dismissal date. The employer is also mandated to submit a written report to the labour officer

regarding the circumstances leading to the dismissal and the reasons for the dismissal. The report must be submitted within four days of the dismissal.

The Employment Code Act does not provide for third-party consent for a dismissal.

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

Yes, and these include employees on maternity leave, sick leave (for a certain period) and compassionate 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 can dismiss an employee for reasons related to gross misconduct. No dismissal should contravene the provisions of the Employment Code Act or the Industrial and Labour Relations Act.

Further, an employer can dismiss an employee for reasons related to the business in an instance where the employer’s business ceases or diminishes a need for the employee to carry out work of a particular kind in the place where the employee was engaged. This is for reasons related to redundancy pursuant to section 55(1) of the Employment Code Act.

In the aforementioned circumstances, the employee is entitled to his wages and other accrued benefits due to him upon dismissal.

With respect to the calculation of compensation, the Supreme Court of Zambia, in the case of *Spectra Oil Zambia Limited V. Oliver Chinyama APPEAL NO. 18 OF 2018*, stated as follows:

“The case of Barclays Bank Zambia Pic V. Weston Luvu and Suzgo Ngulube is quite insightful in this regard. The Supreme Court observed that:

At common law the measure of damages for wrongful termination of the contract of employment is determined by the period of notice. The award is equivalent to the salary for the period of notice. However, there are exceptions. The case of Swarp Spinning Mills Limited vs Sebastian Chileshe and Others which Mr. Lukangaba cited, clearly sets out what some of the exceptions to the normal measure of damages are.

At this stage, we take the liberty to correct Mr. Lukangaba’s assertion that mental anguish is the only exception. What we said in that case is that the normal measure of damages is departed from where the circumstances and justice of the case so demand. Therefore, termination inflicted in a traumatic fashion causing undue distress or mental suffering is but one example. Loss of employment opportunities is another. Another illuminating case where the Supreme Court has guided is Duncan Sichula & Muzi Freight Transport and Forwarding vs Catherine Mulenga Chewa on the measure of damages and principle of calculation thereof, it was held that: An appellat court should not interfere with the award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misappropriated or because it is so inordinately high or so low that it is plainly a wrong estimate of the damages to which a claimant was entitled. Therefore, in light of the foregoing it is our considered view that the award of 12 months’ salary to the respondent does not greet us with a sense of shock, notwithstanding the fact the court found that there was no embarrassment suffered by the respondent. We see no reason to interfere with the award, it is not inordinately high.” (Emphasis ours.)

An employee may be awarded either damages for 12 months' salary, including allowances or perquisites, or 24 months' salary as damages. Additionally, in the case of *Zambia Railways Limited V. Oswell Simumba (1995) ZR 41*, the Court awarded 36 months' salary as damages.

In the recent case of *Paul Mwenya Siame V. Industrial Development Corporation Limited and Attorney General Comp/ IRC/LK/54/2017*, the Court awarded the complainant three months' salary as damages for unlawful and unfair dismissal.

The awarding of salary as damages is normally at the discretion of the Court.

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

Yes, the employer must follow the procedures provided in the contract of employment and section 50(2) of the Employment Code Act states that within four days of the dismissal, the employer should notify the labour officer through a report of the circumstances leading to the dismissal and the reasons for the dismissal.

All dismissal procedures should comply with the provisions of the Employment Code Act as stated in question 6.1 above.

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 bring a claim for discrimination, wrongful dismissal or breach of contract on the part of the employer.

The Court may grant the following remedies where it considers such just and equitable:

- a) award damages or compensation for loss of employment;
- b) make an order for reinstatement, re-employment or re-engagement;
- c) deem the employee as retired, retrenched or redundant; or
- d) make any order or award as the Court may consider fit in the circumstance of the case.

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

Yes, see question 3.5 above.

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

This is not provided for under the Employment Laws.

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 Employment Code Act does not recognise mass dismissals.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The following are some common types of restraint of trade:

- a) restriction of sales representatives from soliciting the customers of a former employer; and

- b) restriction on the seller of a business from setting up in competition to the buyer within a reasonable timeframe.

7.2 When are restrictive covenants enforceable and for what period?

For restrictive covenants to be enforceable, they should fulfil the following requirements:

- i) a valid interest that the party imposing the restraint is trying to protect;
- ii) the restraint must be no more extensive than is reasonable to protect that interest; and
- iii) the restraint must not be contrary to the public interest.

Each of these requirements needs to be considered separately.

With respect to the period, in the case of *J. K. Rambai Patel V. Mukesh Kumar Patel (1985) Z.R. 220*, it was stated as follows:

"It is usual to find as reasonable covenants by employees leaving their master's employment not to practice or take employment in the same capacity within a reasonable period and within reasonable geographical limitation... In this particular case we have no hesitation in finding that the period of two years' restraint imposed upon the defendant was not unreasonable."

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

No, they do not have to.

7.4 How are restrictive covenants enforced?

Generally, restrictive covenants are unenforceable. An exception is where the said covenants are reasonable and seek to protect the interests of the parties concerned and the public. This position was stated in the case of *J. K. Rambai Patel V. Mukesh Kumar Patel (1985) Z.R. 220*, as follows:

"All covenants in restraint of trade are prima facie unenforceable unless they are reasonable with reference to the interests of the parties concerned and of the public."

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Both an employer and employee are mandated to follow the strict rules governing the use and storage of personal and client data provided for under the provisions of the Data Protection Act No. 3 of 2021.

The provisions of section 71 of the Data Protection Act restricts the transfer of personal data outside Zambia without the consent of the data subject. Where the transfer is necessary due to the standard contracts or intragroup schemes, this requires the approval of the Data Protection Commissioner.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

This is not provided in the Employment Code Act. The employee and employer may agree on such a term.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

This is not provided in the Employment Code Act. However, in practice, the employers normally request prospective employees to submit a police clearance before they can be considered for any position.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Yes they may, provided the same has been agreed upon in the contract of employment.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Yes, provided the same has been agreed upon in the contract of employment or it is part of the employer's policies.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are currently no restrictions on how employers can use AI in the employment relationship.

9 Court Practice and Procedure

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

The High Court, under the Industrial Relations Division, is vested with original and exclusive jurisdiction to hear and determine any labour-related matter.

The Industrial Relations Court became a Division of the High Court of Judicature for Zambia, effective from the enactment of the Constitution of Zambia (Amendment) Act No. 2 of 2016, pursuant to the provisions of Article 133(2) of the Constitutional Court of Zambia Act, Chapter 1 of the Laws of Zambia. Article 133(2) provides as follows:

"133(2) There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court."

Further, section 3 of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia, as amended by the High Court (Amendment) Act No. 21 of 2016, provides as follows:

"3 (1) The Court consists of the following divisions:
(a) The Industrial Relations Court;
(b) The Commercial Court;
(c) The Family Court;
(d) The Children's Court; and
(e) Such other specialized court as the Chief Justice may prescribe by statutory instrument."

The High Court is normally presided by a single Judge.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The Court will only consider a complaint or an application after the applicant has exhausted all administrative channels of procedure. Where the complaint has exhausted all administrative channels, the complainant shall serve the Court a notice in writing in a prescribed form. The Registrar then registers the notice in the Court Register and endorses it with the Court's seal, and a sealed copy of the notice is returned to the complainant to serve on any person from whom relief is claimed; such person to be served is said to be the respondent.

The Registrar notifies the respondent of a date appointed by the Court by which an answer to the complaint must be delivered. This procedure is provided under PART III of the Industrial and Labour Relations Rules, Statutory Instrument No. 206 of 1974 (as amended).

A prescribed fee is payable to the Court when filing the Court process.

Conciliation is only mandatory under collective disputes. This is provided for under section 76 of the Industrial Relations Act, which provides as follows:

"76. (1) Where a collective dispute arises and neither of the parties to the dispute is engaged in an essential service, the parties to the dispute shall refer the dispute to

(a) a conciliator appointed by the parties to the dispute; or

(b) a board of conciliation composed of-

i) a conciliator appointed by the employer or an organisation representing employers;

ii) a conciliator appointed by the employees or an organisation representing the employees; and

iii) a conciliator appointed by the employer or the organisation representing the employers and employees or the organisation representing employees, who shall be the Chairman."

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

In the recent case of *Guardall Security Group Limited V. Reinford Kabwe APPEAL NO. 44 OF 2019*, the Court held that an Industrial and Labour Relations matter should be disposed of within a period of one year from the date on which the complaint or application is presented before the Court. In the said decision, the Court further stated that a Court must deliver a judgment on the matter within 60 days after hearing the matter. It is immaterial as to whether or not the delay is or was caused by the Court or the litigants.

The aforementioned decision of the Court was in line with the provisions of sections 85(3)(b)(ii) and 94(1) of the Industrial Relations Court Act.

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

Yes, an aggrieved party may appeal against the decision of the Court of first instance within 30 days from the date of delivery of the judgment. Such appeal is lodged in the Court of Appeal.

The Court of Appeal Rules, Statutory Instrument No. 65 of 2016 does not state the duration within which an appeal should be heard.



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