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*McDermott Will & Emery LLP*  

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I am delighted to have been asked to act as the Contributing Editor to *Global Legal Insights – Employment & Labour Law*, and very pleased that this book is now into its seventh edition, which addresses developments in labour and employment law across 27 countries worldwide. As can be seen from the variety and detail contained in this book, labour and employment law issues never stand still, and businesses operating internationally need to maintain their awareness of trends and impending changes in employment law regimes in the jurisdictions in which they operate.

The objective of this book is to provide general counsel, human resource practitioners, lawyers, advisers and managers with an overview of developments in employment and labour law in a variety of jurisdictions across the world. The authors were asked to provide their perspectives on those current and forthcoming changes to the labour and employment law regime in their respective jurisdictions which they considered to be particularly important in practice.

*Global Legal Insights* and I are very grateful to all the authors for their contributions and hope that this book provides a useful and interesting snapshot of the important current employment law issues in the jurisdictions which it covers.

Charles Wynn-Evans
Dechert LLP
Global Overview

Michael J. Sheehan, Ludovic Bergès & Emma T. Chen
McDermott Will & Emery LLP

Employment law in a global economy is no longer a local issue. Global employers face unique challenges. Individual country compliance presents its own challenge but simultaneous compliance in numerous countries can often feel like playing chess blindfolded. Let’s begin by looking at trend lines in several signal areas of employment governance.

Managing employment contracts

One ongoing challenge is assuring the legal compliance of employment documentation. Companies must ensure – in each separate country – the legal compliance of their contractual documentation: engagement letters; employment offers; employment contracts; bonus schemes; stock options plans, etc.

There is no “one size fits all” for any, much less all, of these. With employment contracts, for example, companies must think through the strategy. The most common approach is to prepare a local law-compliant employment contract in accordance with best practices in the jurisdiction where the employee is to be hired.

Outside of the U.S., the classic U.S.-style at-will offer letter is seldom an option. In many jurisdictions around the world, detailed employment contracts are not only customary but are mandatory. As a consequence, employees in those countries will expect (and even demand) such a comprehensive contract.

In China, a company failing to issue a written employment contract within one month of the commencement of employment will be subject to double wage claims. In the European Union, under Directive 91/533/EEC, an employer is required to inform its employees of all relevant terms of the employment relationship within two months of commencement of employment.

On the plus side, such written employment contracts can incorporate crucial terms such as probationary periods, termination grounds, working time provisions, non-compete and/or non-solicitation provisions:

- Each country has its own rules on the maximum duration of a probationary period, whether renewals are permissible, whether employees are executives or not, whether the contract is permanent or for a fixed-term, and the like. France permits an eight-month probationary period, one renewal included, for executives under an indefinite-term contract (contrat à durée indéterminée).
- In certain jurisdictions, termination provisions are crucial as well. While they may not always give a company full protection (since ultimately, it is statutory restrictions that determine in which instances terminations are permissible), they often give a company at least a good starting point to enforce termination (e.g. in case of violation of company policies such as a code of conduct).
• Working time provisions must also be carefully drafted. In France, where the legal working time is 35 hours per week, there is the possibility of entering into flat-rate pay agreements for autonomous executives whose missions and responsibilities do not permit alignment with the collective working time/office schedule.

Contracts should also address post-termination provisions: confidentiality; non-compete; and non-solicitation restrictions. Legal rules on each of these vary significantly between jurisdictions (even within the U.S.). Some jurisdictions follow a reasonableness approach (Australia, the United Arab Emirates or the UK); others have outright prohibitions (e.g. India, Mexico and Russia); yet others mandate compensation for non-competes (e.g. China, France and Germany).

With so many nuances country-by-country, contract drafters often consider choice of law and jurisdiction clauses. Yet, the utility of such clauses may be more readily available for employees who themselves are not localised. Consider the following recurring scenarios as prime options for such clauses:
• international business travellers (employed in one country, temporarily working in another);
• expatriates and international “secondee”;
• foreign hires (recruited in one country to work in another);
• international commuters (living in one country but working in another);
• foreign correspondents and overseas teleworkers (working in one country for an employer in another);
• employees with international territories (working in several countries at the same time); and
• mobile or “peripatetic” employees (with no fixed place of employment – sailors, flight crews, international tour guides and the like).

While most jurisdictions recognise the principle of choice of law, this is usually overridden by considerations of public policy. For an Italian citizen hired in Italy to work in Italy, it will be a tough sell to apply Australian law merely because the employer is an Australian corporation. There, the general rule that the laws of an employee’s physical worksite are determinative will likely apply regardless of such clauses.

The relevant law for all European Union countries is the Rome I Regulation. Under that regime, foreign employees in Europe will benefit from the mandatory laws of the country with which they have the closest connection, which will usually be the country where they normally work. Accordingly, an employee working in France should receive a French law-governed employment contract, even if the employee works for a UK employing entity. Otherwise, the employee could enjoy the best of both worlds (e.g. UK contractual rules, plus French statutory rules).

Forum-selection provisions that call for a forum other than that of the host country (place of employment) tend to be unenforceable outside the U.S. In London, U.S expatriates working under contracts with such clauses who sue before an English Employment Tribunal are unlikely to see their claim dismissed when their employer invokes the forum-selection clause.

In choice-of-forum situations, Europeans invoke provisions of the so-called “Recast Brussels Regulation” (Brussels I bis Regulation). The provisions of this EU Regulation codify the general rule that employees rarely have to litigate employment disputes outside of their host country place of employment, even if a choice-of-foreign-forum clause purports to require otherwise.
Yet, for highly mobile employees, the place of work is often debatable. For instance, English labour courts have decided that an employee working remotely in Australia had the right to bring an unfair dismissal claim in the UK, focusing on the fact that work had been done for a UK employer, regardless of the employee’s physical worksite.

**Managing/communicating global policies**

Every organisation has its own policies, employee handbooks, and code of conduct. In addition, every organisation has its own HR practices from evaluation processes to training programmes and beyond to issues of corporate culture or even corporate vocabulary. Here again, there is the challenge to extend those across borders and across legal systems in different countries.

Policies may be set out in contracts or through internal rules or handbooks.

In France, policies related to safety, disciplinary procedures, harassment, whistleblowing, etc. (in particular if the policy provides sanctions) must be incorporated within internal rules (the so-called “règlement intérieur”) which must be filed with the labour court and the labour inspectorate. Failing that, sanctions for violating the rules may not be enforceable.

Thus, country by country, companies must consider the interrelationship between contract and applicable policies. In some jurisdictions, it is advisable to incorporate relevant handbook policies into the contract (e.g. in the UK, it is compulsory to mention disciplinary and grievances procedures).

Placement, however, is merely the beginning. Many jurisdictions (such as Belgium, France and Poland) require contracts to be in the local language, even for an employee fluent in the language used within the group employing her/him. Failing that, provisions of the employment contract, the policies or the bonus scheme will be unenforceable, at least for the employer.

Communicating clearly in multiple languages is now a core HR function for global entities. Indeed, the employee may be able to rely on the local language version of the employment documentation while the company cannot. Lost in translation is not merely a catchphrase or a Bill Murray movie title.

A typical example is a global bonus plan where a failure by the employer to translate the target objectives can allow the employee to claim a bonus without needing to comply with the terms of the plan (i.e., without even reaching his/her objectives). This has been confirmed by French court cases, for example.

Yet, even where there is no legal requirement, translations will be required as a practical reality. For instance, in Spain, the employment contract needs to be filed with the government. In other instances, works councils and unions will need to be consulted on the implementation of policies (e.g. in France or in China). Those submissions will need to be in the local language.

As a result, businesses now consider whether to create employment documents in the local language only or in dual language versions. If a dual synoptic document is used (with two columns showing the corporate language and the local language), it is crucial to state which language prevails.

In some countries, such as France and Turkey, local language will always prevail regardless of what is provided for in a contract. In those cases, ensuring translation accuracy can avoid inadvertently granting employees more generous terms under a local translation than the company has intended.
Managing global visibility

In campaigning for President in 1932, Franklin Roosevelt promised a crowd in Pittsburgh that he’d balance the federal budget while cutting “government operations” by 25 per cent. In returning to Pittsburgh during his 1936 campaign, Roosevelt asked his staff how to answer questions about that unfulfilled promise and was told “deny you were ever in Pittsburgh”. So much has changed since then. What is said and done by candidates and by businesses is instantaneously visible. This lesson came earlier to politicians; it is now unavoidable for business entities. The global village is small but social media is large. Thus, what is done in country X will have repercussions in country Y. There is no option to deny that you were there!

Let’s look at some consequences of that global visibility:

- El Super – a small California-based grocery chain with approximately 600 unionised workers – failed to resolve a routine labour dispute with one of the unions representing these employees. The grocery chain’s Mexican parent company, Chedraui Commercial Group, subsequently found itself subject to double barrel complaints filed by U.S. and Mexican labour and civil society groups under the NAFTA labour agreement and Organization for Economic Cooperation and Development (OECD) guidelines over this labour dispute at one store.

- Vedanta – a UK company – found itself subject to a lawsuit by persons living more than 5,000 miles away when an appellate court in the UK held that farmers from a Zambian village could bring a claim against Vedanta and its Zambian subsidiary. See Lungowe and Ors. v. Vedanta Resources PLC and Konkola Copper Mines PLC [Nov, 2017] EWCA Civ 1528. This decision expanded the potential “duty of care” parent companies have under UK law to employees of their subsidiaries to include even non-employees who might be affected by its subsidiaries’ operations.

This trend is particularly apparent with respect to issues of forced labour. Eight of the G20 countries (Australia, Brazil, China, France, Germany, Italy, the UK and the U.S.) have passed or taken steps to pass anti-slavery laws intended to minimise the impact of modern slavery. The UK’s Modern Slavery Act is the prime example.

These “nudge laws” require companies to disclose what actions they have taken to ensure there is no modern slavery (forced labour) in their businesses or within their supply chains. This has the potential result of causing large companies who have not taken actions to prevent modern slavery to be subject to public scorn or shaming.

But, the risk goes beyond adverse publicity. Suits have been filed.

- 
  Barber v. Nestlé USA alleged that Nestlé violated California’s Transparency in Supply Chains Act by failing to disclose that some of the fish used in its cat food products may have been caught by small fishing boats in Thailand who use forced labour, and who then sold the fish to Nestlé’s partner, Thai Union Frozen Products, PCL. Nestlé ultimately won in both the trial court and the appellate court.

- Tomasella v. Hershey Co., Tomasella v. Nestlé USA Inc., and Tomasella v. Mars, Inc. raised similar claims, alleging violations by Hershey Co., Nestlé USA Inc., and Mars, Inc. of the Massachusetts’ Consumer Protection Act by failing to disclose at the point of sale (i.e., on the candy wrappers) their “participation in supply chains making use of the worst forms of child labor” despite having “knowledge of the child and slave labor in its supply chain”. Motions to dismiss are pending.

- Samsung Global and its French subsidiary, Samsung Electronics France, have been challenged in France for the alleged use of misleading advertising by NGOs: i.e.,
Samsung’s website publishes ethical commitments guaranteeing workers’ rights while its factories in China and South Korea allegedly violate human rights (including child exploitation). After a Paris prosecutor closed the investigation, the NGOs filed a civil complaint with the Paris court, Tribunal de Grande Instance of Paris.

Historically, businesses (like Franklin Roosevelt in 1932) focused narrowly on geography. Then, what was said or done in Pittsburgh needed to be evaluated only with respect to Pittsburgh-based audiences. Today, what is done in Pittsburgh may matter in Paris, Prague and Phnom Penh and vice versa.

Managing contradictory commands

Some laws are easier to reconcile: e.g. hours of work. Others are more problematic.

Life gets sticky when what country A demands is illegal in country B. Consider the historic problems of doing business in South Africa in the days of apartheid. Consider the current limits in Saudi Arabia where law and culture make it difficult for women to be effective but laws elsewhere require giving equal opportunity to women for promotion to country manager there.

Those dilemmas are familiar, especially for U.S.-based companies who assign U.S. citizens to managerial roles overseas. Those businesses have learned to make such assignments under the constraints of statutory obligations to avoid discrimination that cannot be excused based on customer preference or local customs elsewhere.

Today, the world is shifting to more noble goals including the need for gender diversity or equality. There too, however, is risk because noble goals do not excuse reverse discrimination under U.S. law. For the moment, those noble mandates focus on the board of directors.

Norway took the lead in implementing gender quotas for directors. Other countries have followed suit, including Belgium, France, Italy, and Malaysia. And just this past September, California’s governor signed a bill requiring publicly traded corporations headquartered in California to have at least one woman on their board of directors by 2019.

For outside directors, there is likely no issue of reverse employment discrimination against men. But, as businesses look to create a pool of women in management with the credentials to fill seats on the board as inside directors, there comes a potential problem when the policies for employment quotas go global.

Clearly, U.S. law does not concern itself with what a Belgian company does with respect to Belgian employees in Belgium. When it is a global business and seeks to implement policies to develop women into vice-presidents in all of its operations (including in the U.S.), then the risk of reverse discrimination becomes large.

Even where the policies and plans are limited to outside the U.S. or other countries that forbid reverse discrimination, there is also a re-emergence of the visibility issue. A corporate announcement from Brussels (even if not implemented in Boston) can be used by a male in Boston passed over for promotion as evidence of a “corporate culture” of animus toward men.

* * *

Guiding global businesses on employment law is indeed challenging. It is a challenge that engages not only you. Richard Branson (who has some small experience in running a global business) has a website devoted to his favourite quotes on challenge. I like this one best from Helen Keller: “Life is either a daring adventure or nothing at all.”
Like you, dear reader, the contributors to this volume are up for the challenges of handling employment law issues for businesses that transcend the borders of a single country. Their insights (and my quick preview of trends) are designed to assist you and your organisation in meeting those challenges. Good luck and thanks for reading our work!
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Michael J. Sheehan is the global head of McDermott Will & Emery’s Employment Practice Group. He concentrates his practice on employment litigation with a focus on prosecuting and defending unfair competition litigation involving large-scale raiding, inevitable disclosure of trade secrets, breach of fiduciary duty and non-compete agreements. A nationally recognised litigator, Michael has extensive courtroom experience, having tried dozens of cases to verdict across the United States. He has acted as lead counsel and successfully defended private and public companies against age, gender, race, retaliation, sexual harassment and trade secret/raiding cases. He has also litigated numerous large-scale wage and hour class actions in state and federal court.
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Emma T. Chen focuses her practice on general litigation matters. Emma has specific experience in employment litigation, including defending companies against claims under the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and other related federal and state statutes. She has prepared fact and expert witnesses for depositions and trial, taken and defended depositions, drafted pleadings, dispositive motions and post-hearing briefs, and managed large-scale document productions. Emma also has experience in all areas of commercial litigation and dispute resolution including contract disputes, international arbitration and international contract actions.
While in law school, Emma served as executive editor of the Journal of Business and Employment Law and as associate editor of the Journal of Labor and Employment Law.
General labour market and litigation trends

Social/legislative/economic developments which have impacted on the labour market/legislation

On-demand workforce

The Victorian Government is undertaking an inquiry into the on-demand workforce. The inquiry will investigate the extent of the on-demand sector and the status of people working with or for online companies or platforms in Victoria. The establishment of the inquiry follows continued unease about the wages and conditions being offered to workers in the on-demand and gig economy.

The inquiry will consider allegations and determinations concerning contracting arrangements and whether these arrangements are being used to avoid workplace laws and other statutory obligations in Victoria.

Modern slavery

The concept of “modern slavery” has impacted on the legislative landscape and modern slavery legislation is under consideration.

While over 50 prosecutions have occurred in relation to “modern slavery” under the Criminal Code Act 1995 (Cth), the liability and accountability of large entities within Australia remains limited due to the lack of legislation requiring entities to conduct due diligence with respect to preventing modern slavery. The result is that instances of modern slavery within organisations’ supply chains, operations and structures may fail to be recognised or no preventative action is taken.

In 2018, the House of Representatives passed the Modern Slavery Bill 2018 (Cth), which is currently before the Senate.

Domestic violence

The prevalence of discussions around domestic violence has led the Fair Work Commission to issue a decision in 2018 that recognised that family and domestic violence “is an issue that impacts on workplaces and...requires specific action”.

The FWC formed the view that all employees should have access to unpaid family and domestic violence leave. Five days’ unpaid leave per annum to all employees (including casuals) experiencing family and domestic violence is now provided for in modern awards. It was also decided that such leave will be available in the event that an employee needs to do something to deal with the impact of the family and domestic violence and it is impractical for them to attend to that matter outside their ordinary hours of work.
Trends in volume and types of employment claims over the last year

In 2017–18, unfair dismissal applications were the most common type of employment claim, making up approximately 43 per cent of total applications. Applications for general protections involving dismissal made up 13 per cent of total applications (this is an increase of 10 per cent).

A majority of unfair dismissal applications were finalised without a formal hearing with 18 per cent either resolved or discontinued before conciliation. Sixty-two per cent were resolved at conciliation and 14 per cent were resolved after conciliation but before a formal hearing. Of the total unfair dismissal applications only 1 per cent were resolved by a decision of a Member that the dismissal was harsh, unjust or unreasonable.

Fifty-eight per cent of general protections matters were resolved at or after a conciliation conference. The number of matters finalised by a FWC Member issuing a certificate stating that all reasonable attempts to resolve the dispute had been, or were likely to be, unsuccessful increased to 27 per cent of cases.

A total of 700 applications for an order to stop bullying were finalised. The majority (92 per cent) of applications were finalised without a decision or order. This is a result of the high rates of settlement and withdrawal of applications, including agreements that are made in the workplace without a formal resolution.

The role of mediation in employment disputes

Parties can agree to resolve a dispute that has arisen between them using a range of dispute resolution processes. Whether the parties agree to be bound by the outcome of that process depends on the nature of the agreement reached between the parties and the wording of any applicable dispute resolution clause in an enterprise agreement or employment contract.

In the Fair Work Commission (the “FWC”), conciliation (a form of mediation) is made available on a voluntary basis, although most parties avail themselves of this process. If the parties are unable to resolve the matter or a jurisdictional objection is raised, the matter goes before the FWC for hearing. “General protections” claims under the FW Act that involve a dismissal must first be dealt with by conciliation, and if a resolution cannot be reached the FWC must issue a certificate to this effect. Parties may then apply for consent arbitration, or if the respondent is unwilling, the applicant may bring a claim in either the Federal Court or the Federal Circuit Court.

Where there is no dismissal, but a general protections breach is alleged, the applicant may bring the matter directly to the Federal Court or Federal Circuit Court if the respondent refuses to participate in a private conference with the FWC.

Issues surrounding mobility of the workforce

Apart from the requirements that must be satisfied regarding working visas where employees within an organisation move between jurisdictions, there are a range of factors that an employer needs to consider in relation to the mobility of its workforce. These include: whether the contract of employment permits relocations of employees that involve a substantial distance from the original place of work or whether this can only be done with employee agreement; the terms on which any move might occur; the effect on accrual of benefits; and other related matters such as taxation consequences.

Redundancies and business transfer of employees and reorganisations

Relevant test for business transfer legislation to apply

The FW Act contains a number of provisions that look to achieve a balance between the
protection of employees’ terms and conditions and the interests of employers in running their enterprises efficiently if there is a transfer of business.

Certain business transfers operate in such a way that an employee’s period of service with their first employer counts as service with the new employer, and the employee retains his or her entitlements, such as accrued annual leave (unless paid out on termination of employment with the first employer).

For these protections to apply, the transferring employee must commence work within three months of the termination from the old employer, the work performed must be substantially the same, and either the old employer and the new employer are associated entities, or there is an outsourcing or insourcing of business between them, or there is an arrangement concerning the ownership of the assets to which the transferring work relates.

**Process for electing employee representatives**

While there is no legislation establishing a framework for the operation of a works council in Australia, a similar structure does operate in some Australian workplaces in the form of consultative committees. These committees are often limited to dealing with work, health and safety in the workplace, or overseeing the implementation of provisions of an enterprise agreement, where the agreement sets up such a committee.

Employees are also entitled to belong to a union that may act on their behalf. Unions are able to represent their members in bargaining over enterprise agreements and can become a party to such agreements. Trade unions can initiate proceedings with respect to breaches of modern awards, and trade unions can also initiate proceedings with respect to breaches of the NES, national minimum wage orders and enterprise agreements.

**Consultation**

Consultation obligations apply under industrial instruments (for example, a modern award or enterprise agreement) when a decision has been made by an employer to introduce a major change or proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable. Consultation requirements include:

- notifying the employees who may be affected by the proposed changes;
- providing the employees with information about these changes and their expected effects;
- discussing steps taken to avoid and minimise negative effects on the employees; and
- considering employees’ ideas or suggestions about the changes.

**Business protection and restrictive covenants**

**Duties of confidentiality (express and implied) and good faith**

Employees owe a common law duty to their employers that prevents them from misusing information. This duty has been codified in the *Corporations Act 2001* (Cth), which specifically prohibits a director, officer or employee (or a past director, officer or employee) from improperly using information to gain an advantage for themselves or someone else at the expense of the corporation they serve (or served). The circumstances in which a breach of the duty of confidentiality by ex-employees through the misuse of information is likely to be an issue is where the employer has made some effort to guard against its free circulation. Employers commonly protect themselves against misuse of information by ex-employees by including post-employment obligations in the contract of employment. This enables the employer to sue for breach of contract if an employee were to compromise trade secrets or confidential information. In some circumstances, an employer may rely on these contractual
terms to seek an injunction to prevent a potential or further breach of confidentiality occurring. The obligation to act in good faith and with fidelity is also implied in all employment contracts.

The courts recognise the protection of trade secrets and other confidential business information as a legitimate business interest and will uphold post-employment restraints where an employer can demonstrate the reasonableness of the restraint.

Restrictive covenants

Restrictive covenants are generally regarded as unenforceable if they are contrary to public policy. They are enforceable where an employer can show that it has a legitimate business interest to protect, and that the geographic reach and time frame of the restraint is reasonable. The interest may include preventing the employee from pursuing or dealing with clients, customers or suppliers they had contact with during their employment but can also extend to prohibiting a former employee from working for a competitor or establishing their own business.

Restrainment clauses are often read down by courts. Typically, the geographic scope and time frame of clauses that would otherwise be unenforceable are “read down” to what is regarded as a reasonable restraint.

Discrimination protection

Protected characteristics

There is a range of federal, state, and territory legislation prohibiting discrimination and harassment in employment in Australia. There is no unified equality act operating at the federal level in Australia, with attributes such as sex, race, age and disability each covered by a separate piece of legislation. State and territory anti-discrimination legislation tends to have a more unified coverage of numerous attributes in the one piece of legislation, but each varies as to the attributes covered, the conduct proscribed and the context in which they operate. Specific prohibitions on sexual harassment and disability harassment operate under federal anti-discrimination legislation, as well as under some state and territory anti-discrimination legislation.

While the attributes covered in each legislative scheme vary, common protected attributes include race, colour, descent, national or ethnic origin, sex, sexual orientation, gender identity, intersex status, age, disability, marital or domestic status, family or carer’s responsibilities, pregnancy, religion, political opinion and social origin.

Different types of discrimination

In Australia, discrimination can take two forms – direct discrimination and indirect discrimination.

While direct discrimination is defined somewhat differently under various pieces of legislation, the common element is a focus on affording a complainant less favourable or unfavourable treatment on the basis of a prohibited ground.

The focus of indirect discrimination is on the impact of requirements, conditions or practices. Even though a requirement, condition or practice might be neutral on its face and applied consistently, it may have the effect of disadvantaging people with a particular attribute and may be considered to be unreasonable.

Burden of proof

As a general rule, Australian anti-discrimination legislation places the onus on the
complainant to show that the employer treated them less favourably because of a protected attribute, although some statutes take a slightly different approach.

In “general protections” claims, the onus is on the employer rather than the employee to establish why a person was adversely affected in the workplace. If this onus is not discharged, it is assumed that the action was taken for a prohibited purpose.

Defences to discrimination

In federal state, and territory legislation there are specific exemptions and exceptions that are tailored for each protected attribute. In the employment context, common exceptions are genuine occupational qualifications, inherent requirements of the job and unjustifiable hardship, acts done under statutory authority, and employment in a private household or private educational institution. In addition, it is possible under most statutory schemes to obtain a temporary exemption.

Compensation and other remedies

The remedies that are available under anti-discrimination legislation include declarations, compensatory damages, injunctions, variations of contract, apologies and retractions.

In a “general protections” claim, the FWC may order reinstatement, payment of compensation or lost remuneration, and continuity of service.

Equal pay: what is covered by an equal pay claim

The FW Act makes provision for applications to the FWC to be made for an equal remuneration order, although few such orders have been made. The application can be made by an affected employee, a union which is entitled to represent an affected employee or the Sex Discrimination Commissioner.

The FWC has the power to make an equal remuneration order requiring that certain employees be provided equal remuneration for work of equal or comparable value. Once an equal remuneration order has been made, it will prevail over a modern award, enterprise agreement, a Fair Work Commission order or any other industrial instrument if it is more beneficial than these instruments. An employer that contravenes an equal remuneration order can be liable for a penalty.

Anti-discrimination legislation also makes it unlawful for an employer to discriminate in regard to the terms and conditions of employment provided to employees, which includes pay.

Protection against dismissal

Potentially fair reasons for dismissal

An employer may dismiss an employee for any reason provided the minimum period of notice set out in the FW Act is provided. However, the dismissal is open to challenge under unfair dismissal legislation if the termination cannot be substantively justified on the basis of a “valid reason” such as unsatisfactory performance, misconduct, or the operational requirements of the business, or was executed in a procedurally unjust manner.

Serious misconduct can warrant summary dismissal without notice or payment in lieu, such as in the case of dishonesty, fraud or other serious conduct that impacts significantly on the employer’s interests, operations or reputation so as to amount to a repudiatory breach of contract. Summary termination in such circumstances arises as a matter of common law, although many employment contracts also specify the circumstances where summary dismissal may arise. The FW Act also sets out examples of conduct that may constitute serious misconduct, such as being intoxicated at work or refusing to follow lawful and reasonable instructions.
Where an employee’s employment is being terminated on the ground of redundancy, and the employee is eligible to make an unfair dismissal claim, the redundancy must be “genuine”. For a redundancy to be considered genuine, an employer must follow the consultation requirements and have considered reasonable redeployment opportunities.

Circumstances in which dismissals can be automatically unfair

A dismissal will be unfair where it is “harsh, unjust or unreasonable”. To determine whether the dismissal was “harsh, unjust or unreasonable”, the FWC will consider:

- whether there was a valid reason for the dismissal related to the employee’s capacity or conduct;
- whether the employee was notified of that reason and given an opportunity to respond;
- if the employer did not allow the employee to have a support person present at any discussions about the dismissal, was that unreasonable;
- whether the employee had been previously warned that their performance was unsatisfactory;
- if the size of the business, or lack of dedicated human resource management specialists or expertise impacted on the procedures that the employer followed when they dismissed the employee; and
- any other matters that the FWC considers relevant.

In addition to the protections offered by the unfair dismissal regime, employees are protected under the FW Act from discriminatory dismissals, those that are targeted at their union activities or the assertion of workplace rights, or where the dismissal is because of a temporary absence from work.

Process to be followed when dismissing

To end the employment, an employer must give the employee written notice or make payment in lieu of notice. Some employment policies, enterprise agreements or contractual terms may make provision for a longer notice period. Minimum statutory notice periods apply under the FW Act, based on length of service. Serious misconduct can warrant summary dismissal without notice or payment.

Procedural factors are relevant in the process, including whether the employee was notified of the reason for termination and given an opportunity to respond, and in the case of unsatisfactory performance, whether the employee was made aware of performance concerns and given an opportunity to improve.

In the event of redundancy, severance pay is required in addition to the notice period. The FW Act sets out a scale of severance pay based on years of service as the minimum entitlement for all employees. For a redundancy to be considered genuine, an employer must follow the consultation requirements and have considered reasonable redeployment opportunities.

Where a decision to terminate on the basis of economic, technological or structural factors relating to the employing organisation will affect 15 or more employees, the employer must notify the relevant trade union representatives and give notice to the government employment agency.

Compensation and other remedies

Remedies vary in accordance with the particular claim, although employees often seek reinstatement or compensation in claims that are commenced in the FWC. An income threshold applies to some FWC proceedings, as well as a cap on compensation.
Employee privacy

Data protection rights for employees and obligations for employers

In Australia, the Privacy Act 1988 (Cth) (“Privacy Act”) deals with the collection, use and disclosure of personal information. Under the Privacy Act there is an “employee records” exemption. Under this exemption, employers are relieved from meeting the requirements of the Act regarding the collection, use or disclosure of information of employees that pertains to the employment relationship. The exemption does not apply to records relating to unsuccessful job applicants and contractors.

Monitoring/surveillance in the workplace (e.g. CCTV, monitoring email/internet use and telephone calls)

Surveillance in the workplace, including computer usage or by way of listening, tracking and optical devices, differs amongst the various states and territories. New South Wales and the Australian Capital Territory have the most robust schemes, which prohibit workplace surveillance unless there is compliance with prescribed notice requirements. The extent to which computer surveillance in the workplace is regulated depends, in other States and Territories, on whether a computer can fall within the definition of a “listening device” and, in the case of Victoria and Western Australia, whether it falls within the definition of an “optical surveillance device”. Tracking surveillance is regulated in New South Wales, the Australian Capital Territory, the Northern Territory, Victoria and Western Australia.

Background checks

Background checks are generally permissible in the Australian employment law context to the extent that such checks are necessary to ascertain a candidate’s ability to fulfil the role. Criminal records and working with children checks are generally mandated for roles that involve working with vulnerable individuals. Other justifiable circumstances include checks regarding honesty and integrity; for example where an employer is seeking to engage an individual in a role that involves responsibility for significant financial transactions.

If a background check is carried out and does not carry some form of justification, there is a risk that it will be considered discriminatory or an infringement of the individual’s privacy.

Drug testing and other forms of testing in the workplace

In Australia, it is common for employers to have a designated drug and alcohol policy or a general work health and safety policy that deals with drug and alcohol testing at work. Alternatively, the terms of an enterprise agreement may dictate the way drug and alcohol testing can be implemented in the workplace. Where the health and safety concerns of a work environment warrant a strict testing regime, an employer may be justified in refusing to hire a prospective employee, or terminating the employment of an employee, who will not submit to a test.

Other recent developments in the field of employment and labour law

One recent development is the connection between transparency of pay and the gender pay gap. In Australia, more than half of all employers commonly include pay secrecy clauses in their employment contracts. The concept of pay secrecy is linked to the gender pay gap. The gender pay gap currently sits at around 14.6% based on average weekly ordinary full-time earnings. This gap is largest when pay levels are secret, but almost non-existent when pay is transparent (for example, where an employer pays the minimum wage rate in accordance with the terms of an award).

There is a push by the Labour opposition to make Australian companies with more than 1,000 employees publicly report on the gender pay gap and to prohibit pay secrecy clauses.
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Belgium

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General labour market and litigation trends

Protection against psychosocial risks at work

There is a general tendency towards enhanced protection of employees’ rights in connection with psychosocial risks at work (including (sexual) harassment, violence, etc.). For instance, as of April 9, 2018, companies should consider carefully, and at regular intervals, their employees’ ability to disconnect after working hours. Deliberation should take place in the committee for prevention and protection at work. At least one Belgian employer has decided to offer its employees the right to be offline outside working hours. The IT system of the employer concerned no longer allows e-mails to be received after 6 PM (e-mails can be sent but will not appear in the recipient’s mailbox until the next working day).

In general, employers need to adopt a policy to prevent and deal with so-called “psychosocial risks at work”, including violence, bullying and sexual harassment (cf. the Act of August 4, 1996 regarding Employees’ Well-being at Work, and executive Royal Decrees, and the Codex regarding Employees’ Well-being at Work of April 28, 2017).

Prevention

First, an employer needs to proceed with a general risk analysis to identify situations which may result in psychosocial risks at work. In practice, the internal or external prevention advisor for psychosocial risks helps with this risk analysis. A specific risk analysis with respect to one particular employment situation may be required as well (if management or at least ⅓ of the employees’ representatives in the committee for prevention and protection at work asks for it). Based on this risk analysis, the employer should take the necessary individual and collective prevention measures.

All the above should be part of the company’s global prevention plan, which is valid for five years. Each year, the company also needs to draft an annual action plan with concrete objectives and measures for the year concerned.

In practice, companies ask their external prevention services to visit the offices/work places and to work on a draft global prevention plan and annual action plan. These services have template check lists, reports, action plans, etc.

Conflicts/complaints

The employer should mandatorily include in the Work Regulations a procedure the employees can follow in the event they consider themselves to be a victim of violence, bullying, etc. in the workplace (psychosocial risks).

Besides the classic complaints (including with the police, public prosecutor, etc.), employees can file a request for an informal or formal psychosocial intervention. Through the informal
psychosocial intervention, the employee informally tries to settle the case (informal discussions with the employer, involvement of a trusted person (if any), reconciliation, etc.) while being assisted by the prevention advisor for psychosocial risks or the trusted person (if present within the company). Through the formal psychosocial intervention, the employer will be actually requested, with the assistance of the prevention advisor for psychosocial aspects, and possibly in consultation with the committee for prevention and protection at work, to take the appropriate measures.

To conclude, it is important to note that employees that have filed a request for a formal psychosocial intervention (this does not apply to informal intervention requests), a complaint for violence, bullying or sexual harassment or that have initiated legal proceedings in this context are protected against dismissal and retaliatory measures in general.

CBA 109

Since April 1, 2014, employees have the right to ask for the reasons for a termination of employment to be provided in writing. Also, employees who are of the opinion that the termination reasons are “obviously unreasonable” may claim an indemnity. CBA 109 defines an “obviously unreasonable termination” as “the termination of employment of an employee having an employment agreement for an indefinite duration, where that termination is based on reasons not related to the employee’s capability or behavior, or where it cannot be considered legitimate bearing in mind the company’s operational needs, and where a normal and reasonable employer would not have decided to terminate the employment”. In the event that a labour court considers the termination to have been “obviously unreasonable”, the employer would have to pay an indemnity of between three and 17 weeks’ remuneration (depending on the court’s opinion as to the degree of the unreasonableness).

Before 2014, only blue collar workers were able to file a claim for “unjustified termination”. White collar employees were obliged to invoke the general civil law principles to obtain any indemnity for unreasonable termination, which resulted in few proceedings. We now see that employees, both blue collar and white collar, are tending to more easily initiate legal proceedings to obtain an indemnity for unreasonable termination (claim based on CBA 109). As only around three years of case law is now available, it is too soon to jump to conclusions. However, in general, labour courts do leave a margin of appreciation for employers in termination decisions. The majority of decisions are still in favour of the employer (in cases where there has been no obviously unreasonable termination).

**Redundancies, business transfers and reorganisations**

**Business transfers**

Under Belgian law, employees confronted with a business transfer within the meaning of CBA 32-*bis* (which implemented EU Regulation 2001/23/EG of 12 March 2001) continue to benefit from all their individual and collective rights. There is an automatic transfer of the employment contract from the current employer to the new employer. There are no recent changes in the law or the leading case law.

**Reorganisations**

There are no important changes in the applicable laws. With respect to collective dismissals, the following rules apply:

- Procedural rules (“Renault legislation”). Once a company has the intention to proceed with a collective dismissal, the employees’ representatives should be informed and consulted well in advance of any actual decision. Certain public authorities should
also be informed. In a subsequent phase, although this is not a legal obligation, a “social plan” may be negotiated. In practice, it is unrealistic for a company to proceed with a collective dismissal without granting the dismissed employees some extra-legal indemnities or advantages via a social plan. Once the information and consultation phase has been closed and the company takes the decision to proceed with the collective dismissal, the actual dismissal of the employees can only take place after a 30- or 60-day waiting period (specific provisions may apply for protected workers and workers benefiting from pre-retirement).

• Rules regarding the collective dismissal indemnity due to employees affected by a collective dismissal. This indemnity, which aims to ease the consequences of collective dismissals, equals 50% of the difference between the net reference salary and the unemployment benefits. If the employees receive a closure indemnity (collective dismissal is often combined with the closure of the undertaking), the collective dismissal indemnity is not due.

• Rules on reconversion or outplacement. Any employer that considers proceeding with a collective dismissal will formally qualify as a “company in reorganisation” from the date of the announcement of the company’s intention to proceed with a collective dismissal until a maximum of two years following the date on which the collective dismissal decision is announced. This status will trigger the obligation to set up a specific structure (reconversion cell) composed of representatives of the employer, at least one trade union, the regional employment office and the sectoral education fund, if this exists.

All employees dismissed in the framework of the collective dismissal are obliged to register with the reconversion cell. This cell’s task is to help the employees that are dismissed (or who could be dismissed) to find a new job. It also supervises the performance of any reorganisation plan put in place by the employer, ensures compliance by the employees with their obligation to register with the employment cell, and ensures compliance by the employer with its outplacement and reclassification obligations.

The definition of a collective dismissal depends on the rules concerned. There are in fact three definitions.

For instance, with respect to the procedural rules, a collective dismissal is a dismissal not related to the employee, carried out during a 60-day period and affecting at least 10 employees in companies employing at least 20 and less than 100 workers, 10% of the workforce in companies employing at least 100 but less than 300 workers, and 30 workers in companies of 300 or more workers. With respect to the indemnity, the thresholds are stricter: a collective dismissal exists if there are at least six employment terminations in companies of between 20 and 59 employees. For companies of 60 employees or more, the 10% rule applies. Finally, with regard to the rules on reconversion or outplacement, there may already be an obligation to set up a reconversion cell if half of the employees are dismissed in companies employing a maximum of 11 employees.

In case of “closure of the undertaking”, the employer should comply with specific notice requirements. Under Belgian law, the legislation on the “closure of an undertaking” applies when the undertaking ceases its main activity. The closure date is the first day of the month following the month during which the total workforce was reduced by more than 75%.

The law imposes obligations on the employer concerning information to be supplied to employees and certain public authorities (although these are less strict than for a collective dismissal), and an obligation on the employer to pay a specific closing indemnity to the employees who are subject to the closure of the undertaking.
Business protection and restrictive covenants

Business protection

Article 17.3 of the Act on Employment Contracts protects trade secrets and other confidential business information. Employees are legally obliged not to disclose, either during the employment contract or after its termination, trade secrets and other confidential information acquired by the performance or during the performance of the employment contract. This article 17.3 has been updated to be in line with the new European Directive 2016/943 regarding trade secrets (Belgian law of July 30, 2016 regarding the protection of trade secrets). A trade secret is now explicitly defined as information which meets all of the following requirements: (i) it is secret in the sense that it is not, as a whole or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (ii) it has commercial value because it is secret; and (iii) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Pursuant to Article 2.2 of the Directive, the “trade secret holder” is defined as “any natural or legal person lawfully controlling a trade secret”. Generally, such control will be retained by the employer. However, the employer can only benefit from trade secret protection to the extent it can demonstrate it has taken reasonable steps to safeguard the secrecy of its know-how. One such step would undoubtedly be the establishment of a contractual framework that imposes a non-disclosure on employees as well as third parties.

Restrictive covenants

Under Belgian law, non-competition clauses can validly be entered into; however, not for all types of employees and subject to strict conditions.

In general, a non-competition clause can be defined as a clause by which the employee prohibits himself, after leaving the company, from performing similar activities, either by developing his own business or by joining an employer who is a competitor, that would enable him to harm the company that he has left by using, for himself or for a competitor, the particular know-how that he has acquired, in industrial or commercial matters.

The legal existence/validity/enforceability of such clause is subject to a number of legal conditions, protecting the employee.

There are three types of non-competition clauses under Belgian law:

• the “ordinary” non-competition clause;
• the “special” non-competition clause (“afwijkingsbeding” or “clause dérogatoire de non-concurrence”); and
• the non-competition clause for sales representatives. 2

1) Ordinary non-competition clause

In order to be valid, the ordinary non-competition clause must meet the following requirements:

• the clause is in writing;
• the employee’s annual salary exceeds €68,361 3 (2018 amount – this amount is modified each year 4) at the moment the employment agreement is terminated;
• the prohibition is restricted to “similar activities”. This concerns a “double similarity”: this means that the prohibition should aim at activities which are similar to those which were performed during the employment relationship and that these activities must be performed at a competing company. The non-competition clause can only protect knowledge of an industrial or commercial nature;
• the prohibition is territorially limited to places where the employee can actually compete with the employer, which may in no case extend outside the Belgian territory;
• the prohibition applies for up to 12 months after termination of the employment; and
• the clause provides for the payment of a specific non-competition indemnity, equal to at least 50% of the employee’s salary for a period equal to the non-competition period, unless the employer notifies the employee within 15 days after termination of the contract that he waives the clause’s application.

The ordinary non-competition clause does not take effect if employment is terminated by the employer:
• during the first six months of the employment agreement; or thereafter
• without serious cause (i.e. with notice or indemnity in lieu of notice).

In other words, the non-competition clause will only be effective (enforceable by the employer) if the employee resigns (with a notice period or with a payment in lieu of notice), is terminated for serious cause after the first six months of the employment agreement, or if the employment agreement is terminated by mutual consent.

2) Special non-competition clause

Under certain circumstances, a special non-competition clause can be inserted in employment agreements. The conditions for the “special” non-competition clause are less restrictive. However, it may only be used for certain categories of companies and for white collar employees (except sales representatives) with specific functions.

The companies concerned have to comply with one of the following conditions:
• companies with an international scope of activities or with significant economic, technical or financial interests in the international markets; or
• companies with an internal research and development division.

In those companies, the special non-competition clause may only be used for employees whose duties allow them, directly or indirectly, to obtain knowledge of practices specific to the company, the use of which outside the company could be harmful to the company.

If these conditions are met, it is possible to deviate from the conditions of the ordinary non-competition clause on the following points:
• the limitation to the national (Belgian) territory (the fields of operation of the company and the name of the countries to which the clause applies and in which the employee concerned is actually performing should be mentioned specifically);
• the maximum period of 12 months (without it being possible to be for an unlimited period; a duration of two or maximum three years seems reasonable); and
• contrary to the ordinary non-competition clause, the special non-competition clause may be applicable, in so far as this is foreseen in the clause, when the employment contract is terminated by the employer without serious cause after the first six months of the employment agreement. It can also be applicable if the contract is terminated during the first six months, in which case it will only have effect during a period equal to the duration of the activities performed during the first six months of the employment agreement.

The following conditions of the ordinary non-competition clause remain applicable with respect to the special non-competition clause:
• the clause is in writing;
• the employee’s annual salary exceeds €68,361; and
• the prohibition is restricted to similar activities (see above on “double similarity”).
• the prohibition provides for the payment of a specific non-competition indemnity, equal to at least 50% of the employee’s salary during the non-competition period (for example, if an obligation of non-competition has been imposed on an employee for two years, the minimum amount of the indemnity to be paid by the employer will not be lower than one year’s remuneration), unless the employer notifies the employee within 15 days after termination of the contract that he waives the clause’s application.

3) Non-competition clause for sales representatives

For the non-competition clause to be valid, the sales representative’s annual salary must exceed €34,180 (amount in effect in 2018). If the salary exceeds this limit, the non-competition clause is valid if (i) it is in writing, (ii) it relates to similar activities, (iii) it does not exceed 12 months, and (iv) it is limited to the region where the sales representative carries out his activities.

If the agreement provides for a fixed indemnity due in case of violation of the non-competition clause, this indemnity cannot exceed three months’ salary. The employer is entitled to claim a higher indemnity if he can demonstrate the presence and scope of the damages.

Contrary to the ordinary non-competition clause, the employer must not pay a specific non-competition indemnity upon termination of the employment. However, sales representatives are entitled to the so-called “clientele indemnity” (indemnity for loss of clientele) in addition to the notice period/indemnity in lieu of notice.

Regarding enforceability, the same rules as for the ordinary non-competition clause apply. This implies that the non-competition clause does not take effect if employment is terminated by the employer (i) during the first six months of the employment agreement, or thereafter (ii) without serious cause (i.e. with notice or indemnity in lieu of notice).

Discrimination protection

The following types of characteristics are protected by the Belgian Anti-Discrimination legislation (in particular the Law of 2007): age; sexual inclination; civil status; birth; fortune; religion; political conviction; language; actual or future health status; handicap; physical or genetic characteristics; social origin; sex; nationality; race; colour; origin; national or ethnical origin; and part-time employees (compared with full-time employees).

Since January 1, 2018, the Belgian social inspection services are authorised, under specific conditions (there should be a presumption of non-compliance), to make anonymous telephone calls in order to detect any non-compliance with anti-discrimination legislation.

When confronted with discrimination, an employee’s first option may be to file a cessation claim. The labour court is competent to order cessation of the discrimination.

In a procedure on the merits, if a labour court finds that a complaint regarding discrimination is well founded, it can order the employer to pay compensation. This compensation will be a fixed amount of six months’ salary, and the employee does not need to demonstrate the detail of the damage. The compensation is intended to cover the entirety of the damage suffered, including emotional distress. However, if an employee is not satisfied with this amount, he or she may try to demonstrate that the actual damage resulting from the discrimination was greater than six months’ salary. In such a case, the labour court may order the employer to pay an indemnity higher than six months’ salary, based on the employee’s evidence. In practice, employees do not often make use of this possibility.
Protection against dismissal

In general, one can distinguish between four types of protected employees:
• employees’ representatives in the works council and committee for prevention and protection at work (highest level of protection);
• trade union delegates;
• prevention advisers; and
• “thematic” protected employees (pregnant employees, employees benefiting from the time-credit regime (career interruption), employees on parental leave, employees having filed a claim for harassment, etc.).

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Notice entitlements

As a result of the so-called 2017 “Summer Agreement” of the Belgian federal government, the notice periods to be respected in case of unilateral termination of the employment agreement have been modified (for the first six months of employment).

Under Belgian law, a permanent employment contract can in principle be terminated by the employer at any time provided proper notice is given (notice period to be served) or an indemnity in lieu of notice is paid (termination with immediate effect). The currently applicable notice periods are as follows:

1. Termination of the employment contract by the employer:
   • During the first five years of employment:

<table>
<thead>
<tr>
<th>Period of Employment</th>
<th>Notice period (in weeks)</th>
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<tbody>
<tr>
<td>Less than three months</td>
<td>1</td>
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<tr>
<td>At least three months but less than four months</td>
<td>3</td>
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<tr>
<td>At least four months but less than five months</td>
<td>4</td>
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<td>At least five months but less than six months</td>
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<td>11</td>
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<td>At least two years but less than three years</td>
<td>12</td>
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<tr>
<td>At least three years but less than four years</td>
<td>13</td>
</tr>
<tr>
<td>At least four years but less than five years</td>
<td>15</td>
</tr>
</tbody>
</table>

   • From five years of employment, the notice period is increased by three weeks for every additional year worked.
   • From 20 years of employment, the notice period is increased by two weeks for every additional year worked.
   • From 21 years of employment, the notice period is increased by one week for every additional year worked.

2. Termination of the employment contract by the employee:

<table>
<thead>
<tr>
<th>Period of Employment</th>
<th>Notice period (in weeks)</th>
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</thead>
<tbody>
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<td>At least three months but less than six months</td>
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<td>At least six months but less than 12 months</td>
<td>3</td>
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<tr>
<td>At least 12 months but less than 18 months</td>
<td>4</td>
</tr>
</tbody>
</table>
Period of Employment | Notice period (in weeks)  
---|---  
At least 18 months but less than 24 months | 5  
At least two years but less than four years | 6  
At least four years but less than five years | 7  
At least five years but less than six years | 9  
At least six years but less than seven years | 10  
At least seven years but less than eight years | 12  
As of eight years onwards | 13 (maximum notice period)

Outplacement

“Outplacement” refers to a package of services and advice that is intended to allow an ex-employee to find new work possibilities as soon and as easily as possible, either with a new employer, or as a self-employed person. In case of termination of the employment agreement by the employer, certain employees are entitled to these outplacement services, which are provided by a specialised outplacement agency but paid for (partially) by the employer.

Employers are obliged to offer outplacement services to all employees who are entitled to a notice period of at least 30 weeks (or a corresponding indemnity in lieu of notice), and to employees aged at least 45. Four weeks of the employee’s indemnity in lieu of notice is used to pay for the outplacement services. This latter obligation to deduct four weeks of the indemnity in lieu of notice to cover the cost of outplacement services has been removed for situations where the health of the dismissed employee concerned prevents him/her from benefiting from outplacement.

Working time

There is a legal limitation in Belgium on the number of hours an employee may work; in principle, an employee may not be at the disposal of his or her employer for more than nine hours a day or 38 hours a week. There are, however, several deviating rules and possibilities to increase an employee’s work roster (without necessarily being obliged to pay overtime payment). The absolute maximum (and strict rules and conditions apply), nevertheless, is 11 hours a day and 50 hours a week.

Often, companies apply the so-called “flexible work regime”, which allows employers to vary work rosters according to the activities and needs of the company. Under this system, employers can introduce deviating work rosters by which working time can be increased or reduced by a maximum of two hours per day (with a total maximum duration of nine working hours per day) and a maximum of five hours per week (with a total maximum of 45 working hours per week). There has to be an alternation between the normal work rosters and the deviating work rosters (with durations both above and below the normal work roster), so that the normal working time is reached by the end of the year.

In general, an employee working longer than the statutory working hours is entitled to time off in lieu and to overtime pay, provided the extra hours were requested by the employer (the overtime regulations are stricter for employees under the age of 18).

Overtime pay is 50% above the normal rate of compensation, and 100% above the normal rate if the overtime is carried out on a Sunday or a public holiday.

Also, the new Law on Workable and Flexible Work of March 15, 2017 has introduced the possibility for employees to volunteer for overtime work. Via a written agreement (which is valid for six months, but is renewable), the employee informs the employer that, at the time overtime work should be performed in the company, he/she is a candidate to do so. The employee can use up to 100 hours per year in the context of this voluntary overtime work.
Overtime payment is due (the *ratio legis* is to offer employees the possibility to increase their salary), but compensatory time off is not.

As a final note, the rules concerning working hours and overtime pay do not apply to certain categories of employees (for example, sales representatives and homeworkers). Similarly, they apply only partially to employees who are in a managerial role within the company, or who hold a position of trust.

**Holidays**

**Annual leave**

In Belgium, the right to annual vacation is calculated according to the work done by the employee during the calendar year (the so-called “service year”) that immediately precedes the year during which the holidays are taken (the “holiday year”). The minimum annual vacation is 20 working days based on a five-day working week, provided that the employee has worked the entire service year subject to the Belgian social security regime (including actual work and periods of accepted absence such as holidays, sick leave, etc.). Unless the employee requests otherwise, a continuous period of two weeks’ vacation must be offered to the employee between 1 May and 31 October.

In addition, employees are entitled to 10 official public holidays.

**Maternity leave**

Pregnant employees are entitled to 15 weeks’ maternity leave, which consists of two periods: pre-natal leave of six weeks (of which at least one week should be taken before the estimated date of delivery); and post-natal leave of nine weeks.

**Adoption leave**

Belgian law currently entitles employees to take six weeks of adoption leave if the child is less than three years old, and four weeks if the child is between age three and age eight (both leave periods are doubled in case of a physically or mentally disabled child).

As of January 1, 2019, all employees will be entitled to six weeks of adoption leave, irrespective of the minor child’s age. This number applies to both parents. Moreover, the new law provides for “additional” weeks of adoption leave (one week in 2019, two weeks at the latest by 2021, three weeks at the latest by 2023, four weeks at the latest by 2025, to end with five additional weeks by 2027 at the latest. The additional weeks can be taken by one adoptive parent or can be split between both parents (e.g., in 2027: six weeks for each parent + five weeks for one parent, to be divided between both parents).

**Sick leave**

Under the Act on Employment Contracts, employees have a right to sick leave and sick pay. The employer is obliged to pay both white collar and blue collar employees 30 days’ “guaranteed” salary in the event of sickness. However, only white collar employees (with an employment agreement of indefinite duration or of a fixed duration of at least three months) are entitled to be paid 100% of their salary by the employer. For blue collar employees (and white collar employees with an employment agreement of a fixed duration of less than three months), the employer is only obliged to pay 100% of the salary during the first seven days of the sick leave. From the eighth day, this percentage is reduced. If the period of sick leave continues for longer than 30 days, the salary will be paid by the mutual insurance company (“mutuelle”), and is calculated on the basis of the duration of the sick leave.

**Other types of leave**

Certain family/private events also afford employees the right to paid leave of absence. They
may, for example, have paid leave in order to comply with civil obligations (e.g., marriage, appearance in court). The duration of the leave will depend on the reason behind it.

In addition, employees have the right to take unpaid leave for certain unforeseeable events that require urgent and immediate action. To qualify for this type of leave, the emergency must render the performance of the employment contract impossible (for example, if there is an accident involving the employee’s cohabitee, or fire damage to the employee’s home). The maximum duration for emergency leave is 10 working days per calendar year. This leave is unpaid, unless otherwise agreed between the parties.

Subject to specific conditions regarding seniority and the working regime, parents are entitled to take “child care leave” by suspending their employment contract or by reducing their performance by 50% or 20%. During child care leave, the employee does not receive a salary, but instead receives an indemnity paid by the Unemployment Agency.

A so-called “time credit regime” or career interruption regime still exists in Belgium, although the legislator is reducing this regime more and more. This system allows employees – subject to several conditions regarding working regime (full-time or part-time), seniority, etc. – to take a career break by either suspending the employment agreement or reducing the working hours (by 50% or 20%). During this period of time credit, the employee will receive an indemnity from the Unemployment Agency. Following 2017 legislation, employees should always have a reason, listed by law, for the career interruption; while it was previously possible to take a one-year break to take a trip around the world, for instance, employees can now only benefit from the time credit regime to take care of their children, to take care of a family member who has a serious illness, to study, etc.

**Whistleblowing**

Under Belgian law, there is no specific statutory protection for employees in the private sector who complain about employer wrongdoing, and no requirements regarding any anonymous complaint procedure. Hence, whistleblowers are not protected as such against termination of contract or other punitive measures. However, the termination of their contract must not be obviously unreasonable, discriminatory or abusive in any other way.

**Worker consultation, trade union and industrial action**

The establishment of a works council is obligatory as soon as the company (technical business unit) employs usually and on average 100 employees. The establishment of a committee for prevention and protection at work is obligatory as soon as the company (technical business unit) employs usually and on average 50 employees. The rules concerned are laid down in the Work Organisation Act (20 September 1948) and the Act regarding the Workers’ Well-Being (4 August 1996).

Every four years, social elections take place in the private sector to elect the employees’ representatives in the works council and committee for prevention and protection at work. The next social elections will in principle take place in May 2020. The specific dates on which employers should organise social elections have not yet been scheduled.

In addition, most major companies also have a trade union delegation (National CBA No. 5 and sectoral rules). A trade union delegation is installed upon the request of one or more employees’ organisations, provided that certain conditions fixed by CBA No. 5 and at sector level are met.

The responsibilities of the works council relate to financial, economic and social matters, while the tasks of the committee for prevention and protection at work relate to health and
safety in the workplace. Both deliberative bodies have information, consultation or prior approval (veto) rights with regard to their respective responsibilities. The works council has the right of prior approval with respect to, for instance, the modification of the work regulations, the planning of educational leave, the planning of time credit regimes (career interruption), etc.

The trade union delegation’s main competences and powers relate to the employer’s compliance with labour law in general, collective and individual agreements and the work regulations, assisting employees in the context of collective or individual conflicts or complaints, and negotiating company CBAs (it being understood that only representatives of one of the three official Belgian trade unions are entitled to sign a company CBA (the signature of a trade union delegate is not valid)).

If there is no committee for prevention and protection at work active within a company, the trade union delegation is charged with the duties usually discharged by the committee for prevention and protection at work regarding well-being at work. In such a case, the delegates are protected against dismissal as if they were representatives on the committee for prevention and protection at work. If there is no committee for prevention and protection at work or works council active within a company, certain competences usually ascribed to those bodies will be assigned to the trade union delegation.

Employees’ representatives within the committee for prevention and protection at work or the works council, as well as trade union delegates, are protected against dismissal.

**Employee privacy**

In 2018, employees’ privacy rights have of course taken a big step forward with the entry into force of the GDPR (General Data Protection Regulation (EU) 2016/679). The GDPR is directly applicable in all Member States. Belgium has adopted its own GDPR Act (the law of 30 July 2018 on protection of natural persons with regard to the processing of personal data). This entered into force on September 5, 2018.

An employee’s right to privacy was already recognised in article 8,1° of the European Convention of Human Rights and in article 22 of the Belgian Constitution. The set of rules laid down in the GDPR now assures this protection.

Since May 25, 2018, (i) employers must make sure they comply with the new data protection rules in their management of human resources, personnel and salary administration, and (ii) employers must also see that their employees comply with data protection law when processing third parties’ or colleagues’ personal data in the framework of their functions. Processing of employees’ or third parties’ personal data must be lawful, fair and transparent. In addition, the processing must comply with the principles of purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality. The employer is accountable for the respect of those principles and must be able to demonstrate compliance.

The condition of lawfulness of the processing is key under the GDPR. It means that the employer can only process personal data if, and to the extent that, at least one of the following applies:

- the employee has given consent to the processing (N.B.: in the framework of an employee-employer relationship, the question of whether or not an employee’s consent can be the legal basis for the processing has been raised many times: because of the employee’s subordinate position compared to the employer, it could be argued that he/she has not freely given consent. This issue has not yet been settled and so there is still uncertainty for the time being);
• processing is necessary for the performance of the employment contract to which the employee is party or in order to take steps at the request of the employee prior to entering into an employment contract;
• processing is necessary for compliance with a legal obligation to which the employer is subject;
• processing is necessary in order to protect the vital interests of the employee or of another natural person;
• processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the employer; and
• processing is necessary for the purposes of the legitimate interests pursued by the employer or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the employee which require protection of personal data.

The processing of sensitive data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, as well as data concerning sex life, concerning health and judicial data, is in principle prohibited. However, the employer can invoke a few exceptions; for instance, if the processing is necessary in order to respect labour law or social security law, or with respect to healthcare at work or health controls, or for the assessment of the employee’s capacity to work, in so far as such data is processed by or under the responsibility of a health professional subject to professional secrecy.

A record of processing activities must be created by the employer. This obligation replaces the former obligation to report to the Belgian Privacy Commission. The record must show an overview of the processing activities carried out within the employer’s company (so not only regarding employees, but regarding all data flows).

The GDPR also strongly reinforces employees’ rights to information and transparency. In order to comply with this extended information and transparency obligation, in practice, employers will generally adopt (or should be advised to adopt) an HR Privacy Policy containing all information the employer must communicate to its employees (i.a: categories of data being processed, purposes and legal basis for the processing, data recipients, employees’ rights, duration of data storage, etc.), as well as the obligations resting on employees when they process personal data while carrying out their duties on the account of the employer. Employers would also be well advised to ensure that this HR Privacy Policy covers not only employees, but all persons (self-employed or not) occupied on the employer’s premises. The information obligation will also impact recruiting. Employers must make sure that a Privacy Notice accompanies all job applications.

Under the GDPR, employees have the right:
• to access the personal data related to them that is being processed by the employer, and to rectify and/or erase (also called the “right to be forgotten”);
• to restrict the processing;
• to object to the processing;
• to receive the personal data related to them, in a structured, commonly used and machine-readable format and ask to have those data transmitted to another employer (also called the “right to data portability”);
• to withdraw consent at any time, it being understood that the withdrawal of consent does not affect the lawfulness of processing based on consent before its withdrawal; and
• to file a complaint before the Belgian Data Protection Authority.

These rights are not absolute and their enforcement may be subject to conditions and exceptions as provided for in articles 15–23 of GDPR.
Whenever a data breach is caused or is found or observed by an employee, the employer must without undue delay and, where feasible, not later than 72 hours after having become aware of the breach, notify the breach to the Belgian Data Protection Authority, unless the breach is unlikely to result in a risk to the rights and freedoms of natural persons.

The entry into force of the GDPR will also undoubtedly have an impact on other areas of employer’s control and authority, such as: video surveillance; e-mails or internet use monitoring; searches; localisation/geo-referencing; computer access; social media use monitoring; background checks, etc. Those surveillance and control measures will have to be assessed and (probably) limited with regard to the GDPR rules and principles.

Finally, any employer that does not comply with the provisions of the GDPR will be liable for a fine of up to 4% of the previous year’s total turnover, with a maximum of €20 million.

Other recent developments in the field of employment and labour law

International employment: single permit

More than four years after the deadline for implementation, Belgium is finally close to the introduction of a single residency and work permit as required by EU law. The relevant directive is Directive 2011/98 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

Although this change in the law in some ways simplifies the application procedure, it is also likely to lengthen the time delay between application and an employee actually being able to start work in Belgium.

As from a certain date (as yet unknown), non-EU nationals wishing to work and reside in Belgium for more than 90 days will need to obtain a single permit. This single permit will combine the current work permit and residency permit.

Under the current system, an employer must obtain a work permit for the employee concerned. Based on this work permit, the employee can obtain a visa D at the Belgian Embassy in their country of residence. Once this visa D has been issued, the employee can enter the Belgian territory and can start working in Belgium (from the date of the work permit). This process takes around six to 10 weeks (depending on the Embassy concerned). Once the employee has arrived in Belgium, they then need to apply for a Belgian residency permit in their commune of residence. In principle, the residency permit is issued automatically on the basis of the work permit.

In the future, there will be one unified application procedure. The employer will need to file a single permit application with the competent Belgian authorities (at regional level). The Regional Migration Service and the Federal Foreign Affairs Service will then investigate the application. The Foreign Affairs Service will then decide whether or not to issue the single permit and inform the employer, the employee, and any relevant authorities. The entire process should be completed within a maximum of four months following confirmation that the application file is complete.

The new procedure will also affect work and residency permit renewals. Going forward, renewal applications will need to be filed two months before the expiry date of the existing work permit (at present, renewals need be filed only one month before expiry).

Given the longer processing time (in some cases, it may be more than four months before the employee can actually start working in Belgium), and as delays and some additional administrative burden are very probable, good advance planning is recommended for all non-EU hiring in Belgium or postings to Belgium.
International employment: posted workers

To ensure fair wages and a level playing field between posting and local companies in the host country, while maintaining the principle of free movement of services, the European Union Posted Workers Directive of December 16, 1996 has been revised.

If a worker is posted from his/her home country to a host country in the EU, the core set of local employment legislation, such as provisions on working time, minimum salary, and health and safety in the workplace, apply to the posted worker, notwithstanding the fact that the employment contract is subject to the home country’s law.

This set of core provisions has now been expanded. For instance, the host country’s local rules on accommodation (if accommodation is offered to the worker) also now apply to the posted workers. The same goes for expenses incurred on behalf of the employer, such as travel and meal expenses. Another main expansion relates to the definition of “remuneration”. It is now explicitly determined that remuneration includes all benefits, that are granted by law to local workers in the same job, such as an end-of-year bonus, meal vouchers, and a mobility allowance (and no longer only the fixed minimum salary). Equal pay for equal work in the same EU country also applies.

After 12 (or 18) months of posting, the entire package of local employment legislation (and not only the set of core provisions) will apply to the posted workers (with some exceptions regarding termination and additional pension schemes).

EU Member States now have two years to transpose the new rules into local legislation. Therefore, in two years’ time, local employment legislation will apply to a (much) larger extent to workers posted to the EU. However, the impact on postings to Belgium will be relatively slight as Belgian law already includes most of the EU-level changes, and because almost the entire Belgian employment legislation should be considered to be core legislation.

* * *

Endnotes

1. Psychosocial risks are defined as the likelihood that one or more workers will suffer psychological damage, which may or not be combined with physical damage, as a result of exposure to a work situation which entails a risk. This “hazardous” work situation may relate to the organisation of the work, the employment conditions, occupational health and safety, the content of the work or interpersonal relationships at work.

2. Sales representatives are employees (not self-employed persons) whose job consists of soliciting business, i.e. search for and visit clients, in view of negotiating about and entering into contracts in the name and on behalf of the employer, and this under the authority of the employer. To qualify as a sales representative, the solicitation of business should be the main component of the job of the employee.

3. If the annual salary is between €34,180 and €68,361 (amounts for 2018), a non-competition clause will nevertheless be valid for those types of functions that have been set forth in a collective bargaining agreement of the Joint Industrial Committee, or, in the absence thereof, at company level. If the annual salary is equal to or lower than €34,180 (amount for 2018), the clause is in any event not valid. As of 2019, the amounts will be €34,819 and €69,639.

4. €69,639 in 2019.
5. Before the Uniform Status for Workers Act of December 26, 2013 (January 1, 2014) came into force, the competition clause did not take effect during the probation period. Due to the abolition of the probation period by this Act of December 26, 2013, the words “during the probation period” were modified to “during the first six months of the employment agreement”.

6. €69,639 in 2019.

7. €34,819 in 2019.

8. This indemnity is equal to three months’ remuneration (including benefits in kind) in years one to five (the employee should have worked as a sales representative) and is increased by one month at the start of every additional five-year period.
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Botswana

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General labour market and litigation trends

The Botswana labour market consists of both the private and public sector, the former inclusive of individual employers and the latter, government and parastatals.

Employment law in Botswana, although largely codified, has been predominantly developed by the Courts with much guidance gathered from international bodies such as the International Labour Organisation (“the ILO”) and the common law. There are several statutes which are instructive, including the Employment Act [Cap. 47:01] and the Trade Disputes Act [Cap 48:02].

The application of the common law is subject to local statutes and the Rules of Court which differ widely from country to country.1

As stated in the case of The Attorney General v Ntesang Oatile,2 foreign precedents are of persuasive value only, as such precedents take root in the different constitutional and statutory provisions from those countries and are influenced by the historical, social and industrial environment of the various countries from which they are derived. Thus, our own courts interpret and apply Botswana laws, taking into account our own local conditions. Our courts may therefore make reference to principles of law from foreign precedents, but they are not bound by them.

Unless ratified and incorporated into our own local laws by statute, international treaties are also not domestically binding. As an example, in 1997, Botswana ratified Convention 87 on Freedom of Association and Protection of the right to organise and Convention 98 on the Right to Organise and Collective Bargaining. Thereafter, a new Trade Disputes Act No. 15 of 2004 and a new Public Service Act No. 30 of 2008 were promulgated, thus domesticating some of the provisions of those conventions.3

Originally, the High Court, through its inherent powers to hear all matters, provided the only jurisdiction for hearing labour matters. However, in 1982, there was enactment of the original Trade Disputes Act which provided that disputes should be adjudicated, inter alia, by a Permanent Arbitrator. The Industrial Court was later established as a specialised court to hear labour matters. At the time of establishment, the Industrial Court was subordinate. The Constitution was subsequently amended thus conferring upon the Industrial Court the same status as the High Court. Appeals from the Industrial Court therefore lie to the Court of Appeal, which is the highest court in Botswana, bearing the last word. Due to its inherent powers to hear all cases, the High Court, however, remains available to hear labour matters.4

The Industrial Court, being a court of equity, applies the law as defined by the labour statutes, the international instruments which have been domesticated in Botswana, and is not bound by the rules of evidence. The High Court, on the other hand, applies the law strictly as defined
substantively, and does not temper the law with equity.\textsuperscript{5} Thus, the High Court will hold parties strictly to the terms of an agreement while the Industrial Court will apply the rules of equity and ILO conventions. A case in point is a term in a contract of employment stating that either party may terminate the contract by giving notice of a set number of months, and without giving any reasons. In interpreting this clause, the High Court has applied the \textit{caveat subscriptor}\textsuperscript{6} rule and held the parties to the terms of the contract, whereas the Industrial Court has applied Article 4 of the ILO conventions which states that for termination of employment to occur, there must be a valid reason, and therefore such valid reason can only be established upon following a certain procedure prior to termination. Thus, a clause of this nature has been held by the Industrial Court as invalid despite agreement by the parties.

In the case of \textit{Samuel Comet Mokara v Horizon Ogilvy},\textsuperscript{7} Justice Mathiba stated that: “under the common law, the parties to a contract of employment are allowed to terminate their contract by giving each other notice of intention to do so. The learned author, John Grogan submits, this was the position until labour courts and legislation introduced the issue of equity…”

Justice Mathiba observed that confusion continues to arise as to which law the courts apply and, after quoting various authorities,\textsuperscript{8} she concluded that it would be in order under the common law to terminate one’s employment on notice where a clause in the contract of employment provides that; however, in labour relations, there is an additional requirement for just cause or a good reason for doing so. She stated, however, that the Industrial Court would use principles of natural justice to overrule common law, but would not use those principles of natural justice to overrule specific statutory provisions.

As a result, Justice Mathiba distinguished the case from the Court of Appeal decision of \textit{Chakalisa Ronald Phuthego v Barclays Bank of Botswana},\textsuperscript{9} which she said espoused the common law position on procedure to be followed in termination of contracts and that the distinction was that such common law procedure would not be applied in the Industrial Court, where the Trade Disputes Act, 2016 and the National Relations Code of Good Practice apply.

As at the time of publication, an appeal had been noted at the Court of Appeal against the decision of Justice Mathiba, but the matter is yet to be enrolled for hearing. It therefore remains to be seen whether the Court of Appeal will hold that its decision in the \textit{Chakalisa Ronald Phuthego} case cited above is binding on the Industrial Court, or whether the Industrial Court, being a court of equity, is correct to distinguish its position from that of the Court of Appeal regarding this issue.

It must be noted that the choice of the forum to hear a labour matter lies with the employee as that is the person who is usually the \textit{dominus litis} in labour relations matters. As the Industrial Court attracts no legal costs unless the matter is held to be frivolous and vexatious, most employees who cannot afford legal fees and costs choose the Industrial Court. Most professional employees would choose the Industrial Court only in cases where, acting on legal advice, they know that they will not succeed in the High Court, the High Court having a shorter turn-around time as opposed to the Industrial Court, which is often inundated with claims as most of their patrons sue on each and every issue arising between them and their employers.

\textbf{Redundancies, reorganisations and business transfers}

\textbf{Redundancy and reorganisation}

Botswana law recognises that it is a managerial prerogative to decide to reorganise their
organisation. The *locus classicus* on this issue is *Mokaya v Morteo Condotte (Pty) Ltd.*, where De Villiers J said:

> When an employer decides to economise he takes a commercial decision to achieve that result. Such a decision is one of exclusive managerial prerogative and the court will not normally interfere with such decision because an employer can manage and control his business as he deems fit in what he perceives to be in the best interest of the business. After all he is, more often than not, the originator and financer of the business. He can therefore set the norms and decide what he wants to do with his business or the way he wants to run his business. An employer has the right to want to remain economically viable and therefore he has the right to try and keep his expenses within the limits of his income and also has the right to try and increase his profits.

Once the decision is taken that the organisation no longer has capacity to continue with its business venture or that it is no longer profitable, the employer will find ways to make changes within the organisation. This is where it makes the decision whether to sell the business, sell some assets, reorganise, privatise and/or reduce staff.

Justice De Villiers, in the case of Mokaya, observes that this is where many employers “...slip up, thinking it is still part of managerial prerogative to finally decide unilaterally which means it is going to adopt to achieve the end result it has in mind”.

Section 25 of the Employment Act provides for termination of contracts of employment by the employer for redundancies or for the purposes of reducing the size of its workforce. It provides the criterion to follow, which is the principle commonly known as first-in-last-out, taking into account such matters as the efficient operation of the undertaking in question, and the ability, experience, skill and occupational qualifications of each employee concerned. It also provides for the giving of written notice forthwith to the Commissioner of Labour and to every employee to be or likely to be directly affected by the reduction.

The employer will first issue the Section 25 notice to the Commissioner of Labour who will, at a meeting between the employer and a representative of the Commissioner, stamp the letter to acknowledge receipt. The representative will also give guidance to the employer as to the procedures to follow for a fair restructuring process. The letter to the Commissioner will normally contain brief backgrounds and facts leading to the decision by the employer to reorganise or restructure.

Soon thereafter, the employer should call a meeting of all the employees and inform them of the intended business restructuring or reorganisation, and further that some or all of the employees are likely to be affected by the decision. The employer must then issue letters individually to all the employees, whether or not they are likely to be affected by the decision and may also attach to that letter a copy of the letter already delivered to the Commissioner of Labour. This immediately shows the employees that the employer is *bona fide* in its intentions to engage with them seeing as it would have already informed the relevant government authorities. This gesture therefore often helps to defuse thoughts and ideas by employees that the employer intends to fold up its business secretly and run away without meeting its legal obligations.

It is important to note that there is no provision in Section 25 that demands consultation. The procedure dealing with consultation and negotiations is therefore a result of case law.

In dealing with procedural fairness, De Villiers J, in the case of *Mokaya v Morteo Condotte (Pty) Ltd.*, stated that:

> The employer must consult with such employees or their representatives at the earliest opportunity. The reason for such consultation is three-fold. Firstly, for the parties to
seek ways of avoiding or averting the need to terminate the employee’s employment. Secondly, if retrenchment proves unavoidable, then the parties should consult on a fair selection criterion and thirdly consult on ways of alleviating the hardships caused by such retrenchment, e.g. a reasonable severance package, possible alternative employment elsewhere, time off to seek alternative employment, etc.

In the case of Botswana Telecommunications Corporation v Gabaake-Kauta, the Court of Appeal said that the considerations as outlined by De Villiers J in the Mokaya matter would more appropriately fall under legitimate expectation, as opposed to Section 25. However, the Court of Appeal also accepted that the doctrine of legitimate expectation was, at least initially, confined to the sphere of administrative law, where one party was a public or statutory body. The Court therefore said that one would thus have to be careful to not confine the principles in the Mokaya case to legitimate expectation, as the principles would apply even to private entities.

Botswana Telecommunications Corporation v Gabaake-Kauta dealt with a situation where the Corporation had invited its employees to apply for a Voluntary Exit Package (“VEP”) of a particular amount. The Corporation had reserved for itself the discretion to accept or reject offers by employees who applied for the VEP. Employees put forward their applications for the VEP. Before the Corporation accepted the offers, the Corporation withdrew the VEP as it was thought to be overly generous by its major shareholder, the Botswana government. The issue was whether the Corporation was entitled to so withdraw the VEP when the employees had already put in their applications and, further, whether the Corporation ought to have consulted with the employees prior to such withdrawal.

The Court of Appeal held that the employees had merely put in applications which were yet to be considered and, as such, the Corporation was entitled to withdraw the VEP prior to acceptance of the offers. There was thus no contract between the parties and therefore no repudiation by the Corporation.

On the issue of consultation, the Court of Appeal pointed out that the case was not concerned with retrenchment but with a voluntary exit package. The employees were not obliged to accept the package, which, even in its reduced form, was more generous than outright retrenchment.

A voluntary resignation is therefore non-obligatory for an employee and is a consultative issue, rather than a negotiable matter. De Villiers J, in the case of Barclays Bank of Botswana Limited v Botswana Bank Employees’ Union, quoted from Cameron et al, The New Labour Relations Act (1989) that:

Consultation conveys the notion that the employer seeks the advice on views of his employees, but retains the final decision. Negotiation on the other hand is in general a method of joint decision-making involving bargaining between representatives of workers and of employers, with the object of establishing mutually acceptable terms and conditions of employment. Negotiation implies an effort to reach agreement by the parties concerned.

Voluntary resignation is termination of employment by an employee, whereas involuntary resignation can be defined as termination of employment by the employer.

This distinction is particularly important in the area of restructuring and retrenchment and the significance of this difference lies in the procedure that will be adopted by the parties in implementing such separation.
As demonstrated above, in the context of a restructuring process, an employer may invite employees to apply for a VEP. In that case, the employees offer resignation from employment and this is a voluntary resignation.

It often does occur that where such an invitation is made, and not enough employees apply, the employer will move on to involuntary exit, which is essentially a retrenchment. In this case, the employer will adopt a process to terminate the employment of the employees in question.

In the case of a voluntary resignation, it is clear that the employee chooses to terminate their employment in exchange for a given VEP and, as such, the parties need only be engaged in a process of consultation as opposed to negotiation.

In the case of involuntary resignation, the parties may engage in a process of negotiations, subject to the provisions of Section 48 of the Trade Unions and Employers Organisations Act [Cap. 48:01], and further subject to the Collective Labour Agreement where one has been signed by the parties.

**Business transfer**

Section 28 of the Employment Act makes specific provision for cases where there is a change of employer. Thus, where an organisation is transferred from one person to another and an employee in the business continues to be employed in that business, the period of continuous employment immediately preceding the transfer shall be deemed to be part of the employee’s continuous employment with the transferee immediately following the transfer. The same applies where a contract of employment between a body corporate and an employee is modified by substitution of one employer by the other.

In terms of Section 29 of the Employment Act, where an employer in any undertaking in Botswana establishes or operates branches of the undertaking outside Botswana, he shall not transfer any employee who is a citizen of Botswana, engaged in Botswana, for employment at any such branch outside Botswana without the written permission of the Commissioner for that transfer.

**Discrimination protection**

Founded on the Constitution of the Republic of Botswana, Section 3 of which provides a bill of rights, the Employment Act has always protected employees against discrimination in the workplace.

Until 2010, Section 23 of the Employment Act protected employees from the traditionally known no-go areas such as termination on the basis of union membership and activism. It also protected an employee seeking office as an employees’ representative. Further, it protected the employee making, in good faith, a complaint or participating in proceedings against the employer involving the alleged violation of any law and finally, protection against termination on the basis of the employee’s race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, colour or creed.

In 2010, the Employment Act was amended to enhance, more progressively, employee protection against discrimination and therefore, in addition to the prohibitions above, an employee’s contract of employment shall not be terminated on the basis of social origin, gender, sexual orientation, health status or disability.

In his book, *Legal Aspects of HIV/AIDS at the Workplace in Botswana and South Africa*, Justice O B K Dingake laments that there is no specific legislation in Botswana dealing with HIV/AIDS at work, yet it is clear from the reading of some of the decisions of the Industrial
Court\(^{22}\) that the impact of HIV and AIDS in the workplace has been severe insofar as the basic human rights of workers are concerned. The amendment of Section 23 in 2010 statutorily prohibiting termination of employment on the basis of the health status or disability of an employee is therefore a welcome development in Botswana.

Overarchingly, still as part of the new amendment, an employee’s contract of employment shall not be terminated for any other reason which does not affect the employee’s ability to perform that employee’s duties under the contract of employment.

In the case of *Samuel Comet Mokara v Horizon Ogilvy*,\(^{23}\) Justice Mathiba observed this as the starting point in determination of the basis upon which one’s employment may not be terminated.

Thus, while it is recognised that, under the common law, parties have the ability to contract freely, in labour relations, provisions such as those under Section 23 may not be ignored. It would therefore seem that where parties contract that they will terminate the employment without an enquiry, equity dictates that a valid reason for termination must still be established. This is more so that the Employment Act provides the basic terms of employment and, in terms of Section 37, a contract of employment which provides conditions of employment less favourable to the employee than the conditions of employment prescribed by the Act is null and void to the extent that it so provides.

As stated above, this decision of Justice Mathiba in the *Samuel Comet Makara* case is currently under appeal. A decision of the Court of Appeal on the matter is much awaited, and will go a long way to finally settle the position in Botswana law where an issue of this nature arises before the Industrial Court.

**Protection against dismissal**

As a general rule, in order for the termination of an employee’s contract of employment to be deemed to be valid, the termination has to be both substantively and procedurally fair.\(^{24}\) Relevant to this header is procedural fairness, which entails that the employee should be given a fair hearing to establish substantively whether there is a reason for termination of employment.

It has been held by our Courts that where a disciplinary action is brought against an employee, such employee should be given the opportunity to state his case in relation to the charge brought against him, and to bring mitigating circumstances to the employer’s notice.\(^{25}\) The *audi alteram partem* rule is therefore crucial to our rules of natural justice in Botswana, which means that where an employee stands charged of any wrongdoing, they must be given an opportunity to defend themselves.

However, the common law does provide for termination of employment without the requirements of the *audi alteram partem* rule, where the parties agree to do so simply by the giving of notice, without providing any reasons. Recently, and as discussed above, the Court of Appeal for the Republic of Botswana has approved this position such that the *audi* rule will not apply where the parties agree to oust its application in a contract of agreement.\(^{26}\) Thus, where the parties agree to terminate the employment contract simply by the giving of notice without a duty for a hearing, and without giving any reasons, that clause will be considered valid. This has caused an uproar among the unions, which consider this new interpretation draconian, as now employers can terminate employment for no reason at all.

As discussed above, the Industrial Court hastened to clarify this decision and held that its mandate is not to apply the common law but to apply the rules of equity founded on
international instruments and the laws of Botswana, such as Section 23 of the Employment Act of 2010, which prohibits termination of employment on the basis, among others, of union activism, tribe, social origin, gender, health status, disability, colour or creed, and further, on any basis that does not affect the ability of an employee to perform his or her work.

As shown above, while the High Court in Botswana will therefore uphold a clause in a contract of employment terminating employment on notice only, the Industrial Court will not do so. As a court of equity, it will rely on Article 4 of the International Labour Convention that there must be a valid reason for dismissal, which can only be established through a disciplinary enquiry.

The Court of Appeal is yet to decide whether the Industrial Court is correct in this regard.

Pre-hearing steps
An employee facing a disciplinary charge is entitled to a hearing within a reasonable period of the alleged offence being known to the employer. An enquiry may, however, not involve a hearing depending on the provisions of the disciplinary code. Thus, it will be sufficient to call an employee to show cause why a certain decision should not be taken against them. This is even more appropriate where the employer is dealing with a high-level employee and it would be logistically challenging to establish a forum to hear the matter and call witnesses, who may be subordinates to the employee and may be uncomfortable to testify against him or her.

Where a hearing will take place, there must be timeous notice to enable the employee to properly prepare for the said hearing and make arrangements with witnesses. What constitutes timeous notice depends on the circumstance of each case in that it will depend on the seriousness of the matter and its effect on the work environment. The disciplinary code usually sets time limits which will serve as guidelines for the parties concerned.

A charge must be issued prior to the hearing to enable the employee to prepare his or her defence.

During the hearing
An employee is entitled to be present at the hearing. Holding a hearing in the absence of an employee may lead to a dismissal being set aside on the basis of procedural unfairness. However, there are circumstances when the hearing may be held in the absence of the employee, such as in the situation of a strike, or where the employee chooses to absent himself or herself without just cause. Usually, a disciplinary charge will state that the hearing will proceed without the employee if he or she does not seek a postponement on a just cause.

Most disciplinary codes provide for representation by a co-worker at the hearing, that the chairperson of the hearing must not only be unbiased but must not have a history of conflict with the employee and that the employee is entitled to present evidence in mitigation and a right to appeal where an adverse decision is made against the employee.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)
A contract of employment for a specified period of time or a specified piece of work runs until the time agreed expires, or the piece of work is completed. This is a fixed-term contract or a fixed-task contract.

However, a contract of employment for an unspecified period of time runs until lawfully terminated. Such contract may be terminated with or without notice, depending on the length of employment and wage payment intervals.
Where the wages are payable in respect of any period not exceeding a day, either party may terminate such employment at the close of any day’s work, without notice having been given to the other party of the intention to do so, save where the contract of employment specifically provides for the giving of notice.29

In the case where wages are payable in respect of any period exceeding a day, such contract may be terminated at any time, irrespective of what the contract provides, subject to notice having been given to the other party of the intention to do so.

As discussed above, recent pronouncements of the Court of Appeal30 on these legal provisions have caused much heartache for workers unions in Botswana, who consider that the law now favours employers terminating contracts of employment for no cause.

The interpretation of the Court of Appeal is that Sections 17 and 18 of the Employment Act do provide for such termination without providing any reasons, which is the position espoused by the common law, and where parties to a contract of employment agree to be bound by such a provision, the courts cannot support a party who challenges it.

As demonstrated above, the Industrial Court31 has, however, held that this decision does not apply in its jurisdiction where the court applies rules of equity and international labour instruments, including the statutory provisions codifying such international instruments; particularly Section 23 of the Employment Act, which prohibits termination of employment on certain grounds.

Regarding the length of notice to be given, the Employment Act32 provides that such minimum length of any notice to be given is determined by the intervals in which wages are paid. For an employee whose wages are payable in respect of any period not less than a week but less than two weeks, and the employee has been in continuous employment for two or more but less than five years, the minimum length of notice shall be two weeks. Where an employee whose wages are payable in respect of any period not less than a week but less than a month has been in continuous employment for five or more but less than 10 years, the minimum length of notice shall be one month. Finally, where an employee whose wages are payable in respect of any period exceeding a day has been in continuous employment for 10 or more years, the minimum length of notice shall be six weeks.

Where an employee is serving probation, Section 20 provides for termination of the employment by notice only, without giving any reasons, and such contract will be deemed to have been terminated with just cause.

Part VIII of the Employment Act provides for various terms of employment relating to working hours. This includes rest periods, hours of work, holidays and other conditions of work.

However, this part of the Employment Act does not apply to employees normally termed as professionals, such as managers, administrators and executives, whose conditions of employment in this regard are regulated solely by their contracts of employment.33

Further, these conditions of service are subject to Wage Orders published by the Minister, and specific to various trades such as Wholesalers, Retailers and Transport, and so forth.

Part VIII covers Section 98, which regulates paid holidays or leave, in terms of which an employee is entitled to a paid holiday or leave at the rate of not less than 1.25 days per month in any period of 12 months from the date of commencement of employment. Of the days earned as leave per every period of 12 months, the employee shall take at least eight working days before the expiry of six months immediately after the period of 12 months within which that leave was earned. The balance of the paid leave earned for every 12 months thereafter shall be accumulated year to year for a period no longer than three years, and at the end of
those three years, all leave shall be taken, failing which it shall be forfeited. That gives a total of four years, and at the beginning of every fifth year, a fresh cycle of leave begins.

No employment contract or law shall provide for leave less favourable than that which is provided by this section.

Section 99 also falls under Part VIII, and provides for paid public holidays, which are specified per industry. Any employee who works on a paid public holiday shall be paid at least double the wages he or she would have been paid had the day been an ordinary working day, or be granted a paid day off *in lieu* of that day within 10 days immediately thereafter.

Section 100, under part VIII, provides for sick leave, being a minimum of 20 days per annum, granted on presentation of a valid medical certificate issued by a doctor, certifying that the employee is unfit for work.

The Employment Act also encompasses provisions which specifically protect female employees. Section 113 provides for maternity leave. Female employees are entitled to leave six weeks before and six weeks after birth. The employees are not allowed to return to work before the expiry of six weeks after giving birth and, where they are still not fit to return after six weeks, a further two weeks will be given, certified by a doctor. Any employer who Breaches these provisions is guilty of an offence. During this period, the employee is entitled to a minimum of half of their basic salary.

Section 115 provides that no notice of termination of employment shall be served on the female employee without good cause within a period of three months prior to the maternity leave. Whether or not there was good cause is a question to be determined by the Commission of Labour on referral to him or her, and a party dissatisfied with the decision of the Commissioner is entitled to note an appeal with the Minister.

Nor shall a notice of termination be served while the employee is on leave and any notice so given shall be null and void. It is criminal conduct to do so.

The female employee will be allowed to nurse their child for at least half an hour per day, both before and after lunch, for a period of six months immediately after their return to work after maternity leave and her basic salary shall not be affected by such absence. It is criminal conduct to not adhere to this provision.

**Worker consultation, trade union and industrial action**

Recognition of trade unions in Botswana is provided for under Section 48 of the Trade Unions and Employers’ Organisations Act [Cap. 48:01], as well as Section 32 of the Trade Disputes Act.

Section 48 of Part XI provides that:

48. If a trade Union represents at least one third of the employees of an employer, that trade Union may apply for recognition under section 32 of the Trade Disputes Act.

(2) Notwithstanding any other provision of this Act, no member of management in any undertaking or enterprise shall be represented by a negotiating body, whether the same is or is not a registered trade union or branch thereof, in respect of matters bearing upon relations between his employer or the industry in which the member of management is employed and those employees thereof or therein who are members of management unless the negotiating body represents only members of management in the same undertaking, enterprise or industry and no other employees.

(3) In this section, “member of management” means an employee who has authority, on behalf of his employer, to employ, transfer, suspend, lay off, recall, promote, terminate the
employment of, reward, discipline or deal with the grievances relating to the employment of any fellow employees or effectively to recommend any such action or the manner in which such grievances ought to be dealt with, if the exercise by him of that authority is not merely of a routine or clerical nature but requires the use of his discretion.

A distinction is therefore made regarding employees who are members of management, and those that are not, as well as their rights to unionisation.

Section 48 has received wide judicial interpretation. Specifically, members of management are barred from membership of a union unless such body represents such members only or exclusively.

In the case of *Botswana Power Corporation Workers Union v Botswana Power Corporation*, the Court of Appeal stated that:

The question at issue, in simple terms, was whether certain categories of employees of the respondent corporation qualified as management as defined by section 61 of the Trade Unions and Employer’s Organisation Act [Cap. 48:01]. If they did, by section 61 they could not be represented by the appellant union in matters bearing upon relations between the employer or the industry in which those persons were members of management and employees. In short, employees qualifying as part of management of the respondent corporation could not be members of the appellant union in matters involving employer – employee relations. For these purposes, the employees recognised as part of management must join a union organised solely for management staff.

The court in that case dealt with Section 61 of the Trade Unions and Employers’ Organisations Act, which is now Section 48, which provided that the employees who qualified as part of management of the employer could not be allowed to unionise in the same Union as the general body of employees.

In an application to the Industrial Court for an order declaring that certain employees of the employer holding specified job positions were entitled to become members of the Union, the employer called an expert witness who gave evidence that the employees of the Respondent holding certain specified job positions were in fact members of management as defined by Section 61(2) of the Act.

The Industrial Court agreed with the employer that such employees were members of management in terms of Section 61(2) of the Act.

On appeal, the court held that:

The relationship of trade unions and employers or employers’ organisations in this country generally, including the collective bargaining process, is governed by the Trade Unions and Employers’ Organisations Act. That general regime applies to employees and the employer in the Botswana Power Corporation. If the Trade Unions and Employers’ Organisations Act provides a regime for employers and employees in the course of which it prescribes a mechanism for collective bargaining between them, why can it not give its own special definitions for the terms, conditions and parties which it recognises as parties to such process?... Section 61 (1) defines the expression “member of management” for the purposes of Section 61 of [Cap. 48:01]. If any person wishes to understand the meaning of the expression in that section, it is to that definition that he should turn.

The answer therefore lay in Section 48 (3) of the Act, which defined a “member of management” as:

...an employee who has authority, on behalf of his employer, to employ, transfer, suspend, lay off, recall, promote, terminate the employment of, reward, discipline or deal with
the grievances relating to the employment of any fellow employees or effectively to recommend any such action or the manner in which such grievances ought to be dealt with, if the exercise by him of that authority is not merely of a routine or clerical nature but requires the use of his direction.

Employee privacy

As a basic human right, private personal information relating to an employee shall not be disclosed by the employer unless that employee consents to the disclosure. This must, however, be balanced with collective bargaining processes regarding disclosure of all relevant information to a recognised trade union that is reasonably required to allow the trade union to consult or bargain collectively.

The general rule is that information that is confidential, and which, if disclosed, may cause material harm to an employee or the employer, is also subject to protection. However, in determining whether or not certain information should be disclosed, our law leans more towards relevance of the information, as opposed to its confidentiality.

In any dispute about disclosure of information, the court will first decide whether or not the information is relevant.

In the context of collective bargaining, a party may approach the Industrial Court regarding disclosure of information. If the Industrial Court decides that the information is relevant, the court shall balance the harm that the disclosure is likely to cause, against the harm that the failure to disclose is likely to cause to the ability of a recognised union; for example, to engage effectively in consultation or collective bargaining.

Other recent developments in the field of employment and labour law

While the recent Court of Appeal pronouncement that employers can terminate employees’ contracts of employment based strictly on the terms of employment as espoused by the common law is considered as settling the varying positions of the courts over the last few years, it has left the trade unions and workers distraught. The Industrial Court has obviously given much hope to the workforce in holding that equity must still prevail where the issue arises before it. As, however, observed by Justice Sappire in the case of Mogende, equity, like beauty, lies in the eyes of the beholder. It must also not be forgotten that the duty of a court is to interpret the law and if employees are aggrieved by the position of the law as it stands, the solution in fact lies with the politician whom they have elected to legislate in Parliament on their behalf.

Endnotes

1. Onalethata Mhaiwa v Yorokee Kapimbua; Case No. CACGB-169-16 (HC CVHGB-001840-15) @ para 13.
2. Case No. CACLB-021-10; The Attorney General v BLLAWU and others; Case No. CACGB-053-12 para 36 (unreported).
3. The Attorney General v BLLAWU and others; Case No. CACGB-053-12 para 36 (unreported).
4. Botswana Railways Organisation v Setsogo and Others, 1996 BLR 763; Samuel Comet Mokara v Horizon Ogilvy; Case No. IC 468/17 (J2753) (unreported).
5. Molosankwe v Botswana Telecommunications Corporation [2010] 3 BLR 659, applying Mogende and Others v Bamangwato Concessions Ltd (Misca 390/04), unreported;
Babeile v The Attorney General [2009] 2 BLR 177; CA and Anaesthesia Intensive Care & Emergency Medical (Pty) Ltd v MRI Botswana Ltd [2005] 2 BLR 252, CA @ 186F-187B.

6. The principle was devised by Innes CJ in an early case of Burger v Central South African Railways 1903 TS 571, where he said at p. 578 that “it is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature”. The brief facts of the matter are that an agent of Burger placed a parcel of law books in a train and signed a consignment note which constituted a written contract between the parties. The Consignment note incorporated the goods traffic regulations by reference, and while Burger had read the consignment note, he had not had sight of, or read the said regulations. When the books were lost in transit, Burger claimed compensation. Compensation was, however, calculated on the basis of the goods traffic regulations and therefore Burger received far less than the value of the books. The court concluded that Burger was bound by the document whether the regulations had been printed on the consignment or were merely referenced therein and that he ought to accept the low compensation.

7. See endnote 4.

8. Sekgwa v Institute of Development Management [2001] 2 BLR 434 @ 460; Mogende and Others v Bamangwato Concessions Ltd (Misca 390/04).

9. CACGB 013-16.


11. Mokaya v Moroteo Condotte (Pty) Ltd (supra) @ 400 A.

12. Garibe and Others v Rocket Fashion (Pty) Ltd [2007] 3 BLR 295 @ 299 F.


14. Supra @ 399 – 400.

15. Supra @ 135 D.

16. Supra.

17. Botswana Telecommunications Corporation v Gabaake-Kauta, supra @ 136 E.

18. Supra.

19. Botswana Telecommunications Corporation v Gabaake-Kauta, supra, @ 134 H.


22. Sarah Diau v Botswana Building Society 2003 (2) BLR 409.


27. Section 17 (1) Employment Act; Botswana Book Centre v Keletso Rakhudu.


29. Section 18 (1) (a) Employment Act.


32. Section 118.

33. Section 2, Employment Act.

35. *Barclays Management Staff Union v Barclays Bank of Botswana Ltd 2012* (1) BLR 109 (IC) @ 112 H.

36. Supra.

37. @ 83 G-H to 84 A.

38. Section 48C (3) (d) of the Trade Union and Employer’s Organisations’ Act [Cap 48:01].

39. Section 48C (3) (c) of the Trade Union and Employer’s Organisations’ Act [Cap 48:01].

40. Section 48C (6) of the Trade Union and Employer’s Organisations’ Act [Cap 48:01].

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Dineo is one of the leading corporate litigators and employment law specialists in Botswana. She was admitted to practise law in 2002 and is well established as a seasoned female legal practitioner in the areas of corporate litigation, employment and labour law, dispute resolution in general, the law of defamation and administrative law. Dineo is passionate about the practice of law and, throughout her career, she has contributed immensely to the jurisprudence of Botswana law, both as lead counsel and co-counsel in many ground-breaking legal cases, representing corporates, parastatals, regulators, non-government organisations, high-net-worth entrepreneurs and individuals, Members of Parliament and Judges of the High Court.

Dineo was one of the first cohort of partners to set up Desai Law Group in August 2016, after working as a Senior Associate at Collins Newman & Co for nine years, which she joined in August 2007. With her solid and consolidated practical training and experience, Dineo has now established Makati Law Consultancy and offers a bouquet of legal services, including mediation and arbitration services tailored to meet the requirements of her wide-ranging clients.

In August 2018, Dineo was appointed as a Chairperson of the Botswana Institute of Chartered Accountants. She is ranked by The Legal 500 as a leading legal practitioner in her areas of expertise.
Brazil

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General labour market and litigation trends

Brazil enacted a labour reform that entered into force in November 2017. The labour reform brought more than 100 changes to the Consolidation of Labour and Employment Laws (Consolidação das Leis do Trabalho – “CLT”), which is the principal statute that regulates labour and employment relations in Brazil.

At a glance, the labour reform modernised the legal framework by:

a) Giving to employers and employees more power to negotiate the terms and conditions of employment while preserving the minimum labour and employment standards under the Constitution.

b) Reducing the interference of labour courts in the law and collective negotiations – the proceedings to issue persuasive precedents are now harder if they are not expressly supported by law, and the analysis of collective bargaining agreements must be restricted to the terms and conditions negotiated by the parties and their compliance with the law.

c) Creating new forms of hiring and termination.

In this regard, the changes include:

a) Releases and waivers (e.g., out-of-court settlement and ratification with the labour court).

b) New termination forms (e.g., termination by mutual agreement).

c) New employment contracts (e.g., sporadic work, part-time jobs).

d) More flexible working time (e.g., compensatory time, shifts, commuting time, work availability, overtime proceedings, exemptions).

e) Review of compensation payments and other related rights (e.g., contractual bonus, discretionary bonus, equal pay, reimbursement of expenses).

f) Review of individual and collective bargaining, and union proceedings (e.g., more discretion to high-level employees, more autonomy to employers and unions, payment of union dues).

g) Possibility to outsource the company’s principal activities.

The labour reform also introduced new features to the procedure law, such as permitting arbitration in certain cases to resolve employment disputes, and payment of attorney’s fees by the losing party in a judicial dispute even if the employee is entitled to free justice.

One year after the labour reform, the figures seem positive in many aspects, particularly regarding the number of new lawsuits filed with the courts, which had a general reduction of almost 45% in the comparative term. In São Paulo, the circuit with the largest number of labour and employment lawsuits, the number of new lawsuits dropped from 106,893 in the first quarter of 2017 to 63,688 in the comparative one of 2018. In Campinas, the circuit with the second largest number, it reduced from 78,275 to 48,384 comparing the first quarters of 2017 and 2018.
Moreover, not only the number of new lawsuits reduced but the number of claims in such lawsuits cut down too – almost 58% less in the first quarter of 2018 compared to the first quarter of 2017. With fewer lawsuits and claims, the studies point to a potential reduction of the litigation costs and a higher quality of court rulings. This trend may be maintained even considering that the conservative party recently won the presidential elections in Brazil.

Redundancies, business transfers, and reorganizations

Redundancies

Before the labour reform, the CLT did not have a rule for redundancies. In the past, the case law determined that employers usually had to bargain with the union of employees before proceeding with a collective termination.

Now the CLT has specific provisions permitting employers to terminate employees without consulting or negotiating with the union of employees, whether regarding individual or collective termination, unless otherwise provided by the applicable collective bargaining agreement.

Redundancies and voluntary termination plans

The previous law did not have a rule on employers implementing voluntary termination plans for redundancy situations. Moreover, the courts used to be split about the validity and effectiveness of such plans, particularly if the union of employees was not involved in the negotiation.

The labour reform regulated this matter by permitting employers negotiating voluntary termination plans with employees, whether on an individual or a collective basis. In the event of redundancy, if the voluntary termination plan involves bargaining with the union of employees and establishes the payment of an additional severance package, the agreement is valid and grants a release from any labour claim, provided such condition was negotiated by the parties.

Business transfers and reorganisations

The CLT establishes that business transfers or reorganisations (e.g., changes in control, share stock purchases, transfers of assets, spin-offs, etc.) cannot affect employment contracts and the terms and conditions of employment. Since the Constitution protects the acquired rights, the new employer must maintain the rights of employees at the same level. In addition, regarding a change in control or transfer of assets (labour succession), the new employer (successor) becomes liable for all labour and employment obligation of the former employer (succeeded).

In principle, there are few hypotheses under the law that permit employers and employees changing the terms and conditions of employment to a lower level (e.g., reducing the meal break from one to half an hour), and usually such cases involve bargaining with the union of employees.

As a rule, previous consultation with the employees or union of employees is not a requirement, unless otherwise provided by the employment contract or collective bargaining agreement.

Considering each business transfer or reorganisation has its particularities, the analysis of the labour and employment aspects should be carried out on a case-by-case basis.
**Business protection and restrictive covenants**

All employees have a duty of loyalty to their employer, which includes protecting the company’s confidential and proprietary information.

In addition, the employer and employee may agree on non-competition, non-solicitation, non-poaching, non-disparagement, and other types of restrictive covenants. Since these types of restrictive covenants are not regulated by law, most of the rules concerning their applicability are addressed by case law.

In particular, only non-competition covenants have a solid interpretation in the Brazilian courts. For such cases, case law has considered the following tests:

a) **Scope**: The restriction must be limited to the employer’s business, and connected with the employee’s job position.

b) **Territory**: The restriction must be limited to the region or city where the employer’s business is located.

c) **Term**: The period of non-competition must be limited (courts and market practice find a period between three and 12 months acceptable).

d) **Consideration**: The employee must be reasonably compensated for the non-competition term (the standard for such compensation is usually the employee’s base salary).

Garden leave is not applicable in Brazil, even in non-competition situations. Normally, the employer pays the consideration in advance. The consideration cannot substitute the severance pay required under the employment law.

If the employee breaches the non-competition agreement, the employer is entitled to back pay and damages compensation within the limits of contractual law and case law. As opposed to the practice of some U.S. courts, in Brazil, the courts cannot amend or apply the non-competition clause toward its validation. In such cases, the Brazilian courts tend not to enforce non-competition covenants against the employee.

**Discrimination protection**

In Brazil, many statutes provide protection to individuals against discrimination, chief of which is the Constitution. Moreover, Brazil has signed important treaties regarding anti-discrimination matters, including the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and Convention no. 100 of the International Labour Organization (equal pay between men and women).

The Constitution provides for the protection of any human right characteristics, including gender, sexuality, race, skin colour, marital status, age, national origin, religion, and political or ideological conviction.

As to the employment relations, the Constitution and employment law provide for the protection of all employees, including women participating in the labour market and their workplace rights (e.g., hiring opportunities, promotions, seniority plans, breastfeeding breaks, etc.), people with disabilities (e.g., hiring, termination, quotas, etc.), and any equal pay matters.

Employers may also establish anti-discrimination policies, which should assist in the prevention of discriminative behaviour in the workplace. Moreover, the existence and application of such policies may contribute to the employer’s defence in the event of a labour audit or claim.
Protection against dismissal

Termination by the employer

Termination for cause

The CLT provides a comprehensive list for the termination of employees for cause:

a) Dishonest conduct.
b) Improper conduct or lack of self-restraint.
c) Helping competitors or competing business (without the employer’s consent).
d) Criminal conviction of the employee, in a final court decision, provided the punishment has not been suspended.
e) General negligence.
f) Drunkenness during working hours.
g) Trade secret violation.
h) Indiscipline or insubordination.
i) Non-attendance to work by the employee for more than 30 days.
j) Acts of violence or injury to the honour or reputation of any person during working hours, except in self-defence or legitimate defence of a third party.
k) Acts of violence or injury to the honour or reputation of the employer or a superior, except in self-defence or legitimate defence of a third party.
l) Constant gambling.
m) Acts of violation of national security duly proved in a governmental investigation.
n) Loss of qualification or requirement for the job position because of the employee’s malicious action (e.g., if the bar suspends or decertifies a lawyer).

In any other situation not listed above, the CLT considers terminations to be without cause.

Termination without cause

In the event of termination without cause, the CLT requires the employer to provide the employee with at least 30 days of notice, plus three days of notice for each year of contract with the same employer, up to a total of 90 days. The contract, collective bargaining, or internal policy may provide additional notice in certain cases.

If the employer terminates the employee without cause, the CLT entitles the employee to the following severance payments:

a) Monthly salary balance.
b) Accrued and prorated vacations, if applicable.
c) Vacation bonus, if applicable.
d) Accrued and prorated 13th salary.
e) Severance fund pay (“FGTS”) (8% of the employee’s compensation).
f) FGTS fine (50% over the balance of the FGTS fund, of which 40% belongs to the employee, and 10% is tax).
g) Other payments may be required depending on the employment contract, collective bargaining agreement, or internal policy (e.g., profit and sharing results, discretionary bonus, contractual bonus, stock options, etc.).

In addition to the statutory entitlements verified in each type of termination, the law requires the employer and employee to comply with the taxes and social security contributions.

Once the termination without cause is concluded, the law permits the employee to collect the FGTS deposited in the employee’s severance fund account. In addition, the employee is entitled to unemployment insurance.
**Termination by mutual agreement**

The labour reform introduced the possibility of terminating an employment relationship by mutual agreement.

In such case, the severance pay is exactly as mentioned in the termination without cause, except for (1) the notice, which is reduced by half, and (2) the FGTS fine, in which the employee’s portion is also reduced by half (from 40% to 20%). Moreover, the employee may collect only 80% of the FGTS deposited in the employee’s severance fund account. The employee does not have the right to unemployment insurance in this case.

To the extent this is a new provision of the CLT, this alternative should be evaluated on a case-by-case basis.

**Procedures and related termination matters**

In general, the employer must comply with the following procedures when terminating an employment relationship: (1) provide the employee with notice and termination documents; (2) submit the employee to medical examination; and (3) pay the severance in 10 calendar days following the termination date, unless otherwise provided by the applicable collective bargaining agreement.

After the labour reform, the CLT no longer requires the employer to ratify the termination of the employment contract with the applicable union of employees.

**Release and separation agreements**

The labour reform introduced the possibility of ratifying out-of-court settlements between the employer and employee with the labour court.

In such case, the employer and employee may settle a release upon the payment of the statutory severance and any other discretionary compensation. After that, the parties may opt to ratify such release with the court, provided a lawyer or the applicable union of employees assists the employee during the process. If the court ratifies the agreement, the employee waives any right regarding the employment relationship.

The execution of release and separation agreements should be analysed on a case-by-case basis.

**Job tenure and termination**

The CLT does not permit the employer to terminate the employment contract without cause if the employee is entitled to job tenure.

The job tenure classification is dependent on statutory and collective bargaining agreement provisions, and case law, including: (1) if the employee had a work-related accident or suffers from a work-related illness, the employee has tenure from the moment of leaving up to 12 months after the date of reinstatement; (2) if the employee is a union representative, the employee has tenure from the moment of application to the position up to one year after the mandate ends; and (3) if the employee is pregnant, the employee has tenure from the moment of pregnancy confirmation up to five months after the birth date.

The analysis of the labour and employment aspects concerning job tenure and termination should be carried out on a case-by-case basis.

**Statutory employment protection rights**

**Basic employment rights**

**Minimum salary and wage**

In Brazil, salaries are paid on a monthly basis. The federal minimum salary is currently...
R$954.00 (approx. US$318.00) per month and R$4.33 per hour (approx. US$1.44). State law or collective bargaining agreements may provide higher amounts, and the employer must respect whatever is more beneficial to the employee.

Salaries have to be paid in Brazilian currency, by or before the fifth business day of the month subsequent to the work month. The employer may advance this payment on a two-weekly basis. Each year the law or collective bargaining agreement establishes a salary readjustment index. Usually, this readjustment is based on the inflation and monetary restatement calculated for the previous year.

*Working hours*

The working hours cannot exceed eight hours per day and 44 hours per week. In certain cases, the law establishes a six-hour limit for the daily work schedule, taking into consideration any special conditions under which the work is performed (e.g., continuous rotating shifts).

The CLT also exempts certain employees from the limitation of working hours, so they are not entitled to overtime pay. This exemption applies to employees that carry out their work mostly out of the employer’s premises (e.g., salespersons, employees in home offices), or hold a position of trust in the company (officers, managers, supervisors).

Overtime pay is at least 50% of the employee’s base wage; collective bargaining agreements may provide for a higher allowance in certain cases.

The labour reform introduced the possibility for employers to negotiate compensatory schedules with employees on an individual basis. In Brazil, this is called a “bank of hours”. The bank of hours permits the implementation of such flexible time, provided that the balance is executed every six months. The law also permits employers to negotiate the bank of hours on a collective basis by means of bargaining with the union of employees.

*Rest periods*

The employee is entitled to a minimum one-hour break for a meal and rest during working hours lasting more than six hours, or a 15-minute break for working hours lasting between four and six hours. The labour reform permits employers to extend or reduce their break through bargaining with the union of employees.

Female employees have at least two breaks of 30 minutes each to breastfeed their babies in their first six months of life. The employer cannot discount this break from the employee’s pay, or ask the employee to compensate it later.

Employees are also entitled to a minimum rest of 11 hours between two working days and a paid weekly rest of 24 hours (preferably granted on Sundays).

*Vacation*

After working for 12 months for the employer (vesting period), the CLT provides the employee with 30 calendar days of vacation. The employer decides when the employee will be on vacation, which must be within 12 months following the vesting period.

The vacation pay is based on the employee’s monthly salary. Additionally, the CLT requires employers to pay one-third of the employee’s monthly salary as a vacation bonus. If the employee does not take vacation within 12 months following the vesting period, the employer must pay double the applicable compensation (vacation penalty).

Employees may choose to sell up to 10 days of their vacation period. In addition, the labour reform introduced additional provisions, in particular: (1) the employee may split the vacation into up to three periods, provided one of them is longer than 14 days, and none of the others is shorter than five days; and (2) the employee cannot start the vacation period two days before a holiday or weekly rest, otherwise the employer has to pay the vacation penalty.
**13th salary**

The 13th salary corresponds to one extra monthly salary per year. Employers may pay it in two instalments: the first, between February and November; and the second, up to and including 20 December.

**FGTS**

The law requires employers to deposit 8% of the employee’s compensation in the employee’s severance fund. If the employee is terminated by the employer, the employee may collect the severance amount deposited during the employment relationship (see “Protection against dismissal” above).

**Leave**

There are several types of leave under the CLT and other statutes, including: (1) paternity leave (five days, extendable to 20 days); (2) maternity leave (120 days, extendable to 180 days); (3) adoption leave; (4) funeral leave; and (5) sick leave (if required absence is longer than 15 days), among others.

**Additional employment rights**

The law, contracts, collective bargaining agreements and internal policy may provide additional employment rights, including shift and hazard premiums, bonuses, profit-sharing, additional forms of compensation, vacation entitlements and extensions, and additional leave periods, among others.

In particular, the labour reform introduced some changes to the classification of certain compensation payments, which may encourage employers to give more incentives to employees. As a rule, additional compensation (e.g., bonus) paid to employees is taken into account in the calculation of the other statutory rights (e.g., 13th salary, weekly rest, vacation, FGTS, overtime, etc.), and they are subjected to tax and social contributions. The law now exempts such effects and the payment of tax and social contributions in certain cases (e.g., discretionary bonus), provided certain statutory and factual elements exist. The case law may also determine additional elements for such classification.

Whistleblowing provisions are not applicable under Brazilian law.

**Worker consultation, trade unions, and industrial action**

**Overview of workers’ representation**

All employers and employees are represented by a labour union by a legal requirement. The union of employees cannot extend its representation to non-employees, such as independent contractors.

The classification of labour unions depends on (1) the economic sector (e.g., metalwork, oil and gas, automotive, electronics, commerce, etc.), and (2) the geographic territory in which the employers and employees operate (i.e., a single city or multiple cities, a single state or multiple states, nationally). These two elements form the concept of “union class” (categoria sindical).

There is only one labour union per class of employers (union of employers) and employees (union of employees) in a given economic sector and geographic territory. Such representation is not dependent on any showing of support for the union representative, or any definition of being a member of the labour union in the collective bargaining process. All labour unions are required by law to have a collective bargaining agreement. Moreover, the law provides that collective bargaining agreements must cover all participants of the applicable union class.
Right to strike and employer’s response

The right to strike is provided under the Constitution and regulated by Law 7,783 (1989). The right to strike belongs to each employee but must be executed through the employees’ union. The applicable union of employees will call the general assembly (as provided by the union’s statute), and discuss the work stoppage with the represented employees. Only in very rare situations does the law permit employees to pursue a strike without the union’s assistance. In these cases, the employees will have to elect a bargaining unit to negotiate directly with the employers’ union or company.

The right to strike must follow certain statutory procedures, which include timing, subjects of strike, and proceedings (modus operandi). Strikes are illegal in the military services but allowed for police, firefighters, and other public civil authorities. Lockouts are also considered illegal.

If the strike is abusive, the labour court will order the employees to return to work. The employer may notify or suspend, or even terminate the employees involved in the abusive strike. The employer cannot discipline employees that participated in a strike if this participation did not involve any abusive conduct or illegal action.

During the strike, the employment contracts are suspended, so employees are not entitled to salary and related compensation. Moreover, the employer cannot hire permanent or temporary replacements to occupy their job positions. Only if the work relates to essential services or key machines and equipment may the employer contract replacements to maintain the operations.

The parties may resolve their dispute through mediation or arbitration, or file a petition (dissídio de greve) to the labour court that has powers to moderate the dispute and settle it. The court’s decision in these cases, whether equitable or not, is limited to the applicable legislation.

Employee privacy

The principal sources of data privacy in Brazil are:


f) The Access to Information Law (2011): protection of data privacy of individuals (access via individuals’ permission only).

g) The Internet Law and its regulations (2014/2016): collection, use, and protection of individual’s data privacy on the internet; proceedings to save and maintain this data.

h) The Data Protection Law (enacted in 2018, effective only as of February 2020): an extensive package of rules regarding the collection, treatment, and protection of data privacy.

As to the effects of data privacy on employment relations, the main sources of law applicable to them are the Constitution, the Civil Code, and the recent Data Protection Law. As a rule, the data collected must be connected to the employee’s job position and duties. In addition,
companies should regard the collection and treatment of such data in their internal policies, which may set up additional rules concerning: (1) collection; (2) right to access; (3) disclosure to third parties; (4) time of retention; (5) use of such data; (6) security procedures; and (7) analysis and investigation for compliance purposes.

The Data Protection Law represents an important feature of data privacy in Brazil, and it has been compared to the same as practised in other countries, such as those applied in the European Union. In particular, this law provides that personal data of employees may only be processed with employees’ consent, and under certain limits, including:

a) If necessary for compliance with any legal or regulatory obligation.
b) If necessary for the performance of a contract or preliminary procedures related to the contract of which the data subject is a party.
c) If necessary to meet the legitimate interest of the employer (the data controller), or third parties.

With respect to international transfers of data, the Data Protection Law permits such transfers under specific circumstances, which include:

a) To countries with an adequate level of protection (to be determined by the national data protection authority).
b) Through the use of standard contractual clauses, global corporate rules, seals, certificates and codes of conduct approved by the national data protection authority.
c) When necessary to comply with a legal or regulatory obligation, or for the performance of a contract.
d) With the specific and declared consent of the employee, in which case prior information on the international character of the operation must be provided, clearly distinguishing it from other purposes.

Under certain limits and circumstances, the law and case law permit monitoring/surveillance (e.g., e-mail, telephone calls, bring your own device (BYOD), etc.) or vetting in the workplace. Background checks are not regulated by law, but case law permits it for certain employees, including domestic workers, professional drivers, certain employees in the finance/banking sector, and employees working with hazardous products (e.g., explosives). To the extent this is a sensitive matter because it involves constitutional rights and the recent Data Protection Law, analysis should be conducted on a case-by-case basis.

**Other recent developments in the field of employment and labour law**

One of the principal changes enacted with the labour reform is permitting companies to outsource their principal business activities.

Before the labour reform, a precedent of the Superior Labour Court (Tribunal Superior do Trabalho) regulated the outsourcing matter. This precedent prevented employers from outsourcing their principal business. Only non-principal activities could be outsourced, otherwise the employer and outsourcing company could be considered liable for any employment obligation concerning the outsourced workers.

In addition to authorising employers to outsource their principal business, other obligations were introduced to the contracting parties in order to avoid fraud and protect the outsourced workers, such as:

a) In the event of employment termination, the employee cannot provide services to the employer as an outsourced worker before 18 months of the termination date.
b) The employer cannot hire any outsourcing company whose partners had an employment relationship with the employer, or rendered services to the employer as independent contractors, until 18 months after the termination date.
c) The employer cannot use the outsourced worker in activities other than those agreed in the contract with the outsourcing company.

d) The outsourcing companies must have a minimum corporate capital depending on the number of employees.

The application of outsourcing is limited by certain laws. For instance, the Aeronautical Law provides that the work of a crew must be performed by a direct employee. In the field of public administration, the execution of certain jobs must be done by public servants, which are selected through a public exam. Discussions relating to outsourcing in utility concessions such as telecommunications and electric power are ongoing. But some recent decisions of the Brazilian Supreme Court point to fewer restrictions in the use of outsourcing.

Another feature of the labour reform is the introduction of arbitration for the resolution of employment disputes.

The CLT permits using arbitration if the employee earns a monthly salary higher than two times the benefits cap paid by the social security. In addition, the employee must consent with the arbitration, whether by means of the employment contract or signing a term of arbitration.

In the past, the labour courts were disinclined to accept arbitration because it could comprise the employee’s fundamental rights. In this regard, the arbitration law (9,307 of 1996) permitted arbitration only if no fundamental employment rights were involved, although this classification between fundamental and non-fundamental was (and continues to be) controversial.

Now that the CLT has specific provisions permitting the use of arbitration as a resource to resolve employment disputes, employers and employees should take advantage of it and begin to consider the possibility of instituting arbitration for certain employment contracts.

* * *

Endnotes

1. Rogério Marinha, representative of the Brazilian House of Representatives (Câmara dos Deputados), chief-reporter of the labour reform, presenting Os 150 dias de vigência da Reforma Trabalhista, in the Seminar 150 dias de Reforma Trabalhista hosted by the União Nacional de Entidades de Comércio e Serviços, São Paulo, May 2018.

2. Id.
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Canada

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General labour market and litigation trends

Employment and labour law in Canada is designed to regulate both the conditions of employment and the relations between employers and employees. There is a patchwork of legislation across the federal jurisdiction and the 10 provinces and three territories in Canada that governs employment relationships. While labour and employment matters are principally within provincial and territorial jurisdiction in Canada, the federal government has jurisdiction over certain industries that are viewed as having a national, international or inter-provincial character, such as banks, air transport, pipelines, telephone systems, television and inter-provincial trucking. All other employers are provincially regulated for the purpose of labour and employment matters and are governed by the employment standards, labour relations and other employment-related legislation of each of the provinces in which it has operations.

Regardless of whether a business is provincially or federally regulated, or where in Canada it carries on business, Canadian employers should be familiar with the following types of employment-related legislation:

- Employment standards legislation.
- Human rights legislation.
- Federal and provincial privacy legislation.
- Occupational health and safety legislation.
- Workers’ compensation legislation.
- Labour relations legislation.

The legislation referred to above is only the start. Regulations made pursuant to this legislation also establish numerous rights and obligations for employers and employees. Further, employers are often also required to satisfy common law obligations owed to their employees in Canada’s common law provinces, and to abide by the Civil Code of Québec in Quebec. The most significant of these obligations is to provide employees with reasonable notice of the termination of the employment relationship without cause.

Recent trends in Canada include the legalisation of cannabis and extraordinary damages awards in wrongful dismissal litigation.

Legalisation of cannabis

On October 17, 2018, the Cannabis Act came into force in Canada. This statute legalised the recreational use of cannabis in Canada, whereas the use of medical cannabis has been permissible in Canada for many years. The Cannabis Act provides a legal framework for controlling the production, distribution and possession of cannabis in Canada.

As a result, Canadian employers are concerned about the impact of legalising recreational...
cannabis on issues such as workplace health and safety, the duty to accommodate addictions, and the availability of permissible and reliable drug testing for cannabis at work.

Under Canadian occupational health and safety legislation, employers have a duty to protect the health and safety of their workers. This obligation includes ensuring employees do not endanger themselves or others due to impairment by drugs or alcohol. Employers are entitled to expect that employees arrive at work unimpaired and capable of performing their duties in a safe and effective manner, whether or not the workplace is considered to be safety sensitive in nature.

Drug addictions are considered to be disabilities under Canadian human rights legislation. Employers have a duty to accommodate employees with disabilities up to the point of undue hardship. Employers will need to consider accommodation requests related to cannabis addiction just like any other accommodation request for other disabilities. Health and safety is a factor in determining whether the accommodation requested constitutes undue hardship, and as such, in reviewing these requests, employers will need to consider whether the employee works in a position that is safety sensitive.

Further, it is expected that drug testing will receive increased attention from employers. While drug testing has historically not been generally permissible in Canada, more recently it appears that courts and arbitrators are more willing to tolerate certain testing in safety sensitive industries or positions. However, there is no test available that accurately measures present or current impairment due to cannabis use. This leads to questions about whether an employer can discipline or terminate the employment of employees for a positive result.

As a result of these changes, Canadian employers have been revising and updating their drug, alcohol, accommodation and health and safety policies and procedures.

Extraordinary damages in employment law cases

In Canada, former employees will typically claim damages for loss of compensation and benefits during the common law or contractual notice period upon termination of employment without cause. These damages are commonly referred to as “wrongful dismissal damages”. In addition to wrongful dismissal damages claims, there has been a recent trend by former employees to also bring claims for “extraordinary damages” in such litigation.

Extraordinary damages include moral and punitive damages, either of which may be awarded as a result of an employer’s bad faith conduct in the manner of an employee’s dismissal. Moral damages (also known as aggravated damages) are awarded as compensation for the mental distress inflicted upon an employee as a result of bad faith in the manner of his or her dismissal. In order to be compensable, the mental distress must rise above the level of distress that will ordinarily be experienced by most individuals upon the termination of one’s employment.

The purpose of punitive damages, on the other hand, is not to compensate a plaintiff for some loss, but rather to punish a defendant for its harsh, vindictive, reprehensible and malicious or high-handed conduct and deter others from acting in the same manner. Punitive damages will only be awarded where an independent actionable wrong (such as a breach of the duty of good faith in contractual relations) can be established, and where the objectives of punishment and deterrence are not met by the award of other heads of damages.

Canadian courts have traditionally been reluctant to award both moral and punitive damages in the same case. This is a result of cases such as Honda Canada Inc v Keays, 2008 SCC 39, in which the Supreme Court of Canada recognised that moral damages also act as a deterrent. However, recent case law indicates that some conduct on the part of the employer may be perceived by courts as being so egregious as to justify an award under both heads of damages.
The amount of such awards also appears to be creeping upward. For example, in *Galea v Wal-Mart Canada Corp*, 2017 ONSC 245, the Ontario Superior Court awarded a former Wal-Mart Canada Corp employee a total of C$750,000 in punitive and moral damages. This was one of the highest punitive and moral damages awards in Canadian employment law.

**Business protection and restrictive covenants**

**Enforceability of restrictive covenants in Canada**

Employers’ use in Canada will often include both non-competition covenants and non-solicitation covenants in employment agreements in order to restrict an employee’s post-employment activities. A non-competition covenant prohibits a former employee from becoming engaged in a business that competes with the business of his or her former employer. A non-solicitation covenant prohibits a former employee from soliciting the customers or employees of his or her former employer.

Canadian courts will not enforce restrictive covenants that unnecessarily restrict an employee’s freedom to earn a livelihood after the end of an employment relationship. A former employer must demonstrate to the court’s satisfaction that the scope of the covenant is “reasonably necessary” for the protection of the business. What is “reasonably necessary” depends on the nature of the business, its geographic reach, and the former employee’s role and responsibilities in that business. At minimum, a restrictive covenant must be linked to an employer’s legitimate proprietary interests. It must also be reasonable in terms of (i) geographical scope, (ii) temporal scope, and (iii) activities restricted.

Canadian courts will generally only enforce non-competition covenants in “exceptional” circumstances; for example, where an employee is essentially the “face” of an employer’s business to its customers, such that those customers would follow that employee to a competitor after termination of the employment relationship, even if they were not solicited by the former employee.

In the absence of exceptional circumstances, courts typically find that non-solicitation covenants provide adequate protection to an employer’s business interests and will accordingly refuse to enforce non-competition covenants on the basis that they are not commercially necessary.

Canadian courts will not “blue pencil” or read down restrictive covenants that contain overbroad provisions to render those covenants enforceable. If a restrictive covenant is ambiguous or overbroad, courts will strike the entire clause rather than attempting to rewrite it.

**Discrimination protection**

**Human rights legislation in Canada**

Every Canadian jurisdiction has enacted human rights legislation that establishes, among other things, a comprehensive system for the investigation and resolution of complaints relating to discrimination. Although these human rights statutes deal with matters beyond the scope of the employment relationship, they also contain a number of provisions that deal with workplace discrimination.

With limited exceptions, Canadian human rights legislation provides for an individual’s right to equal treatment with respect to employment, and prohibits discrimination in the workplace based on certain “prohibited grounds”, which are set out in the legislation. As a general observation, discrimination has been defined to include any adverse distinction, exclusion or preference based on a prohibited or protected ground as defined by the legislation.
Protected grounds of discrimination

The prohibited or protected grounds of discrimination vary slightly from jurisdiction to jurisdiction, and include, among others, the following: age; race; colour; national or ethnic origin; place of origin; citizenship or nationality; source of income; language; sex; sexual orientation; gender identity expression; ancestry; disability, including substance dependencies; marital status; family status; pregnancy; creed or religion; political beliefs; and certain criminal convictions.

Human rights legislation in many provinces and territories also prohibits the distribution of employment applications that express or imply a preference for an individual with certain characteristics related to prohibited grounds of discrimination. In addition, the human rights statutes of most Canadian provinces and territories contain a prohibition against sexual harassment and harassment based on other prohibited grounds. The legislation also seeks to protect employees who make complaints regarding discrimination or harassment by prohibiting reprisals of any kind against those individuals.

As such, employers in Canada must be careful to ensure that they do not make employment decisions with reference to any of these characteristics, including hiring, compensation, promotion and dismissal decisions. Further, the protected ground must not be even a small part of the overall employment decision if that decision is adverse to the individual, and intention to discriminate or breach human rights legislation is not required for a finding of such a breach.

Enforcement

Enforcement of Canadian human rights legislation is essentially a complaint-driven process. Most jurisdictions have a human rights commission that will provide advice and assistance to individuals who believe they have been subject to unlawful discrimination. If a complaint is filed, the human rights commission will investigate the complaint. If the complaint cannot be settled, the human rights commission may refer the complaint to a human rights tribunal for adjudication. In some provinces, such as Ontario, individuals have a right to file complaints directly with the human rights tribunal without first filing a complaint with a commission or other investigative body.

Generally, human rights tribunals have broad remedial powers, including the power to award damages for loss of employment or wages, and damages relating to loss of enjoyment or hurt feelings. Human rights tribunals may also reinstate an employee to his or her employment or require an employer to take steps to ensure that discrimination does not continue. For example, in some jurisdictions an employer may be required to institute an anti-discrimination policy, report periodically to the human rights commission, and make specific changes to its employment systems or practices. Further, most human rights legislation provides that those persons who infringe the rights provided for by the legislation are guilty of an offence and liable to pay certain fines.

Pay equity and transparency

Both provincial and federal human rights legislation in Canada prohibits discrimination in employment on the basis of gender. Some jurisdictions, such as Ontario and Quebec, also have specific pay equity legislation that is meant to “redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes” (section 1 of Quebec’s Pay Equity Act).

On October 29, 2018, the federal government introduced Bill C-86, Budget Implementation Act, 2018, No. 2 in the House of Commons, which also proposes new pay equity legislation
for federally regulated employers. Under the proposed legislation, federally regulated employers will be required to evaluate their compensation practices to ensure that they are providing equal pay for work of equal value.

Further, in 2019, barring any amendments made by the new government in the province, Ontario employers will also be subject to pay transparency legislation. Ontario’s Pay Transparency Act, 2018 (“Act”) was introduced by the Ontario government in part in an effort to close any wage gap between men and women by ensuring that compensation is based on a job’s requirements and the candidate’s qualifications. The stated purposes of the Act include:

• promoting gender equality and equal opportunity in employment and in the workplace, including equal compensation, through increased transparency of pay and workforce composition;
• increasing disclosure of inequities related to employment and compensation that women and other Ontarians may experience, to encourage the removal of these inequities;
• promoting the elimination of gender and other biases in hiring, promotion, employment status and pay practices;
• supporting open dialogue and workplace consultation between employers and employees, including with respect to compensation and equal opportunity; and
• supporting economic growth through the advancement of equity in employment and in the workplace for women and other groups.

The Act will prohibit employers from seeking compensation history information about an applicant. Applicants, however, can still voluntarily disclose this information without being prompted, and these restrictions do not apply to publicly available compensation history information. The Act will also require employers to include the expected compensation or the range of expected compensation in publicly advertised job postings. Finally, the Act will enforce increased reporting requirements for employers relating to compensation.

Protection against dismissal

Just cause for dismissal

In Canada, employment may be terminated with or without just cause (or serious reason in the province of Quebec). The overwhelming majority of terminations proceed on a without cause basis, in part, because employers bear the heavy burden of demonstrating that they had cause to dismiss an employee.

Just cause dismissal is reserved for the most egregious of misconduct that strikes at the heart of the employment relationship. Determining whether or not a termination is for a justified cause requires a factual inquiry into the context and circumstances of the misconduct. Some examples of misconduct that might rise to the level of just cause include fraud, theft, harassment, or breach of fiduciary duty.

It is less clear that there is just cause to terminate when it comes to incompetence or poor performance. Courts usually require employers to show that they took proactive steps in managing poorly performing employees before finding that a dismissal was for cause. Even then, it is only in rare cases that a Canadian court will agree that an employee’s poor performance gave an employer cause to terminate that employee’s employment.

Dismissal without cause

In most Canadian jurisdictions and provinces, an employer may terminate an employee’s employment for any reason, in the absence of unlawful discrimination or some other breach of statute. However, where there is no cause to terminate, an employer will be required to
provide the employee with notice or payment *in lieu* of notice. The actual notice entitlement will depend on the applicable employment standards legislation, the employee’s written employment agreement and the common law of Canada (except in Quebec).

In the absence of an enforceable termination clause in a written employment contract, an employee’s termination entitlements will be governed by Canadian common law (with the exception of Quebec). One obligation imposed upon employers by the common law is to provide employees with what is referred to as “reasonable notice of termination” of employment or pay *in lieu* of reasonable notice.

There is no fixed formula for determining reasonable notice in any given case. There are, however, several factors that courts consider when determining reasonable notice, including the availability of similar employment as well as the employee’s age, length of service, position and level of compensation. In essence, the courts aim to identify, on a case-by-case basis, the length of notice that the employee will need to find alternate work of a similar nature. Reasonable notice generally ranges from a few weeks up to 24 months depending on the above factors, but there are exceptions.

The concept of reasonable notice is intended to signify actual or written advance notice. As a result, an employee’s notice entitlement typically includes all elements of the employee’s compensation package. Accordingly, an employer will typically have an obligation to provide or pay the employee with an amount equal to the employee’s salary, benefits, car allowances, pro-rated bonuses, and pro-rated commissions, and if applicable continued vesting of equity-based compensation, for the period worked to the termination date and through the applicable notice period.

Written employment agreements may modify or limit an employer’s common law obligations. In general terms, where there is a proper and enforceable employment contract that specifies what the employee will receive upon termination of employment, then it will be the employment contract – and not the common law – that the employer will rely on in determining an employee’s entitlements upon termination. However, any agreement that purports to contract out of or provide less than the employee’s statutory entitlements above would be unenforceable. Other more general contractual considerations, such as adequate consideration, duress and unconscionability, also play a role in determining the enforceability of employment contracts. Furthermore, any ambiguity in a written employment agreement will most often be read in favour of the employee.

Note that the discussion in this section does not consider the employment standards statutes in certain provinces and federally that place limits on an employer’s ability to terminate without cause once an employee has been employed for a specified number of years.

**Minimum statutory requirements**

Employment standards legislation in all Canadian jurisdictions also sets out minimum notice (or pay *in lieu* of notice) obligations in relation to the dismissal of an employee without cause. It should be emphasised that the statutory minimums prescribed by employment standards legislation with respect to notice and severance are just that – minimum standards. They represent the lowest possible amounts that an employee is entitled to receive on dismissal without cause. An employer cannot contract out of the statutory minimum entitlements.

Generally, an employee’s entitlement to statutory minimum notice of dismissal increases with his or her length of service. For example, in Ontario, employees are entitled under statute to approximately one week’s notice (or pay *in lieu* of notice) for each completed year of employment, up to a maximum of eight weeks. Although employees’ entitlement to notice of
termination of employment varies slightly from province to province, employment standards legislation across the Canadian jurisdictions currently provide for a maximum statutory notice requirement of eight weeks or less in the context of an individual termination of employment.

In the context of what is generally referred to as a “mass termination”, there may be enhanced notice requirements for employers. The definition of what constitutes a mass termination varies by province.

In Ontario and the federal jurisdiction, employment standards legislation also requires employers to provide employees with statutory severance payments (in addition to statutory notice or pay in lieu of notice) in certain circumstances. In Ontario, employees who have five or more years of service at the time of their dismissal are entitled to statutory severance pay, if their employer has a payroll of C$2.5 million or more, or if the dismissal is part of a discontinuance of a business involving the termination of 50 or more employees in a period of six months or less. Severance pay is equal to one week’s pay for each completed year of employment and a proportionate amount of one week’s pay for a partial year of employment, to a maximum of 26 weeks’ pay. In the federal jurisdiction, an employee is entitled to statutory severance pay if he or she has completed 12 consecutive months of employment with an employer before being dismissed. Statutory severance pay in the federal jurisdiction is currently calculated as the greater of two days’ wages for each year of employment completed by the employee and five days’ wages.

On October 29, 2018, the federal government introduced Bill C-86, the Budget Implementation Act, 2018, No. 2 (Bill C-86). If passed, Bill C-86 will amend the group and individual termination provisions under the Canada Labour Code by increasing the minimum notice of termination.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Each jurisdiction in Canada has employment standards legislation in place setting out minimum entitlements for employees. Recently, many Canadian jurisdictions have made significant amendments to their employment standards legislation, resulting in increased protections for employees. We will provide an overview of important amendments below.

Federal amendments

On December 3, 2017, the federal government adopted new rules for maternity, parental and caregiver benefits under the Employment Insurance Act (EIA) and the corresponding leaves under the Canada Labour Code (CLC). The changes came into force via the Budget Bill Implementation Act, 2017 (Bill C-44).

The EIA was amended to allow birth mothers to access employment insurance (EI) maternity benefits up to 12 weeks before their due dates (as opposed to eight weeks previously). A corresponding change to the CLC was made to allow birth mothers to commence maternity leave up to 13 weeks prior to the child’s due date.

The EIA was also amended to allow for payment of parental benefits over a longer period of time at a lower benefit rate. An eligible parent is now given the option of extending his or her EI parental benefits over a 61-week period after a child is born or adopted at the benefit rate of 33 per cent of his or her average weekly insurable earnings (up to a maximum amount). Previously, an eligible parent only had the option of receiving 55 per cent of his or her average weekly insurable earnings (up to a maximum amount) over a 35-week period after the child was born or adopted. Coinciding amendments to the CLC were made to extend the length of parental leave to 63 weeks.
Bill C-44 additionally established a new adult caregiver benefit that allows an eligible caregiver to receive EI benefits for up to 15 weeks to care for a critically ill adult family member. In addition, the EIA now allows family members to receive EI benefits for up to 35 weeks to care for a critically ill child. Previously, only parents of a critically ill child could receive such benefits. Bill C-44 amended the CLC to reflect the extension of EI benefits. Now, employees are entitled to up to 17 weeks of leave to care for a critically ill adult family member and up to 37 weeks of leave to care for a critically ill child who is a family member. The CLC applies only to employees of employers that are federally regulated, such as individuals employed by banks, federal Crown corporations and broadcasting companies. As such, the amendments to the CLC only pertain to employees of employers that are federally regulated.

It should also be noted that on October 29, 2018, the federal government introduced Bill C-86, the *Budget Implementation Act, 2018, No. 2* (Bill C-86). If passed, Bill C-86 will amend the EIA to increase the maximum number of weeks for which parental benefits may be paid if these benefits are divided between claimants. Bill C-86 will also amend the CLC to, among other things, increase the aggregate amount of maternity and parental leave that may be taken by employees if that leave is divided between employees.

Bill C-86 also proposes to, among other things:
- provide five days of paid leave for victims of family violence, a personal leave of five days with three paid days, an unpaid leave for court or jury duty, and a fourth week of annual vacation with pay for employees who have completed at least 10 consecutive years of employment;
- eliminate minimum length of service requirements for leaves and general holiday pay and reduce the length of service requirement for three weeks of vacation with pay;
- prohibit differences in rate of wages based on the employment status of employees;
- address continuity of employment issues when a work, undertaking or business becomes federally regulated or in cases of contract retendering; and
- update group and individual termination provisions by increasing the minimum notice of termination.

**Ontario amendments**

On November 27, 2017, the Ontario government passed the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148), rolling out major changes to the province’s employment and labour laws, including the *Employment Standards Act, 2000*. The Bill 148 amendments pertain to employees of employers that are provincially regulated in Ontario. The key amendments that are currently in force are summarised below:
- Parental leave: Entitlement to parental leave increased from 35 weeks to 61 weeks for employees who take pregnancy leave, and from 37 weeks to 63 weeks otherwise.
- Critical illness leave: Employees with six consecutive months of service are now entitled to a critical illness leave of absence of up to 17 weeks to provide care and support to a critically ill adult family member.
- Minimum wage: The general minimum wage increased to C$14/hour.
- Vacation: The minimum vacation entitlement for employees with five or more years of employment increased to three weeks per year.
- Personal emergency leave: Employees in all workplaces (previously limited to workplaces with 50 or more employees) are now entitled to a personal emergency leave of up to 10 days per calendar year, which comprises two paid days and eight unpaid days of leave.
• Child death leave and crime-related child disappearance leave: An employee with six consecutive months of service whose child dies from any cause is now entitled to a child death leave for a period of up to 104 weeks. This leave is distinct from the crime-related child disappearance leave, which also increased to 104 weeks.
• Family medical leave: Entitlement to family medical leave increased from eight weeks in a 26-week period to 28 weeks in a 52-week period.
• Domestic/sexual violence leave: An employee who has been employed for at least 13 weeks is now entitled to a domestic/sexual violence leave of up to 10 days and up to 15 weeks, if the employee or a child of the employee experiences domestic or sexual violence (or the threat of such violence). The first five days of this leave must be paid.
• Equal pay for equal work: Employers are now prohibited from paying an employee at a rate of pay less than the rate paid to another employee because of a difference in employment status. This protection extends to temporary, seasonal, casual, part-time and temporary help agency employees. However, there are exceptions for differences in rate of pay based on factors other than employment status, such as seniority, merit and quantity or quality of production.

Bill 148 stipulates that the following amendments will come into force on January 1, 2019:
• Minimum wage: The general minimum wage will increase to C$15/hour.
• Scheduling: Eligible employees will have new rights related to scheduling, including the following:
  • An employee will have the right to refuse an employer’s request or demand to work on a day that the employee was not scheduled to work if the request or demand is made less than 96 hours before the time the employee would commence work.
  • If an employer cancels an employee’s scheduled day of work or on-call period with less than 48 hours’ notice, the employer will be required to pay the employee wages equal to the employee’s regular rate for three hours of work.
  • An employee who is “on call” and not called to work (or who is called into work and works for less than three hours) must be paid his or her wages for three hours of work.
  • An employee will be permitted to request a change to his or her schedule or work location after three months of employment. If the employer denies the employee’s request, the employer must provide written reasons for the denial.

It should be noted that on October 23, 2018 the newly elected provincial government introduced Bill 47, Making Ontario Open for Business Act, 2018 (Bill 47). If passed, Bill 47 will repeal the following Bill 148 amendments that were described above:
• the minimum wage increase set to come into force on January 1, 2019;
• the scheduling provisions set to come into force on January 1, 2019;
• the new equal pay for equal work provisions; and
• the new personal emergency leave provision.

Alberta amendments
On June 7, 2017, the Alberta government passed Bill-17: The Fair and Family-friendly Workplaces Act (Bill 17). Among other things, this piece of legislation delineated various changes to the Alberta Employment Standards Code. The Bill 17 amendments pertain to employees of employers that are provincially regulated in Alberta. The key amendments are summarised below:
• Rest periods: Employers must now provide employees a minimum 30-minute break for every five hours of consecutive work. The previous provisions required a 30-minute break during each shift in excess of five consecutive hours of work.
• Minimum wage: The ability for employers to pay employees with disabilities less than minimum wage was removed from the legislation.
• Overtime: Time off in lieu of overtime pay is now calculated at 1.5 hours for each hour of overtime worked. The previous provisions calculated overtime at a ratio of 1:1. Overtime can also now be banked for six months rather than three months.
• Termination and temporary layoffs: Employers must now give at least one week’s notice of termination to an employee employed for between 90 days and three months. Previously, no statutory notice was required for employees with less than three months of service.

Employers are also newly prohibited from forcing employees to use entitlements such as vacation or banked overtime during a termination notice period. However, if an employer and employee agree in writing, banked overtime can be used during a termination notice period.

Further, with respect to temporary layoffs:
• temporary layoffs are now limited to 60 days within a 120-day period; and
• written notice of a temporary layoff to an employee is now required.

• Group termination: The previous provision required employers to provide four weeks’ written notice in the event of a group termination. Now, eight weeks’ notice is required if 50–99 employees are terminated, 12 weeks’ notice is required if 100–299 employees are terminated, and 16 weeks’ notice is required if 300+ employees are terminated. Group termination occurs if the employees all work at a single location and termination occurs within a four-week period.

• Compassionate care leave: Compassionate care leave was extended to 27 weeks from eight weeks and caregiver status was expanded to include non-primary caregivers.
• Maternity/parental leave: Maternity leave was extended from 15 to 16 weeks. Parental leave was also extended from 37 weeks to 62 weeks.
• Death or disappearance of a child leave: Employees are now entitled to up to 52 weeks of leave in the event that their child disappears as a result of a crime, and 104 weeks if their child dies as a result of a crime.
• Critical illness of a child leave: Parents of critically ill children are now entitled to 36 weeks of leave.
• Critical illness of an adult family member: Employees are now entitled to up to 16 weeks of leave to take care of an ill or injured adult family member.
• Long-term illness and injury leave: Employees are now entitled to 16 weeks of leave per year for long-term personal sickness or injury.
• Domestic violence leave: Employees are now entitled to up to 10 days of leave per year in order to address a situation of domestic violence.
• Personal and family responsibility leave: Employees are now entitled to up to five days of leave per year for personal sickness or short-term care of an immediate family member.
• Bereavement leave: Employees are now entitled to up to three days of leave per year for bereavement of an immediate family member.
• Citizenship ceremony leave: Employees are now entitled to ½ day of leave per year in order to attend a citizenship ceremony.
• Leave entitlement: Employees are now eligible for most leaves of absence after 90 days of service, as opposed to the previous requirement of one year of service.

Quebec amendments

Quebec’s National Assembly recently enacted Bill 176, entitled An Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work
balance (Bill 176). Bill 176 was assented to on June 12, 2018. The Bill 176 amendments pertain to employees of employers who are provincially regulated in Quebec. Below is a description of the key changes made to the Act respecting labour standards (Quebec Act) and which, unless otherwise indicated, came into force on June 12, 2018.

- Wages: An employer will be prohibited from remunerating an employee at a lower rate of wage than that granted to its other employees who perform the same tasks in the same establishment solely because of the employee’s employment status or because the employee usually works fewer hours each week. This amendment will come into force on January 1, 2019.
- Work schedule: Employers and employees may now agree on the staggering of working hours on a basis other than weekly, without the authorisation of the Commission des normes, de l’équité, de la santé et de la sécurité du travail, provided certain conditions are met. Notwithstanding such an agreement, the workweek cannot exceed the standard workweek provided for under the Quebec Act (or the applicable Regulations) by more than 10 hours.
- In addition, the Quebec Act will impose a two-hour limit on the number of overtime hours an employee is required to accept in addition to his or her regular workday and it will allow an employee, under certain circumstances, to refuse to work overtime if he or she has not been informed of the work schedule at least five days in advance. This amendment will come into force on January 1, 2019.
- Statutory general holidays: An employer must now pay an employee the indemnity for statutory general holidays even if the employee is on vacation on the date of the holiday or if the holiday does not coincide with the employee’s regular work schedule.
- Vacations: Employees who, at the end of a reference year, are credited with three years of uninterrupted service with the same employer, will be entitled to three consecutive weeks of vacation instead of two. This amendment will come into force on January 1, 2019.
- Absences owing to sickness, organ or tissue donations, accidents, domestic violence, sexual violence or criminal offences: Going forward, the first two days of leave, each year, will be remunerated, provided the employee has three months of uninterrupted service. Remuneration for the first two days of absence will come into force on January 1, 2019.
- This leave has also been expanded such that an employee can now be absent from work without pay for up to 26 weeks over a period of 12 months owing to domestic violence or sexual violence.
- Family or parental leave and absences: The Quebec Act now allows any employee to be absent from work for 10 days per year to fulfil obligations relating to the care, health or education of the employee’s child or the child of a relative or of a person for whom the employee acts as a caregiver. The first two days of absence for these reasons, each year, will be remunerated, provided the employee has three months of uninterrupted service. Remuneration for the first two days of absence will come into force on January 1, 2019. The period of time during which an employee can be absent if he or she must stay with a relative is now: (i) 27 weeks over a period of 12 months because of a serious and potentially mortal illness; (ii) 36 weeks over a period of 12 months because of a serious illness or serious accident suffered by a minor child; and (iii) 16 weeks over a period of 12 months because of a serious illness or serious accident suffered by any other relative.
- Period of absence during a death or a disappearance: An employee may now be absent without pay for up to 104 weeks if his/her minor child dies, regardless of the
circumstances of the death. An employee may also be absent without pay for up to 104 weeks upon the disappearance of his/her minor child or upon the death by suicide of his/her spouse, child of adult age, father or mother. Further, an employee is entitled to five days’ leave, including two remunerated days, upon the death of a close relative. This amendment will come into force on January 1, 2019.

- Psychological and sexual harassment: Verbal comments, actions and gestures of a sexual nature are now expressly included in the notion of psychological harassment. The Quebec Act will require employers to adopt and make available to their employees a psychological harassment prevention and complaint processing policy. This obligation will come into force on January 1, 2019.

British Columbia amendments

On May 17, 2018, Bill 6, which amends the British Columbia *Employments Standards Act* (BC ESA), came into force. Bill 6 was introduced to provide employees with more generous and flexible pregnancy, parental and compassionate care leaves. Bill 6 also creates new job-security protections for parents upon the death or crime-related disappearance of their child. The Bill 6 amendments pertain to employees of employers that are provincially regulated in British Columbia.

The changes to the BC ESA bring British Columbia in line with federal employment insurance maternity leave benefits and statutory leaves of absence in other jurisdictions.

- Pregnancy and parental leave: The BC ESA now allows birth mothers nearing the end of their pregnancy to begin pregnancy leave up to 13 weeks before their due date – two weeks earlier than previously allowed. The previous entitlement of 17 consecutive weeks of unpaid pregnancy leave remains unchanged for employees who request it before giving birth; while employees requesting leave after giving birth will see their leave entitlement increase from six to 17 weeks. Employees requesting parental leave are now entitled to a longer period of leave. The amendments to the BC ESA harmonise British Columbia’s leave period with the benefits afforded to new parents under the federal *Employment Insurance Act*. Birth mothers who choose to take pregnancy leave are entitled to up to 61 consecutive weeks of unpaid leave, in addition to their 17-week pregnancy leave. This new combined entitlement period of 78 weeks (18 months) is an increase from the previous maximum of 52 weeks (12 months). Non-birth parents, including the parents of adopted children, also benefit from the amendments.

- Compassionate care leave: The amendments also include an expanded compassionate care leave. In the event that a family member requires care or support stemming from a medical condition with a significant risk of death within 26 weeks, employees are entitled to request unpaid leave of up to 27 weeks. Employees previously were only entitled to eight weeks of leave. The amendments also allow the leave to be taken at any time across a 52-week period.

- Child death and crime-related disappearance leave: Bill 6 also adds additional types of family responsibility leave, which may be requested upon the death or crime-related disappearance of a child who is under the age of 19. Employees are entitled to a leave period of up to 104 weeks upon the death of their child. The entitlement is limited to the period immediately following the child’s death, or if the child disappears, when the child is found dead. Separately, if the child of an employee disappears and it is probable that the disappearance is the result of a crime, that employee is entitled to up to 52 weeks of unpaid leave. If the
child is found during the leave, the leave will continue for a period of 14 days, but will end immediately if the child is found dead. Leave under both sections of the BC ESA is not available to employees who are charged with a crime that resulted in the death or disappearance of the child.

**Employee privacy**

**Amendments to PIPEDA**

In Canada, the collection, use and disclosure of personal information is regulated at both the federal and provincial level, resulting in different requirements in different jurisdictions. At the federal level, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies to all federally regulated employers in the context of their collection, use and disclosure of employee personal information. It also applies to many provincially regulated private sector organisations collecting, using or disclosing personal information, but only in the course of commercial activities (which does not include the collection, use and disclosure of employee personal information for employment purposes).

While the concept of informed consent is one of the foundations of PIPEDA, federal works, undertakings or businesses are permitted to collect, use or disclose personal information necessary to establish, manage or terminate an employment relationship without the consent of the employee or applicant. Similarly, information produced by an employee in the course of their employment, business or profession is also permitted to be collected, used or disclosed without consent so long as the collection is consistent with the purposes for which the information was produced.

Recent amendments to PIPEDA introduced provisions that created a federal mandatory breach reporting regime for Canada’s private sector. In April 2018, the federal government published the Breach of Security Safeguards Regulations (Regulations) setting out the requirements of the new regime, and announced that the Regulations would come into force on November 1, 2018.

As of November 1, 2018, organisations are now required to notify the Office of the Privacy Commissioner of Canada and affected individuals of “a breach of security safeguards” involving personal information under the organisation’s control where it is reasonable in the circumstances to believe that the breach creates a “real risk of significant harm” to affected individuals. Other organisations and government institutions must also be notified where such organisation or institution may be able to mitigate or reduce the risk of harm to affected individuals. Organisations must also keep and maintain records of all breaches of security safeguards regardless of whether they meet the harm threshold for reporting.

Failure to report a breach or to maintain records as required is an offence under PIPEDA, punishable by a fine of up to C$100,000.
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Andrea is an experienced advocate with over 20 years of practice advising corporations and other employers on employment and privacy law matters. Andrea provides timely and practical advice to employers across a variety of sectors, including banking and financial services, retail, manufacturing, healthcare products, technology, and marketing and advertising. In addition to providing day-to-day compliance and strategic advice, Andrea regularly acts for employers in various legal proceedings, including wrongful dismissal and human rights claims and in claims enforcing post-employment obligations. Andrea also advises on the employment and privacy law aspects of commercial transactions, including M&A transactions, reorganisations, insolvencies and outsourcing transactions. Andrea is the Practice Group Leader of the national Employment & Labour Group, Co-Chair of the Privacy Group and a member of the Blakes NITRO team. Andrea is also a member and past Co-Chair of the Diversity & Inclusion Committee at Blakes.

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China

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General labour market and litigation trends
The PRC labour contract law has been in effect for more than 10 years. Over these years, we have seen the number of labour disputes increase very quickly and, in the first quarter of 2018, labour disputes have been one of the top five causes of actions for civil lawsuits brought in the people’s court across the country, which is a result of various reasons.
In contrast to their parents, the new generation of employees born during or after the 1990s have grown up in the city and are usually more educated than their parents. Meanwhile, the decreasing workforce has given these young people more bargaining power with their employers. In general, the new generations have greater consciousness of workplace rights than their parents and tend to seek a job with life and work balance rather than a job just to make a living.
The effective exploitation of the internet in China is essential to improving labour productivity, but at the same time it also helps employees to learn and understand their rights very quickly and makes it easier to take collective action against employers.
In the past few years, we have seen an increased number of multi-national companies closing or downsizing their factories in China and relocating the production sites to Mexico or Southeast Asia. In 2018, this trend has continued and is driven partially by the increasingly expensive labour cost as well as, for example, the trade war between the US and China. In practice, factory closures and downsizing often leave employees, especially long-term workers, with unpaid salary and insufficient redundancy payments, which therefore causes an increased numbers of lawsuits and, quite often, collective lawsuits.
Labour disputes are no longer a tool for workers to protect their interests. In practice, we have seen more and more labour disputes involving senior management like directors, general managers, etc. These senior management personnel are more sensitive to their own rights and usually the amount of the claim is much higher, especially where the claims involve options, non-compete or training. It is quite common nowadays for the disputed amount in an employment dispute to reach RMB 500,000 to RMB 1 million if senior management personnel is involved, and in some extreme cases it can go beyond RMB 10 million. Senior employees tend to claim reinstatement of the employment contract instead of pursuing severance compensation, due to difficulties in finding a new job with the same remuneration and the existence of a statutory cap on monthly salary and number of months’ salary. Where the employment contract is reinstated, the company may face a huge amount of salary to be paid for the period from the termination date to the reinstatement date, which can be nearly two years or even longer due to the long process of arbitration and first and second instance trials.
Redundancies, business transfers and reorganisations

Redundancy
When downsizing a business, inevitably lots of employees’ employment will be terminated. According to the Labour Contract Law of the PRC, if the employer, under any of the following scenarios, is about to: (i) terminate more than 20 employees at once; or (ii) terminate more than 10% of its total employees, in the event that the employees about to be terminated at once is less than 20, it will constitute a mass layoff:
a) it is under restructuring according to the Enterprise Bankruptcy Law of the PRC;
b) it encounters serious difficulties in its production and business operations;
c) the enterprise changes products, makes important technological renovation, or adjusts the methods of its business operation, and it is still necessary to lay off the number of employees after changing the employment contract; or
d) the objective economic situation, on which the employment contract is based, has changed considerably and the employer is unable to perform the employment contract.

However, the abovementioned scenarios set by the Labour Contract Law of the PRC are quite general and ambiguous. Due to such ambiguity, to determine in practice if the employer’s state is qualified as one of the above-listed scenarios, and is therefore entitled to terminate its employees in a mass layoff, it will be subject to the discretion of the labour arbitration tribunal or court. At the very beginning of making the mass layoff plan, it is important for the employer to consult with the local labour bureau to obtain their endorsement. Their endorsement can be used to support the employer’s position.

The mass layoff process may take a few months. The steps involved include finalising the list of employees to be laid off, collecting these employees’ information, quantifying the severance compensation, communicating with and seeking endorsement of the local labour bureau, calling for general meetings of the employees and implementing the mass layoff plan.

Business transfers and reorganisations
In the business transfer or reorganisation process, it is very common for employees to be transferred from their former employer to a new employer. Correspondingly, employees’ employment with the former employer will be terminated and the employees will enter into a new employment contract with the new employer. In this process, employment termination is involved. According to the Labour Contract Law of the PRC, the employment can only be legally terminated with statutory causes and with a severance payment. Otherwise, the termination will be found illegal and the severance pay shall be doubled.

The Labour Contract Law of the PRC does not clearly provide that business transfers and reorganisations are statutory causes for the purpose of legally terminating the employment. When under disputation, the employer bears the obligation to prove that the concerned business transfer or reorganisation is qualified as a statutory cause, and therefore the termination is legitimate and the concerned employee is not entitled to the doubled severance payment. Otherwise, the termination will be found illegal and the severance pay shall be doubled.

The Labour Contract Law of the PRC does not clearly provide that business transfers and reorganisations are statutory causes for the purpose of legally terminating the employment. When under disputation, the employer bears the obligation to prove that the concerned business transfer or reorganisation is qualified as a statutory cause, and therefore the termination is legitimate and the concerned employee is not entitled to the doubled severance payment. Given such, some employees may take the occurrence of a business transfer or reorganisation as an opportunity to cash out their past years of employment with the former employer, and prepare to forgo their employment with the new employer for the purpose of claiming the severance payment, or hijacking the employer to at least get favourable terms for the new employment.

To justify that a business transfer or reorganisation constitutes a statutory cause, such as “fundamental changes to the objective circumstances” under the Labour Contract Law of the PRC, the company will need to prove that a) the business transfer or reorganisation makes it
impossible to continue the performance of the employment contract, and b) the parties have attempted to negotiate changing the employment contract but failed to reach an agreement. Under the scenario of “fundamental changes in objective circumstances”, a 30-day prior notice, or alternatively one month’s payment in lieu of notice is also required. It is also not entirely clear-cut whether mergers and acquisitions qualify as making it impossible to continue employment, so this is something that the company should evaluate case by case.

**Business protection and restrictive covenants**

PRC law protects trade secrets and intellectual property-related confidential information of the employer.

Any information or document can be treated as a trade secret if the information or document: (i) is not known to the public; (ii) is capable of bringing economic benefits to the owner of the trade secret and has practical applicability; and (iii) for which the owner has undertaken measures to keep secret.

Business connections like client, customer or supplier information, designs, formulae, source code, etc. could be protected as trade secrets if they meet the above-mentioned criteria.

A post-termination non-compete agreement/clause could be entered into between the employer and any senior management personnel, senior technician and other staff, if they have been provided with access to trade secrets of the employer and are under a confidentiality obligation. The duration, geographical scope and business to be restricted shall be agreed by the parties.

To give effect to a post-termination non-compete agreement/clause, under the PRC law it shall satisfy the following criteria:
1) the duration is not more than two years;
2) a monthly compensation (not less than 30% of the monthly salary of the employee, averaging 12 months before the termination) are paid during the non-compete period;
3) the employee is a senior management personnel, senior technician or other employee who will gain access to the trade secrets of the employer and is under a confidentiality obligation; and
4) being limited to competing business which produces or deals in the same category of products or engages in the same category of business.

There are no specific tests to determine the effectiveness of a non-dealing, non-solicitation or non-poaching clause. It will be examined by the court on a case-by-case basis when being disputed.

**Discrimination protection**

In the past few years, there has not been much progress on the legislation relating to discrimination protection. Besides the general principles of protecting the equal work rights of vulnerable groups, such as the disabled, we have not seen any constructive rules being adopted to promote this protection.

On the other hand, discrimination against women in working environments who are within the age range of giving birth has drawn massive attention. Particularly, the Chinese government has changed the one-child policy and is encouraging women to have a second child. This policy has caused employers to be reluctant to hire female employees. With national level legislation with respect to eliminating discrimination and protecting women’s
equal work rights being absent, some local governments have started to take measures to initiate change. On 1 September 2017, the *Women’s Rights Protection Regulations of Hebei Province* (《河北省妇女权益保障条例》) (“Regulations”) came into effect. In these Regulations, the local Women’s Association is entitled to query an employer if they have been made aware of the existence of discrimination against women by such employer, and can request the employer to correct its wrongdoing. If the concerned employer refuses to correct the wrongdoing, the Women’s Association is entitled to report this to the local labour bureau and list it on the “Negative List”.

**Protection against dismissal**

Under the PRC law, an employment contract may only be terminated with legal cause. Legal cause for an employer to terminate employment is limited to the following circumstances:

a) where the employee seriously violates the employer’s rules and regulations;
b) where the employee commits a serious dereliction of duty or practices graft, causing substantial damage to the employer;
c) where the employee, by means of deception or coercion or by taking advantage of the employer’s difficulties, forces the employer to conclude or change the employment contract against the employer’s true intent;
d) where the employee enters into an employment relationship with any other third party without the employer’s prior written consent, and thus seriously affects his performance of the tasks assigned by the employer, or the employee refuses to rectify his conduct after being notified by the employer;
e) where the employee is held criminally liable under applicable law;
f) the employee reaches retirement age;
g) the employee passes away or is declared missing or dead;
h) the employee is sick or suffers an injury not related to his employment and is unable to perform the original work or other work reassigned by the employer;
i) the employee is incapable of performing his job for which he was employed and remains unqualified even after receiving training or reassignment to another work post;
j) the employment contract can no longer be performed because the objective conditions under which the contract was entered into have materially changed and no agreement as to the amendment of the contract can be reached after the parties’ negotiation;
k) the employer is bankrupt, winding up or closed, or being revoked; or
l) the employment contract expires.

Usually the employer is obliged to pay severance compensation for termination except in scenario a), b), c), d), e), f) or g). Where the employer terminates the employee on the basis of scenarios h) to l), the employer should pay severance compensation. For each year of service with the employer, the employee is entitled to one month of severance compensation (subject to a statutory cap). In case of scenarios h) to j), the company needs to notify the employee one month in advance or give payment *in lieu* of notice (in the same amount as the last month’s salary). Where the employer terminates an employment contract without legal cause, it should pay double the usual severance compensation; the employee may still request the reinstatement of the employment contract in this case, which in practice could be upheld by the labour arbitration tribunal or the court.

Based on our experience, when determining whether there is a legal cause for termination, the courts tend to be critical with, and set a high standard of proof for, “accusations” made by a company about its employees on the grounds of incompetence, misconduct, dereliction,
etc. For example, if there is illegal appropriation, it is common for the court to require proof that it has been reported to the public security bureau.

**Statutory employment protection rights**

Under the PRC law, employees are entitled some statutory rights. These rights cannot be effectively waived by the employee even by a mutual agreement between the parties; for example, termination by the employee with 30 days’ prior notice, entitlement to social insurance contribution, statutory leave, execution of a written employment contract, etc. After the probation, the statutory notice period for the employee to terminate an employment contract is 30 days, which is usually not allowed to be extended by the company through the employment contract.

Under PRC law, social insurance contributions consist of two portions: the employer-contributed portion, the sum of which is additional to the monthly salary of the employee; and the employee-contributed portion, which is deducted from the employees’ monthly salary. In practice, we have seen many cases in which an employee has waived its entitlement to social insurance contribution in order to receive higher take-home pay. Some employers may think that this is a “win-win” arrangement and also believe that it can be protected by a mutual agreement. However, according to PRC law, such waiver by the employee is not valid or legally binding upon both parties.

Under PRC law, a company is required to enter into a written agreement with its employee. PRC law allows the employee to claim double salary for each month the employee works, calculated from the second month of work which is not performed under a written labour contract, if the company fails to enter into or renew the written employment contract. In practice, the labour arbitration tribunal or the court will usually uphold a claim for double salary for 11 months at the most.

**Worker consultation, trade union and industrial action**

Under PRC law, any provision in internal rules and regulations regarding the employee’s labour remuneration, working hours, rest and leave, labour safety and hygiene, insurance and benefits, training, labour discipline and work quota control or other issue directly involving the immediate interest of employees, can be finalised only after discussion with, and proposals and suggestions by, the employee representative congress or all the workers, and negotiation on an equal basis with the union or the employees’ representatives. In order to validate the internal rules and regulations involving the immediate interest of employees, the employer shall make them public or communicate the same to the employees. In practice, it is common to have the employees sign meeting minutes to evidence that the democratic procedures have been followed when passing the rules and also sign a copy of the finalised internal rules and regulations to evidence that the internal rules and regulations have been communicated to the employee properly.

Under PRC employment laws and regulations, the trade union plays an important role in the formulation of company rules and regulations, collective employment contract negotiation, termination of employees, and mass layoffs. In case the employer intends to terminate the employment contract, it shall first inform the trade union of the cause of termination. The trade union may request the employer to take corrective action if it considers that the cause of termination will violate the laws, administrative regulations or the employment contract. The trade union may enter into a collective employment contract with the employer on behalf of the employees. In a mass layoff or in the process of formulating company rules and regulations, the trade union should be consulted properly.
There is a trend of an increasing number and scale of industrial actions, which is being used by the employee more and more often as a tool to assert its legal rights or negotiate better terms of employment. Where the employees start a strike because of incompliance on the part of the company in relation to employee benefits and rights, PRC judicial bodies are usually protective of the employees and often uphold claims of termination without legal cause if the employer terminates the employees for organising or participating in the strike.

**Employee privacy**

In the PRC Labour Contract Law, there are no specific rules with respect to protecting employees’ privacy. In legal practice, to protect employees’ privacy, normally regulations with respect to privacy rights provided in the general civil codes must be relied upon. Meanwhile, it would be helpful to understand the stance taken by the PRC judicial bodies in the absence of clear statutory guidelines in different scenarios.

The PRC Cybersecurity Law was promulgated on 7 November 2016 and came into force on 1 June 2017. Employees’ personal information, including but not limited to name, date of birth, ID number, personal biological identification information, address, and telephone number, constitutes personal data that is subject to the protection of the PRC Cybersecurity Law. So far under the PRC Cybersecurity Law, only personal information collected by critical information infrastructure (“CII”) operators will be regulated. Such information should be stored within the territory of China (local storage), and where such information and data have to be provided abroad for business purposes, security assessments must be conducted (security assessment). However, it seems very likely that future legislation will extend the local storage and security assessment requirement from CII operators to all network operators, which are defined very broadly under the Cybersecurity Law as the owners or managers of the network and the providers of the network service. This area should be monitored by companies within its group exporting its internal data, which involves personal information collected and generated in the course of its operation in China.

Additionally, some employers monitor the electronic devices, such laptop or cell phone, of their employees. Where the electronic devices belong to the company, it may usually be assumed (quite often it is also provided in writing) that the mobile device will be used only for business purposes, and therefore the company has the right to take, copy and read the data held on the electronic device. Where the electronic devices belong to the employee, companies are not allowed, without the employee’s consent, under PRC law to access and check any mobile device belonging to the employee, even if such device has been used by the employee for business purposes. However, please note that as China’s legal system does not adhere to the doctrine of binding precedents, deviation from past court/arbitration decisions is possible.

Moreover, some employers install CCTV in their office. As there is no provision regulating privacy protection in working environments, to determine if an employee’s privacy right in a working environment has been breached can only be analysed case by case. We have seen a labour dispute in Hangzhou in which an employee claimed that the employer infringed his privacy right by installing CCTV in the office space. This claim is not supported by the court considering that installing CCTV to record employees’ performance in office hours was clearly provided in the employee handbook.

**Other recent developments in the field of employment and labour law**

The exponential development of instant messaging and online payments in China has made correspondence through QQ or WeChat, Alipay payment records, and communication via
company chatting software one of the main forms of evidence in labour disputes. Although these types of evidence are admissible in a PRC labour arbitration or trial, in practice a company may not keep a good record of such evidence and sometimes the communications are carried out by senior staff on behalf of the company through their own mobile devices. This has created new issues for companies in the collection and preservation of evidence.

Under PRC labour law, foreigners working in China are also required to make social insurance contributions. However, lots of expatriates, who have the intention of returning to their home country, are also concurrently paying social insurance contributions back in their home country. To resolve the double payment of social insurance contributions, China has accelerated the speed of entering into and implementing bilateral treaties on social security. So far, China already has bilateral social security agreements with Germany, South Korea, Denmark, Canada, Finland, Switzerland, the Netherlands, Spain and Japan, most of which came into force in 2017.
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Introduction

Danish labour legislation can be divided into two main areas: individual employment law; and collective employment law. Individual employment law is mainly governed by mandatory employment regulation such as the Danish Salaried Employees Act and/or by individual agreements. Collective employment law is subject to collective bargaining agreements, which are entered into by labour unions on one side and an employer, multiple employers or employers’ associations on the other side (“Collective Agreements”). Furthermore, EU legislation and Danish legislation entail general restrictions, which apply to both individual and collective employment law. This includes, among others, European non-discrimination rules and rules concerning working time.

When a dispute arises regarding an employee’s employment, the dispute can be handled by the Danish Civil Courts (the District Courts, the High Courts and the Supreme Court), the Danish Labour Court, by industrial arbitration tribunals and/or by privately held arbitrations at the Danish Institute of Arbitration. In general, the Danish Civil Courts handle cases concerning the individual employment area and the general legislation, whereas the Danish Labour Court and the industrial arbitration tribunals decides on disputes, which is connected to Collective Agreements.

The following sections will provide insights on:
- New legislation.
- Business protection and employment clauses.
- Discrimination protection and recent cases.
- Recent case law on Collective Agreements.

New legislation

The Danish Holiday Act

Under the Danish Holiday Act, employees accrue 2.08 holiday days per employed month from 1 January until 31 December (the “Accrual Year”). Employees can take the accrued holiday from 1 May until 30 April in the following year (the “Holiday Year”). This is defined as the staggered holiday model (the “Staggered Holiday Model”).

In 2014, the EU Commission informed the Danish Government that the Danish Holiday Act was possibly a violation of EU legislation, hereunder the European Working Time Directive. According to the Working Time Directive, EU Member States shall ensure that all employees have the right to a minimum of four weeks’ paid holiday annually. This is incompatible with the Staggered Holiday Model, as employees who are new or return to the Danish labour
The market can be required to work for more than 16 months prior to being entitled to payments during his/her holiday.

Therefore, the Danish Parliament passed a piece of legislation (the “New Holiday Act”), which enters into force on 1 September 2020 with a transitional period commencing on 1 January 2019.

Under the New Holiday Act, employees still accrue 2.08 holiday days per month. However, employees will be entitled to take the holiday the month after the holiday has been accrued (the “New Holiday Model”). Employees will, thus, be entitled to paid holiday from the second month of the employment and 25 paid holiday days during the first year of employment.

The period in which the holiday is accrued under the New Holiday Act is a 12-month period from 1 September until 31 August. The period in which the accrued holiday shall be taken will be the same as the accrual period, plus an additional four months, i.e. 1 September until 31 December in the subsequent year; a total period of 16 months. The extension of the holiday year is introduced in order to provide a greater flexibility for employees, who are new to the Danish labour market.

A transitional period commences on 1 September 2019 and is in force until the New Holiday Act enters into force on 1 September 2020. The accrued holiday (25 days) will, during this period, be frozen and it cannot be taken or paid out in lieu. The accrued holiday will be withheld until the employees retire or by other means leave the Danish labour market after which the accrued holiday will be paid out to the employees. This transitional period entails a significant financial burden on the employers, as they are obliged to pay an amount equivalent to 25 holiday days (plus interest) into a new fund, which is being established.

The Danish Stock Options Act

Under the current Danish Stock Options Act, stock options and warrants are subject to a good/bad leaver model, which cannot be deviated from to the detriment of the employees.

An employee is considered a good leaver, if:

• the employment is terminated due to the employment being terminated by the employer without this being a result of the employee’s breach of duties (e.g. redundancy or change of personnel for operational requirements); or
• the employee terminates the employment due to the employer’s breach of the employment agreement.

An employee is considered a bad leaver, if:

• the employee terminates the employment in accordance with the agreed notice period in the employment agreement; or
• the employer terminates the employment due to the employee’s breach of the employment agreement.

If the employee is considered a good leaver, the employee retains the right to exercise awarded stock options or warrants when the employment lapses. If the employee is considered a bad leaver, the employee’s right to exercise the awarded stock options or warrants lapses, unless the parties have stipulated otherwise in an agreement.

As a consequence of an agreement between the Danish Government and the Danish Parliament and a recommendation from the Ministry of Industry, Business and Financial Affairs’ Entrepreneurial Panel, the Danish Stock Option Act will be amended from 1 January 2019.

The amendment entails that the good/bad leaver model will be repealed and replaced with a new freedom of contract model under which the parties have a wide contractual discretion.
(the “Freedom of Contract Model”). Under the Freedom of Contract Model, the parties are considered equals and the protection of the employee is, consequently, reduced. The parties can, for example, agree that the employer can repurchase stock options or warrants, acquired by the employee under an agreement with the employer at market value, when the employment lapses. If an agreement is unreasonable due to the Freedom of Contract Model, it can be set aside as invalid under the general clause in section 36 in the Danish Contracts Act. However, experience show that this clause is difficult to enforce in a court case.

The amendment will apply on agreements concluded after 1 January 2019. Agreements concluded prior to 1 January 2019 will continue to be subject to the current Danish Stock Options Act, including the good/bad leaver model.

The Danish Trade Secrets Act

On 9 June 2018, the new Danish Trade Secrets Act (in Danish: lov om forretningshemmeligheder) entered into force. The Danish Trade Secrets Act is based on the European Trade Secrets Directive, which aims to harmonise the legal framework regarding the protection of trade secrets across the EU.

Prior to the Danish Trade Secrets Act entering into force, the protection of trade secrets was mainly governed by the Danish Marketing Practices Act. However, the Danish Employment Clauses Act (in Danish: ansættelsesklausulloven), the Danish Criminal Act (in Danish: straffeloven) and the Danish Administration of Justice Act (in Danish: retssikkerhedsloven) also contain rules on trade secrets and the protection hereof. This protection has not been changed by the Danish Trade Secrets Act and will, thus, still be in force.

The main changes set forth by the Danish Trade Secrets Act include:

- a statutory definition of the term “trade secret”;
- improved compensation for unlawful use of trade secrets;
- regulation of when legal proceedings under the act shall commence; and
- a specific regulation allowing disclosure of trade secrets to labour unions.

A statutory definition of the term “trade secret”

Prior to the European Trade Secrets Directive and the Danish Trade Secrets Act, trade secrets were not defined statutorily. However, case law in the EU, including Denmark, has established a definition of trade secrets, which has now been made statutory in the Directive and the Act.

Trade secrets are, therefore, still defined as information that:

1. is confidential in the sense that the information is not commonly known or apparently accessible by persons who normally work with that type of information;
2. has commercial value as the information is a secret; and
3. is subject to reasonable confidentiality measures by the owner of the trade secret.

Improved compensation for unlawful use of trade secrets

Under the earlier rules of the Danish Marketing Practices Act, a damages claim could only include the actual loss sustained by the infringed party.

Under the Danish Trade Secrets Act, damages claims can, however, include (1) the infringed party’s actual loss, (2) the infringing party’s unjust enrichment, and (3) any non-economic damages sustained by the infringed party. This deviates from the general principle of “compensational damages” in Danish legislation under which damages normally only include the infringed party’s actual loss. Consequently, the change constitutes a substantial improvement of the infringed party’s rights.
Legal proceedings

The earlier rules in the Danish Marketing Practices Act did not entail any limitation on when the infringed party had to commence legal proceedings concerning infringement of trade secrets. However, under the Danish Trade Secrets Act, the infringed party shall initiate legal proceedings or preliminary injunctions within six months from becoming aware of the infringement. The limit entails that the infringed party shall act with promptness in any situation where an infringement has occurred.

Disclosure of trade secrets to labour unions

The Danish Trade Secrets Act entails a general ban of unlawful acquisition, use and disclosure of trade secrets. However, under the act, the employees and/or employees’ representatives are entitled to forward information to labour unions regarding the employees employment’s terms and conditions. This entails that labour unions can assist employees in disputes with their employers and provide consultation on matters that have affected or will affect the employees’ employment.

Employment clauses

During the employment, a general duty of loyalty exists between employers and employees, which entails a general obligation of confidentiality. A breach of this duty may be sanctioned by the Danish Courts and an employee who neglects this obligation can be required to pay damages to the employer. Furthermore, when the employment has ended, the Danish Trade Secrets Act and the Danish Marketing Practices Act prevents the employees (to a certain extent) from targeting customers of the former employer (see above).

The duty of loyalty and the Trade Secrets Act does, however, not entail that employees are obligated not to have commercial contact with a former employer’s customers or perform competing activities after the employment has ended.

If an employer wants to prevent former employees from having commercial contact with the employer’s customer or from performing competing activities after the employment has ended, it is important for the employer to enter into an employment clause.

Prior to 1 January 2016, the use of employment clauses was governed by the Danish Salaried Employees Act and the Danish Contracts Act. On 1 January 2016, the Danish Employment Clauses Act entered into force. Employment clauses entered into prior to 1 January 2016 remain, however, subject to the Danish Salaried Employees Act and the Danish Contracts Act. The Danish Employment Clauses Act entails a more strict regulation of the use of employment clauses, including no-hire clauses, non-competition clauses, non-solicitation clauses and combined non-competition/-solicitation clauses (“Combined Clauses”).

No-hire clauses

A no-hire clause is entered into between two employers/companies and prevents one or both of the parties’ employees from obtaining employment with the other party. Prior to the Danish Employment Clauses Act entering into force, no-hire clauses were, under certain circumstances, valid. However, all no-hire clauses entered into after 1 January 2016 are, as a main rule, invalid. As part of a transitional arrangement, no-hire clauses concluded prior to 1 January 2016 will remain valid until 1 January 2021, whereafter they will cease to have any effect.

However, there are two exceptions to this regulation. Firstly, in connection with a business transfer, the buyer and seller of the company can enter into a no-hire clause as part of their negotiations. Such agreements are valid during the transfer and six months after the closing date and only in relation to employees who have been employed by the transferred company.
for at least three months. Secondly, the Danish Temporary Employment Act (in Danish: *vikarloven*) entails that an employment agency and a user company, to which the temporary employees are posted, can enter into an agreement, after which the user company shall pay a fee to the employment agency if the user company hires one of the temporary employees.

**Non-competition clauses, non-solicitation clauses and Combined Clauses**

A non-competition clause entails that an employee is restricted from performing competing work, including taking employment with a competing company or engaging in activities which compete with the activities carried out by the employer.

A non-solicitation clause prohibits an employee from, directly or indirectly, having any commercial contact and/or obtaining employment with the employer’s customers or business partners following the employee’s resignation.

A Combined Clause includes both a non-competition clause and a non-solicitation clause. A Combined Clause is, thus, burdening to employees after the requirements for such clauses are increased when compared to non-competition clauses and non-solicitation clauses.

In order for an employment clause to be valid, the clause shall meet the following general requirements:

- the employment has to have lasted for at least six consecutive months;
- the employee shall receive monthly compensation in the restrictive period;
- the restrictive period amounts to a maximum of 12 months from when the employment lapses or six months in the case of a Combined Clause; and
- the employee is informed in writing of all requirements for the employment clause to be valid under the Danish Employment Clauses Act.

In relation to non-competition clauses, it is additionally required that:

- the employee occupies a “highly trusted position” or has entered into an agreement with the employer in relation to a right to an invention made by the employee; and
- the employer informs the employee in writing of the reasons which makes a non-competition clause necessary for the specific employee.

The criteria “highly trusted position” constitutes an intensification of the requirements, as the former regulation only required the employee to be in a “trusted position”. According to the preparatory works of the Danish Employment Clauses Act, an employee that as part of their job has free access to the employer’s trade secrets will in general meet the requirements. The fact that an employee is part of management will, however, not in itself be sufficient. However, in general, a Danish court will most likely find that an employee who is part of management will occupy a highly trusted position.

In relation to non-solicitation clauses, it is an additional requirement that:

- the scope of the clause is limited to customers, which are or have been in a “commercial relationship” with the employer within the 12 months prior to the termination.

**Compensation**

If the restricting period of a non-competition or a non-solicitation clause amounts to six months or less after the employment lapses, the employee is entitled to monthly compensation of at least 40% of the employee’s remuneration. Such compensation must be paid monthly during the restrictive period unless the employer terminates the agreement. The employee cannot unilaterally terminate a non-solicitation or non-competition clause.

If the restricting period amounts to more than six months after the employment lapses (and less than 12 months), the employee is entitled to a monthly compensation of at least 60% of the employee’s remuneration during the restrictive period.
If the parties have agreed on a Combined Clause, the employee is entitled to a monthly compensation of at least 60% of the employee’s remuneration during the restrictive period. The compensation is reduced if the employee finds other appropriate occupation during the restricting period. Furthermore, it is required that the first two months of the compensation is paid out to the employee no later than at the time of the employee’s resignation.

**Discrimination protection and recent cases**

**Discrimination protection**

*New discrimination cases widen the definition of “disability” within the Danish Non-Discrimination Act*

Under the Danish Non-Discrimination Act, a person may not be treated less favourably compared to others due to a disability. Furthermore, the act entails that an employer, who wants to terminate or change (significantly) the employment terms for an employee with a disability, is obligated to exhaust all proportionate restructuring measures prior to terminating or changing the employment terms. This obligation does not apply if the employer can prove that the accommodational measure(s) imposes a disproportional burden on the employer.

Neither the European Non-Discrimination Directive nor the Danish Non-Discrimination Act contain a definition of “disability” and, therefore, the definition has been determined in case law. The European case *Ring and Skouboe Werge C-335/11 and C-337/11* states that a “disability” comprises any condition, caused by a medically diagnosed condition, limiting the employee from effectively participating fully and equally with other employees in the labour market, if the condition is long-lasting.

This definition was followed by the Danish Supreme Court in two cases from 2013 and 2015. Both cases concerned employees who suffered from medically diagnosed conditions. It has, however, remained unclear whether it was a requirement under the Danish Discrimination Treatment Act that a “disability” was medically diagnosed. In two cases dated 22 November 2017, the Danish Supreme Court had the opportunity to decide on this matter.

In the first case, an employee was on full medical leave due to dizziness following an operation. After a while, the employee resumed work on a part-time basis after which the employer terminated the employee.

It was uncontested between the parties that the employee suffered from dizziness, that dizziness was not diagnosed as a medical condition and that the condition affected the employee’s working capacity.

The employee argued that the termination was unlawful under the Danish Non-Discrimination Act as the termination was based on her “disability”. The employer argued that the employee had not been discriminated as the termination was based on the contents of an e-mail forwarded by the employee to the employer.

The Danish High Court ruled that “disability” under the Danish Non-Discrimination Act refers to medically diagnosed conditions. As the employee’s condition did not fulfil this criterion, the Danish High Court found that the termination did not constitute discrimination under the Danish Non-Discrimination Act.

The employee appealed the decision to the Danish Supreme Court, which stated that “disability” must be interpreted in accordance with EU legislation. With reference to the European case *Milkova C-406/15*, the Danish Supreme Court stated that “disability”
comprises any condition resulting from physical or mental impairments hindering an employee from fully and effectively participating on equal terms with other employees on the labour market. Thus, a medical diagnosis was not a requirement under the Danish Discrimination Treatment Act.

In this specific case, the employer, however, documented that the termination was not related to the employee’s “disability”, but rather to the e-mail forwarded by the employee to the employer. For this reason, the Danish Supreme Court ruled that the termination was valid.

In the other case, an employee suffered from daytime tiredness, which severely affected her working capacity with no chance of improvement within at least 12 months. Due to this, the employee had been on medical leave for a period after which she gradually resumed work until she worked around 12–18 hours per week. During a subsequent new medical leave, the employer terminated the employee with a reference to the employee’s absence due to illness.

The Danish Supreme Court restated that “disability” must be interpreted in accordance with EU legislation. Accordingly, the Danish Supreme Court found that the employee had a “disability” as the daytime tiredness constituted a long-term disabling condition. Therefore, the employer was obligated to provide proportionate restructuring measures to retain the employee in the employment. The employer had not provided such measures and, thus, the Danish Supreme Court found that the termination was in breach of the Danish Discrimination Treatment Act.

In summary, these two cases shows that a “disability” under the Danish discrimination rules does not require the condition to have been medically diagnosed. The decisive criteria is rather, if the “disability” prevents the employee from performing work on equal terms with other employees, and if the “disability” is long-lasting. This assessment is objective and shall include all facts of the case, taking specifically into consideration any statements from doctors and/or other healthcare professionals.

Employees on part-time sick leave under the 120 Days Rule

Under Danish legislation, it is possible to include a provision in an employment agreement after which a salaried employee can be terminated with one month’s notice, if the employee has received sick pay for a total period of 120 days during a period of 12 consecutive months (the “120 Days Rule”). It is a requirement that the notice of termination is given immediately following 120 days of absence due to illness and while the employee receives sick pay. However, the validity of the termination is not affected by the fact that the employee returns to work after the notice of termination has been given to the employee. In practice, the notice of termination shall, thus, at the earliest be served on the 121st sick day on which the employee receives sick pay.

There has remained some uncertainty as to how the 120 Days Rule is calculated in relation to part-time sick leave as this is not regulated in the Danish Salaried Employees Act or in the preparatory works of the act.

This uncertainty has been clarified in two cases handed down from the Danish Supreme Court.

In the first case, the Danish Supreme Court was asked to assess whether an employer had calculated sick leave correctly in relation to an employee, who had been on part-time sick leave.

Due to illness, the part-time employee went on part-time sick leave and after a while on full-time sick leave. Thereafter, the employee was terminated with reference to the 120 Days Rule.
The employer argued that the calculation of the 120 Days Rule should be based on the employee working full time, even if she was employed part time. Consequently, the employer included work-free days when calculating the 120 Days Rule. Furthermore, the employer argued that part-time sick days should be calculated on an average basis and not based on how many hours the employee actually had been on sick leave.

The Danish Supreme Court ruled that only the days on which the employee was in fact on sick leave could be included in the calculations of the 120 Days Rule. Consequently, the court found that work-free days could not be included in the calculation. Furthermore, the Danish Supreme Court held that part-time sick days should be included in the calculation based on how many hours the employee actually was on sick leave and not on an average basis.

For this reason, the employer was not entitled to calculate sick leave as if the employee worked full time and on an average basis of the part-time sick days. Thus, the termination of the employee with a reference to the 120 Days Rule was invalid.

The second case involved an employee on full-time sick leave, who offered to resume work on a part-time basis. The employer rejected the offer for operational reasons. The Danish Supreme Court was asked to assess whether the employee’s offer to resume work on a part-time basis should be included in the calculation of the 120 Days Rule. This would entail that the days on which the employee would have worked, if the employer had accepted the offer, should be excluded from the calculation of the 120 Days Rule.

The Danish Supreme Court held that an employer has the freedom of will to hire, which also entails that the employer was free to accept or reject the employee’s offer. Accordingly, the employee’s offer had no relevance on the calculation of the 120 Days Rule and the calculation should, therefore, include all of the employee’s sick days, including the days on which she had offered to resume work.

In conclusion, an employer shall be aware that it is not allowed under the Danish Salaried Employees Act to calculate sick leave on an average and that only the actual days on which the employee is on part-time sick leave can be included in the calculation. Additionally, an employee’s offer to resume work does not have any effect on the calculation of the 120 Days Rule.

**Recent case law on Collective Agreements**

**The legitimacy of an industrial conflict**

The Danish Labour Court was recently asked to assess whether a labour union can initiate industrial actions against employers who have already acceded to a Collective Agreement with another labour union.

In a case handed down from the Danish Supreme Court, a number of employers had acceded to a Collective Agreement with the Danish Metalworkers’ Union. A competing union, 3F, notified an industrial action against the employers to force them to accede to a Collective Agreement with 3F. 3F and Danish Metalworkers’ Union is both members of LO which is the largest main labour union (known as an umbrella organisation).

The employers argued that the notification was illegal, as the employers had already entered into a Collective Agreement covering the employees’ work. 3F argued that employees, who performed warehouse and transport work, did not fall within the scope of the Danish Metalworkers’ Union and that 3F for that reason was entitled to notify an industrial action against the employers.
The Danish Labour Court ruled that a labour union cannot initiate an industrial action to force an employer to accede to a Collective Agreement if the employer is already covered by a Collective Agreement with another labour union under the same umbrella organisation (in this case LO). The Danish Labour Court also stated that any deviation from this requires “very strong reasons”. In this regard, the Danish Labour Court assessed that the employees’ work was within the scope of the Collective Agreement with the Danish Metalworkers’ Union, after which the requirement of “very strong reasons” was not fulfilled.

The case shows that a labour union is not entitled to initiate industrial actions against an employer who has acceded to a Collective Agreement with another labour union, if both labour unions are members of the same main umbrella organisation.

Statutory intervention in industrial conflict on teachers’ working time regulations was legitimate

In April 2013, an industrial conflict emerged in Denmark during the negotiation of Collective Agreements between Local Government Denmark (KL) on one side and the Confederation of Teachers Unions on the other side, which led to a lockout of 67,000 teachers. After 25 days of lockout, the Danish Government interfered and enacted the Danish Act 409, which entailed that an employer could deviate from the rule of at least 11 hours of daily rest pursuant to the Working Time Directive in some specific situations.

The Confederation of Teachers Unions argued that this was a breach of the European Working Time Directive and commenced legal proceedings against the Ministry of Employment. The case, eventually, came in front of the Danish Supreme Court.

The Danish Supreme Court held that the regulation in the Danish Act 409 was subject to national legislation and, thus, not a breach the European Working Time Directive.

Furthermore, the Danish Supreme Court assessed that the sections, which allowed the daily rest period to be reduced from 11 to eight hours once a week, was in accordance with the European Working Time Directive as the directive allowed for derogations in “Collective Agreements”.

The Danish Supreme Court also held that the interpretation of the term “Collective Agreement” had to be based on national legislation and practice. Following this, the Danish Supreme Court stated that the Danish Act 409 became an integral part of a Collective Agreement as if the parties had negotiated the act themselves and that the sections, therefore, were a continuation and extension of what the parties previously had agreed. Thus, the Danish Supreme Court ruled that the Danish Act 409 was compliant with the Working Time Directive.

The distinction between “fringes” and benefits forming part of a remuneration package is crucial

In a case from the Danish Supreme Court, the court assessed whether the Danish railway infrastructure’s manager Banedanmark, as an employer, was entitled to terminate a right of free transport (in Danish: fribefording) with an appropriate notice. This required the right of free transport to be classified as a “fringe” and not as a “substantial benefit” forming part of the employees’ remuneration packages.

If the right of free transport was a fringe, the right could be terminated with an appropriate notice.

If the right of free transport, however, was a substantial benefit, the right had to be individually terminated with each employee’s individual termination notice.
The case involved employees subject to a Collective Agreement and employees subject to the Danish Public Servants Act. Both employee groups argued that the right to free transport was a substantial benefit, but with different arguments:

The employees subject to a Collective Agreement argued that the right to free transport was an integral part of the employees’ remuneration packages and, thus, a benefit. This was, among other things, based on the fact that the right had existed for a long period of time as the legal basis followed from the Danish National Railway Tariffs Act from 1896 (in Danish: lov om statsbanernes takster).

The public servants argued that a termination of the right of free transport was not within the scope of changes that a public servant is obligated to endure under the Danish Public Servants Act. Additionally, it was argued that the public servants were entitled to receive the same remuneration as they had until that point.

The Danish Supreme Court ruled that:
• the right to free transport had always been based on the unilateral decision of the employer;
• it had never formed part of the employees’ remuneration packages;
• it was entirely independent on the employees’ responsibilities, qualifications and/or the nature of work; and
• the employees did not get any compensation if they chose not to use the right to free transport.

For these reasons, the Danish Supreme Court held that the employer had been entitled to cancel the right to free transport with an appropriate notice.

The case illustrates that fringes do not constitute a part of an employee’s remuneration package, even if it has been in force for decades, and that a fringe can be terminated with an appropriate notice.
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General labour market and litigation trends

General labour market

Finnish employment law is characterised by the strong position of trade unions and employer associations. In practice, this means that in addition to the minimum terms of employment set out in legislation, most sectors of work are also subject to an industry-specific collective agreement, which obliges unorganised employers to comply with the minimum terms and conditions set out in the industry-specific, generally applicable collective agreements.

A competitiveness agreement has postponed Finnish collective bargaining to late 2017 and early 2018. Currently, the most relevant collective bargaining agreements have been updated and are effective until 2020 or 2021.

In the competitiveness agreement, Finnish central organisations agreed to forbear any collective salary increases during the agreement period. Now, after the competitiveness agreement has expired and a new collective bargaining agreement has been held, the updated collective bargaining agreement increases employees’ salaries by approximately 3.2% in total. These increases will be executed by gradual, annual increases during the agreement period. However, most of the updated collective bargaining agreements leave the possibility to execute salary increases by local agreements.

The most significant change to the updated collective bargaining agreement relates to changes in the annual working time. Most of the new collective bargaining agreements include the competitiveness agreement’s extension of employees’ annual working time by 24 hours without affecting salary costs. This was rather surprising, as the competitiveness agreement was originally intended to have only a temporary effect in the Finnish labour market.

Currently, the hottest topic in the Finnish labour market is the Government’s proposal to lower employees’ protection against dismissal in companies that employ fewer than 10 employees. The phrasing of the new law is still mostly unknown, but the principle is clear: providing lower, personal-related grounds for dismissal in small enterprises. Naturally, Finnish central trade unions are not willing to accept this change, and have declared national strikes in order to knock down the Government’s proposal.

Redundancies, business transfers and reorganisations

Employer’s consultation obligation

The past year has not seen any large-scale amendments regarding the employers’ consultation obligation. However, the Government has set up a tripartite working group to prepare a proposal to renew the Finnish Act on Co-operation within Undertakings (FIN: laki...
The tripartite working group will start its operations in approximately late 2018. Most likely there will be major changes to the Finnish Co-operation Act within Undertakings in the near future.

Currently, under the Finnish Act on Co-operation within Undertakings, a company that permanently employs at least 20 employees must consult with the employees or their representatives before any radical changes, which affect or might affect the employees, are made in the company. For example, the employer has a consultation obligation regarding changes in business operations that would affect the personnel. This obligation also applies to business transfers and to reductions in personnel.

In respect of considering personnel cutbacks, the consultation obligation, more commonly referred to as co-operation negotiations, is designed to ensure that the reasoning behind any potential redundancies is discussed and alternative solutions are presented before the company makes any final decisions. However, even if the employers are not bound by the results of these negotiations, it is highly important that they follow the correct procedure. A failure to do so can result in significant compensation liability and damage to the company’s reputation. The current maximum indemnification is EUR 34,519.

Finland’s economy has gained momentum and growth in the past year on the same level as it was in 2008. Due to this there have not been any significant co-operation negotiations in Finland. According to a recent survey regarding the labour force conducted by Statistics Finland, the number of employed in August 2018 had risen by more than 64,000 compared to the previous year. In addition, the employment rate stood at 72.6%, which is the highest employment rate since 2008.

The employer’s ability to change the terms of employment

In Finland, the employer can change essential contractual terms of employment only if it so agrees with the employee or if legal grounds exist for the termination of the respective employee’s employment. If there are grounds for the termination, any changes must be made following the applicable term of notice. The employer must also clearly indicate the grounds for the termination, what employment contract terms and conditions will be changed and how as well as what the consequences will be if the employee refuses the changes.

In general, the terms and conditions of employment that are not considered essential contractual terms (often various company policies) may be altered unilaterally by virtue of the employer’s right to manage and supervise the work. However, in some cases, non-contractual terms of employment may also be regarded as essential contractual terms that cannot be altered unilaterally.

For example, in connection with the Finnish Supreme Court decision 2016:80, the Finnish Supreme Court ruled that even if there is no provision in the employment contract regarding the place of work, the employer might not have the right to change the employee’s place of work based on the right to manage and supervise the work. This is because the place of work may have become established practice during the employment relationship, and it will therefore be considered a contractual term of employment. If the employee has spent a number of years working solely on the same premises, the employer might no longer have the right to move them elsewhere, for example, for the purposes of training or based on job rotation.

Consequently, employers should note that non-contractual conditions and practices affecting employment may also become established practice, and therefore equivalent to a contractual term of employment. If the employers wish to avoid this, it is recommended that they would
regularly address the terms that are not regarded as contractual terms to their employees. However, the wording of, for example, employment contracts is not decisive, and the actual practice determines the outcome. This means, for example, that even if the employer and employee do stipulate the change of the place of work in the employment contract, a certain place of work may still become established as contractual practice if the employee in reality only works at one place. Therefore, the possibility of the employer to unilaterally change the terms of employment should always be assessed separately on a case-by-case basis.

**Business protection and restrictive covenants**

**Non-compete agreements**

There are no recent amendments regarding business protection and restrictive covenants. However, the Government has set up a tripartite working group to clarify the need for change in legislation on non-compete agreements. The task of the working group is to evaluate the need for the non-compete agreements and to prepare any suggested changes.

The background for setting up the working group is a general discussion on using non-compete agreements in cases where confidentiality agreement should be enough. It is expected that the working group will propose stricter rules and payment obligation when using the non-compete agreements.

**Trade secrets and whistleblowing**


Before this, the Finnish legal framework did not include any provisions relating to whistleblowing. The new Trade Secrets Act includes provisions on whistleblowing regarding trade secrets. Under the Act, the acquisition, use or disclosure of trade secrets is not unlawful if a trade secret has been acquired, used or disclosed for revealing misconduct or illegal activity, provided that the informant acted for the purpose of protecting the general public interest.

This provision aims to protect an informant who expresses or uses the trade secret to disclose illegal activity in order to protect the public interest. However, the whistleblowing programmes have been established in several companies in connection with compliance programmes. If the employer has a functioning and safe whistleblowing programme, where the employee is able to report confidentially and anonymously, and the reported abuses are also addressed, the employee is obligated to use whistleblowing programme before it will disclose any trade secrets to a third party.

**Discrimination protection**

Employees’ protection against discrimination and equality has been under a large debate during the past year. The main reason for this debate has been the #MeToo campaign. The campaign has, however, not generated any amendments to the Finnish Non-discrimination Act (Fin: yhdenvertaisuuslaki) or the Finnish Act on Equality between Women and Men (Fin: laki naisten ja miesten välisestä tasa-arvosta), mainly because Finnish legislation on non-discrimination and equality already has effective tools against discrimination in working life. It is important to note, however, that Finnish society still experiences discrimination, and the main problem is people’s opinions and actions. These problems can be solved only by social debate and education.
Protection against dismissal

The past year has not seen any large-scale amendments regarding employees’ protection against dismissal. However, the above-mentioned Government’s proposal on lowering personal-related termination grounds in small enterprises may effect on employees’ protection against dismissal. The future will show if there are any changes to be implemented.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Whistleblowing

Whistleblowing relating to trade secrets is defined in the section “Business protection and restrictive covenants” above. Currently, this is the only whistleblowing-related provision in Finnish legislation. During the last couple of years, however, several authorities and NGOs have begun to pay increasing attention to this and conducted research on the subject. Consequently, certain steps have been taken in order to clarify the position of whistleblowers and the requirements for assessing reports of wrongdoing. As a result, certain industry-specific tools have been introduced.

For example, the Finnish Financial Supervisory Authority (Finanssivalvonta, “Fiva”) has established a whistleblower tool that came into effect on 1 January 2016. Whistleblowers may use it to report violations of supervisory provisions. Fiva has an obligation to work together and exchange information with the labour protection authorities in order to ensure the protection of the whistleblowing employees. There are no specific regulations regarding whistleblower protection, but Fiva will have the authority to give more specific orders in future.

In addition, Finland’s Ministry of Justice has published a report (25/2016) on 17 June 2016 regarding the protection of people that have reported suspected corruption. The report recommends, for example, that an anonymous online whistleblowing tool should be established for the disclosure of suspected corruption.

Many larger companies have voluntarily introduced their own internal whistleblowing programmes, and overall, it is expected that more legislation regarding whistleblowers will be introduced and further developed in the near future.

Worker consultation, trade union and industrial action

Finnish employment law is characterised by the strong position of trade unions and employer associations. In practice, this means that in addition to the minimum terms of employment set out in legislation, most sectors of work are also subject to an industry-specific collective agreement, which obliges unorganised employers to comply with the minimum terms and conditions set out in the industry-specific generally applicable collective agreements.

Please find more information of recent Finnish collective bargaining from section “General labour market and litigation trends”.

Employee privacy

The past year has not seen any large-scale amendments regarding employee privacy. Finnish employment legislation is already well in line with the GDPR rules that came into force in May 2018.

The Government is considering the possibility of enacting the new Finnish Data Privacy Act (FIN: tietosuojalaki). However, it is still unclear if this will ever happen and how it
might affect national employment law. Currently, employees’ privacy is determined under the European Union’s GDPR rules and under the Finnish Act on the Protection of Privacy in Working Life (Fin: laki yksityisyyden suojausta työelämässä).

**Other recent developments in the field of employment and labour law**

**The Government’s proposal for a new Finnish Working Hours Act**

On 27 September 2018, the Government proposed a complete revision of the Finnish Working Hours Act (Fin: työaikalaki) that would replace the current Working Hours Act from 1996. The new Working Hours Act is intended to enter into force on 1 January 2020. The purpose of the proposal is to update the Working Hours Act to reflect changes in the way the business structure and work is carried out, and to adjust the Working Hours Act to reflect boundary conditions of the Working Hours Directive. The proposal includes three major changes to the Working Hours Act.

1. The proposal introduces a completely new definition called flexible working arrangement (Fin: joustotyöaika). The flexible working arrangement is for expert tasks where the work objectives and the overall schedule are more important than the actual place of work. The flexible working arrangement could be agreed by an agreement between the employer and the employee when the employee could independently decide their working time and the place for work during at least half of their working time. Regular working hours should still be adjusted to 40 hours per week within a four-month period. Working time monitoring would be based on the weekly working hours provided by the employee.

2. The other major change in the proposal relates to a working time bank (Fin: työaikapankki). Currently, the working time bank is available only in collective bargaining agreements. For this reason, the working time bank cannot be applied to an employment that is not covered by the collective agreement. The Government’s proposal includes provisions on the working time bank that allow a statutory working time bank for all workplaces.

3. The new Working Hours Act would apply to all employees who need working time protection. Only those employees who can independently decide on their working hours will be excluded from the scope of the act. According to the proposal, experts and middle management may still be under the Working Hours Act. However, the proposal is interpretative on this matter and it remains unknown how the change (if any) might effect on the situation with experts and middle management.

Finally, it is important to note that the final content of the new Working Hours Act may still undergo changes before its implementation.

**Limitations to the use of non-traditional employment contracts**

Amendment to the Finnish Employment Contracts Act (Fin: työsopimuslaki) regarding the use of non-traditional employment contracts entered into force on 1 June 2018. The aim of the new provisions is to ensure certain kind of limitations to the use of non-traditional employment contracts. Before this amendment, non-traditional employment contracts limitations derived from the legal praxis and several collective agreements.

A non-traditional contract can refer either to a so-called zero-hour contract, i.e. an employment contract where the employee’s minimum working hours are not specified, or to an employment contract where the employee’s regular working hours vary within certain agreed limits, e.g. between 10 and 20 hours a week. Under the Finnish Employment Contracts Act, the non-traditional contract is defined as an employment contract with variable working time.
The non-traditional contract may not be agreed by the employer’s initiative if the employer’s need for labour force is fixed. In other words, this means that the employer’s need for labour must genuinely fluctuate from time to time if it wishes to conclude such contracts at its initiative. On the other hand, there are no limits to agree the non-traditional contract by the employee’s initiative.

In addition, the employer is obliged to inform the relevant employees in writing about its expectations regarding how often and in which situations the employees’ work contribution will presumably be needed. If the employee’s actual working hours do not reflect the agreed hours over a period of six months, the employer must negotiate on adjusting the agreed working hours if the employee so requests. If no new minimum working hours is reached, the employer must present in writing the relevant criteria for the manner in which the current working conditions remain in line with the employer’s need for labour.

Lastly, the new amendments affect the sick pay and notice pay entitlements of non-traditional contracts. Furthermore, employees with non-traditional contracts can no longer give their unlimited consent for accepting additional work (i.e. hours exceeding the agreed hours) in their employment contracts.

These new limitations were part of the latest collective bargaining. For this reason, most of the new collective bargaining agreements consist of the new provisions relating to the limits of the use of non-traditional employment contracts. Limitations vary in different collective bargaining agreements (e.g. the employer obligation to re-adjust working hours by request of the employee, duration of reflecting period of actual working hours or when and how non-traditional employment contracts can be agreed).

The mobility of workers from third countries

Finland has implemented the European Intra Corporate Transfer Directive (66/2014/EU) (the “ICT Directive”) by the national Act on the Conditions of Entry and Residence of Third-country Nationals in Intra Corporate Transfer (Fin: Laki kolmansien maiden kansalaisten maahantulon ja oleskelun edellytyksistä yrityksen sisäisen siirron yhteydessä) (the “ICT Act”). The ICT Act came into force on 1 January 2018.

Under the ICT Act, managers, specialists and trainee employees can apply for an ICT residence permit that can be obtained for the duration of the transfer. The maximum duration of the transfer is three years for managers and specialists and one year for trainee employees. In addition, the ICT residence permit application must be processed within 90 days whereas the regular permits must be processed within four months.

One of the benefits of the ICT residence permit is that third-country nationals who hold a valid ICT residence permit issued by one member state may, if certain conditions are fulfilled, enter, stay, and work in one or several other member states. These conditions are:

- if the employee is transferring to Finland for a maximum of 90 days in a 180-day period, a mere notification process along with certain documentation is required; and
- in terms of longer assignments, the employee should apply for a mobile ICT permit. This permit is granted on less stringent conditions compared to a standard residence permit process.

The Finnish Trade Secrets Act

As mentioned above in the “Business protection and restrictive covenants” section, Finland has implemented the EU Trade Secrets Directive by the national Trade Secrets Act (Fin: liikesalaisuusdirektiivi), which entered into force on 15 August 2018.

A trade secret is not a new concept in the Finnish legal frame. Prior to the new Trade Secrets Act, Finnish legislation had provisions regarding trade secrets in the Unfair Business
Practise Act (Fin: laki sopimattomasta menettelystä elinkeinotoiminnassa), in the Finnish Employments Contracts Act and in the Criminal Code (Fin: rikoslaki). The new Trade Secrets Act replaced provisions relating to trade secrets in the Unfair Business Practise Act. In addition, the aim of the new Trade Secrets Act is to make the definition of the trade secret uniform, which will apply to all trade secrets-related legislation.

Under the Trade Secrets Act, a trade secret means information that meets all of the following requirements:

1. it is a secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
2. has commercial value because it is secret; and
3. has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Basically the concept of the trade secrets is similar as before. However, the concept is now defined in the legislation, which obviously increases legal security.

In addition to the definition of a trade secret, the new Trade Secrets Act sets out provisions on the lawful and unlawful acquisition, use, and disclosure of trade secrets. This was a necessary amendment, mainly due to new civil remedies in cases of an unlawful acquisition, use or disclosure of trade secrets. The new Trade Secrets Act includes provisions that enable the court to order not only precautionary measures, injunctions and damages, but also corrective measures and – under certain conditions – compensation for use instead of an injunction and corrective measures.

Under the Employment Contracts Act, the employee is prohibited to unlawfully use or disclose the trade secret to a third party during the term of employment. The prohibition continues after the termination of the employment relationship only if the employee has obtained such information unlawfully. However, the employer and the employee can agree by a non-disclosure agreement that the Trade Secret Act will apply to all somewhat unlawfully use or disclosure of the trade secret even after the termination of the employment. In this case, the employee is prohibited to unlawfully use or disclose the trade secret regardless of whether the trade secret is lawfully or unlawfully acquired.

**Conclusion**

In summary, Finland remains a welfare state that attaches great importance to the protection of the legal rights of employees. Such an approach is clearly demonstrated by factors such as the continued importance of adhering to the provisions of employment legislation, the recent case law and the unique Finnish collective labour law. In addition, such measures are a reflection of the Finnish working culture that traditionally operates on the basis of empowering and protecting employees at all levels and promotes a management style with low hierarchy.

In the past year, Finland’s economy has finally grown to the same level as it was prior to the global financial crisis in 2008. This has reflected in the Finnish unemployment rate. One major reason for this change was the competitiveness agreement, where the Government and the central labour organisations found the solution to increase the employment rate and competitive capacity.

Despite the many new changes and discussion openings, Finland still has to find additional solutions to update the employment legislation to meet the challenges of future’s versatile and international working environment and in order to ensure the competitive capacity of the employers.
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General labour market and litigation trends

Labour legislation

Carrying out of the labour law reform orders

Aimed at completing and ensuring consistency among the provisions taken in application of Law No. 2017-1340 of 15 September 2017, an enabling law granting the power to take measures via orders to reinforce the social dialogue, called the 6th Labour order, has been adopted. It provides more details on certain definitions and measures introduced by the orders of 22 September 2017 in order to clarify them, but it also contains several substantive modifications.

For instance, the notion of a group has been reshaped, the scope of redeployment clarified, the role of the trade union delegate further explained, the articulation between company agreement and national inter-branch agreements organised, and the scope for negotiation of the works council extended to agreements relating to employment preservation. But, above all, the new employee representative entity, the Social and Economic Committee (CSE), has been the object of some clarifications and modifications.

Hence, the 6th Labour order provides that in case an expert is consulted, such expert must be a chartered accountant or an empowered expert, and in case of a merger it must compulsorily be a chartered accountant. The establishment of specifications by the expert and the CSE is not systematic, the expert’s assessment must justify it. In addition, the order further defines the conditions for the transition from the old representation system to the new one, notably by providing the nullity of the provisions of the company agreements relating to the former employee representative institutions as from the date of the first round of the elections of the CSE’s employee delegation members. Finally, the employer is exempted from consultation on provisional job and skill management in case of agreements negotiated on these matters.

By a law dated 29 March 2018, the labour law reform orders were ratified. The ratification law also makes a few changes, but its main function is that it completes the reform process. The reform thus realised constitutes the most important labour law reform since the famous 1982 Auroux laws. With more than 400 pages in the Official Journal, the extent of the change is considerable, so altered are the notions and mechanisms. Securing individual work relations, simplifying and optimising collective work relations (both representation- and negotiation-wise) are assuredly the key works of the reform. We must, however, not rush into judging its efficiency and effectiveness. A few months, probably ultimately running into a few years, are necessary before being able to note some improvements in terms of securing and simplification, especially given that such improvements will be made effective only with the help of those involved in labour law (employers and employees, social partners, judges, jurists, HR services and lawyers) who must now grasp all the potentialities of the reform.
Law for the freedom to choose one’s professional future

The law for the freedom to choose one’s professional future, which constitutes, according to Muriel Pénicaud, Minister of Employment, “the second step of the French social model renovation” after the Macron orders, was definitively adopted on 1 August 2018. The matter having been referred to the Constitutional Court, the final text will be published upon its decision being made. We can, however, already recount the main lines of the reform on professional training, apprenticeship and unemployment insurance, achieved by the law.

On the overhaul of the personal training account (Compte personnel de formation – CPF), it must be noted that, as of 1 January 2019, subject to the application decrees notably fixing the amounts, the CPF shall now be supplied in terms of Euros instead of number of hours. The objectives of this change are commendable: furthering a better appropriation of the measures by their beneficiaries; putting an end to the iniquity of a variety of practices of the CPF’s financiers; and becoming more adequate to meet training offers. People with disabilities shall receive an employer contribution to their CPF and part-time workers shall benefit from the same rights as full-time workers. The list of training courses eligible for the CPF will be removed, and instead the CPF will allow the funding of all training activities attested by duly validated and registered professional certifications. A mobile application of the CPF will be made available: all CPF holders will be able to choose and pay directly for their training course without going through an intermediary (employer, joint commission, etc.) and each worker will be able to compare the quality of the training courses, their success rate, etc., in order to assess whether the training course will meet their expectations. Finally, a “professional transition (CFP-TP)” CPF has been created: it is a specific way to use the CPF to finance long-term training in order to change job or occupation in relation to a professional transition. Individual training leave, which allowed employees to undertake such training activities, has consequently been withdrawn.

Regarding apprenticeships, young people will be able to get an apprenticeship until they are 30 years old (29th year of age completed) instead of 25 as it currently stands. The term of the apprenticeship contract shall be a minimum of six months (instead of the current one year) to a maximum of three years, except in the event of an extension. The objective of this reworking clearly lies in the fight against unemployment, which particularly affects young workers. These provisions shall apply as from 2018, after the publication of the law. The maximum term of the professional training contract shall be increased from 24 to 36 months (adjustment of the term of apprenticeship contracts) and it will be possible to perform the professional training contract partly abroad for a period of no more than one year.

Regarding unemployment insurance, as from 1 January 2019, employees who resign in order to create their own company or to undergo professional retraining, will be able, subject to conditions, to benefit from the unemployment insurance benefit. The professional retraining activity must be real and serious as attested by a regional inter-branch joint commission. In addition, the law grants rights to the benefit of independent workers who are facing compulsory liquidation or receivership of their company. They shall receive a lump-sum allowance without having to pay an additional contribution. It could amount to €800/ month for six months; the amount and duration of payment shall be specified by decree. Furthermore, the unemployment contribution payable by employees will cease. This has already been reduced from 2.40% to 0.95% on 1 January 2018 and must be suspended from 1 October to 31 December 2018. In parallel, the rate of employers’ contribution to unemployment insurance may be reduced or increased according to the number of contract terminations, followed by registration at Pôle Emploi.
Beyond these themes, two new features must be noted. Firstly, the law establishes the interim permanent employment contract (the CDI-i), implemented since 2015. It is a contract entered into with a temporary employment agency for the performance of successive job placements. It is governed by the provisions of the Labour Code relating to permanent contracts, subject to some adjustments. Employers welcome this development of temporary employee loyalty, but how can we not fear an increased workers’ casualisation? Secondly, the principle of equal pay for women and men becomes a performance obligation in companies of at least 50 employees. They will have to publish annual indicators about pay level differences and set up actions to phase them out. In case of non-compliance, companies shall be punished with a financial penalty (up to 1% of the payroll), payable to the old-age solidarity fund.

Employment trends

On 21 June 2018, the DARES published a survey on the evolution of fixed-term contracts (contrat à durée déterminée – CDD) and indefinite-term contracts (contrat à durée indéterminée – CDI) hiring and termination over the past 25 years.5

Regarding hiring, it appears from the survey that 88% of employees (excluding temporary work) worked via a CDI and 12% worked via a CDD in 2017. The proportion of CDDs in employment increased sharply between 1982 and 2002, but more moderately afterwards. Within the CDD and CDI hiring flow, the proportion of CDDs has sharply risen in 25 years, notably since the 2000s, increasing from 76% in 1993 to 87% in 2017. It must be noted that this is in addition to a sharp increase in very-short-term contracts: in 2017, 30% of CDDs lasted only a single day. This phenomenon particularly affects the medico-social accommodation sector, the audiovisual sector and the catering sector. In 2017, 40% of employees had a CDD of less than one month and did not find a longer CDD or a CDI afterwards. On the contrary, this group of employees signed an average of 3.5 CDDs of less than a month within one quarter.

Regarding terminations, practices have greatly evolved following the establishment of mutually agreed termination 10 years ago,6 which often is a substitute for resignation and, sometimes, for redundancy on economic grounds.

Another observation which includes hiring and terminations is that the labour turnover rate went from 29% in 1993 to 96% in 2017. This rise is mainly a result of the development of very short CDDs, whereas the use of CDIs remains relatively stable.

On a more positive note, Obergo’s and CFDT-Cadres’ 2018 telework barometer shows that telework had a positive effect on 95% of the men and 96% of the women surveyed, and allows for an increase in productivity in 86% of them. However, for 57% of those surveyed, telework also translates into an increase in their working hours. A reality or a feeling? Probably both, according to the workers concerned.

Social dialogue trends

The DARES has published the results of two surveys on social dialogue, which suggest that social dialogue is not absent from small structures, but it turns out to be more informal than in companies of a greater size,7 and that collective bargaining remains characterised by legal obligations.8 Particularly in very small companies (TPEs), conditions and working hours are the subjects discussed the most, while there is little exchange about employment and wages. Employers’ tendency to involve the employees in decision-making increases correlatively to the presence of conflicts in the company so that, according to the report, conflicts can be a sign that there exists a social discussion within the company.

Moreover, this was expected and has been published. A decree of 15 May 20189 for the application of article 16 of the Labour Law10 changes the conditions in which the filing of
collective agreements signed as from 1 September 2017 are made, in order to grant the general public access to company agreements through a national platform. From now on, group, company, establishment and intercompany agreements must be filed by the structure’s legal representative, or by the legal representatives of the structures concerned by the agreement, on the teleprocedure platform of the Ministry of Employment, put online on 28 March 2018, called “Téléaccords” (Teleagreements). Filing requires a version of the agreement signed by the parties, a publishable version, namely not including the signatories’ surnames and first names, and a copy of the letter notifying the text to all the representative organisations.

Employment litigation trends

The annual report of performance of the Ministry of Justice for 2017 has just been presented. It appears therefrom that the flow of employment disputes has not declined, including before the courts of appeal. Despite the recent reforms notably aiming at improving the functioning of the labour courts and decongesting them, the employment courts’ and courts of appeal’s caseload remains significant. Yet a 18.5% decrease in requests made to employment tribunals can be noted. According to the report, litigants and their lawyers seemed to have had trouble appropriating the obligation to bring an action before the labour court by means of an application containing a brief presentation of the grounds of each originating motion, along with documents and a list thereof, such obligation being applicable as of 1 August 2016. Yet the number of closed cases has fallen by 7% and the processing time has increased by 0.4 months (to reach an average of 17 months). The number of cases to deal with surely remains important, especially for the employment divisions of the courts of appeal, due to the economic crisis which has caused the number of complex cases with high economic, social and political stakes to explode.

Workers’ mobility

A few days apart, temporary posting has been the focus of the reflections of the Cour de cassation (the French Supreme Court) and the CJEU. Rallying to the position of the CJEU, the employment division of the Cour de cassation decided, in a decision by the plenary assembly dated 22 December 2017, that a E 101 certificate issued by the institution designated by the competent authority of a Member State is binding upon both the social security institutions of the Member State where the work is being performed and the courts of said Member State, even when it is noted by the latter that the conditions of the concerned worker’s activities do not obviously fall within the material scope of the European regulations relating to the application of the social security regimes. This constitutes a case law turnaround. Hence, the presumption of validity of the temporary posting E 101 certificate is nearly incontrovertible. Only fraud, according to a recent decision of the CJEU, allows the ruling out of certificates issued in the State of temporary posting. The solution is convenient but, in practice, it might come up against the problem of timing making it ineffective. Indeed, fraud allows the judicial institutions of the host State to rule out temporary posting certificates but only after a reasonable period has lapsed following a case being referred to the institutions of the State issuing the certificates, without the latter having reexamined the reasonableness of the issuance of said certificates based on concrete elements outlined by the host State and, as the case may be, withdrawing them.

Business protection and restrictive covenants

Confidentiality

The confidentiality clause does not have to be subject to financial compensation. This is what has just been decided by the employment division of the Cour de cassation, which
thus confirms the duality of notions and, hence, of the regimes governing post-contractual clauses depending on whether they undermine the free carrying out of a professional activity. More specifically, the Court states that the employee’s commitment, after termination of the employment contract, not to file a patent for inventions designed while performing his or her contract along with the commitment not to publish any scientific article and not to disclose any trade information or any technical piece of information, relating to his or her employer, does not amount to a non-compete clause and does not entitle him/her to the payment of financial compensation. The High Court thus confirms that only a clause undermining the free carrying out of a professional activity justifies compensation. In this case, the clause most certainly prevents the employee from commercially exploiting inventions belonging to his or her former employer and disclosing information relating to his or her activity at home, but it does in no way limit his or her power to find a new job corresponding to his or her qualifications and to his or her professional experience.

Restrictions

Even in the absence of a non-compete clause, the employee has a duty of loyalty inherent to the employment contract on the basis of which, as the case may be, competitive acts committed by an employee can be sanctioned. The employment division of the Cour de cassation has just brought some clarification on the nature of the acts likely to face a disciplinary sanction. It decides that “the fact for an employee to create, while at the service of her employer, and without informing the latter, a liberal activity of judicial representative directly competing with theirs, alone constitutes a breach of her duty of loyalty amounting to serious misconduct make it impossible for her to remain in the company”. However, the facts must be thoroughly analysed to see their reprehensible nature. More specifically, a distinction must be drawn between the acts preparatory to a future activity which would be developed after termination of the employment contract, and the acts of competition or attempted competition committed during the performance of the contract. Finally, it must be noted that the disciplinary sanction may be imposed without having to demonstrate the loss suffered by the employer, since the litigious fact “alone” characterises a breach of loyalty constituting serious misconduct.

The employment division of the Cour de cassation has reached two decisions relating to settlement agreements which merit our attention in that they allow for a good assessment of the scope of a settlement agreement according to its wording. The scope of the settlement agreement regarding later requests by the employee depends on whether or not a clause waiving the right to bring an action is inserted. Without such a clause, the settlement agreement has the force of res judicata only regarding the dispute object of the legal instrument. The settlement agreement clause waiving any action in general renders all the employee’s later requests inadmissible. These two decisions conveniently put an end to the preceding case law uncertainty, and the employment division hesitating between a strict and a wider interpretation of the scope of the settlement agreement.

Protection against discrimination

Notions

Unequal treatment does not necessarily amount to discrimination. After a period of hesitation, the employment division of the Cour de cassation reaffirmed this distinction, which can only be approved. Indeed, it confirms a decision by the court of appeal which noted that an employee actually only put forward an infringement of the principle of equal treatment, inasmuch as she affirmed having been discriminated against in respect of remuneration
following her maternity leave, without explaining in what way. Quite fortunately, it is not enough to put forward a difference in treatment and a discriminatory ground. It falls to the employee to establish a sufficient link between the two. This requirement is all the more imperative, according to us, since proof-wise, the employee must only present fact elements suggesting the existence of a form of discrimination.

Principle of equality and collective bargaining

A collective agreement may provide for lower wages for beginner employees, as has resulted from a decision by the Conseil d’Etat (the French Administrative Supreme Court). It concerned the plastics industry national collective agreement of 1 July 1960, pursuant to which any company of the branch may make a 5% deduction, for a 24-month period, from the minimum wages set for beginner executives, in particular new graduates with no professional experience. According to the CGT National Federation of Chemical Industries, this provision introduces a form of discrimination based on age and disregards the “equal pay for equal work” principle. The Conseil d’Etat disagrees and we can understand why: there is no discrimination based on age, if the chosen criteria is that of the level of experience, not age; and there is no unjustified breach of equality if the professional experience previously acquired by an employee can justify a difference in wages if said difference is related to the position requirements and the responsibilities actually assumed. A question that had not been raised in this case may be asked: Would the Cour de cassation accept to apply, in the hypothesis of the case at hand, the presumption of justification of treatment differences instituted through agreement? Probably…

On this issue, it decided that treatment differences, instituted by company agreement, between employees pertaining to different establishments, are presumed justified. In this decision with maximal circulation, the Court extends to company agreements a solution with respect to treatment differences instituted by establishment agreements between employees pertaining to different establishments. It must be stated as a reminder that treatment differences instituted by agreement benefits, from now on, form a presumption of justification. Since the rule was laid down, it has been progressively extended to all situations. It applies whether there is a treatment difference in professional categories or within the same professional category, whether the treatment difference results from different collective agreements or not, or whether it relates to employees of the same establishment or from distinct ones. In this last case, the Court had to decide only on treatment differences resulting from an establishment agreement. The solution now also applies, unsurprisingly, when they result from a company agreement. It is thus for the party who contests the treatment differences to demonstrate that they are unrelated to any consideration of a professional nature.

Can the fight against discrimination at work affecting women be ranked among these considerations? A decision delivered a few months earlier allows for a collective agreement to grant a half day of rest for International Women’s Day. An employee, in this case, had requested damages claiming that she had been subject to an unjustified difference in treatment. She reproached the court of appeal for having considered the difference in treatment, which is justified by the need to encourage women’s fight in their struggle to be equal to men as not established in the workplace, when nothing justifies that men be excluded from said struggle – the appeal is clever in this respect. The argument was, however, dismissed by the Cour de cassation for which the measure aims at establishing equal opportunities for men and women by removing existing inequalities affecting opportunities for women. Men are of course welcome in this fight, but the granting of advantages to women to make this fight possible for them seems justified.
Harassment

The nullity of a dismissal based on the disclosure by the employee of psychological harassment acts requires a certain formalism in the disclosure, which in the end turns out to be protective of employees. We already know that a dismissal is null when the actual ground for dismissal or one of the grounds for dismissal aims at sanctioning disclosure by the employee of psychological harassment acts. Only bad faith, which can only result from the knowledge by the employee of the falseness of the acts he or she discloses, precludes nullity. The Cour de cassation has just brought some clarification on the scope of such protection: it is subject to the disclosure of acts qualified by the employee as psychological harassment. This solution, which we understand, must be further clarified to avoid any confusion. If it requires the employee to consider the reported facts as constituting psychological harassment to benefit from the protection, it is not compulsory for these facts to constitute psychological harassment. Hence, the judge does not have to seek if the recounted facts meet the conditions of article L. 1152-1 of the Labour Code. In other words, the employee does not have to characterise the constitution of psychological harassment on the basis of the disclosed facts; he or she must simply describe the disclosed facts as psychological harassment. He or she must formally present them as such. We, however, understand the solution: on the one hand, potential nullity of the dismissal justifies special precautions; on the other hand, doing without this requirement would compel the judge to ponder the characterisation of the facts, thereby resulting in the protection being subject to all the legal criteria of psychological harassment being met, which is precisely what the legislator intended to avoid.

Religious matters

The Cour de cassation has had the opportunity to identify the practical consequences from decisions delivered by the CJEU on 14 March 2017 in relation to the wearing of the Islamic scarf within a company. It considers that the employer, entrusted with the mission to uphold within the work community each employee’s fundamental freedoms and rights, may provide for, in the internal rules of the company or in a memorandum subject to the same provisions as the internal rules, pursuant to article L. 1321-5 of the Labour Code, a neutrality clause forbidding the visible wearing of any political, philosophical or religious sign in the workplace, as long as said clause, which is general and undifferentiated, is applied only to employees in contact with clients. It considers that in the presence of an employee’s refusal to comply with such a clause while carrying out her professional activities with the company’s clients, it is for the employer to seek whether, while taking into account limitations inherent to the company and without the latter having to bear an additional charge, it is possible for it to offer the employee a position requiring no visual contact with its clients, instead of dismissing her.

This solution has the advantage of fixing a real guide on religious matters within a company:

• A company may implement a neutrality policy.
• Said policy must be provided for by a clause in the internal rules or a memorandum. Hence, staff representatives should be able to give their opinion on this policy when being consulted on the text and the labour inspectorate and in the same way, as the case may be, the courts should be able to check its conditions.
• The clause must be objective (and thus must aim at any kind of expression of any belief) and legitimate (namely, be limited to what is strictly necessary, for instance, by aiming only at employees who are in contact with clients) and its enforcement must be proportionate (hence the obligation to offer a position without any contact with clients before considering any dismissal when facing the employee’s refusal to comply with the neutrality requirements).
In the absence of such a clause, the ban on expressing one’s religious beliefs constitutes a form of discrimination, which can be justified only by an essential and decisive condition resulting from the nature of a professional activity and its operating conditions. Without such a condition, dismissal of an employee who refuses to comply with neutrality requirements shall be null.

Protection against dismissal

Through remarkable case law, the employment division has put an end, or has almost done, to automatic loss, or in other words, the loss deduced from the wrongdoing.34 Dismissal-wise, it is now clearly established that an employee suffering from a procedural irregularity must demonstrate the existence and extent of his or her loss to obtain compensation therefor. What about irregularities as to the substance? Automatic loss is preserved since the Cour de cassation has decided, in a decision to be given the widest circulation, that the unjustified loss of an employee’s job causes him a loss the extent of which is for the judge to assess.35 Two types of irregularities likely to impact the dismissal must be distinguished: for procedural irregularities, automatic loss is excluded; and for substantial irregularities, it is maintained. This solution is entirely consistent with the compensation schedule in case of a dismissal without a real and serious cause resulting from the Macron orders. As the legislator systematically provides for minimum compensation, except when the length of service is less than one year, the existence of any loss is legally presumed, which was formerly the case only for employees with at least a two-year length of service and employed by a company of more than 11 employees. Compelling an employee to prove a loss would then become contra legem.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

In cases relating to an employment contract, the employment division of the Cour de cassation is used to apply civil law rules whenever the solution cannot be found in a special text of the Labour Code. Lately, and pursuant to a decision benefitting from maximal circulation, it has explicitly referred to the reform of the law of obligations to clarify the regime of promised employment contracts and distinguish them from job offers.36 More specifically, it has affirmed that the evolution of the law of obligations, resulting from order No. 2016-131 of 10 February 2016, leads to a different assessment, in labour relations, of the scope of employment contract offers and promised employment contracts. It also specifies that the act whereby an employer proposes a commitment specifying the position, wages and starting date and expresses its author’s will to be bound in case of acceptance constitutes an employment contract offer, which can be freely retracted as long as it has not reach its addressee. The retraction of the offer before the expiration of the time-limit fixed by its author, or, failing that, the end of a reasonable period, prevents the conclusion of the employment contract and the author’s non-contractual liability could be called into play. It adds, however, that the unilateral promise to enter into an employment contract is a contract whereby a party, the promisor, grants the other, the beneficiary, the right to opt for the conclusion of the employment contract and the author’s non-contractual liability could be called into play. It adds, however, that the unilateral promise to enter into an employment contract is a contract whereby a party, the promisor, grants the other, the beneficiary, the right to opt for the conclusion of the employment contract, of which the position, wages and starting date are determined, and for the conclusion of which only the beneficiary’s consent is required, and that the revocation of the promise during the time given to the beneficiary to opt in does not prevent the conclusion of the promised employment contract. The distinction may seem subtle but is worth being defined: whereas previously, the promise to hire amounted to an employment contract if it contained the position offered and the starting date, what
matters now is the employer’s intent to commit itself or not, its will having to be explicitly expressed in the document.

**Worker consultation, trade union and industrial action**

The nullity of a collective agreement relating to the setting up of staff representative institutions has no retroactive effect. Through this solution, the *Cour de cassation* going back to its case law, pursuant to which what is null is deemed to have never existed, a null agreement could not have any effect. This decision anticipates the application of the new article L. 2262-15 of the Labour Code resulting from the Macron orders and pursuant to which: “in case a collective agreement is annulled in whole or part by a judge, the latter may decide, if it appears to him or her that the retroactive effect of this annulment is likely to have obviously excessive consequences due both to the effects this agreement has produced and the situations which have arisen when it was in force and to the general interest which could require the temporary maintenance of its effects, that the annulment shall produce its effects only for the future or to modulate the effects in time of his or her decision, subject to the contentious actions which may have already been brought at the time of his or her decision for the same cause of action.” So then why limit the solution only to agreements relating to the setting up of staff representative institutions? We must certainly not attach too much importance to the reference to the object of the agreement in the sense of a formal legal principle. And what about the mandates of the employees who have been elected or appointed pursuant to the agreement? In the absence of any retroactivity, the elections are absolutely not called into question, so they shall remain, at least until a new agreement puts an end to the illicit situation, if we understand the decision correctly.

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**Endnotes**

2. Ord. No. 2017-1385 relating to the reinforcement of collective bargaining; Ord. No. 2017-1386 relating to the new organisation of the social and economic dialogue within a company and facilitating the exercise and valuation of trade union responsibilities; Ord. No. 2017-1387 relating to the predictability and securing of work relations; Ord. No. 2017-1388 relating to the collective bargaining framework; and Ord. No. 2017-1389 relating to the prevention and consideration of the effects of being exposed to certain professional risk factors and on occupational health risk benefits accounts. For a presentation of the orders, see our contribution to *GLI – Employment & Labour Law, 2018, Sixth Edition*.
4. For instance, the competitiveness agreements have been renamed the collective performance agreements, cases of null dismissal excluding the application of the compensation schedule have been listed, the conditions of collective mutually agreed termination have been clarified, and the rules relating to the CSE’s budget have been revised.
10. Law No. 2016-1088 of 8 August 2016 relating to work, the modernisation of the social
dialogue and the securing of career paths.
12. See, notably, Law No. 2015-990 of 6 August 2015 about growth, activity and equal
economic opportunities, Decree No. 2016-660 of 20 May 2016 relating to the labour
courts justice and to the judicial handling of labour litigation, Law No. 2016-1547 of
18 November 2016 about the modernisation of the XXI\textsuperscript{st} century justice, and Decree
No. 2017-1008 of 10 May 2017 including various procedural provisions relating to the
labour courts.
and 12-81.461.
13-12.423.
33. CJEU 14 March 2017, cases C-157/15 and C-188/15.
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General labour market

The economic upturn in Germany has stabilised in spite of the uncertainties of the worldwide economy at the beginning of 2018. Germany’s real Gross National Product (GNP) increased in 2017 by 2.2%.

The Forecast of the Institute for Labour Market and Occupational Research for the Economy and the Labour Market 2018 [IAB-Prognose für Wirtschaft und Arbeitsmarkt 2018] expects the real GNP to grow by 2.1%. There are, however, risks from, above all, US trade policy and the consequences of the Brexit vote.

Unemployment in Germany continued to decrease and with approx. 2.33 million unemployed has meanwhile reached its lowest level since the reunification in 1990. In spite of this positive outlook, there are structural problems in finding jobs for the unemployed whose qualifications often do not meet the requirements of employers or when supply and demand do not concur due to regional discrepancies.

The good economic situation substantially reduces the risk of job losses and dismissals are also at their lowest level since the reunification. Logically, the number of unfair dismissal claims continues to fall. On the employment side, recruiting problems are increasing. The time taken to fill a vacancy increases and the number of vacancies is at a record level. The additional potential of employing refugees will still, in practical terms, take some time because considerable investment in training and language knowledge is required.

The volume of work is also at a high level. In 2018, the weekly full-time working hours under collective bargaining agreements, in practice at an average of 38 hours, will equal the figure for the previous year. The average weekly working hours over all full-time and part-time employees is 29.7 hours. 29.8 days remains the usual number of holiday days under collective bargaining agreements. The average level of absence due to illness in 2018 is expected to be 4.3% which is slightly above the figure for the previous year, with a gradually rising tendency. This level corresponds to 63.9 hours’ work lost per employee annually.

Redundancies, business transfers and reorganisations

Developments in court judgments have occurred in the area of transfers of undertakings. In the course of such a transfer, the employer or the new owner must, prior to the transfer, give notice in text form of the details of the transfer to the employees affected by the transfer according to § 613a Civil Code (BGB). The employees then have one month after receipt of the notice to object to the transfer of their employment. In practice, this notice is often a source of formal errors in the course of a transfer of undertaking because details are forgotten or unclearly described. The period for objecting does not then begin to run for the employees
and there is a considerable period of legal uncertainty as to whether the employees can avail of their right to object or not to the results.

In its judgment of 21.12.2017 (File No. 8 AZR 700/16), the Federal Labour Court has specified the duration of the period of legal uncertainty which must be accepted. According to the judgment, employees now have up to seven years after a transfer of undertaking within which to object to the transfer. The Court clarified that this seven-year period begins to run from when the employee has been informed in text form of the transfer of the employment with the (planned) time and subject matter of the transfer and the identity of the transferee, and given instructions on their right to object. Without this information being given to the employee, the period for objecting continues to run indefinitely. Simply continuing to work for the new owner does not justify curtailing the right of the employee to object. This judgment is unsatisfactory in practice because an employee, who certainly knows that a transfer of undertaking has occurred, can defer his objection for seven years.

§ 17 Protection Against Unfair Dismissal Act (KSchG) often constitutes a practical obstacle to dismissals following a transfer of undertaking. This provision imposes complex obligations on the employer to notify the Employment Agency of dismissals which reach certain thresholds. A consultation process, according to which a works council must be informed and discussions conducted for the avoidance or reduction of dismissals with it, is imposed. If the employer breaches these formal obligations, a dismissal can be invalid for that reason alone.

According to the wording of § 17 KSchG, the thresholds must be calculated according to the number of employees, not including temporary agency workers. Since this German provision implements EU law, the provisions of EU law must always be considered when interpreting the German provision. If, in national court proceedings, interpretation is disputed, the Court of Justice of the European Union (CJEU) decides. The Federal Labour Court had such a case at the end of 2017 (File No. 2 AZR 90/17 (A)). The issue was whether and under what conditions temporary agency workers are to be taken into account together with employees when calculating the thresholds. The Court’s judgment is anxiously awaited by practitioners. The number of temporary workers has tended over the long term to increase even more dynamically. On average, there were approximately 1 million such workers in Germany in 2017.

It is very difficult to predict the decision the CJEU will make. From the perspective of labour market policy, it is not necessary to include temporary workers in the calculation for the purposes of the thresholds under § 17 (1) KSchG, since the Employment Agency is not obliged to cater for them. Temporary workers return to their leasing agencies and are not on the labour market. If one, on the contrary, regards the character of § 17 KSchG as a provision of operational cooperation, the indications for the inclusion of temporary workers are strong. It has already been decided by the highest courts that temporary agency workers are to be included for the purpose of calculating the thresholds for the size of the works council and reconciliation of interests in the event of operation changes.

**Business protection and restrictive covenants**

Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 “on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure” has considerable labour law implications. This directive is aimed at harmonising know-how protection standards throughout Europe in order to strengthen start-ups and small and medium-sized businesses in their research
projects. It strengthens free enterprise and promotes innovation. The effects on labour law are particularly evident in the areas of compliance and whistleblowing.

At present it is observed that the European Know-how Directive must still, in principle, be transposed into German law. The German legislator tabled a bill on 18.7.2018 for that purpose. The period for implementation had, however, already expired on 8.6.2018. Legally, this means the provisions of the Know-how Directive must now be considered in interpreting German law and are already indirectly applicable.

There is no single statute in Germany so far which regulates all aspects of the protection of trade and operational secrets that are protected to date by contractual damages claims because employees are subject to an ancillary obligation to protect them. The Act against Unfair Competition (AUC) increases that protection by creating criminal offences. Betrayal of trade and operational secrets by employees can lead to criminal prosecution under § 17 AUC. Injunctions under the Civil Code may also be considered.

The Directive will continue to be relevant – in interpreting German law – in the future, and therefore the changes faced by businesses are already visible today.

A significant change from the present legal situation is the amended definition of a trade secret, which the Directive defines in Art. 2 Nos 1 and 2 as information which:

“has commercial value because it is secret;
has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.”

The Directive thereby adds a new feature in comparison to the previous definition of a trade secret in German law; namely, reasonable steps to keep it a secret are now required in order to constitute a trade secret. That is new and demands action on the part of businesses.

While it has already been required that an intention of the entrepreneur to maintain secrecy must be objectively demonstrated, it has also been required so far that the entrepreneur has an interest in the secrecy. Now, however, purely objective criteria apply to trade secrets, the satisfaction of which must be proved by the entrepreneur even in court in case of dispute. Actual protective precautions are required, e.g. the classification of information according to the degree of confidentiality attributed to it, access or security controls and valid confidentiality clauses. In the interests of legal certainty, especially important and highly classified information should therefore be expressly marked as “secret” or “confidential”. The specific precautions must also be “reasonable”. That means that the nature and significance of the flow of information must influence the degree and the intensity of the necessary measures. That applies in particular to the kinds of control and the cost of the measures.

Business will now be forced to take action to protect trade secrets because of the “reasonable steps” requirement. The following may be indicated as reasonable secrecy measures:

- clear responsibility for specific trade secrets;
- classification of trade secrets according to the level of confidentiality they demand;
- setting up access controls and technical security measures; and
- conclusion of updated confidentiality agreements.

In order to be able to prove these measures in case of dispute, a Compliance Officer should direct and document the measures. Depending on the circumstances, training of personnel in dealing with secret information may be indicated.

According to Art. 5 b) of the Know-how Directive, the protection of external whistleblowing is dealt with for the first time. So far, the right of employees to disclose irregularities in their own business to external bodies was vindicated or rejected by a comprehensive weighing in
each particular case of the obligation of the employee to protect the employer’s trade secrets against the right to file a complaint against the employer of irregularities in the business. Internal remedies, in so far as they were reasonable for the employee in the particular case, took priority. A general public interest in the disclosure of irregularities was an additional requirement. Finally, the office of the public prosecutor was, in the prevailing opinion, the only addressee of admissible external whistleblowing coming under consideration.

In future, the threshold for legal disclosure of trade secrets will be lower. Furthermore, the press is considered as an addressee in addition to the office of the public prosecutor.

The Know-how Directive – which refers to “revealing” (and not “filing a complaint”) – suggests that a disclosure in the form of a publication, for example, in public media, can be legitimate. In addition, the whistleblower is, in future, not only entitled to report illegal activity but also “misconduct, wrongdoing”, which does not reach the threshold of criminality. Immorality, for which German law has not so far imposed penalties, is covered by the terms “misconduct, wrongdoing”. Tax structuring abroad, which is not illegal but morally questionable, is an example.

Against this background, businesses should reassess their current protection of trade secrets and – if they have not done so already – voluntarily establish internal compliance systems which can prevent external whistleblowing. Internal whistleblower and compliance systems are, in view of the new legal situation of improved whistleblower protection, the safest method of avoiding disclosure conflicts.

Finally, the Know-how Directive may affect collective agreements (industry-wide or works agreements), since whistleblower protection may not be undermined by collective agreements. The extent to which ethical guidelines, internal reporting systems or confidentiality clauses in collective agreements are worded to conform to the Directive or require amendment must be reviewed. While there is a disputed opinion that ethical guidelines and internal reporting systems are not directly subject to the Know-how Directive, to the extent they constitute a restriction of external whistleblowing, they may be in breach of the Know-how Directive.

**Discrimination protection**

A German judgment favourable to businesses on discrimination protection was handed down by the Federal Labour Court on 23.11.2017 (File No. 8 AZR 372/16) in a case about the requirements placed on a job advertisement. A restrictive judicial position was thereby reversed. According to the judgment, the requirement in a job advertisement that the applicant must have “very good” written and spoken German and “good” written and spoken English did not constitute indirect discrimination punished by § 3 (2) General Equal Treatment Act (AGG) as discrimination on grounds of “ethnic origin”. The court did not accept that a particular ethnic group – a remarkable aspect – was specifically discriminated against by this language requirement. The question of whether the language requirement was materially justified in the specific case was therefore no longer crucial.

The argumentation is so remarkable because the court, referring to a judgment of the ECJ of spring 2017, now takes the position that (indirect) discrimination because of “ethnic origin” requires that members of a “specific” ethnic origin are particularly discriminated against in comparison to other persons by the requirement – here, such requirement being “very good” German in the job advertisement.

The argumentation has also been criticised on the ground that the condition of discrimination against a “specific” ethnic group leads to paradoxical results. The discrimination must always be against a “specific” ethnic group – for example Sinti. If a number of ethnic groups suffer discrimination, no ethnic discrimination arises.

Discrimination protection
The judgment must be welcomed by businesses in Germany because it draws clear lines as to when discrimination arises and increases the protection of businesses – which according to experience do not wish *per se* to engage in inadmissible discrimination – against the proliferation of discrimination claims.

**Statutory employment protection rights**

The *special protection* of severely handicapped persons against dismissal under the Social Code IX (SGB IX) has meanwhile been strengthened by the Federal Participation Act (BTHG).

It is provided in the Act that now the participation of representatives of handicapped persons is a mandatory requirement in the course of the dismissal of a handicapped employee. Handicapped persons representation, which can be elected under certain conditions, advocates the special interests of handicapped persons and employees with equivalent conditions. Employers must now involve handicapped persons representation in each dismissal. The situation is therefore similar to that of the participation of the works council. According to § 178 (2) SGB IX, the dismissal of a handicapped person issued by the employer without such participation, is invalid.

The pending amendments to labour law agreed in the Coalition Agreement of the Federal Government must also be noted. After long negotiations on the formation of a government, the government parties agreed these points at the beginning of 2018. Precisely when they will be implemented is not foreseeable at present. Some amendments can, however, be anticipated, as set out below.

The law on temporary employment contracts, which has made a considerable contribution to the flexibility of German businesses, will be amended in important aspects mostly to the benefit of employees.

Making employment temporary without a material reason, i.e. in the absence of special grounds, e.g. substitution during pregnancy or long-term illness, will be considerably restricted, though not abolished. In future, employers with more than 75 employees will be entitled to limit the employment of a maximum of 2.5% of the employees without a material reason. If that percentage is exceeded, any additional temporary employment without material reason is deemed to be permanent employment. The percentage refers to the time of the last temporary employment without material reason. The duration of temporary employment without material reason will be admissible only for 18 instead of 24 months and only one extension will be permitted instead of the present three extensions according to § 14 (2) sent. 1 Part-time and Temporary Employment Act (TzBfG).

At present, a temporary employment contract with material reason can be extended a number of times. Limits arise from European law and complex German judgments which apply only after many limited periods or a long overall duration. In future, temporary employment is intended to be inadmissible if previously there has been permanent employment or a number of temporary employment periods with a total duration of five or more years. The maximum period of five years is also to include any leasing of the employee by one or more lessors. A new temporary employment with the same employer will become possible only after a period of three years.

In the course of work on call, which means that the employee must provide his/her work in accordance with the fluctuating work requirement in the business, the employee is intended to be given more planning and income security. The proportion and remuneration of work on call should in future be permitted to fall below or exceed the agreed minimum working time.
by, at most, 20% and 25% respectively. Without an agreement on weekly working hours, at least 20 hours per week are deemed to be agreed. “Zero-hour contracts” used especially in the restaurant and retail businesses are thereby intended to be excluded.

The law on part-time working presently only provides a right to a permanent reduction of working hours. The employee has no right to later increase the working hours again at his/her own wish. The employer is only obliged to take into account the interests of the employee in increasing the number of working hours when filling vacant positions.

In future there is to be a genuine right to temporary part-time working. An automatic return to the former working hours after the expiry of the temporary period logically follows.

Only amendments to the following points are clear at present.

- The right to temporary part-time work will apply only in businesses with more than 45 regular employees. In businesses with between 46 and 200 employees, a reasonable limit will be introduced. Only one in 15 employees will have a right to temporary part-time work. For that calculation, the first 45 employees will be included. If that limit is exceeded, the employer can reject the application.
- During the temporary part-time work, there is no right to increase or reduce the working hours or premature return to the previous working hours.
- The employer can reject the temporary part-time work application if it is for less than one year or for more than five years.
- On the expiry of the temporary part-time working period, the employee can apply for a further period of temporary part-time work at the earliest after one year.
- The parties to a collective agreement will be entitled to agree provisions differing from the above.

**Employee privacy**

The most extensive changes to labour law come without doubt from the new data protection law applicable since 25.5.2018.

In order to understand the new data protection law, one must firstly consider a special feature resulting from the hierarchical position of various sources of law, i.e. the European General Data Protection Regulation (GDPR) and the new German Federal Data Protection Act (BDSG 2018). Both codifications now apply, i.e. the GDPR and the BDSG 2018, simultaneously and parallel to each other. However, the GDPR takes precedence in the hierarchy over the BDSG 2018 – with some exceptions.

Although the BDSG 2018 deals comprehensively with many issues and is similar in structure to the old BDSG, it must be noted now when applying the law that any situation relevant to data protection cannot be considered only under the provisions of BDSG 2018, but simultaneously with the GDPR. In employee data protection – as in other areas with data protection relevance – since 25.5.2018, two cogs, namely the GDPR and the BDSG 2018, interact with the same wheel.

The new legal situation can then be approached with the awareness that the German legislator has not fundamentally changed data protection, in any event not in the area of labour law. While the new provisions of § 26 BDSG 2018 do not leave everything as it was, there remains a certain continuity and structural similarity to the former data protection provision, the old § 32 BDSG. This has the enormous advantage that the decades of labour law judgments on the extent and limits of employees’ personality rights, on the resulting right of the employee to informational self-determination and the strengthened judgments in recent years on the interpretation of the old § 32 BDSG, can assist in the understanding of § 26 BDSG 2018.
For the new data protection law, therefore, a recent judgment of the Federal Labour Court, still under the old law, is as relevant as before. The judgment of 27.7.2017 (File No. 2 AZR 681/16) dealt with a case in which an employer installed software, a keylogger, on an employee’s work PC which recorded all keyboard strokes and took screenshots at regular intervals.

Previously, the employer had informed its employees that all “Internet Traffic” and the use of its systems would be logged. After examining the data created with the help of the keylogger, the employer confronted an employee with the accusation that he used his work PC for private purposes during working hours. A dispute about the extent of the private use arose between the parties and ultimately the employee was dismissed. In the subsequent unfair dismissal claim, the Federal Labour Court emphasised that the knowledge of the private use by the employee derived from the keylogger could not be considered in the court proceedings. The employer, by the use of the keylogger, breached the employee’s constitutionally guaranteed right to informational self-determination as part of the general personality rights.

Sourcing the information was not admissible on data protection grounds because the employer had no suspicion based on facts of the commission of a crime or other serious breach when installing the software. The installation of the software in the absence of such suspicion was therefore inadmissible.

Although legal uncertainty affecting some established principles is limited by the national BDSG 2018, the provisions of the new European legislation of the GDPR must be included in future legal assessments. The GDPR places special importance on a transparent, and for those affected, intelligible provision for dealing with personal data. Art. 5 GDPR summarises the fundamental principles of the new employee data protection as follows:

- **“lawful, processing in good faith, transparency”**
  Personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. This principle is made more specific by the detailed information and notification obligations of the employer in Art. 12 ff. GDPR.

- **“purpose limitation”**
  Personal data may be collected only for specified, explicit and legitimate purposes. Any data processing is therefore to be recorded in writing with a detailed description of the purpose of the planned data processing and provided to the affected person, i.e. in labour law, applicants and employees.

- **“data minimisation”**
  Data collection and processing must be limited to what is necessary in relation to the purposes for which they are processed.

- **“accuracy”**
  Personal data must be accurate and kept up to date. Personal data that are inaccurate must be erased or rectified without delay.

- **“storage limitation”**
  Data may not be kept for longer than is necessary for the purposes for which the personal data are processed. This principle is closely connected to the data protection law erasure obligation.

- **“integrity and confidentiality”**
  Personal data must be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage.
These new measures force businesses to take action if they are to reduce the risk of drastically increased fines and damages claims of their employees. Art. 83 GDPR provides fines of up to 4% of global turnover or up to €20m. The fines are thereby greatly increased compared to previous law, which under the old § 43 BDSG provided a maximum fine of €300,000.00.

Generally, it must be said that probably only a few businesses in Germany can present a data protection system fully compliant with the present legal position. Realistically, implementation will still take some time. In the meantime, some general implementation steps which must be undertaken by businesses have become apparent. One can say overall that the following areas must be subjected to more precise review:

- amendment of works agreements;
- amendment of employment contract provisions to ensure compliance with the employer’s duties of transparency, notification and information;
- amendment of employment contract provisions to impose data secrecy;
- amendment of consents of employees to the use of employees’ personal data;
- changes in dealing with applicants or employment investigations;
- changes to the private use of work communications systems; and
- changes to employers’ supervision measures.

**Other recent developments in the field of employment and labour law**

In 2018, it was also decided, for the second time, to increase the statutory minimum wage introduced three years ago. In two stages – as is usual in collective bargaining negotiations – the relevant commission consisting of representatives of employers, trade union, and academics decided to increase the minimum wage on 1 January 2019 from €8.84 to €9.19 per hour and on 1 January 2020 to €9.35.

Finally, in April 2017 the maximum period for leased employees introduced in the Employee Leasing Act (AÜG) in 2018 expired for the first time. The period is 18 months in principle for an employee leased to one customer. It can, however, be extended in collective bargaining agreements. Only few industries have availed of that so far. In the metal and electrical industry, the electrical trade and the steel industry, such general collective bargaining agreements have been concluded. Without such extensions of the leasing period, businesses were instructed to cease the engagement of such leased employees; for example by agreed termination of the relevant lease or other termination thereof.
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Steps towards flexibility: Atypical forms of employment in Hungary

A traditional employment relationship is typically established between one employer and one employee for conducting one specific job function, for an indefinite period of time and for full-time employment. However, there are so-called atypical forms of employment provided in Hungarian employment law, differing from the traditional form of employment relationship, with the purpose of supporting both employers’ and employees’ flexibility in the labour market. Most such atypical forms were introduced by the current Labour Code (Act I of 2012). In this chapter we introduce the atypical forms of employment according to Hungarian law and their everyday practice based on our experience since 2012.

In Hungarian law, the atypical nature of an employment relationship may be manifested in:

- the period of time of the employment relationship (fixed-term employment, occasional work);
- the number of employers (multiplied employers’ contract or employer sharing);
- the type of employer (employment relationships with public employers);
- the number of employees (job sharing);
- the type of employee (executive employees);
- the place of work (teleworking);
- the requirement of availability (work on call, outworkers); or
- the separation in the person of the employer (temporary agency work, work via a cooperative).

The atypical nature of the employment shall be reflected by the employment contract, meaning the provisions of the establishment, fulfilment and termination of the employment relationship. Atypical forms of employment are governed primarily by the Labour Code; there are forms, however, similar to employment but not falling under the scope of the Labour Code, instead regulated by other legislation; for instance, conducting work as a member of a cooperative or working in the framework of simplified employment.

Although certain types of atypical employment relationships have become widespread in practice (such as fixed-term employment, temporary agency work, cooperatives), other types have hardly spread in the everyday practice (such as job sharing, multiplied employers’ contracts) in spite of the fact that those would be reasonable choices for employers struggling with the staff shortage that the current Hungarian labour market (2018) is faced with, especially in the IT sector and in the recruitment of blue-collar workers.

Fixed-term employment relationship

The fixed-term nature of the employment relationship must be explicitly provided in the employment contract (the length of the employment relationship must be determined); in the
absence thereof, the employment relationship must be regarded as concluded for an indefinite period. The duration of fixed-term employment shall be determined on a calendar basis or in another appropriate manner. The date of termination of the employment relationship may not depend solely on the will of either party if the parties determine the duration of the employment relationship on a non-calendar basis. For example, “the end of the Company’s business needs” is not an acceptable expiry date. However, if the employment relationship was established for the duration of the absence of another employee (such as parental leave of a colleague) then the period of time of the fixed-term contract is dependent on the decision of a third party (the employee on parental leave).

The term of a fixed-term employment relationship shall be limited to five years, including the duration of any extended fixed-term employment relationship and the establishment of a new fixed-term employment relationship following the expiration of the extended and the previous fixed-term employment contract (within a period of six months). If the fixed period expires, the employment relationship will be terminated by virtue of the law. According to judicial practice, the extension of a fixed-term contract is not prohibited (up to five years); however, a new fixed-term agreement is not valid if it is aimed at defrauding the legitimate interest of the employee or the circumvention of the rules protecting the employees. In such case, a new period of employment concluded for a definite period shall be deemed to have been established for an indefinite period of time. The establishment of a fixed-term employment relationship after the probation period, in order to extend the probation period, does not comply with the law (former Supreme Court, case Nr. Mfv. I. 10.798/2006).

If a work permit is required for establishing the employment relationship, it can be established for a maximum period of time specified in the permit. In case of the renewal of the work permit, the duration of the new fixed-term employment relationship (together with the previously established employment relationship) may exceed five years.

**Part-time work**

According to the Labour Code, employment relationships are established for full-time employment (eight hours a day) by default. However, parties have the option to agree on shorter working hours; for example, four or six hours per day. Such agreement must be defined in the employment contract (part-time work). According to practice, remuneration for part-time employment is proportional; for example, for a part-time employee of four hours a day, at least 50% of the mandatory minimum wage must be paid. Under the Labour Code, in case of part-time work, the maximum amount of annual extraordinary work is also proportional: while the annual limit for full-time employees is 250 hours, then it is – for example – 187.5 hours for a part-time employee with a six hours/day contract.

In some cases set out in the Labour Code, the part-time agreement is a must for the parties: if a child-raising employee requests part-time employment, the employer is required to modify the employment contract to part-time until the child reaches the age of three – in case the employee is raising three or more children, the end of the part-time employment is when the youngest child reaches the age of five.

**Work on call**

This form of employment is primarily ideal for those who for some reason are unable or temporarily unwilling to carry out regular and typical employment. Work on call must be agreed in the employment contract. In this form of legal relationship, the employer may order the work in accordance with the due date and/or necessity of tasks. The work schedule
must be announced a minimum of three days before the prescribed working day. Working on call is a special type of part-time employment, in which the daily working time may not exceed six hours.

Work on call is not generally applied in everyday practice. Although it ensures flexibility, the reason employers do not prefer it is that the employee is entitled to a salary for the periods in which no actual work duty was performed. According to our practice, this form of employment is used for certain specific tasks, such as cleaning or maintenance of a vacation resort before a guest arrives.

**Job sharing**

In case of job sharing, one employer and at least two employees agree on the joint fulfilment of one job position. In the employment contract, a provision must be defined regarding each employee and regarding all the conditions of employment (e.g. base wage, probation period, place of employment). In the event of an employee being prevented from working (due to sickness, vacation, etc.), the other employee(s) as contractual parties are obliged to fulfil the employment relationship. Hence, this form of employment is advantageous for the employer, as it does not need to arrange a substitution in case of a temporary absence of an employee, as the other employee(s), as contractual parties, must perform the job duties in their stead.

When scheduling the working time, the provisions on flexible work arrangements are applicable. This means that employees shall jointly fulfil the obligations arising from the employment relationship according to their own schedule. Salaries are by default provided to employees at an equal rate, but the parties may agree differently as well. In the latter case, it is specified in the employment contract what kind of remuneration the employee is entitled to. In this regard, the requirement of equal treatment shall be considered.

Any employee may terminate this employment relationship. The employment relationship will cease to exist by virtue of the law if the number of employees reduces to one person. In this case, the employer is obliged to pay compensation.

Job sharing would be reasonable for employers facing a lack of work staff, especially in administrative functions or for simple physical tasks. However, employees are not generally open to such contracts and this form of employment is not widely used in the labour market.

**Multiplied employers’ contract (employee sharing)**

This employment relationship is established by and between more than one employer and one employee, where they agree to fulfil one job position. Multiplied employers’ contracts can be a good option for company groups or for business needs supporting the operation of more employers; for instance, companies of the same group often have a common payroll specialist or companies leasing a property may employ a common receptionist. Ownership relations between employers is not a legal requirement.

The Labour Code does not contain many detailed rules related to this type of employment, so it is recommended to specify in the employment contract how the employee should fulfil his obligations towards each employer (for example, the employee has to work one week for one employer, the other week for the other, etc.). It is also recommended to agree on the place(s) of work.

It is mandatory to determine which employer pays the salary as it is relevant both for taxation reasons and from a social security aspect. Accordingly, employers are obliged to designate an employer in writing to fulfil the tax obligations at the time of the establishment of the
employment relationship and to inform the employee of the designated employer. In the absence of a designation, any employer may be required to meet the tax obligations arising from the employment relationship. In addition, employers are jointly and severally liable for the employee’s claims, i.e. the employee can enforce his claims (for example, overtime compensation) against any of them.

The employment relationship can be terminated by any employer or by the employee’s legal declaration; however, the parties may derogate from this rule and may appoint an employer who can accept termination letters or may issue such legal declaration. Employment relationships cease to exist by virtue of the law if the number of employers decreases to one. Multiplied employers’ contracts are not widespread in practice; however, they are sometimes applied at multinational company groups and at small neighbouring retail shops.

**Teleworking**

Teleworking means activities performed on a regular basis at a place other than the employer’s premises, using computers or other means of information technology, where the end product is delivered by way of electronic means. For example, data processing or software development can be performed through teleworking.

In the employment contract, the parties shall agree on the employment by means of teleworking. Under the Labour Code, the employer must notify the employees about the job opportunities in the framework of teleworking; if an employee wishes to do so, he must make a proposal to the employer to which the employer shall give an answer in writing within 15 days (but is not obliged to accept the employee’s offer).

In case of teleworking, the employer’s right of instruction is limited solely to the definition of duties to be discharged by the employee (for example, the collection and transmission of a specific series of data). The work schedule is basically flexible. In both respects, the parties may agree otherwise; for example, the employer may instruct the employee in detail in each task and may apply a fixed working order. At the same time, such restrictions are not really realistic.

The employer may restrict the use of computing equipment or electronic devices (such as a desktop computer, laptop, modem) solely to the work the employee performs on its behalf. This is of particular importance in the light of the General Data Protection Regulation (GDPR). Regarding work safety aspects, teleworking can only be carried out at a workplace approved by the employer in advance and the employee can only change the working conditions that are relevant to work safety with the employer’s consent.

The methods of monitoring are determined by the employer (but the parties may agree otherwise). The employer’s actions of control, and the means and methods used, may not be a disproportionate burden on the worker and the other person using the property for employment.

Although teleworking could be ideal for younger employees or for those who are temporarily out of the active labour market (such as a mother raising a child), it is currently not widespread in practice. Employers rather prefer to apply a home office system in the framework of which employees are allowed to work from home one to two days per week, provided that the nature of the job is suitable for such work.

**Outworkers**

Outworkers may be employed in jobs that can be performed independently and which are remunerated exclusively with a performance wage. Regarding the fact that the activity must
be carried out independently, the employer’s right of instruction is limited to specifying the technique and work processes to be used by the employee (unless otherwise agreed). Outworkers’ legal relationship can be established, for example, for the manufacturing of handcrafted products, such as the sewing of special dresses or producing furniture of limited edition.

The employment contract shall define the nature of work to be performed by the employee, the place where work is carried out and the method and extent of covering the employee’s expenses (e.g. a flat rate or detailed settlement). Basically, the employee shall carry out the work using his own devices/equipment and the employee’s working time shall be flexible.

The employee shall be reimbursed for the expenses actually incurred in connection with the work, or – if the expenses actually incurred cannot be determined – a fixed, flat-rate sum shall be paid to the employee. This includes the operating and other costs of the equipment used by the employee. Payment of remuneration and expenses shall be withheld if the work done is deemed insufficient due to reasons attributable to the employee (waste product). Payment of remuneration and expenses shall be reduced if the employer is able to use the product in part or in whole.

**Occasional work (simplified employment)**

This employment relationship is widespread in respect of short-term or seasonal work, such as working for a few days at a summer festival, cleaning once a week, acting as a background extra for the shooting of a movie, etc. The Labour Code contains only the basic rules thereto; the detailed provisions are covered by Act LXXV of 2010.

In spite of the general rule, the employment contract does not have to be in writing, but the employment relationship is established by fulfilling the mandatory notification towards the National Tax Authority. Simplified employment can be agricultural seasonal work (up to 120 days per year), touristic seasonal work (up to 120 days per year) or occasional work (up to five consecutive days and up to 90 days per year). In case of such type of employment, several general employment rules are not applied (such as allocation of vacation; registering the working hours, etc.).

**Employment relationships with public employers**

A public employer is defined as a public foundation or a business association in which the State, a municipal government, a nationality self-government, an association of municipal governments, a territorial development council, a budgetary agency or a public foundation has majority control either by itself or collectively.

The employment relationship with public sector employers is subject to stricter judgment than the general rules, given that these employers manage public funds, and thus the employer’s and employee’s freedom of agreement is limited; for example, higher severance payments or extension of the notice period are not allowed, not even via a collective bargaining agreement.

**Executive employees**

An executive employee is defined as an employer’s director and any other person under his direct supervision and authorised – in part or in whole – to act as the director’s deputy. Such employees are executive employees by virtue of the law (no specific agreement is required).

In addition, employment contracts may invoke the provisions on executive employees if the employee is in a position considered to be of considerable importance from the point of view of the employer’s operations, or fills a post of trust, and his salary reaches seven times the
mandatory minimum wage. The latter can be, for example, a manager of a local commercial unit of a supermarket chain, an internal auditor of a company, a production manager of a factory or a CFO of a company. According to judicial practice, the fact that an employee performs his job responsibilities independently and in that context performs decision-making tasks, does not make him an executive in the legal meaning by default (Hungarian Curia, case Nr. Mfv. I. 10.482/2014; Hungarian Curia, case Nr. Mfv.I.10.559/2017).

There are special rules for executive employees given that they have a higher responsibility and remuneration than an average employee, but their legal protection is weaker (the executive is not covered by the collective bargaining agreement, there is no obligation to give reasons for dismissal).

Executive employees’ work schedules are flexible, so they cannot claim any wage supplement (unless otherwise agreed). If an executive employee terminates the employment unlawfully, he will be required to pay an amount corresponding to 12 months of absentee pay. There is no need to give any reasoning for termination with notice by the employer, and there is no protected period before the retirement age in terms of dismissals.

The Labour Code also includes certain cases of conflict of interest; for instance, an executive shall not acquire shares (with the exception of the acquisition of stocks in a public limited company) in a business association which is engaged in the same or similar activities or that maintains regular economic ties with their employer; nor shall they conclude any transactions falling within the scope of the employer’s activities in their own name or on their own behalf.

Employers apply executive contracts quite often in case of directors and lower managers who are in an important position or at a post of trust (such as chief financial officers, HR managers, heads of production, etc.).

**Temporary agency work**

In everyday practice, the most commonly applied atypical form of employment is the temporary agency work relationship. This type of employment was originally created to solve the problems arising from temporary absences (e.g. due to sickness or maternity leave), but it is also suitable for the availability of a workforce of sufficient quality and quantity at the appropriate time in the case of industries that undergo strong fluctuations.

Temporary agency work is a trilateral relationship; the essence of it is that the employee establishes a temporary work employment relationship with a temporary work agency (as an employer), but shall work for a third-party employer (without being in employment with the latter one, which is called the user enterprise). The user enterprise pays a fee to the temporary work agency. Thus, the temporary agency work is based on two contractual relationships: an employment relationship between the employee and the temporary work agency; and a civil law contract between the temporary work agency and the user enterprise. On the basis of these two legal relationships, the temporary agency employee actually works for a third party, i.e. the user enterprise.

Temporary work agency is defined as any company established in an EEA Member State that is authorised under national law to engage in such business activities, or a business association established in Hungary whose quotaholders have limited liability, or a cooperative in respect of employees other than its members, provided that the company/cooperative meets the legal requirements prescribed by the law (for example, 10,000,000 Hungarian Forints – about 30,000 Euros – has been paid as a bank deposit) and it is registered by the governmental agency.

A user enterprise may be any employer (business association, foundation, church, etc.).
The duration of assignment (performance of work for the user enterprise) may not exceed five years, including any period of extended assignment and re-assignment within a period of six months from the time of termination of his/her previous employment, irrespective of whether the assignment was made by the same or by a different temporary work agency.

It is not allowed by law to hire a temporary work agency employee to replace an employee during a strike; furthermore, the user enterprise cannot require the employee to work for another employer. According to judicial practice, it is contrary to the law if the user enterprise orders work duties for the agency employee at a third employer (former Supreme Court, case Nr. Mfv. II. 10.984/2006).

As written above, there is a civil law relationship – a service contract – between the temporary work agency and the user enterprise, which shall be in writing. The agreement has to include the most important material conditions of the assignment (such as the duration of the temporary work, the nature of the work to be done, the place of work, any special requirements in terms of the employees, remuneration rules) and the parties shall agree on the sharing of the employer’s rights (the employment relationship may only be terminated by the temporary work agency). Besides the written agreement, the user enterprise shall inform the temporary work agency in writing about many other conditions related to the actual assignment. The agreement between the temporary work agency and the user enterprise shall be null and void if the temporary work agency and the user enterprise are affiliated by way of ownership in part or in whole.

As indicated above, the user enterprise is the actual employer; therefore, it has to meet the provisions on work safety, must provide the conditions necessary for the work, must provide the employee aptitude test, and must ensure the correct conditions for disabled persons. Furthermore, the user enterprise exercises employer’s rights and obligations regarding the working hours and work schedule and their registration.

The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment, equal to those available to the user enterprise’s own employees; in particular:
- the protection of pregnant women and nursing mothers;
- the protection of young employees (under the age of 18);
- the amount and protection of wages, including other benefits; and
- the provisions on equal treatment.

The provisions on the requirement of equal treatment are not mandatory in one respect from the beginning of the assignment: for the amount of wages and other benefits, equal treatment shall apply only from day 184 of the employment at the user enterprise with respect to any employee who is engaged with a temporary work agency in an employment relationship established for an indefinite duration and who is receiving salary in the absence of any assignment at a user enterprise.

The employment relationship – similarly to the regular employment relationship – can be terminated by mutual agreement, notice or by an immediate termination. At the same time, there are different provisions for temporary agency work relationships, such as the notice period (that shall be only 15 days instead of 30 days) and may terminate the employment relationship if the assignment at a user enterprise was terminated.

**Working via a cooperative society**

A cooperative society is a civil law entity that has a membership (which is not constituted of employees). Based on the membership, a member can work at an external company based on
an agreement between the cooperative society and the external company. In this context, a special trilateral legal relationship is created when the cooperative “outsources” its member to a third party and the external company pays a certain service fee to the cooperative. The rules of cooperative society work cannot be found in the Labour Code, but in Act X of 2006 on cooperatives.

Currently, three types of cooperatives are widespread in Hungary: school cooperatives (schoolchildren, university students); pensioner cooperatives; and social cooperatives (for permanently unemployed persons).

It is essential that in the context of performing work duties, the external company may instruct cooperative members directly. The right of instruction covers, in particular, the method, time and schedule of the fulfilment of tasks.

School cooperatives and pensioner cooperatives are widespread in the current labour market, as most of the employers employing blue collar workers (such as factories, storage and logistics companies) are faced with a serious lack of permanent work staff.

**Conclusion**

Summarising the above, although the employment law rules allow a relatively high number of types of atypical work, in practice, there is still no legitimacy for all of them (for example, job sharing or work on call). Certain atypical forms of work, however, are widespread and popular among employers (such as temporary agency work or cooperative society work).
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India

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General labour market and litigation trends

Since the time of independence, various beneficial labour laws have been enacted to protect the interests of employees and to increase employment opportunities in a labour-abundant country such as India. Under the Constitution of India, labour falls in the concurrent list giving power to both the Central and the respective State Government to legislate on such items, with the residual law-making powers vesting with the Centre. This has resulted in a plethora of central and state laws related to wages, employment, industrial relations, social security, etc. With a view to fostering labour market flexibility in line with changing market conditions, and ‘ease of doing business’ in India, the Central Government, since 2014, has been attempting to refine, consolidate and simplify the myriad labour law legislation in India.

We have summarised below key amendments/proposals for labour law reforms at central and state level, trends in employment claims and litigation trends.

Below is a summary of key amendments, proposals and reforms at the central level:

(i) The Payment of Gratuity (Amendment) Act, 2018

The Payment of Gratuity Act, 1972 (“Gratuity Act”) is a piece of social security legislation which provides post-retirement defined benefits arrangements for employees engaged in various industries, factories and establishments. Gratuity is a tax-free defined benefit that is payable when an employee exits due to resignation, superannuation, physical disablement, etc. As per the Gratuity Act, payment of gratuity is entitled to every employee who (a) has been in continuous service for five years or more, and (b) is employed in an establishment with 10 or more employees.

The Payment of Gratuity (Amendment) Act, 2018 (“Gratuity Amendment Act”) received Presidential assent on 28 March 2018 and was notified on 29 March 2018. Prior to the Gratuity Amendment Act, the upper ceiling on payment of gratuity was INR 1,000,000 (Indian Rupees 10 Lakhs). The Gratuity Amendment Act has done away with prescription of an upper ceiling and empowers the Central Government to increase the maximum limit of gratuity from time to time by way of a notification.

- Maximum Gratuity: Considering the inflation and wage increase in case of employees engaged in the private sector, the Central Government has specified that the amount of gratuity payable to an employee engaged in the private sector shall not exceed INR 2,000,000 (20 Lakhs).
- Maternity Leave: For the purposes of calculation of continuous service for the payment of gratuity to employees who are on maternity leave, the Central Government has specified that the total period of maternity leave shall not exceed 26 weeks. This is in line with the Maternity Benefit (Amendment) Act, 2017 (“MB
Amendment 2017”), which increased the duration of paid maternity leave available to working mothers from 12 weeks to 26 weeks.

- **Power of Central Government**: Having abolished the gratuity limit, the Central Government can now increase the maximum limit of gratuity by way of a notification, without requiring prior approval from the Parliament. This will enable quicker determination of the maximum gratuity limit.

(ii) **Industrial Employment (Standing Orders) Central Amendment Rules, 2018**

The Industrial Employment (Standing Orders) Act, 1946 (“IESO Act”) was enacted to afford protection to workmen and regulate conditions of employment, grievances of workmen, issues related to employee misconduct, etc. The Ministry of Labour and Employment, vide the notification dated 16 March 2018, has notified the Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 (“IESO Amended Rules”) to introduce a significant labour reform – allowing fixed-term employment across all sectors. The key changes are:

- **Fixed-term contracts**: Prior to notification of the IESO Amended Rules, the facility for hiring on the basis of a fixed-term contract was initially available only for the apparel manufacturing sector. The IESO Amended Rules now allow for fixed-term employment across all sectors. However, to protect the interests of permanent employees, the IESO Amended Rules are applicable prospectively, and clarify that the employer of an industrial establishment shall not convert the posts of the permanent workmen existing in his industrial establishment to fixed-term employment, as on the date of the notification.

- **Protection of fixed-term workers**: Fixed-term workers will be eligible for all statutory benefits available to a permanent worker, according proportionately to the period of service rendered by them, even though their period of employment does not extend to the qualifying period of employment required in the statute. Further, the work conditions in terms of work hours, wages, allowances, and other statutory dues of a fixed-term employee would be on par with those of the permanent workmen.

- **Termination**: The IESO Amended Rules also clarify that no notice of termination of employment is required in the case of temporary workmen (whether monthly-rated, weekly-rated or piece-rated, those on probation or bad workers). Further, no fixed term workman is entitled to any termination notice or pay in lieu thereof due to non-renewal of contract. To provide a safeguard for temporary workmen against arbitrary dismissals, it has also been clarified that the services of a temporary workman shall not be terminated as a punishment unless he has been given an opportunity to explain the charges of misconduct alleged against him.

The IESO Amended Rules will enable industries across all sectors, whether seasonal or not, to hire workers for assignments that are based on the duration of the project or specific tenure. Additionally, this will also provide flexibility to terminate such workers post-completion of such assignment.

(iii) **Enhancement of the wage ceiling under the Payment of Wages Act, 1936**

The Payment of Wages Act, 1936 (“Wages Act”) is piece of a welfare legislation which regulates and ensures timely payment of wages to workers employed in industries. The Wages Act primarily aims to prevent unlawful deductions and unjustifiable delays in payment of wages and provides for permitted deductions in case of absence from duty or any damage or loss caused by an employee or certain facilities provided by the employer, amongst others. The Wages Act further aims to streamline the timeliness of payment of wages and the wage period and provides for a speedy grievance redressal mechanism and penal provisions.
The applicability of the Wages Act depends on (a) the wage limit, and (b) the class of establishments prescribed by the Central/State Government. Previously, only employees whose wages were less than INR 18,000 per month were covered under the Wages Act. With the intent to broaden the scope of the Wages Act and maximise its coverage to a broader section of workforce, the Ministry of Labour and Employment, Government of India – vide the notification dated 28 August 2017 – enhanced the wage ceiling for an employee’s coverage under the Wages Act from INR 18,000 per month to INR 24,000 per month.

(iv) Code on Wages Bill, 2017

The Code on Wages Bill, 2017 ("Wage Code") was introduced in the Lok Sabha by the Ministry of Labour & Employment, Government of India as a part of its aim of reforming labour laws and improving the ‘ease of doing business’. The Wage Code consolidates and replaces four existing labour laws: (i) the Payment of Wages Act, 1936; (ii) the Minimum Wages Act, 1948; (iii) the Payment of Bonus Act, 1965; and (iv) the Equal Remuneration Act, 1976.

- **Uniform Definition of Wages**: The Wage Code provides for a uniform definition of wages as opposed to different definitions of wages or remuneration under the extant labour laws. Wages under the Wage Code are defined as all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being expressed which would be payable to a person employed in respect of his employment on fulfilment of terms of employment, whether express or implied. It, however, excludes bonus, the value of any housing accommodation, or the supply of light, water, medical attendance, contribution to pension and provident fund by the employer, travelling allowance and gratuity.

- **Uniform Minimum Wage Limit**: Currently, State Governments set the minimum wage limit under the Minimum Wages Act, 1948 for each sector in their respective states. As per the Wage Code, minimum wages for certain employments including railways and mines will be prescribed by the Central Government, whereas for all other employments, the State Government will prescribe the minimum wages. Further, to maintain a certain uniformity, the Central Government may prescribe a benchmark national minimum wage and the states cannot prescribe minimum wages lower than the national minimum wage. Further, the Central Government may prescribe separate national minimum wages for different states or regions of the country.

- **Uniform Applicability**: Currently, the Payment of Bonus Act, 1985 is applicable only to workers earning wages below INR 21,000 per month. Similarly, the Payment of Wages Act, 1936 applies to workers earning monthly wages of INR 24,000. Further, certain labour laws are restricted in their application to employees only in scheduled industries or specific establishments. The Wage Code entitles all workers to equal remuneration and a universal minimum wage regardless of their wages and type of industry. It provides for payment of a bonus to every employee receiving a wage less than the amount set by the Central Government.

(v) Draft Karnataka Maternity (Amendment) Rules 2018

The Maternity Benefit Act 1961 ("MB Act") was amended vide the MB Amendment 2017 to, *inter alia*, increase the maternity leave available to female employees to 26 weeks. As a part of the MB Amendment 2017, a requirement for a creche facility to be provided by the employer was made mandatory and was made effective from 1 July 2017. It was prescribed that every establishment with 50 or more employees
is mandatorily required to provide a crèche facility within such distance as may be prescribed. It is interesting to note that the MB Amendment 2017 uses the gender neutral term ‘employees’ instead of ‘female employee’. This is because, though a woman is biologically endowed to give birth, the responsibility to take care of a child lies with both the father and the mother. Therefore, even if an establishment consists of only males, such establishment should have a crèche facility to also enable fathers to bring their children to the crèche.

In furtherance of the MB Amendment 2017, on 30 August 2018 the Draft Karnataka Maternity (Amendment) Rules 2018 (“Draft Karnataka Rules”) were published in the official state gazette of Karnataka. The Draft Karnataka Rules provide for crèche facilities to be provided by the employer within the premises of the establishment or within 500 metres of the entrance gate of the establishment. Specific requirements of the crèche’s infrastructure such as its working hours, the staffing of the crèche, periodic medical examination of children, maintenance of medical records, etc. are also prescribed by the Draft Karnataka Rules.

Similar rules have been framed by the state of Haryana. While it is anticipated for the other states in India to follow suit and enact the maternity benefit rules, the enactment of the Draft Karnataka Rules is a welcome step in providing benefits to the female labour force.

Litigation trends

In terms of trends in industrial disputes, the number of man hours lost has seen a decline in recent years. As per the Annual Report 2017–2018 of the Ministry of Labour and Employment, Government of India, the year 2017 saw a 32% decrease in the number of man hours lost due to industrial disputes as compared to 2016. Such a drop is commendable and augurs well for greater industrial productivity in the country.

Redundancies, business transfers and reorganisations

Labour laws in India such as the Industrial Disputes Act, 1947 (“ID Act”) provide protection to workmen such as redundancy/retrenchment compensation. However, such protection is available only to certain category of employees termed as ‘workmen’. An employer is required to comply with the statutory requirements for retrenchment and transfer of undertakings under the ID Act in the event the concerned employee falls within the category of ‘workman’.

In case of redundancies necessitating termination of services of workmen, the employer is required to comply with the notice period and compensation requirements as set out under the ID Act. In cases where the business of a company is being transferred, the ID Act provides for certain conditions to be satisfied wherein the workers may also be transferred to the new employer, subject to the consent of the workmen concerned.

Business protection and restrictive covenants

Restrictive covenants are a regular feature in most employment contracts. Commonly used restrictive covenants take the form of a non-compete agreement, non-solicitation agreement and non-disclosure/confidentiality agreements. A non-compete agreement is an agreement entered into between two parties, whereby one party is prohibited from joining another competing business by virtue of being employed or associated with the other party. A non-solicitation clause in an agreement restricts an employee from soliciting a company’s client or customer, for his or her own benefit or for the benefit of a competitor, during the term or post expiry of the term of employment. A non-disclosure agreement is an agreement that
restricts an employee from disclosing a trade secret or confidential information during or after cessation of employment. Such agreements are typically included in employment contracts, either as a clause in the contract or as a separate agreement.

The Indian Contract Act, 1872 prohibits any agreements which would be in restraint of any trade. The Courts have, therefore, consistently taken the firm view that all post-employment non-compete clauses would be unenforceable as they would be deemed restraint of trade, while non-compete clauses operating during employment have been considered enforceable against the employee. Non-disclosure agreements for the protection of trade secrets post-employment would form an exception to this principle and have been held to be enforceable. While the view of the judiciary on enforcement of non-solicitation agreements is not uniform, courts in India have allowed non-solicitation clauses to be enforced post cessation of employment as well. However, the onus of proof in respect of any potential breach of non-solicitation obligations is on the ex-employer.

**Discrimination protection**

(i) **The Rights of Persons with Disabilities Act, 2016**

The Rights of Persons with Disabilities Act 2016 ("RPWD Act") became operational on 19 April 2017 and replaced the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 ("Erstwhile Act"). The RPWD Act now prohibits discrimination against persons in government organisation as well as in the private sector. The private sector was not regulated by the Erstwhile Act. As per the provisions of the RPWD Act, every establishment is required to notify an ‘Equal Opportunity Policy’ containing measures, facilities and amenities that would be provided to the persons with disabilities to enable them to effectively discharge their duties in the establishment. Reservation in vacancies in government establishments has been increased from 3% to 4% for certain persons or class of persons as defined under the rules framed under the RPWD Act.

(ii) **Supreme Court Verdict on Section 377 of the Indian Penal Code, 1960**

In a landmark judgment, a five-Judge Constitution Bench of the Supreme Court of India in the case of Navtej Singh Johar & Ors. v. Union of India (Writ Petition (Criminal) No. 76 Of 2016) ("Navtej Singh Case"), on 6 September 2018, decriminalised consensual same-sex acts and held Section 377 of the Indian Penal Code 1860 ("IPC") to be unconstitutional insofar as it criminalises consensual sexual acts of adults in private. In light of the Navtej Singh Case, employers will now have to put in place inclusive policies against discrimination of staff belonging to the LGBT community in the workplace. Further, family-oriented benefits such as medical insurance, provident fund, pension and gratuity benefits, etc. may be extended by the employers to the same-sex partner nominated by the concerned employee, subject to acceptance by third-party service providers such as insurers, pension and provident fund authorities, etc.

**Protection against dismissal**

Indian labour legislation does not endorse hire and fire policies. For dismissal of an employee, the provisions of the ID Act as well as specific provisions of the IESO Act will have to be complied with. Employers need to follow certain procedures before terminating an employee’s service, and in some instances, are required to pay compensation. Allerrals on grounds of misconduct must follow a proper procedure requiring a domestic enquiry. Further, the employee must be given a reasonable opportunity to be heard as part of the
enquiry process. The importance of an enquiry and all aspects thereof such as the right to cross-examine have been stressed by courts repeatedly. Indeed, in cases where the enquiry has been vitiated or has followed unlawful procedure, courts have had no hesitation in reinstating the employee to his earlier position with back wages.

The decision of an employer is liable to be challenged before an Industrial Tribunal and further before the High Court and Supreme Court as well. Courts may grant relief such as reinstatement with back wages or compensation in lieu of reinstatement.

Where an establishment is to shut down, the ID Act lays down a procedure to be followed. In cases where there are 100 or more workmen, Government approval will be required for closure of the establishment as well as termination of services of workmen.

Termination of services of employees who do not qualify as a ‘workman’ under the ID Act will be governed by the terms of the employment agreement/appointment letter.

Statutory employment protection rights (such as notice entitlements, whistle-blowing, holiday, parental and maternity leave, etc.)

As mentioned above, the MB Amendment 2017 introduced several changes in terms of: an increase in the tenure of maternity benefits; bringing adoptive and commissioning mothers under the umbrella of maternity benefits; provision of crèche facilities; promoting work from home policies; and the like. Similarly, the Employee State Insurance, 1948 Act is another piece of welfare legislation aimed at ensuring insurance in case of sickness, maternity and employment injury. The Employee Provident Fund and Miscellaneous Provisions Act, 1952 is a piece of welfare legislation which mandates all employers to contribute towards a provident fund for their employees earning wages up to INR 15,000.

Gratuity: As mentioned above, the Gratuity Amendment Act provides that the amount of gratuity payable to an employee shall not exceed INR 2,000,000. Further, for the purposes of calculation of continuous service for the payment of gratuity to employees who are on maternity leave, the Central Government has specified that the total period of maternity leave shall not exceed 26 weeks.

Whistle-blowers: The Whistle-blower Protection Act, 2014 covers the protection of whistle-blowers in the public sector including Government companies and departments. However, whistle-blowers in the private sector are not yet covered by any legislation.

Worker consultation, trade union and industrial action

The ID Act and the Trade Unions Act, 1926 (“TU Act”) govern the major aspects of industrial relations in India. The ID Act deals with provisions for retrenchment and lay-offs. It also provides a detailed dispute resolution mechanism involving both conciliatory and adversarial forms of resolution.

The regulation of trade unions is covered mainly by the TU Act. The TU Act legalises the formation of trade unions and provides adequate safeguards for trade unions’ activities. The TU Act provides for the formation, registration and regulation of trade unions in the country. Additionally, the TU Act also provides certain immunities to the trade unions and such trade unions may claim immunity from charges of criminal conspiracy. Further, trade unions are also immune from civil liability subject to certain conditions. It is important to note that criminal charges for offences committed in course of industrial actions do not qualify for immunity.
Employee privacy

The Draft Personal Data Protection Bill, 2018 (the “PDP Bill”) was released by the Ministry of Electronics and Information Technology, Government of India on 27 July 2018 along with the report by the Committee of Experts under the chairmanship of Justice B. N. Srikrishna. The privacy of employees working in corporate establishments is currently governed by the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (“SPDI Rules”), formed under the Information Technology Act, 2000 (“IT Act”), which has increasingly proved to be inadequate.

The PDP Bill is a keystone development in the evolution of data protection law in India. The PDP Bill notes that the right to privacy is a fundamental right and makes individual consent central to data sharing. Under the PDP Bill, an exemption to obtaining consent of the employees by the employer for processing their data has been granted for certain employment-related matters such as recruitment, termination, assessment of performance, etc. However, this ground for processing personal data without consent of the employees can only be invoked if processing personal data on the basis of consent is not appropriate in consideration of the employer-employee relationship, or would involve a disproportionate effort on the part of the employer due to the nature of the processing activities.

Other recent developments in the field of employment and labour law

On 21 February 2017, the Ministry of Labour and Employment, Government of India has notified the Ease of Compliance to Maintain Registers under various Specified Labour Laws Rules, 2017 (“Ease of Compliance Rules”). The Ease of Compliance Rules provide for a rationalised and simplified procedure for maintenance of registers that will enable establishments to have combined registers, either in electronic or in physical form, as required under various labour legislation. By reducing the number of registers required to be maintained under certain labour laws, the Central Government hopes to reduce the compliance burden of establishments in their day-to-day business and to improve the ease of doing business in India.
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Ireland

Mary Brassil & Stephen Holst
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General labour market and litigation trends

Ireland’s economy enjoyed robust economic growth in the course of the last year. The GDP growth of 5% that was predicted for 2017 by the EU Commission was far surpassed by the actual rate of 7.3%, making Ireland’s the fastest GDP growth rate in Europe. Accordingly, the rate of 4% for 2018 was adjusted upwards to a predicted 5.6%, with a further prediction of 4% for 2019. Consistent with this growth, the Irish unemployment rate has continued to fall from 6.1% to 5.4%. The health of the economy is further reflected in the Central Statistics Office’s findings that, for the first time in 10 years, there is net inward migration in 2018 of 34,000, compared to 19,800 last year.

In October 2018, the Irish government delivered its budgetary policy. The budget has continued the trend of reducing personal taxation levels. The new tax-advantaged share option scheme known as the Key Employee Engagement Programme (“KEEP”) was amended with a view to encouraging more SMEs to implement the scheme. However, the KEEP requirements remain stringent, in particular the condition that the total market value of issued but unexercised share options per SME to join the scheme must not exceed €3 million.

PAYE Modernisation (Real Time Reporting), which effects changes to the current operation of payroll processing, will be implemented from 1 January 2019. Under the new regime, employers will be obliged to notify Revenue of every payment they make to employees including the date of payment and the amount of tax deductible or repayable. The Department of Finance estimates that this will yield an amount of €50 million in 2019.

The Workplace Relations Commission’s (“WRC”) annual report demonstrates a 6% increase in employment litigation in Ireland. 7,300 complaints were received by the WRC last year, with 92% of adjudication complaints processed within a shorter period of six months. The WRC Inspectorate Division carried out slightly fewer investigations this year, totalling 4,750.

The Labour Court’s annual report shows a decrease of 2% in referrals, receiving 1,093 referrals and holding 708 hearings. The Labour Court did, however, experience an increase in appeals to it of decisions made by Adjudication Officers (“AO”) after the passing of the Workplace Relations Act 2015 (the “2015 Act”). Such appeals increased from 399 in 2015 to 711 in 2017. This increase reflects that the Labour Court is now the single appeal avenue for most claims following the 2015 Act.

Redundancies, business transfers and reorganisations

Redundancy

Redundancies continued their downward trend in 2018. There were 1,646 redundancies in
the first eight months of this year, down 20% on the 2,053 in the same eight months of 2017. While redundancies have decreased, a higher portion of those that occur are compulsory as opposed to voluntary. However, there continues to be a strong practice, across all sectors, of employers paying additional ex gratia severance payments ranging from three to six weeks’ pay per year of service. In some cases, worker demands for enhanced severance packages have been resolved by adding extra payments separate to the main “weeks per year of service” formula including, for example, the introduction of standalone loyalty payments to reward employees with longer service.

In Cinders Limited –v– Celina Byrne, the Labour Court considered the issue of entitlement to statutory redundancy payment where an employee refused an offer of alternative employment. The complainant worked for a boutique store which the respondent decided to close due to declining sales. The complainant was offered and rejected alternative employment, firstly in one of two concession stores operated by the respondent, and secondly in a boutique near to the one in which she had previously worked. While the Court considered it reasonable for the employee to refuse the offer of employment in the concession store on the basis of the differing nature of the work, it found the refusal to accept employment in the boutique was unreasonable as the employee had no reasonable basis for her assertion that it would also cease trading. Having unreasonably refused suitable offers of alternative employment, no redundancy payment was, therefore, due to the employee.

Business transfers

The assessment of whether the European Communities (Protection of Employees on the Transfer of Undertakings) Regulations 2003 (the “Transfer Regulations”) apply is a fact-specific and complex matter which continues to be subject to dispute. In Euro Car Parks (Ireland) Limited –v– Kelly, the new owners of a car park decided to insource the operation of the business and terminated the contract of Euro Car Parks (Ireland) Limited which had previously been engaged to operate the car park. At first instance, the AO held that the Transfer Regulations did not apply to the employees of Euro Car Parks (Ireland) Limited as no transfer of assets occurred, no staff transferred and the previous holder of the contract did not cease to fully exist nor was a business or part of a business belonging to it transferred. However, the Labour Court, having satisfied itself that the operation of the car park could be characterised as a stable economic entity, focused on the continuation in the use of the core assets of the business post-transfer as opposed to the change in ownership of those assets and accordingly, held that the Transfer Regulations applied.

While recent authority had appeared to clarify that liability for breach of information and consultation obligations under the Transfer Regulations rests with the transferee, the decision of the Labour Court in OSC One Complete Solution Limited –v– Grant appears to have muddied the waters somewhat. The transferor in that case argued that it had not been possible to consult with employees in advance given the sensitivities of the commercial negotiations in circumstances where the transferee was a public listed company. It also submitted that it had consulted with the affected employees as soon as practicable following the transfer. However, the Labour Court held that as the transferor did not comply with its obligations prior to the date of the transfer, it was liable to pay the maximum compensation of four weeks’ remuneration to the employee.

Business protection and restrictive covenants

The High Court decision in Susquehanna International Group –v– Needham will be of interest to employers seeking to enforce confidentiality obligations against former
employees. The plaintiff (“SIG”) alleged that the defendant, its former employee, had assisted his new employer (a competitor of SIG) with the recruitment of other SIG employees and had supplied confidential information about SIG’s business to that competitor. SIG took proceedings seeking injunctive relief and damages and as part of the discovery process, wished to obtain sight of any documents held by the defendant’s new employer and the recruitment agency engaged by it to recruit him. Rather than seeking costly third-party discovery, SIG instead argued that documents were within the defendant’s “possession, power or procurement” and thus discoverable directly from him, as they could be obtained by the defendant by way of a data subject access request to his new employer and the recruitment agency. Baker J accepted that where a party has documents in his possession or has the legal entitlement to require possession, the documents should be discovered. While an order compelling a counter-party to litigation to make a data subject access request will not always be appropriate, she generally endorsed this approach as a “straightforward, less costly process” to seeking non-discovery from a third party.

The cases of Kerry Group Services International Limited –v– Oliveira and Danceglen Limited T/A Dubnoyne Castle Hotel & Spa –v– Riberio earlier this year demonstrated the usefulness of robust policies and procedures relating to email and IT usage in the workplace. In the latter case, the employee’s dismissal was upheld after he was found to be in “extremely serious” breach of the respondent employer’s internet and email security policies following the removal of a USB key which contained highly confidential company information and data from the management information system.

Discrimination protection

Retirement ages

Mandatory retirement ages continue to dominate the political agenda, with the Government in its ‘Roadmap for Pensions Reform’ having committed to facilitating older people working beyond retirement age. This is expressly said to be to empower older people, to allow them to optimise their financial readiness for retirement and to sustain the viability of the wider pension system.

Earlier this year, the Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017 (the “Code of Practice”) was published. The Code of Practice, issued by the WRC, outlines best practice when engaging with employees about retirement and is likely to influence tribunals’ approach to claims of age discrimination in mandatory retirement cases. The Code of Practice requires employers to provide employees with clear guidance about retirement procedures, both at retirement and throughout the employee’s career, irrespective of whether the employee is a member of any pension scheme. The Code of Practice provides that, where an employer intends to retire an employee upon attaining the mandatory retirement age, it is best practice for an employer to notify the employee in writing six to twelve months in advance of that date before meeting with the employee face-to-face. Scrupulous adherence to the Code of Practice is likely to become a significant factor in successfully enforcing mandatory retirement ages.

The Code of Practice was followed by the publication of the Retirement and Fixed-Term Contracts Guidelines by the Irish Human Rights and Equality Commission (the “Guidelines”). The Guidelines address the use of fixed-term contracts beyond retirement age and confirm that such contracts can only be offered where an employee is actually subject to a mandatory retirement age. They also provide some guidance on the “objective and reasonable justification” exemption under the Employment Equality Acts 1998 to 2015 when justifying the recourse to fixed-term contracts.
Earlier this year, an award of €50,000 in compensation was made by the WRC in the well-publicised case of Valerie Cox –v– RTE. A former reporter who was no longer receiving work from the national broadcaster because of her age succeeded in a claim of age discrimination, where she could show others working in the same role (albeit as independent contractors) who were over the purported retirement age of 65. RTE’s attempts to justify the retirement age, including on the grounds of intergenerational fairness, dignity and ensuring the promotion of younger members in a broadcasting setting, were rejected, given some level of ambiguity in the staff handbook concerning the mandatory retirement age.

The decision of the High Court in Quigley –v– HSE confirms that injunctive relief may be available in cases where an employer proposes to retire an employee upon reaching the mandatory retirement age. The Court in that case granted interlocutory relief restraining the termination of the plaintiff’s employment as a doctor on the grounds that he had reached the purported retirement age. The doctor’s contract was expressed to be of “indefinite duration” and was not subject to any express retirement age. Furthermore, there was evidence from colleagues of the plaintiff that many others in the organisation had been working beyond the retirement age. Noting that no others in the same contractual position as the plaintiff had been forced to retire, the Court held that the plaintiff had made out a “strong case likely to succeed” and noted that damages would be an inadequate remedy for the loss of professional standing if the plaintiff were forced to retire. The Court in this case was critical of the wastefulness of compulsorily retiring professionals of considerable accumulated skill and experience.

Reasonable accommodation

In January of this year, the Court of Appeal gave judgment in Nano Nagle School –v– Marie Daly. Ms Daly, who had been confined to a wheelchair following a road traffic accident, argued that her employer had failed to take “appropriate measures” under the Employment Equality Acts 1998 to 2015 (the “Equality Acts”) to allow her, as a person with a disability, to participate in employment. Following her accident, Ms Daly’s occupational health specialist certified that she was unable to perform seven of the sixteen tasks associated with her role. Section 16 of the Equality Acts requires that employers take appropriate measures unless the measures would impose a disproportionate burden on the employer. The Court of Appeal held that it is correct to construe the obligation pursuant to section 16 as potentially including an obligation to consider redistributing certain tasks among other staff. However, whether an employer is obliged to do so depends upon whether the tasks in question are the essential tasks required of the role in question. The Court held that there is no legal requirement on an employer to remove essential tasks of a position or to redistribute these tasks to other employees. The employer in Ms Daly’s case, therefore, was not obliged to even consider redistribution, as no amount of reasonable accommodation would have enabled her to perform the essential tasks of her role. Section 16, it was confirmed, envisages some distribution of tasks only where they are not essential to the position; in such instances, such a redistribution must be attempted, no matter how unrealistic the proposal. The decision in Nano Nagle also clarifies that, in considering reasonable accommodation, employers may validly take into account other legitimate interests which they may also have to accommodate, such as, in the Nano Nagle case, the interests of the school children.

Similar territory was traversed by the subsequent decision of the WRC in Mary Doyle Guidera –v– Dunnes Stores. In that case, the employee was unfit for work due to stress and anxiety. The company’s occupational health physician stated that, with ongoing care and review, she would make a good recovery and return to work. The employer met with
the employee during her sick leave during which time she was requested to provide a return to work date. The employee provided her employer with a letter advising that she had been referred to a specialist and that her return to work would depend on the outcome of this referral. However, her employer insisted on being provided with a return to work date and when the employee was unable to provide one, her contract was terminated. The Court found that in the absence of an impending specialist’s report, which would have allowed the employee’s doctor to provide a return to work date, the employer was not in a position to objectively consider those appropriate adjustments which might be made to her working arrangements which could ensure her continued capability to perform her role with the employer. The Court upheld Ms Doyle Guidera’s complaints of discrimination and awarded her compensation of €30,000.

Protection against dismissal

Unfair dismissal

The High Court earlier this year delivered judgment in Bus Átha Cliath – Dublin Bus –v– McKevitt, a case which provides important guidance in relation to fair procedures where a dismissal is based on medical incapability. In this case, a pattern of sickness absence by an employee culminated in permanent sick leave which lasted for over two years until the Company retired the employee on ill-health grounds. The Court found that the procedures applying to a dismissal on capacity grounds require the employer to show that: (i) the incapacity was the reason for dismissal; (ii) the reason was substantial; (iii) the employee received fair notice that dismissal for incapacity was being considered; and (iv) the employee was afforded an opportunity of being heard. The Court found that although the employee had not been notified in writing that her retirement on ill-health was being considered, she had been informed verbally at numerous appointments with the Company doctor such that “notice was given in substance”. The Court also stated that it could not be said that the employee did not have an opportunity to be heard, given the various reports forwarded by her own medical advisers. It found that there was no right to such an appeal in the context of dismissal due to incapacity and this model is instead “that which applies in a case of alleged misconduct where witnesses may be called and findings of fact made”. The Court therefore upheld the dismissal.

In the case of UPC Communications Ireland –v– Employment Appeals Tribunal and Ann Marie Ryan the High Court found that, in circumstances where the terms of the employee’s contract were silent on the implications and effect of a notice of dismissal, the employee was entitled to treat her dismissal as stayed pending the outcome of an internal appeal. This brought the employee’s claim for unfair dismissal within the statutory time period. This case therefore serves as a caution to employers to ensure that their contracts, policies and procedures clearly outline the effect of a dismissal notice.

The case of A Banker –v– A Bank also underlines the importance of well-defined investigation and disciplinary procedures but also demonstrates that an employer will not be able to avoid an order for re-instatement or re-engagement of the employee simply by arguing that trust and confidence has broken down from its perspective. The claimant trader was dismissed for gross misconduct after he applied above-market interest rates to his parents’ bank account. The claimant argued that this was a common practice in the Bank of which line managers were aware. The AO did not, on the evidence, consider this to constitute gross misconduct. He also found a number of serious deficiencies in the disciplinary process including a failure to properly record witness statements, failure to
afford the claimant with an opportunity to cross-examine witnesses at the disciplinary stage, proceeding in the claimant’s absence at one disciplinary hearing and a failure to produce reports from the employer’s IT system which may have corroborated the claimant’s position that he had not been engaged in improper conduct. On the basis that the complainant’s performance reviews were extremely positive, and that dismissal would have a severely negative impact on his career prospects in the financial regulation sector, the AO ordered his re-instatement with immediate effect from the date of his dismissal, despite the Bank’s argument that re-instatement would lead to “future friction [and] disharmony”. It should be noted, however, that no direct evidence was presented by the Bank of any basis for such fear.

In Towerbrook Limited t/a Castle Durrow Country House Hotel –v– Ernest Young the High Court provided guidance concerning bias in investigation and disciplinary processes. In this case, an employee was dismissed following an altercation with the managing director of his employer which resulted in the employee making a complaint to the employer company that he had been assaulted. A further altercation occurred between the employee and the CFO. Following receipt of the employee’s complaint, the managing director suspended the employee on full pay, pending an investigation. The managing director then proceeded to investigate the employee’s complaint himself and subsequently invited the employee to a disciplinary hearing conducted both by the managing director and CFO. The employee refused to participate in the disciplinary procedure which was conducted in his absence and resulted in his termination. The employee then took a successful action for unfair dismissal to the Employment Appeals Tribunal which the employer appealed to the Circuit Court and subsequently to the High Court. The High Court found that it was “hardly surprising” on the facts that the employee had objected to the investigator and found that the managing director was neither independent, impartial nor objective and that the entire process resulting in the dismissal was fundamentally flawed and contrary to the procedures of natural justice. The Towerbrook case followed the case of Nasheueur –v– NUI Galway earlier this year in which the Court of Appeal stated that the failure to consult with an employee in fixing the substance of the terms of reference of a bullying investigation did not raise a reasonable apprehension of bias in the mind of an informed observer. This was so even where the complainant and the employer had had such input.

Constructive dismissal

Recent cases have confirmed the high threshold required of employees seeking to successfully establish a claim of constructive dismissal. In Kaydee Cosmetics Limited –v– Elizabeth Blake, the Labour Court held that, while the actions of the employer were at times “hamfisted”, they fell “short by a considerable distance” of the requisite threshold for a claim of constructive dismissal. In this case the employee had been involved in an altercation with her line manager after she was refused an additional day of annual leave. The employee’s remark that she ought instead to have taken a sick day led to a meeting at which she received an informal warning. The employee was subsequently issued with a written warning, partly due to her conduct at this meeting and after which she took a period of sick leave. Upon her return, the employee was placed on temporary lay-off due to a downturn in the respondent’s business. The Court noted that while the procedures employed relating to the lay-off were imperfect, a genuine effort had been made to retain staff with the optimum range of skills to steer the company through its difficulties. The employee later successfully appealed the written warning and raised various grievances which her employer sought to address by way of a meeting. Ultimately, however, no meeting was held prior to the employee’s resignation. The Court indicated that the key issue in this case was the employer’s behaviour and not how the employee perceived it and was satisfied that the
employer’s behaviour was “at all times focused on repairing the relationship rather than oppressing the Complainant”.

However, the case of An Employee –v– A Pharmacy suggests that an alternative avenue of redress may be available under the Equality Acts for employees who resign their employment due to bullying, harassment or discriminatory conduct by their employer. In this case, the employee had been certified as unfit for work following a number of incidents whereby disparaging and critical remarks about her appearance were made by her employer in the presence of others. The AO was satisfied that on balance, the behaviour of the respondent was “repeated, inappropriate and undermining of the dignity of the employee” and found the employee had established a prima facie case of discrimination on the grounds of gender and harassment. The employee was awarded a sum equating to approximately 32 weeks’ remuneration.

Statutory employment protection rights

Whistleblowing

The Protected Disclosures Act 2014 (the “PDA”) sets out robust statutory protections for workers to raise concerns regarding potential wrongdoing that has come to their attention in the workplace. Section 5(7) of the PDA, as originally drafted, provided that the motivation for making a disclosure was irrelevant. However, the European Union (Protection of Trade Secrets) Regulation 2018 (the “Regulation”) has, since coming into effect on 9 June 2018, changed this. Whistleblowers must now, inasmuch as they use or reveal a “trade secret” in the course of their disclosure, prove that they acted for the purpose of protecting a genuine public interest.

A trade secret is considered to be such if the information: (a) is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has a commercial value because it is a secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. Under the Regulation, whistleblowers are liable to a three-year custodial sentence and a fine of €50,000 for making a protected disclosure, using trade secrets, where it cannot be proven that the disclosure was motivated by the protection of the public interest.

Maternity, paternity and parental leave

Under the Maternity Protection Acts 1994 and 2004, pregnant employees are entitled to 26 weeks’ ordinary maternity leave and may avail of an additional period of 16 weeks’ maternity leave. Section 16 of the Social Welfare Act 2017 recently extended maternity leave entitlement (and the associated maternity benefit) to allow a further period of maternity leave for mothers of babies born prematurely on or after 1 October 2017. This is equal to the length of time between the actual, premature date of birth and two weeks before the expected date of birth. Separately, the Shared Maternity Leave and Benefit Bill 2018 is at an early legislative stage, and proposes to allow pregnant employees to share their entitlement to ordinary maternity leave (and the associated state benefit) with the father of the child, the spouse, civil partner or cohabitant of the mother of the child.

Until recently, there had been some speculation that an employer would be exposed to a claim of gender discrimination where the employer pays enhanced maternity benefit to its female employees who avail of maternity leave but do not pay enhanced paternity benefit to those male employees who avail of two weeks’ paternity leave in accordance with the Paternity Leave and Benefit Act 2016. The case of A Complainant –v– A McCann FitzGerald Ireland
Respondent earlier this year provides the latest confirmation that the two types of leave are not comparable, maternity leave being granted not only to allow bonding with the child, but also as a protection for the mother against the physiological and psychological effects of pregnancy and motherhood. Given the special protection afforded to pregnancy and maternity under Irish and European law, employers are not compelled to provide the same level of benefits to male employees on paternity leave as they do to female employees on maternity leave.

The Parental Leave Acts 1998 and 2006 provide an entitlement for parents to a period of 18 weeks parental leave per child up to 8 years of age (or 16 years of age where the child has a disability or long-term illness). The Parental Leave (Amendment) Bill 2017 proposes to extend parental leave entitlements from 18 weeks to 26 weeks per qualifying child. In addition, parental leave will now be able to be taken in respect of children up to 12 years of age. The Government in its Budget for 2019 has also announced that a scheme of parental leave payments for employed and self-employed persons from November 2019. This ‘Parental Benefit’ will provide two weeks’ paid parental leave to both the mother and father of new born children at a level of €245 per week.

Worker consultation, trade union and industrial action

The Sectoral Employment Order (Mechanical Engineering Building Services Contracting Sector) 2018 (the “2018 Order”) took effect on 6 March 2018. A Sectoral Employment Order sets minimum rates of remuneration and other terms and conditions applying to employees in a particular sector. The 2018 Order is the second such order to be given effect under amending provisions of the Industrial Relations (Amendment) Act 2015 which replaces the previous system of Registered Employment Agreements which became ineffective following the decision in McGowan –v– Labour Court. The 2018 Order relates to the mechanical engineering building services contracting sector, and applies to qualified plumbers and pipefitters and registered apprentice plumbers and pipefitters (craftsperson) employed in the mechanical engineering building services contracting sector. It provides for mandatory terms and conditions including minimum pay, pensions and sick leave entitlements, as well as the introduction of a new dispute-resolution procedure. The terms of the 2018 Order are now binding on employers and may be enforced before the WRC.

Employee privacy

The General Data Protection Regulation (“GDPR”) applies to the processing of personal data in the EU from 25 May 2018. It provides for more extensive obligations on employers as data controllers and processors, and strengthens protections for employees as data subjects. Further rules are set out in the Data Protection Acts 1988 to 2018. Employers should also note that the Data Protection Commission (“DPC”) has received a €3.5 million increase in funding as part of Budget 2019 which brings its total funding allocation for the year to €15.2 million – up from €1.9 million in 2014. These increased resources, along with a doubling of complaints to the DPC since the coming into force of the GDPR, mean employers should take extreme care in their handling of personal data. There have been more than 1,100 reports of data breaches involving personal information made to the DPC since GDPR came into effect. Monitoring and surveillance in the workplace must be done in a manner which strikes an adequate balance between an employee’s reasonable expectation of privacy and the employer’s legitimate interests in protecting its business, reputation and resources.
Employers should therefore ensure that employees receive advance warning of the standards of behaviour expected of them and are aware that the employer may engage in monitoring, as well as ensuring that the business has valid reasons for monitoring and that such monitoring is proportionate to the aim sought to be achieved. In the case of Dublin Port Company –v– 160 Various Grades, employees hired post-2013 were contractually obliged to submit to testing for intoxicants while employees hired pre-2013 were subject to a dated policy which allowed intoxicant testing for due cause only. While there was no dispute regarding the necessity of an appropriate intoxication policy in this category of employment, the Court stated that random testing for intoxicants must be necessary, justified and proportionate with regard to operational issues identified by the employer. In this case, no such necessity was identified.

Other recent developments in the field of employment and labour law

Disciplinary processes
The Court of Appeal in Iarnród Éireann –v– McKelvey very recently reaffirmed the orthodox view that employees are not generally entitled to legal representation in the course of internal disciplinary processes. The employee in that case was the subject of a disciplinary inquiry regarding theft of company property and his request to be legally represented at the hearing was denied by his employer in accordance with the terms of its disciplinary procedure. Reaffirming the established principles from the leading case of Burns –v– Governor of Castlerea Prison, Irvine J held that the circumstances in this case were not of such exceptionality that the employer ought to have acceded to a request for legal representation. She noted that, although the employee faced a process which might result in his dismissal with a consequent impact on his employment prospects and reputation, this was a straightforward allegation and no different in substance to a substantial number of employees facing allegations of misconduct in the workplace.

The factors in deciding whether a right to legal representation arises were, in the Burns case, said to include the seriousness of the charge and proposed penalty, the likelihood of points of law arising, the capacity of the employee to present his own case, the likelihood of procedural difficulties arising, the need for speed in the adjudication and the need for fairness between those involved in the process. In McKelvey, the Court of Appeal seemed to suggest that, inasmuch as the highly publicised decision in Lyons –v– Longford Westmeath ETB “departed significantly” from the Burns line of authority, the Lyons case did not represent the law. In Lyons, the High Court had found that the failure of an employer to allow an employee to be legally represented in the course of an investigative hearing amounted to a breach of the constitutional right to fair procedures. Irvine J commented that the fact that the Code of Practice on Grievance and Disciplinary Procedures remains silent on legal representation is “perhaps indicative of the view that it should be possible for organisations to carry out inquiries into alleged misconduct on the part of employees on an “in house” basis without the need to involve lawyers”. This, coupled with the comment from the Court that it is not necessary for “the procedure to be deployed [to] ape the type of hearings with which we are familiar in criminal or civil proceedings before the courts” will be broadly welcomed by employers.

Employment status
Irish law continues to preserve the traditional dichotomy of employees and independent contractors and an increasing number of claims come before the WRC where individuals classified as independent contractors have been found in reality to be employees. Earlier this
year, an independent review of RTÉ, the state broadcaster, found that out of a total of 433 contracts reviewed, up to 157 individuals in RTÉ were wrongly classified as independent contractors.

This followed the launch of an awareness campaign by the Department of Employment Affairs and Social Protection as part of which individuals are encouraged to apply to the Department for an assessment of their employment status. Two Private Members’ Bills on this subject are also currently progressing through the legislative process.

In the case of A Plasterer – v– A Plastering & Construction Company, the WRC found that six plasterers employed by a plastering and construction business were employees rather than self-employed contractors and awarded each individual €18,000 in compensation. The WRC, as well as considering the Code of Practice for Determining Employment or Self Employment, applied the traditional employment status tests including consideration of the level of control, the mutuality of obligation, the ability to appoint a substitute, and the economic reality of the relationship. The WRC found that the plasterers worked hours specifically set by the business, which also supplied all of the necessary material and equipment, instructed the plasterers at all times as to what they were to work on and moved them from task to task.

Gender pay gap

The gender pay gap continues to dominate media headlines in Ireland. The most recent data discloses that women are paid an average of 13.9% less than men. Closing the gap is a priority under the current Programme for Government and both a government bill and a private members bill requiring mandatory gender pay gap reporting are currently making their way through the legislative process. The government bill, the Gender Pay Gap (Information) Bill, follows the outcome of a public consultation process on measures to tackle the gender pay gap.

Bullying or negligence?

Earlier this year, the Court of Appeal found an employer had breached its duty of care to a supervisor by failing to take action to prevent the recurrence of aggressive behaviour by her subordinates towards her. This finding was made notwithstanding that the legal threshold for bullying had not been met. McCarthy – v– ISS Ireland Ltd concerned a cleaning supervisor who, over two years, experienced five separate incidents where different subordinate employees acted aggressively towards her, the stress and anxiety from which caused her to resign. The Court of Appeal found that where the appellant had made complaints to her employer of this hostility, the employer owed her a duty of care to take reasonable steps to address what had occurred and to prevent recurrence. This was particularly so given that the appellant’s supervisory role by its nature was capable of leading to confrontation with those being supervised. The employer was found liable for negligence by failing to have in place policies and procedures dealing with issues of this nature and by failing to provide the appellant with a safe place of work. It appears, therefore, that even where allegations of bullying are not sustained by an employee, the employee may yet succeed in a case of negligence against her employer.

Disciplinary sanctions

The imposition of disciplinary sanctions is frequently the subject of challenge. A case before the Court of Appeal earlier this year clarifies that, even where a final written warning has expired without further steps being taken against the employee, the Courts will take the reputational implications of such a warning very seriously and relief before the Courts
remains available in such instances. In *Dillon v Catholic University School*, disciplinary proceedings found that a teacher had engaged in “inappropriate behaviour towards a student” when he called the student by an offensive name. The teacher was issued with a final written warning, which was expressed to be “active for a period of 12 months”. The teacher, having failed to obtain orders quashing the decision to impose the final written warning before the High Court, succeeded before the Court of Appeal. Whereas the High Court had considered the proceedings to be moot inasmuch as the warning had expired, the Court of Appeal disagreed that the warning no longer had any implications or effects. Hogan J stated that a final written warning of this kind, referring as it did to inappropriate contact with a pupil, is likely to have enormous implications on the teacher’s constitutionally protected rights to a good name and to earn a living. He stated that, inasmuch as the final written warning had the potential to have a serious impact on his employment prospects and his ability to earn a livelihood in his chosen profession, the issue could not be reduced to the level of insubstantiality or mere technicality. The case is also noteworthy for the comment made by Birmingham P that, because there had been “an element here of playing fast and loose with the procedures and a failure to engage in the way one would expect of a long-term professional employee”, he would consider carefully whether to depart from the usual rule that costs follow the event.

**National minimum wage**

The Minimum Wage in Ireland increased to €9.55 an hour from 1 January 2017 and will increase further to €9.80 per hour on 1 January 2019, together with some other tax changes introduced by Budget 2019.
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Italy

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General labour market and litigation trends

The last statistics published on 12 June 2018 by ISTAT (the Italian National Institute of Statistics), the main supplier of official statistical information in Italy, revealed that the first quarter of 2018 was characterised by stationary employment compared to the last three months of 2017, in an overall panorama of increasing unemployment and decreasing inactivity.

In particular, based on ISTAT research, in the first quarter of 2018, employment remained substantially stable compared to the previous quarter, due to the further increase in fixed-term employees (+69,000, +2.4%) and the corresponding decrease in both permanent employees (-23,000, -0.2%) and self-employed (-37,000, -0.7%). The employment rate remained broadly unchanged at 58.2%, too. According to the most recent monthly data (May 2018), without considering seasonal workers, the number of employees continued to grow compared to April 2018. In particular, employment rose to 23.382 million, +0.5% compared to April. Unemployment stood at 2.793 million, -2.9% compared to the previous month.

The employment rate was 58.8%, +0.2 percentage points compared to the previous month, the unemployment rate was 10.7%, -0.3 percentage points compared to April 2018 and the inactivity rate was 34.0%, steady with the previous month.

From an employment law standpoint, a few deep reforms have been implemented over the current decade. The most significant reforms were:

- Law 183/2010, which introduced very strict limitation periods for – inter alia – objection to dismissals, thus substantially limiting uncertainty for employers and the duration of court proceedings;
- Decree Law 138/2011, which introduced the possibility for trade union agreements to derogate in pejus to National Collective Agreements, thus allowing general industry provisions to adapt to specific exigencies of companies;
- Law 92/2012 (so-called “Riforma Fornero”), which dramatically reduced the number of cases in which reinstatement applies to unfair dismissals, and introduced deflationary tools of litigation; and
- Law 183/2014 (the so-called “Jobs Act”), a wide reform including eight decree laws implemented in 2015 concerning most areas of employment law (Decree Laws 22, 23, 80, 81, 148, 149, 150 and 151).

In addition to the above, a new labour law reform has recently taken place in Italy. Indeed, on 13 July 2018, the Law Decree 87/2018 has been converted into law (Conversion Law 96/2018 of 9 August 2018) and was published in the Official Journal on 11 August 2018.
Among other things, Law Decree 87/2018 sets several provisions regarding labour law, amending – inter alia – Law Decree 81/2015. In particular, the most important changes made by the decree concern the amendment of the fixed-term employment contracts regulation and an increase of the indemnity due in case of unlawful dismissal provided by Law Decree 23/2015.

As far as litigation is concerned, thanks to the reforms mentioned above, court cases concerning dismissals and short-term contracts dropped by 70% in 2012–2018.

**Protection against unfair dismissals**

Under Italian labour law, any dismissed employee who deems his/her termination not to have proper grounds is entitled to bring an action before the Labour Court in order to challenge it. The terms to challenge the dismissal are that it must be: (i) within 60 days from its communication; and (ii) within 180 days following such challenge to bring action before the competent Labour Court.

The Jobs Act reform – in particular, Legislative Decree 23/2015 – has introduced a new regime for individual and collective unfair dismissal, aimed at reducing the circumstances of reinstatement and making more certain and assessable the consequences in cases of unfair dismissal. The said Decree introduced the open-ended employment contract to the Italian labour market, with protection increasing based on seniority (the so-called “Increasing Protection Contract”).

The Jobs Act provision is applicable to:

- employees hired under an open-ended employment contract starting from 7 March 2015;
- employees hired before 7 March 2015 under a fixed-term employment contract converted into an open-ended contract after 7 March 2015; and
- apprentices hired before 7 March 2015 with an apprenticeship contract converted into an open-ended contract after 7 March 2015.

Moreover, the dismissal of employees who are already in employment on 7 March 2015 will be subject to the new rules if the employer’s workforce exceeds the legal threshold set out under Art. 18 Law 300/1970 (i.e., more than 15 employees in the business unit or in the same municipality, or more than 60 in the entire company) as a consequence of any new employee hires.

Finally, the Jobs Act has definitively abolished the protections stemming from Article 18 of Law 300/1970, removing reinstatement for employees enrolled from the entry into force of the Jobs Act onward, unless the lay-off is served in some residual circumstances described below.

**Consequences for the employer in case of unfair dismissal**

In the event of void, oral and discriminatory termination, the employer would have to perform the following:

(i) reinstatement of the dismissed employee to his/her previous job position. In this case, the employee may waive the right to reinstatement, electing to receive (in lieu of reinstatement) additional compensation equal to 15 months’ salary; and

(ii) payment of the salary that would have been accrued from the time of dismissal to the reinstatement (plus social security due thereon) to an extent; however, this cannot be less than five months’ salary.
In addition to the cases described above, according to the Jobs Act, reinstatement (which may also be replaced by compensation *in lieu* equal to 15 months’ salary, at the request of the employee) will be applicable for dismissal for subjective reasons or for just cause, where it has been proven that “the complained material fact is inexistent”. In this case, the employee, along with the reinstatement, is entitled to the payment of an indemnity which cannot exceed 12 months’ pay, plus the relevant social security contribution due for the entire period.

In any other case of unlawful dismissal, employees’ protection only consists in the entitlement to an indemnity.

In particular, when the dismissal – whether for subjective or for objective reasons – is declared unlawful by the court, according to Article 3 of Law Decree 23/2015, the employees are entitled to an indemnity equal to two months’ salary for each year of service, with a minimum of four months’ and a maximum of 24 months’ salary. The law specifies that the said indemnity is not subject to social security contributions.

The indemnity payable for unfair dismissal for employees hired as of 7 March 2015 was increased by Law Decree 87/2018. The minimum indemnity was raised from four to six months’ salary, while the maximum indemnity increased from 24 to 36 months’ salary. The calculation method remains unchanged (i.e. two months’ salary for each year of service). Moreover, when dismissals have been notified in breach of the procedure provided by the law, the employee is entitled to an indemnity amounting to one month’s salary for each year of service, with a minimum of two months’ and a maximum of 12 months’ salary. Also in this case, the mentioned indemnity is not subject to social security contributions.

For companies with up to 15 employees, the amount of the indemnity is halved, and, in any case, it cannot exceed six months’ salary. Reinstatement is foreseen only for discriminatory or void dismissals.

**Termination settlement offer**

For employees hired as of 7 March 2015, a special termination settlement procedure introduced by the Jobs Act is applicable, with the purpose of settling any possible dispute arising from the dismissal.

Based on this procedure, the employer may opt to offer, within 60 days from the day on which the dismissal is served (for any reason), a settlement to the employee equal to one months’ salary per each year of service, with a minimum of two and a maximum of 18 months. This amount is halved – and it cannot exceed six months’ salary – for employers staffed with up to 15 employees.

The settlement compensation has been increased by Law Decree 87/2018 from two to three months’ salary and from 18 to 27 months’ salary.

It is worth noting that settlement compensation is exempted from income tax (so-called “IRPEF” in Italian tax law) and social security contributions and shall be immediately paid to the employee by cashier’s check within one of the so-called “protected offices” set out under law (i.e. union associations, the local public labour office, agencies provided for under collective bargaining agreements, etc.).

The acceptance of the offer entails the termination of the employment relationship and the waiver of whatever claim related to the dismissal.

Additional compensation paid as part of the settlement deal (i.e. for the employee to waive all rights in relation to the former employment such as, for example, non-paid overtime and alleged demotions) will be subject to the ordinary tax treatment.
Collective dismissal

As well as for individual dismissal, by means of the Jobs Act reform, reinstatement is also no longer a remedy for unlawful collective dismissal – except for collective dismissal served in oral form – and the employer is subject to pay only an economic indemnity, depending on the employee’s length of service.

Pursuant to Article 24 of Law 223/1991, the dismissal of five or more employees in the same business unit, within a period of 120 days, due to a reduction/reorganisation/shutdown of the company’s business, amounts to a collective dismissal.

The collective dismissal can be lawfully implemented only once a mandatory procedure has been properly fulfilled in accordance with Articles 4 and 24 of Law 223/1991. The procedure begins with the employer submitting a written notice to the works councils (if any) or to the trade union to inform it of its intention to carry out a collective dismissal.

The Jobs Act reform provided, for the first time, that executives must be included in the calculation that triggers a collective dismissal, and that employers will need to set up a separate negotiation with the trade union with regard to executives.

Unless a termination agreement is reached, dismissed employees can individually or collectively challenge the dismissals given within 60 days from receipt. Failing a settlement after such challenge, the employees can trigger a court procedure within 180 days following such challenge.

As anticipated, as with individual dismissals, in the case of a collective dismissal, should the dismissal be deemed unfair by the court, the consequences for the employer depend on the date of hiring (before or after the enforcement of Jobs Act).

Therefore, after the enforcement of the Jobs Act (i.e. for employees hired after 7 March 2015), pursuant to Article 5, Par. 3, Law 223/1991, in case of breach of the mandatory procedure and/or non-compliance with the selection criteria, the only consequence for the employer is the payment of an indemnity equal to two months’ salary per each year of service, with a minimum of four and a maximum of 24 months.

As for individual dismissals, reinstatement (or payment equal to 15 months’ salary) is always granted in case of a discriminatory dismissal or if the dismissal is not notified in writing. In such case, the Labour Court nullifies the unfair dismissal and the employer is also obliged to pay compensation for the damage suffered from the employee’s unfair loss of job, in any case not less than five months’ salary, and to pay the social contribution and compulsory insurance.

Fixed-term employment contracts

Fixed-term contracts are regulated by Legislative Decree 81/2015, implementing the Jobs Act, and the Dignity Decree.

Fixed-term contracts can last up to 36 months, including any extension. It is worth noting that periods of work concerning duties of the same level and legal category, performed by the same parties, within a fixed-term staff supply contract, are considered in the calculation of the maximum duration of 36 months.

Fixed-term contracts are not allowed in the following circumstances:
(a) to replace employees exercising the right to strike;
(b) to replace employees affected by a collective dismissal in the past few months;
(c) to replace employees suspended from work (or subject to a working time reduction) due to temporary lay-offs; and
(d) for employers who are not compliant with the work safety obligations set under Law Decree 81/2008.

Quantitative limits are normally set by national collective agreements; otherwise, failing such provision in the national collective agreements, the law states that the overall number of fixed-term contracts may not exceed 20% of the workforce hired on the basis of an open-ended employment contract at 1 January of the year of hiring (of the fixed-term employee). Fixed-term contracts are exempted from quantitative limits in specific cases provided by the law (e.g. in the start-up phase of new activities or performance of seasonal activities).

Extension of the contract is possible for employment relationships not exceeding 36 months, up to a maximum of five times over a 36-month period. If the number of extensions exceeds five times, the contract is deemed to be an open-ended contract from the date on which the sixth extension commences.

Renewal of a fixed-term contract between the same parties is allowed, but a timeframe between the old contract and the new one must be observed; in particular: (a) 10 days for employment contracts up to six months; and (b) 20 days for employment contracts of over six months. In case of violation of the above-mentioned terms, the law states that the new contract shall be considered an open-ended contract.

The new rule confirms that the employment can continue beyond the period originally established between the parties: (a) for 30 days for employment contracts up to six months; and (b) for 50 days for employment contracts of over six months.

In this case, the employee is entitled to a supplementary wage.

In case the above-mentioned terms are exceeded, the contract is deemed to be an open-ended contract starting from the expiration of the terms above.

Finally, for 12 months after termination of a fixed-term contract, individuals employed for at least six months have preferential rights to re-employment under an open-ended contract with reference to the same duties performed during the fixed-term employment relationship.

Law Decree 87/2018 will be applicable to employees hired from 14 July 2018 as well as to fixed-term contracts renewed or extended after 31 October 2018 (in accordance with the so-called transition clause).

The new Decree changes the fixed-term contracts regulation, introducing the following provisions:

- the length of a fixed-term contract may not exceed 24 months;
- a fixed-term contract not exceeding 12 months may be entered into without the need to provide specific reasons;
- a fixed-term contract exceeding 12 months may be entered into only if at least one specific reason is given;
- a fixed-term contract may be renewed only if at least one specific reason is met;
- the extension of a fixed-term contract is allowed up to a maximum of four times within a period of 24 months;
- a fixed-term contract entered into for seasonal activities may be renewed or extended without the need to give a specific reason; and
- a 0.5% increase of the additional contribution for each fixed-term contract renewal is provided.

Furthermore, Law Decree 87/2018 changes the time limit for challenging a fixed-term employment contract. According to the new regulation, an employee can challenge it within 180 days from the termination of the contract (instead of the 120 days provided in the Jobs Act).
Law Decree 87/2018 also changes the fixed-term supply agreement regulation, extending to fixed-term supply agreements most of the rules governing fixed-term contracts.

Therefore, the rules mentioned above concerning the (i) application of the specific reasons, (ii) maximum length of contract, and (iii) maximum number of extensions, shall apply to supply contracts.

On the contrary, Articles 21, Par. 2 (“Stop and go”), 23 (“Maximum number of fixed-term contracts”) and 24 (“Preferential rights to be re-employed”) of Law Decree 81/2015 shall not be applicable to supply agreements.

Moreover, unless otherwise provided in the collective agreements applied by the user company, the number of fixed-term or temporary workers may not exceed 30% of the number of open-ended contract workers employed by the user company as at 1 January of the year in which the fixed-term or supply contracts were entered into.

Finally, so-called fraudulent staff leasing (repealed by Law Decree 81/2015) has been re-introduced – which takes place whenever the use of supply agreements has the purpose of avoiding mandatory laws or collective agreements – which provides for a fine of EUR 20 for each temporary worker involved and for each day of work.
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Work-Style Reform Promotion Act

Introduction

Despite certain notable achievements during the five years of Abenomics, ranging from a JPY 47 trillion increase in the nominal GDP and 9% economic growth in Japan’s economy to across-the-board pay scale hikes, private demand, including personal consumption and capital investments, remain generally stagnant. Key factors impeding Japan’s economic growth include a declining population attributable to a decreasing birth rate, differences in working conditions between full-time and indefinite-term employees (“regular employees”) and part-time and other fixed-term employees (“non-regular employees”).

On June 29, 2018, the Japanese Diet passed work-style reform legislation (the “Work-Style Reform Promotion Act”) which has been a high-priority item for Prime Minister Shinzo Abe. This legislation is actually a package of amendments to eight statutes aimed at realising a society where all workers can choose from among diverse work options so as to achieve a work-life balance. The current laws affected by the Work-Style Reform Promotion Act include the Labour Standards Act, the Worker Dispatching Act, the Act on Special Measures for Improvement of Working Hours Arrangements, the Act on Improvement of Employment Management for Part-Time Workers, and the Labour Contract Act.

Noteworthy features of the Work-Style Reform Promotion Act include (i) comprehensive and continuous promotion of work-style reform, (ii) amelioration of work-life balance, and (iii) ensuring fair treatment regardless of form of employment.

Discussion

Comprehensive and continuous promotion of the work-style reform

The overarching principle of the Work-Style Reform Promotion Act is the requirement that employees be made aware of their job responsibilities, the abilities and experience necessary for performing their duties as well as other prerequisites. Equally important related principles are: that efforts must be made to ensure employment stability by fairly evaluating employees’ abilities using methods that reflect, among other things, their job descriptions, abilities and experience necessary for performing their duties and prerequisites; that employees must be treated based on these evaluation results; and that measures to ensure effective and appropriate treatment must be implemented.

In particular, the Work-Style Reform Promotion Act introduces a legal cap on overtime hours, work-hour restriction exemptions for high-level professionals, and rules based on an “equal work, equal pay” principle to address disparity in working conditions between regular employees and non-regular employees. Further, employers are required to strive to
improve working conditions, such as shortening working hours for employees and creating an environment in which employees can work in accordance with their motivation and abilities while maintaining a work-life balance.

Amelioration of work-life balance

The Work-Style Reform Promotion Act contains the following measures to promote the amelioration of employees’ work-life balance:

a. Cap on overtime hours

Currently, an employer can have employees work beyond the statutory working hours if a specific labour management agreement has been concluded in accordance with Article 36 of the Labour Standards Act (an “Article 36 Agreement”). In principle, and subject to certain exceptions, the maximum hours of overtime under an Article 36 Agreement is capped at 45 hours per month and 360 hours per year for each employee (or 42 hours per month and 320 hours per year in the case of the variable working hours system for which the applicable period exceeds three months). In this respect, the Work-Style Reform Promotion Act provides that any Article 36 Agreement with overtime work in excess of the limits would be illegal.

The Work-Style Reform Promotion Act creates a new statutory cap on overtime work of 720 hours per year, less than 100 hours per month, and 80 hours per month on average during each period of two, three, four, five and six consecutive months. Violations are subject to imprisonment of up to six months or fines of JPY300,000.

The application of the rules above may be subject to deferment or exemption as discussed below.

- Automobile driving and construction business: The cap on overtime work will apply from April 1, 2024, five years after the Work-Style Reform Promotion Act takes effect on April 1, 2019. The cap on overtime work will be 960 hours per year.
- Doctors: The cap on overtime for doctors will apply from April 1, 2024, five years after the Work-Style Reform Promotion Act takes effect on April 1, 2019. Details about the maximum hours will be determined by an Ordinance of the Ministry of Health, Labour and Welfare. The timing of the implementation has not yet been determined. Concrete regulations, including to reduce working hours, will be discussed in a forum that allows input from the medical community.
- Sugar manufacturing industry in Kagoshima Prefecture and Okinawa Prefecture: From April 1, 2024, five years after the Work-Style Reform Promotion Act takes effect on April 1, 2019, the overtime work limitation of less than 100 hours per month, and 80 hours per month on average during each period of two, three, four, five and six consecutive months will no longer be applicable.
- The research and development of new technologies and products is exempt from the cap on overtime work. However, health insurance measures to ensure the health of employees, such as face-to-face guidance by physicians and the provision of substitute leave, will apply.

b. Revision of additional pay for overtime work in excess of 60 hours per month at SMEs

The current moratorium on the premium wage rate (50% or more) for overtime work in excess of 60 hours per month for SMEs will be abolished, and the general rules which are applied to employers other than SMEs will apply (effective from April 1, 2023).

c. Amendment of the annual paid leave system

Traditionally, the employer has had no legal obligation to give employees annual paid leave. However, the Work-Style Reform Promotion Act requires employers to give
employees who are granted annual paid leave of 10 days or more, at least five days of annual paid leave each year during the period requested by the employer. However, it is not necessary to designate the number of days of annual paid leave taken as a result of the designation of the time of the employee and the planned grant.

d. **Revision of the flexible working hours system**
Under the conventional flextime system, the settlement period (which is a period during which average working hours per week must not exceed 50 hours) must be one month or less. However, it may be up to three months, enabling a more flexible working style.

e. **Establishment of an advanced professional system**
When employees with a clear scope of work, such as employees who are in charge of R&D, finance and consulting, and a certain annual income (at least 10 million yen) are engaged in work that requires a high level of expertise, they are required to take 104 days off a year without fail, and the provisions on working hours, holidays, late-night extra wages, etc. are excluded from the application of the provisions, such as the consent of the employee. In addition, employees may withdraw their consent to exclusion from the application of such provisions.

f. **Obligation to understand the status of working hours under the Industrial Safety and Health Act**
In order to ensure the effectiveness of measures to ensure the health of employees, working hours will be ascertained by methods prescribed by the Ordinance of the Ministry of Health, Labour and Welfare.

g. **Time of implementation**
The act will come into force on April 1, 2019. However, the maximum overtime work at SMEs will come into effect on April 1, 2020, and the revision of extra pay by SMEs will come into effect in April 2023.

**Ensuring fair treatment regardless of form of employment (also known as “Equal Pay for Equal Work”)**

a. Establishment of provisions to eliminate unreasonable treatment

- **Balanced treatment**
The Work-Style Reform Promotion Act stipulates that the reasonableness of part-time and fixed-term employees with respect to regular employees must be determined in light of (i) the job content (the content of work and the degree of responsibility), (ii) the scope of the job and changes in assignment (otherwise known as the “mechanism of utilisation of human resources”), and (iii) other circumstances, and in light of the nature and purpose of the treatment of each part-time employee and fixed-term employee, taking into consideration the circumstances considered appropriate in light of the nature and purpose of the treatment. Accordingly, the title of the Part-Time Work Act (the “Act on Improvement, etc. of Employment Management for Part-Time Workers”) has been revised to the “Act on Improvement, etc. of Employment Management for Part-Time Workers and Term Employment Workers”.
As a result, Article 20 of the existing Labour Contract Act will be deleted.

- **Equal treatment**
With regard to fixed-term employees, it will be obligatory to ensure equal treatment compared to regular employees when (i) job descriptions, and (ii) the scope of changes to job descriptions and obligations, are the same.
• Dispatched workers
  Dispatched workers are required either: (i) to be treated on an equal and balanced basis with the regular employees of the dispatched employer; or (ii) to be treated in accordance with a labour management agreement that meets certain requirements (such as being paid equal or higher wages than the average wages of the dispatched employers’ employees who perform the same type of work).

b. Strengthening the obligation to explain the treatment of employees
  For part-time workers, fixed-term workers, and dispatched workers, explanations about the details and reasons for differing treatment from regular employees have been made obligatory.
  The current status of implementation of the accountability obligation for the category of workers mentioned above is described in the table below.

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<tr>
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<th>Accountability obligation when hiring</th>
<th>Accountability obligation after hiring</th>
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<tr>
<td>Part-time workers</td>
<td>Stipulated under the current law</td>
<td>Newly stipulated</td>
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<tr>
<td>Fixed-term workers</td>
<td>Newly stipulated</td>
<td>Newly stipulated</td>
</tr>
<tr>
<td>Dispatched workers</td>
<td>Newly stipulated</td>
<td>Newly stipulated</td>
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</table>

c. Time of implementation
  This will come into force on April 1, 2020, but only applies to SMEs from April 1, 2021.

Supreme Court decisions

Introduction
  On June 1, 2018, the Supreme Court handed down two cases: the Hamakyorex case; and the Nagasawa Transport case. These are the first Supreme Court rulings on the issue of discrimination between regular employees and non-regular employees. Article 20 of the current Labour Contract Act prohibits treatment deemed unreasonable in light of (a) the content of duties, (b) the scope of changes in job descriptions and assignments, and (c) other circumstances. The Supreme Court’s view on Article 20 was presented in these decisions. These Supreme Court decisions will continue to have significance even after the implementation of the Work-Style Reform Promotion Act as they will have a material impact on the interpretation of the various provisions of the this law as well as its practical implementation in Japanese companies.

Hamakyorex case
  The Hamakyorex case involved different treatment between a full-time employee and a contract employee engaged in a delivery service as a truck driver. The Supreme Court held that such different treatment violated Article 20 of the Labour Contract Act when such treatment arises because of the fixed or indefinite nature of the employment. The Supreme Court also concluded that different working conditions of a full-time employee and a contract employee that violate Article 20 are invalid.
  The alleged differing treatment involved six allowances: housing allowance; full-time allowance; no-accident allowance; work allowance; meal allowance; and commutation allowance. The procedure used by the Supreme Court was to first determine the nature of the allowances, and then take into account that it was the same in (a), but different in (b), and (c) the unreasonableness of other circumstances in the light of the purpose of the respective wages. Considering such facts above, the Supreme Court found the employer’s treatment, with the exception of housing allowances, to be unreasonable, because the requirement to
pay the above allowances other than housing allowance do not differ based on whether the employee is a full-time employee and a contract employee. On the other hand, the Court held that it was not unreasonable to pay housing allowance only to full-time employees as such employees are subject to relocations involving moving house, which may increase the employee’s housing cost.

Nagasawa Transport case

This is a case in which the disparity in treatment between regular employees and non-regular employees who are re-employed on a new contract after their retirement became an issue. In this regard, the disparity between regular employees and such non-regular employees differed in character from the general problem of non-regular employees, and it was a special case that takes into account the employment of re-employed employees. Like the Hamakyorex case, this involved a delivery driver. The Supreme Court held that, although factors (a) (the content of duties) and (b) (the scope of changes in job descriptions and assignments) were the same, the special nature of post-retirement re-employment was taken into account. The decision procedure is similar to that of the Hamakyorex case. In other words, the court first determined what the purpose of the wage is and then examined (a) and (b), then (c) the special nature of post-retirement re-employment in light of the purpose of each wage and whether the different working conditions are unreasonable.

The distinction between the Hamakyorex case is that post-retirement re-employment situations are taken into account, and it is concluded that efficiency allowance, job allowance, bonuses, housing allowances, and family allowances are not unreasonable. On the other hand, the Court held that, with regard to the allowance for diligence, since (a) the contents of the duties are the same, the necessity of full-time service incentives is the same, and it was determined that it was unreasonable not to pay it to non-regular employees.

Practical points

The Supreme Court’s rulings in these cases concern the issue of allowances. Employers need to reconfirm their intentions for each allowance and verify that they are not evaluated as unreasonable. It is considered possible to reconcile that the work allowance and the full-time work allowance are unreasonable because the same job contents are the grounds for unreasonability, and if the job contents differ, they are not unreasonable. Housing allowances can be explained by relocation with or without relocation. Commutation allowances should basically be considered in the same manner as permanent employees. It should be kept in mind that the difference between post-retirement re-employment and permanent employees is not permissible without limit. If it is desired to make further differences in the treatment of permanent employees and post-retirement re-employment, it will be possible to reduce the likelihood that (a) a clear difference in job descriptions, and (b) a clear difference in job descriptions and the scope of changes, will be considered unreasonable.

Conversion of fixed-term employment agreements to employment agreements without a fixed term

Gist of the Labour Standard Act’s amended Article 18

Certain amendments in August, 2012 to Japan’s Labour Contract Act, in particular Article 18, gave certain employees the right to convert fixed-term employment contracts to employment contracts without a fixed term, thereby effectively placing such employees on equal footing and with equal legal protects as “regular full-time employees”.

Prior to the amendment of Article 18, Japan’s Labour Contract Act and other major employment-related acts were based on the concept that employment agreements should, in
theory, have no fixed term, and that employment agreements with fixed terms should only be an exception. Although there is no required minimum length for fixed-term employment, the maximum length of fixed-term employment cannot, subject to certain exceptions, exceed three years.

In practice, Japanese companies hire “regular employees” on a full-time basis without a fixed term. Typically, these “regular employees” continue to work until reaching the age for retirement as prescribed in the company’s employment rule, usually until the age of 60, after which companies offer “re-employment” until age 65 on a separate employment arrangement and with a lower salary. Following the demise of the boom economy in the 1980s and 1990s, the vast majority of Japanese companies started exploring the option of fixed-term employees as a way of containing human resource costs. This trend toward increasing hiring on a fixed-term basis increased the overall percentage of fixed-term workers in the labour market which gave rise to the need to provide legal protection for fixed-term workers, hence an amended Article 18.

Conversion to employment agreement without a fixed term

Section 1, Article 18 essentially gives a fixed-term employee the right to convert his or her employment into employment without a fixed term if the fixed-term employment with the same employer has lasted for more than a total of five years. The fixed-term employee must apply for an employment agreement without a fixed term before the expiration date of the fixed-term employment contract then in effect. Since the amendment to Article 18 came into effect in 2013, April 1, 2018 was the first date on which conversions thereunder became possible.

The new employment agreement without a fixed term will come into effect on the date immediately following the expiration of the then-in-effect employment agreement with a fixed term, and the work conditions will be the same as those under the employment agreement with a fixed term, but without the fixed term. In essence, the employer will be obligated to continue their employment until they leave voluntarily or reach retirement age.

How companies responded

Since the conversion right is expected to have a major long-term impact on employers’ human resources and financial resources, employers should explore legally viable options to handle conversion applications from employees. This could have a significant long-term effect on the employer’s human resources policy and/or system.

One avenue initially explored by employers was establishing internal working rules that essentially contained different terms of employment than those in the employment with a fixed term. This option was based on Article 18 that allows employers to vary the employment conditions applicable to converted employees without fixed terms. If established, these internal employment rules would be applicable to employees after conversion. Absent these rules, the employment conditions post-conversion will be the same as those pre-conversion (except for the absence of the fixed term).

Based on the assumption the post-conversion employees may work long-term for the employee, companies should make rules that allow the employer maximum flexibility for things such as job description, work locations, etc. This is in contrast to employment agreements with fixed terms whose work conditions are generally fairly rigid with respect to the job description, work location, etc. This type of approach offers companies maximum flexibility necessary for an adaptable management environment. Employers should be sure to include a retirement age in these rules for converted employees to avoid having too many employees close to retirement age.
Due to the potentially negative impact on employers’ practices and finance, some employers urge employees with fixed term contracts to waive their conversion rights in even sometimes by including them in the employment contract. Employers should exercise caution since advance waivers are void as a violation of public order and morality.

Employers should also exercise caution with respect to negative consequences for the exercise of the conversion right in the form of lower wages, etc. Since lowering wages cannot be done without a reasonable ground, this type of practice would be deemed invalid and not legally binding on the employees who wish to exercise their conversion right.

Exemptions from the conversion rule

There are three categories that are exempt from this five-year rule of conversion. First is the category that includes professors and lecturers involved in research or academic activities at a university. The second category is for researchers or engineers involved in science and technology who are employed at a research and development agency or university, etc. with a fixed term. The third category protects elderly employees who should retire at the age of 65, who are often rehired with fixed terms after initial retirement. This continuous hiring obligation was initially created to ameliorate the public pension fund deficit. A special law allows employers to avoid conversion rights for this category if the employer files an application with the government and receives approval from the Ministry of Health, Labour and Welfare.

* * *

Endnotes

1. Under article 138 of the Labour Standard Act, SMEs means:
   • Business operators whose amount of stated capital or whose sum of contributions is not more than 300 million yen (or 50 million yen for business operators whose main business is retail or service business, or 100 million yen for business operators whose main business is wholesale business; or
   • Business operators who continuously employ not more than 300 workers (or 50 workers for business operators whose main business is retail, or 100 workers for business operators whose main business is wholesale or service business).

2. Article 20 of the existing Labour Contract Act states: “If a labour condition of a fixed-term labour contract for a Worker is different from the counterpart labour condition of another labour contract without a fixed term for another Worker with the same Employer due to the existence of a fixed term, it is not to be found unreasonable, considering the content of the duties of the Workers and the extent of responsibility accompanying the said duties (hereinafter referred to as the “content of duties” in this Article), the extent of changes in the content of duties and work locations, and other circumstances.”
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General labour market trends

During the first six months of 2018, Malta recorded an economic growth of 5.4%, which is remarkable when compared with the growth of 2.2% recorded in the European Union. This economic growth is partly a corollary of the ‘job-rich economic growth’ in the Maltese labour market. In fact, according to statistics published by the Malta National Statistics Office (NSO), the national employment rate was 69.2% during 2017, thus being 1.5% higher than the European Union average for the same year. In the first quarter of 2018, the number of persons in employment increased by 6.6%, whilst the employment rate during the same period was of 69.7%. The unemployment rate was recorded at 3.9%, representing a decline of 0.2% over the corresponding period in 2017. During August 2018, the unemployment rate was recorded at 3.8%, and the youth unemployment rate decreased to 8.8% when compared with the rate of 11.9% in August 2017.

The private sector was responsible for 90% of the increase in new jobs, with the main contributors being (i) the administrative and support services sector, (ii) the professional, scientific and technical sector, (iii) the arts, entertainment and recreation sector, (iv) the accommodation and food service sector, and (v) the human health and social work sector. By comparison, at the end of April 2018, the rate of persons gainfully employed in the public sector stood at 23.2%.

The number of persons employed on a part-time basis has increased between 2012 and 2017, with 15 out of 100 being employed part-time. Notwithstanding, the rate of part-time workers in Malta during 2017 was 6.4% lower than EU levels; 8.6% less for females and 2.5% less for males. The number of part-time workers constitutes approximately a quarter of female workers in Malta, whilst a third of female workers were employed on a part-time basis at the EU level.

With regard to the gender gap in employment, during the first quarter of 2018, the lowest rate was recorded among persons aged between 15 and 24 years, with the gender employment rate gap increasing with age. The male employment rate for persons aged between 25 and 54 years was 92.1%, whilst the female employment rate was nearly 69%. Additionally, it is interesting to note that both the male and female unemployment rates for the first quarter of 2018 were recorded at 3.9%, representing an increase in the unemployment rate of males by 0.3% and a decrease in the female unemployment rate by 0.9%.

The rate of full-time foreign workers in Malta recorded by Jobsplus in 2017 amounted to 19.9%, with the number of Europeans being double the number of third-country nationals.
The impartiality and independence of the Industrial Tribunal

In recent jurisprudence, the question arose of whether the composition of the Industrial Tribunal infringed the right to a fair hearing by an independent and impartial Tribunal under article 39(2) of the Constitution and article 6(1) of the European Convention of Human Rights and Fundamental Freedoms. In Raymond Spagnol vs Board of Management tat-Teatru Manwel,11 Spagnol appealed the Industrial Tribunal’s decision, which held that the action for unjust dismissal was time-barred, and on 22 March 2016 requested the Court of Appeal to refer the above question to the Civil Court, First Hall in its Constitutional Jurisdiction. Subsequently, Act XXXIII of 2016 was enacted, amending the provisions concerning the way chairpersons are appointed and chairpersons’ security of tenure.

Despite this, the First Hall considered that since the industrial dispute was registered before the Tribunal in 2014, the applicable dispositions of the law were those prior to the enactment of Act XXXIII of 2016. It held that, although the renewal of the appointment or the removal of a chairperson is subject to consultation with the Malta Council for Economic and Social Development, it is the Prime Minister who makes the final decision. It further added that the Prime Minister does not require consensus as to his final decision.12 Therefore, the First Hall concluded that since the Tribunal is made up of persons who are subjected to the “unfettered discretion”13 of the Prime Minister, the Tribunal cannot be seen to be independent and this may in turn prejudice the rights of person appearing before the Tribunal. The Court therefore held that the composition of the Industrial Tribunal infringed the right to a fair hearing.

Conversely, the Constitutional Court14 considered that Spagnol had a right of appeal and therefore any deficiency in the composition of the Tribunal could be remedied by the Court of Appeal, an undoubtedly impartial and independent court. It further considered that since the transitory provision in Act XXXIII of 2016 provides that the amendments should apply once in force, if the appeal is acceded to, the case would be reheard before the Tribunal and its composition would be regulated by the new dispositions. Therefore, the First Hall should have applied the law in force and its conclusions were based on irrelevant considerations. The Constitutional Court concluded that the fact that the chairperson was appointed by the executive does not diminish its independence or impartiality as long as the chairperson has guarantees against arbitrary removal.

As opposed to the law prior to the 2016 amendments, the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, now provides ample guarantees against the arbitrary removal of chairpersons. Act XXXIII of 2016 introduced a procedure whereby the persons appointed to the panel of chairpersons and members of the Tribunal may be removed by the Prime Minister following consultation with the Employment Relations Board.15 Such decision must be reasoned and is also subject to appeal. Therefore, the Constitutional Court deems that the answer to the constitutional reference should be that there is no violation of the right to a fair trial by an independent and impartial Industrial Tribunal and, therefore, revoked the appealed sentence.

Similarly to the Industrial Tribunal, the Court of Appeal on 5 October 2018 deemed the action to be time-barred and rejected the appeal.

Business protection and restrictive covenants

One of the fundamental issues discussed in recent judgments relates to the validity of non-compete clauses in employment contracts. Whilst a general clause restricting direct competition with the employer after termination of a contract or preventing the employee
from working for competitors is generally unenforceable, a clause prohibiting employees from soliciting clients of the employer is generally enforceable.

An interesting case on the matter is *M.a.i.n. Services Limited vs Galea Albert pro et noe*, delivered by the First Hall, Civil Court on 28 September 2017. The First Hall examined the nature of fiduciary obligations and the contractual obligations resulting from the defendant’s contract of employment, amongst which was the obligation to “...not work for, not have any interest whatsoever in any business entity, individual or corporate, of any kind, irrespective whether the business be competitive or otherwise to that of the Company, unless with prior written approval of the Company”.

The defendant had been a director and a trusted employee of the plaintiff company. Following his resignation, CompAir UK Limited (‘CompAir’), with which the plaintiff company had a commercial relationship for around 12 years, terminated its contract, and Galea became the new distributor of CompAir. The Court considered that contractual clauses and fiduciary obligations apply even following the termination of a contract of employment. It further considered that Galea had obtained knowledge of the client during his employment and was planning to operate a similar business prior to resigning. It held that, by operating a similar business to that of *M.a.i.n. Services Limited* (‘MAIN’), the defendant breached his fiduciary duties. Therefore, the Court moved on to liquidate damages and in doing so, it considered that the annual profit derived by the plaintiff company from CompAir’s products amounted to €49,718, which during the proceedings accumulated to €497,180, due to elements of the market and possible fluctuations. Consequently, it ordered the defendant to pay MAIN €350,000. This decision was appealed on 17 October 2017 and is still pending before the Court of Appeal (Civil, Superior). It will be interesting to see whether the Court of Appeal will confirm this decision or re-evaluate the amount of liquidated damages.

**Discrimination protection**

The Equality Bill

A Draft Equality Act and a Draft Human Rights Equality Commission Act were presented for public consultation in 2015 by the then Minister for Social Dialogue, Consumer Affairs and Civil Liberties. Since then, discussions have been and are still ongoing and, on 24 May 2018, the Ministry for European Affairs and Equality issued a Press Release indicating that the draft Acts underwent another public consultation and an opinion from the Venice Commission was also requested.

The Equality Bill (‘the Bill’) proposes to increase the protection afforded to the various spheres of life, including employment, and seeks to protect the following characteristics: “age; belief, creed or religion; disability; family responsibilities; family or marital status; gender expression or gender identity; HIV status; maternity; pregnancy; race; colour or ethnic origin; sex or sex characteristics and sexual orientation.” Thus, it includes a wider spectrum of protected characteristics than those at EU level. The fact that the Draft Equality Act goes beyond what is required by EU law was also noted by the Venice Commission in Opinion No. 920/2018.

The Bill imposes a broad duty on the employer to “take effective measures to prevent all forms of discrimination, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion”. In this regard, the Venice Commission has suggested that the proposed Equality Act should “set out more precisely specific positive duties of employers… aimed at advancing equality and promoting diversity under these equality duties”.

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Upon the request of a person claiming to have been sexually harassed or discriminated against or upon the request of the Commissioner acting upon a complaint, the Bill also imposes upon the employer the obligation to provide a report on the allegation made. Whilst the Employment and Industrial Relations Act already provides for the responsibility of the employer for discrimination and harassment, this Act would go a step further.

One of the most controversial items to be introduced is the reversal of the burden of proof. If this Bill is enacted, it is the defendant who must prove that there has been no breach of the principle of equal treatment or that the less favourable treatment is justified. If the person is found guilty of a breach of any of the provisions of the Bill, he shall be guilty of an offence and shall be liable to a fine (multa) of not more than €5,000 or to imprisonment for a period not exceeding six months, or to both the fine and imprisonment.

The Vienna Commission has also recommended that the proposed Equality Act should specifically establish the duty of employers vis-à-vis persons with special needs to “take ‘reasonable accommodation’ measures”.

**Protection against dismissal**

**Compensation and other remedies**

The average compensation awarded in cases of unjust dismissal amounts to approximately €10,000. Despite this, in *Neville John Stewart Wylie vs Maitland Malta Limited*, the Industrial Tribunal awarded €72,000 as compensation. This case concerned whether the termination of an employment constituted a genuine redundancy. The Tribunal held that, in order to determine whether the decision taken by the defendant company was based on a just reason rather than a reasonable one, it must ensure that the termination was guided by a number of principles, including whether the restructuring in the company took place due to commercial reasons or in order to increase the efficiency of the company which led to the redundancy, and whether the post was actually abolished. The Tribunal went on to consider several factors, including that the plaintiff’s competences, especially in accounts, were exceptional, his experience and his loyalty towards the defendant company and the fact that his duties were assigned to a new employee, which gave rise to doubts as to whether his post had actually been abolished. The Industrial Tribunal concluded that the termination of employment was unjust and in breach of the law. It then proceeded to award the aforementioned compensation on the basis of the contract which the plaintiff had with the defendant company.

**Statutory employment protection rights**

**Annual leave**

The Budget for 2019 introduced an extra day of annual leave starting from 2019; thus the total number of days of leave will be 26. This was done by way of a gradual implementation of the electoral promise to restore public holidays which fall on weekends.

**Annual leave, payslips, transfers of business and temporary agency workers**

On 10 August 2018, four Legal Notices were introduced regulating areas concerning annual leave entitlement, itemised payslips, transfer of business, and temporary agency workers. However, on 22 August 2018, the Government suspended these Legal Notices in order to give way to further consultation with social partners.
Employee privacy

Data protection rights for employees and obligations for employers

In order to implement Regulation (EU) 2016/679 of the European Parliament and of the Council of 17 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (‘GDPR’), Chapter 586 of the Laws of Malta was enacted to repeal and replace the Data Protection Act, Cap. 440. The relevance of this legislation to employment is that it seeks to create a balance between the legitimate interests of the employer and reasonable privacy expectations of employees due to advancements in technology.27

The GDPR defines ‘personal data’ as “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”.28

Article 5 of the GDPR lays down six principles in relation to the processing of personal data. Summarily, these principles are that data must be processed lawfully, fairly and in a transparent manner, it must be collected for specified and legitimate purposes, it must be adequate, relevant and limited to what is necessary, accurate and up to date, not kept for a longer period than is necessary and processed in a manner that protects against unauthorised access.

Personal data may only be processed if at least one of the following six criteria is present: (i) the data subject must have either given his consent to the processing; (ii) processing must be necessary for the performance of the contract; (iii) for compliance with legal obligations; (iv) to protect the vital interests of data subjects or another person; (v) for performance of a task carried out in the public interest; or (vi) for the purposes of the legitimate interests pursued by the person processing the data (‘the controller’) or a third party, except where such interests are overridden by interests or rights of the data subject.29 Nevertheless, in employment, consent is not considered as a valid basis for processing data since it cannot be ensured that it is freely given in line with the GDPR30 and it is not practical for the employer to rely on the employee’s consent. The processing of personal data must, therefore, be necessary for the performance of the contract, necessary to comply with a legal obligation or for the purposes of the legitimate interests pursued by the employer. Despite this, where the processing of data is not necessary for the performance of the contract, such as subscribing to newsletters by the employer or the uploading of photos on social media sites, the employer’s consent is a sufficient basis for processing.

Apart from the aforementioned obligation, the employer must also abide by Article 13 of the GDPR and provide to employees the information mentioned therein in order to be able to collect personal data from the employee. The latter includes the identity and contact details of the controller, the contact details of the data protection officer, the purpose and legal basis for processing, the legitimate interests pursued, recipients or categories of recipients, whether the controller intends to transfer data to third countries and, if possible, the period for which the data will be retained or the criteria to determine that period.

Personal data

In Doreen Camilleri vs Kummissarju Għal-Informazzjoni u l-Protezzjoni tad-Data, the Court of Appeal in its Inferior Jurisdiction31 decided an appeal against a decision of the
Information and Data Protection Appeals Tribunal, in which Camilleri alleged the breach of data protection rights as the password of her email account was changed and used under false pretences following the termination of her employment. The appellate court considered the legitimate interest for business continuity against the obligation of fairness, best practice and transparency, and concluded that although the email account belonged to the employer, the email address contained the employee’s name which is considered personal data. Therefore, the employee should have been asked to give a handover in order for the emails in her account to be archived. Therefore, in these circumstances, the Court concluded that the processing of data was not carried out in accordance with good practice in terms of the Data Protection Act applicable at the time.

Monitoring or surveillance in the workplace

Since as noted above, the ground for processing personal data is usually legitimate interest, the latter must also form the basis for the reason of the use of CCTV at the workplace. Consequently, the use of CCTV must be justified, the employee must be informed of the reason for its use, and the retention period must also be justified.

The Court of Appeal in a judgment delivered on 5 October 2018, *Maltapost vs Kummissarju Għal-Informazzjoni u l-Protezzjoni tad-Data*, held that one must establish a balance between the necessity of maintaining security and the right to privacy of the individual. It also referred to the EDPS Video-Surveillance Guidelines, in which the European Data Protection Supervisor noted that the retention period for normal security purposes is one week. Therefore, it confirmed the decision of the Information and Data Protection Commissioner, in which it was held that a retention period of 20 days could only be allowed in exceptional circumstances.

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Endnotes

5. ‘Economic Survey, 2018’ (n 1) 40.
11. Court of Appeal (Civil, Inferior), decided on 5 October 2018.
12. First Hall, Civil Court (Constitutional Jurisdiction), No. 7/16 MH, decided on 14 July 2017, 35.
13. Ibid., 37.
15. Article 73(6)(d) and (e) of the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta.
16. M.a.i.n. Services Limited vs Galea Albert pro et noe, Civil Court, First Hall, decided on 28 September 2017.
20. Article 22(1) of the proposed Equality Bill.
21. Article 29(1) of the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta.
22. Article 25 of the proposed Equality Bill.
29. Ibid., Article 6.
30. Ibid., Article 4(11).
31. Doreen Camilleri vs Kummissarju Għal-Informazzjoni u l-Protezzjoni tad-Data, Court of Appeal (Civil, Inferior), decided on 5 October 2018.
32. Maltapost vs Kummissarju Għal-Informazzjoni u l-Protezzjoni tad-Data, Court of Appeal (Civil, Inferior), decided on 5 October 2018.
33. Ibid., 5.
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Mexico

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General labour market and litigation trends

Throughout its history, the Mexican labour legislation, the Federal Labor Law (FLL), has undergone a couple of major amendments and some other minor reforms. The last amendment of the FLL took place in December 2012. After this amendment of the FLL, the trends in labour and employment law has been to put into practice new manners of handling and managing employment and industrial relations between employers, employees and labour authorities. The 2012 amendments are the most substantial changes made to the statute since it was integrally amended in 1970, and came more than a year after a fundamental reform was made to the Mexican Constitution with regard to the protection of human rights.

The most recent major amendment to Mexican labour legislation occurred on October 13, 2016, when the initiative to reform Articles 107 and 123 of the Political Constitution of the United Mexican States was approved by the Plenum of the Senate. The initiative was a result of the ‘Dialogues for Daily Justice’ carried out by the Economic Research and Teaching Center, which consulted with academics and lawyers to elaborate a set of proposals on this matter. The main aspects of said constitutional reform are:

• The creation of labour courts to replace the boards of conciliation and arbitration, delegating the administration of labour justice to federal and local court systems, therefore switching the administration of labour justice from the executive branch to the judicial branch.

• The creation of ‘conciliation centres’ in federal and local jurisdictions; this will be a mandatory step in the judicial procedure for employers and employees that must occur before the formal initiation of a labour dispute.

• Collective bargaining agreements, internal labour regulations and the procedures for their execution, filing, registration, conciliation and litigation will be concentrated in a newly created, decentralised governmental body, which will depend on the executive branch and will be in charge of the abovementioned collective matters, as well as the ‘conciliation centres’.

• Regarding outsourcing arrangements, it is expected that the sanction of considering the beneficiary of the services as the employer of the employees providing the services will be eliminated, returning to the formula that the beneficiary will only be considered jointly liable in case of non-compliance by the third-party company service provider.

• In case of strikes for the execution of a collective bargaining agreement, the union must accredit the representation of the employees. Also, the union must prove that at least 30% of the union members work in the company subject to the strike and that it is the employee’s wish that the union represents them, having to prove that the employees have complied with the union membership requirements and that they requested the exercise of the actions against the company.
Redundancies, business transfers and reorganisations

Redundancies
There is no specific statutory process regarding redundancies; therefore whenever an employer wishes to make an employee redundant it has to follow the same process of dismissal or termination without cause. There is no need to notify the government or the employee’s union about the redundancy (unless otherwise provided in the collective bargaining agreement), and no social plan, offers of alternative employment or notifications to the employees are required. In a redundancy, the common practice is to offer the employee full statutory severance pay in exchange for the execution by the latter of the corresponding termination documents (termination agreement or resignation and quitclaim).

Business transfer
Mexico does not have business transfer legislation that protects employees affected by a merger, acquisition or outsourcing transaction as there are in other jurisdictions. However, the FLL contains a provision that regulates the transfer of employees from one employer to another as a result of a corporate buyout or restructuring of the business. Such transfer shall take place on a certain date agreed among the parties (employers) and it has been held recently that the transfer of employees shall take place whenever the whole or the main part of the business is also transferred. Such transfer is known in the law as an ‘employer substitution’, which is a legal proceeding whereby an employer assumes any and all obligations of the former employer of an individual or group of individuals without terminating, suspending or modifying the terms of the original labour relationship.

Under an employer substitution, employment relations already in existence, as well as the terms and conditions attached to them (salaries, benefits, work shift, etc.) cannot be reduced or changed unilaterally by the new employer. If they are somehow affected, employees are legally entitled to claim with the labour boards the granting or observance of their corresponding salaries, seniority, benefits and conditions or even to rescind the labour relationship with cause and with responsibility on the employer.

Employment substitutions do not require the employee’s consent to be effective and do not trigger any severance payments. The law requires employers to deliver a substitution notice to the employees, as well as to the Social Security Institute. When informing the Social Security Institute of the substitution, the National Fund for Workers’ Housing is automatically advised of the substitution by the Institute.

The FLL and the Social Security Law provide that the former (substituted) employer is jointly liable with the new employer (substitute) for a period of six months onwards for any obligation existing before the effective date of the substitution.

Business protection and restrictive covenants
Article 5 of the Mexican Constitution states that no individual shall be kept from engaging in any profession, industry, commerce or job that best suits him or her, as long as it is lawful. Therefore, from a strict labour law perspective, non-compete and non-solicitation clauses and agreements are not enforceable in Mexico, as the authorities cannot restrict individuals from the exercise of the aforementioned right. However, if such clauses and agreements are executed or established to be in force for the duration of the employment relationship with the employees, then the non-compete and non-solicitation clause or agreement would be enforceable in Mexico.

Notwithstanding the foregoing, some employers have adopted the practice of executing agreements (of a civil nature) with their employees under which the employees assume
negative covenants (i.e., non-compete, non-solicitation or non-disparagement) tied or linked to a liquidated damages provision that would have to be paid by the employee in the event of a breach of such negative covenant. In such a case, the employee is not restrained from performing the restricted activity, but in the event of a breach could be held liable for the payment of the established amount. The foregoing could have a deterrent effect on employees for not competing or soliciting against or disparaging their former employers; however, such clauses could also be held null and void if related directly to the employment or if submitted to and resolved by a labour board (soon to be a labour court) or federal labour court. Another approach is paying the former employee an agreed amount for not competing, which payment shall be made at the end of the non-compete period, since it is the best way to encourage the former employee not to engage in competitive activities during the agreed period.

**Discrimination protection**

In Mexico, the topic of discrimination has been growing over the past few years, leading to the creation of federal and local anti-discrimination laws and regulations, which have the sole purpose of protecting all employees against any act of discrimination which aims to prevent or cancel the recognition or exercise of rights and equal opportunities based on race, skin colour, religion, gender, national origin, citizenship, age, disability, genetic predisposition or carrier status, marital status, sexual orientation, physical or mental disability or any other characteristic protected by law.

The antecedent of greatest importance regarding protection against discrimination is the Mexican Constitution, which establishes an anti-discriminatory principle in its Article 1. As a result of the 2001 reform, its first article was reformed in order to prohibit all forms of discrimination aimed at nullifying or undermining the rights and freedoms of individuals.

Moreover, the Federal Law to Prevent and Eliminate Discrimination (Discrimination Law), which was published in June 2003, sets forth the creation of the National Council for the Prevention of Discrimination (CONAPRED), a decentralised agency of the Interior Ministry that has the main purpose of: (i) contributing to the cultural, social and democratic development of the country; (ii) carrying out the corresponding actions to prevent and eliminate discrimination; and (iii) elaborating and promoting public policies for equal opportunities and treatment. The CONAPRED is also responsible for receiving and resolving complaints for alleged discriminatory acts committed by individuals or by federal authorities in the exercise of their functions.

**Protection against dismissal**

It is not easy to terminate an employment relationship in Mexico due to the principle of ‘employment stability’ governing employment relations in the country. This principle shall be understood as meaning that any employment relationship shall not be terminated at an employer’s will unless the employee incurs in one of the causes for termination foreseen in Article 47 of the FLL.

Regardless of the causes set forth in Article 47 under which an employer may terminate a labour relation with cause, employees with more than 20 years of seniority can only be terminated when the causes are particularly serious or when they are recidivists, although the FLL does not provide what is classed as serious.

There is also cause for termination when it comes to trusted employees (managers, supervisors, etc.), particularly when the employee commits an act that leads to the employer losing confidence or trust in such employee.
When lawfully terminating an employee’s contract for a statutory cause, the employer must provide him or her with a written notice stating the causes for termination and the dates on which such causes were carried out, or file it with the corresponding labour boards within five days of the termination date, for said authority to deliver it to the employee. In this case, the employer has the burden of proof regarding the causes of termination stated in the corresponding notice.

When terminating an employee’s contract with sufficient cause, the employer has to pay only the accrued benefits. If the employer fails to prove the causes for termination or the delivery of said notice to the employee, the termination shall be deemed unjustified as a matter of law regardless of the cause, and the employer must reinstate the employee at his or her job or tender severance pay, consisting of: three months’ integrated salary; 20 days’ integrated salary for each year of service; a seniority bonus, equal to 12 days’ salary for each year of service; and accrued benefits owed to the employee, such as a Christmas bonus, vacation days earned and a vacation premium.

Since proving the causes for termination and the delivery of the termination notice is difficult, it has become common practice for employers to negotiate settlements with their employees, which can be documented in one of the following ways:

- having the employee address a unilateral communication to the employer advising his or her voluntary separation from the job (i.e., a resignation letter). A signed payment quitclaim with the breakdown of the benefits paid to the employee should also be obtained from the employee upon payment by the employer of the amount agreed; or
- a termination agreement may be executed. Such document could be ratified by the parties with the corresponding labour board; however, this is not mandatory.

The second option provides the parties with added legal certainty since the document issued as a result of ratifying the termination agreement with an authority has the effect of an official judgment.

**Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)**

The FLL sets forth the minimum standard benefits and work conditions to which an employee is entitled and consequently an employer is bound to comply with or provide to the employee under the FLL.

**Vacations and mandatory holidays**

Under the FLL, employees who have been employed during a term greater than a year are entitled to an annual fully paid vacation period, which under no circumstance may be less than six business days; said paid vacation period will increase by two business days for each additional year of service, up to a maximum of 12 days. After the fourth year, the vacation period will increase by two business days for each additional five-year period of service, up to a maximum of five. Also, employees have the right to be paid a vacation premium of at least 25% of their daily salary for the vacation days enjoyed each year. Additionally, article 74 of the FLL provides the following non-business days (holidays): (i) January 1; (ii) the first Monday of February in commemoration of February 5; (iii) the third Monday of March in commemoration of March 21; (iv) May 1; (v) September 16; (vi) the third Monday of November in commemoration of November 20; (vii) December 25; (viii) presidential assumption of duties (December 1 every six years); and (ix) election dates. During these days, employees are entitled not to work; however, employers are obligated to pay them the amount corresponding to their salary. Employees that render their services on
such holidays are entitled to receive twice the amount corresponding to their daily salary as compensation for working on a holiday.

Maternity and paternity leave

The FLL provides that pregnant employees are entitled to leave their job for a period of 84 days. Furthermore, such law provides for this temporary absence to take place 42 days before birth and 42 days after birth, although pregnant employees are now allowed, with the authorisation of a social security physician, to move four weeks of the prenatal period to the postnatal absence period in order to allow the mother to spend more time with the newborn after birth. The Social Security Law (“SSL”) provides that during these 84 days, the employer is exempted from paying to the corresponding employee her salary and the Mexican Social Security Institute (better known as “IMSS”) is responsible for paying an amount equal to 100% of the salary to the corresponding mother. Nevertheless, the Social Security Law has not yet been modified to reflect and match the possibility of transferring four weeks from the prenatal to the postnatal period of leave; therefore there is still a discrepancy between both statutes relating to the payment of the subsidy by the IMSS, since the latter expressly states that it will cover the salaries relating to the 42 days of prenatal and 42 days of postnatal leave.

When an employee is subject to dismissal while pregnant, the company responsible may be subject to a claim initiated by the employee for unlawful dismissal, as well as an investigation by the authority in charge of solving and investigating discrimination acts, the CONAPRED; however, when relating to private parties (i.e. companies) committing discrimination acts, the CONAPRED does not have the authority to sanction the company if it is found guilty of committing an act of discrimination.

Also, the FLL grants to fathers of newborns five days of paid leave, counted from the date on which the baby is born.

Notice entitlements

Under the FLL, the only mandatory notice period given to employers is in the case of an employee’s dismissal based on a statutory cause set forth under the FLL, in which case the employer must provide the employee with a written notice stating the causes for the termination and the dates on which such causes were carried out by him/her, or file it with the corresponding labour boards within five days of the termination date for said authority to deliver the notice to the employee directly. In any other case of termination/dismissal, there is no statutory notice period established under the FLL by which employers must abide.

Worker consultation, trade union and industrial action

Worker consultation

Under Mexican legislation, there is no specific law or regulation setting forth the requirements or procedures by which employers must abide in connection with consultations, whether national or international, regarding their employees and company operations, nor there are regulations or legislations regarding sanctions or procedures to be taken when a company does not comply with the consultations.

Trade unions

The Mexican Constitution and the FLL guarantee the right of employees to form or join a union for representing and defending their interests before the employers and to have the union execute a collective bargaining agreement (CBA) with the employer for the purpose of setting up the terms and conditions of the employment of unionised employees. CBAs are to be negotiated and restated each year with regard to the salaries of unionised employees and
every two years in connection with the employment terms and conditions of such employees. The most important right and at the same time leverage for unions forcing employers to negotiate the CBAs and to comply with their terms is the right to call a strike and to actually stop activities until their demands are resolved.

**ILO Convention 98**

On September 18, 2018, the Senate ratified the International Labour Organization (“ILO”) Convention 98 regarding the right to syndicalism and collective labour rights, which establishes the effective recognition of employees’ right to collective bargaining. This will represent good news for unions and workers’ representation, taking into consideration that said convention is fundamental in terms of unions' collective bargaining rights.

Regarding multinational companies, the ratification of said Convention could ultimately change the way in which collective matters are handled in Mexico. The Ministry of Labour and Social Welfare seems to be quite serious about encouraging transparent collective negotiation between employers’ and workers’ representatives. The main goal is to avoid concentrating solely on workers’ best interests and to encourage both parties of the labour relationship to reach agreement in the spirit of the basic principle of labour peace, as well as preventing or eliminating the ‘white’ or ‘ghost’ union practice.

**Employee privacy**

On 5 July 2010, the federal government published in the Federal Official Gazette the Federal Law for Personal Data Protection Possessed by Private Persons (‘DPL’), which has been in force since 6 July 2010 and is intended to protect personal data held by private persons – either companies or individuals – in order to regulate the lawful, informed and controlled treatment of said data, with the objective of ensuring the right to privacy as well as the right of informational self-determination of persons. The DPL protects personal data that is subject to process, use or transfer, at a national and international level.

To clarify the content of the DPL, on December 21, 2011, the Ministry of the Economy published in the Federal Official Gazette the Regulations of the DPL (“the Regulations”), which have been mandatory since December 22, 2011. The Regulations provide in detail the conditions for the compliance and enforcement of the DPL to bring legal certainty to its regulated subjects.

Both regulatory instruments have a direct impact for employees, either as a means of strengthening their right to privacy in relation to their employer and its subcontractors or to establish duties that employees must comply with in order to preserve the privacy of the personal data that it processes in the course of their activities.

In terms of the DPL and its Regulations, there is no obligation to register the company – in its role of data controller – with the Mexican data protection agency (the National Institute of Transparency, Access to Information and Protection of Personal Data (“INAI”)) or any other government body. However, diverse obligations should be fulfilled in order to comply with the provisions of the DPL and its Regulations.

The Regulations compel the employers to elaborate an inventory of processed personal data to identify its nature – since sensitive, financial or economic personal data requires the written express consent of the data subject to be collected and processed and should be protected by stronger measures than if it is ‘ordinary’ personal data. Besides, the inventory may allow the forms of the processed data to be determined (i.e., whether it is expressed or contained in digital means, in printed form, or in visual or sound mechanisms).
For the collection and processing of personal data, the general rule is that the data subject – including the employees – must be informed by means of the privacy notice about the collected data, the purposes of the processing, the data transfers and the means to exercise the right to access, rectification, cancellation and opposition to the data processing, as well as the way to express his or her consent to authorise the data processing and transfers. However, the data subject’s consent is not required for the processing of personal data to be lawful if it is necessary to comply with obligations derived from a legal relationship, such as a labour contract, entered into by the data subject (employee) and the data controller (employer). Candidates for an employment position do not fall within this exception as they do not have any legal relationship with the employer, so their consent is required for transferring their personal data to a third party.

The Regulations compel the companies to limit access to personal data only to authorised employees due to their position or functions. The DPL also provides that companies must implement and maintain administrative, technical and physical security measures to protect personal data against damages, losses, alteration, destruction, use, access or unauthorised use (Article 19 of the DPL and Chapter III of the Regulations).

Under Article 48 of the Regulations, the employer is compelled to implement a range of actions to ensure that their employees comply with the DPL and its Regulations such as:

- develop binding and enforceable privacy policies and programmes within the organisation;
- implement a training, updating and staff awareness programme on the obligations on personal data protection issues;
- establish an internal system for supervision and monitoring, verification or external audits to test out the compliance of privacy policies;
- allocate resources for the implementation of privacy programmes and policies;
- provide mechanisms for the enforcement of the privacy policies and programmes, as well as for sanctioning its lack of compliance;
- establish measures for tracking personal data during its processing;
- establish procedures to receive and respond doubts and complaints from the personal data holder;
- have mechanisms for compliance with privacy policies and programmes, as well as for sanctions for non-compliance;
- establish measures for the assurance of personal data, meaning a set of technical and administrative actions that guarantee the responsible party’s compliance with the principles and obligations set forth by the DPL and its Regulations; and
- establish measures for the traceability of personal data, that is, actions, measures and technical procedures that allow to track personal data during its treatment.

Privacy regulations should be related to the internal labour regulations in order to enforce sanctions within the company in case of infringement.

Cross-border data transfers

In terms of the DPL and its Regulations, companies are not compelled to register their data transfers at the INAI or at any other government agency and, as a general rule, data transfers are subject to the consent of the data subjects (generally granted through the privacy notice); however, the DPL provides for a few exceptions in which the employee’s consent is not required for the data transfer:

- the transfer is necessary for preventive treatment or medical diagnosis, the delivery of health care, medical treatment or the management of health services;
• the transfer is to companies under the same corporate control (subsidiaries and affiliates under the common control of the data controller), or to a parent company or an associated company that operates under the same processes and internal policies;
• the transfer is necessary under a contract that has been concluded, or a contract to be concluded, in the interest of the employee by the employer and a third party; or
• the transfer is necessary for the maintenance or fulfilment of a legal relationship between the company and the employee (Article 37 of the DPL).

Neither the DPL nor the Regulations require safe harbour registration for data transfers or for carrying out an onward transfer.

Sensitive data

In terms of the DPL, sensitive data is defined as the personal data that pertains to the data subject’s most intimate sphere, or data that, if misused, could lead to discrimination or cause a serious risk to the data subject. In particular, personal data is considered to be sensitive if it contains sensitive issues such as racial or ethnic origin, current or future health status, genetic information, religious, philosophical and moral beliefs, union membership, political opinions, and sexual preference (Article 3, Section VI of the DPL).

Financial and economic data is not included within the category of sensitive data; however, the processing of such data requires the express consent of the data subject, except as provided by law (Article 8, Section IV of the DPL).

The requirement for consent in the case of the collection of sensitive data is more stringent than in the case of non-sensitive data. When sensitive personal data is collected, the privacy notice must address explicitly that it deals with this type of data (Article 16 of the DPL). No databases that contain sensitive data should be created without justifying their creation for legitimate purposes, concrete and consistent actions or explicit purposes pursued by the regulated subject (Article 9 of the DPL).

If infringements to the DPL are committed in the processing of sensitive data, the penalties can be increased to twice the established amounts (Article 64, Section IV of the DPL).

Background checks

Under the DPL and its Regulations, background checks, credit checks and criminal records are allowed if the candidate for employment has granted his or her express consent, since such records include sensitive data.

Employers must be aware of processing personal data under the principles of lawfulness, consent, information, loyalty, proportionality, confidentiality and accountability, and must be aware of processing the candidate’s or employee’s personal data or information on a non-discriminatory basis.

Drug testing in the workplace

There is no law or regulation regarding this topic that establishes the proper procedure for conducting drug tests in the workplace; however, the FLL sets forth specific obligations and prohibition to the employees, including the prohibition to present themselves at the workplace under the influence of alcohol, drugs or any narcotic without the proper medical prescription; and the obligation to the employees to submit themselves to the medical examinations that may be required or mandated by the employer in accordance with paragraph X of article 134 of the FLL. Based on the above, the companies can conduct medical exams, including drug tests, as long as such exam is properly informed to the employee and the employee’s consent is obtained in order to avoid any future conflict or claim based on discrimination as a result of the practice of the drug test.
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An overview of Oman labour law

Background

Oman is one of the fastest growing economies in the Middle East, with its government diligently undertaking a great number of development projects to modernise the economy, improve the standard of living, and thrive to become a more active player in the global marketplace. Ergo, and in concurrence with its vision, Oman became a member of the World Trade Organization in October 2000, and is industriously continuing to amend its financial and commercial practices to conform to the highest international standards.

Consequently, and as the government tirelessly endeavours towards the betterment of its workforce legislation and the economic atmosphere, Oman introduced an enhanced Labour Law in 2012 to more advantageously regulate employment relationships for private employees. For this, the Labour Law is considered to be a strong law, providing a balanced relationship between private employers and their employees, all the while laying strict conditions of timely payment of wages, mandatory leaves, protection against unfair termination, medical insurance and workmen compensation of employees on one hand, and regulating the employees’ code of conduct on the other hand. However relevant, the Oman Labour Law does not apply to civil servants, security forces personnel and domestic servants, as these are governed by separate laws such as the Civil Services Law, the Military Service Law, and by Ministerial Decisions issued from time to time by the Ministry of Manpower (“MOM”), the government authority for implementing and enforcing the Labour Law.

The Oman Labour Law, stipulated by Royal Decree 35/2003, is the primary source of law dealing with labour and employment-related issues in the Sultanate of Oman. Amendments of this Royal Decree, through various Royal Decrees and Ministerial Decisions, have been recurrently carried out, in order to better accord the relevant domestic legislatorial codes with various comprehensive constitutions. The private sector workforce is regulated by the Constitution, the Labour Law, the MOM’s Decisions, and the Social Insurance Law.

The Oman Labour Law comprises Royal Decree 35/2003, which laid the foundation of a dedicated labour law in Oman, with its amendments, and the various related Ministerial Decisions, which are issued from time to time to regulate the workforce atmosphere in Oman as per the then prevailing economic and security policies of the government.

General overview and analysis

The Oman Labour Law applies to all private sector employees (other than domestic workers, Omani civil servants and security forces personnel), whether Omani or non-Omani, employed by local or foreign companies having an office in Oman.
The Labour Law governs, including but not limited to, employment contracts, leave entitlements, working hours, overtime pay, annual leave pay, worker passage, industrial safety rules, the labour disputes resolution mechanism, medical coverage, gratuity/end of service benefits, etc. The Law, with prudent regulation in establishing fairness between local and international workers, requires expatriate employees to meet the following criteria:

1. be professionally/academically competent for the post – the MOM, for most job categories, examines the educational records of the foreign national for whom clearance is sought by his prospective employer;
2. have a contract with an employer who has a valid licence to conduct its business;
3. have a valid work permit; and
4. be medically fit – the Royal Oman Police (“ROP”) requires a certified medical fitness certificate, conforming to the criteria it publishes in accordance with Ministry of Health’s policies, to be submitted along with the other documents for visa issuance.

In Oman, it is illegal for expatriates to work without an employer and without a work visa, as per the Foreigners Residence Law of Oman, failing which, both the employer and the employee shall suffer the risk of penalties, that may be as harsh as serving jail time and/or deportation of the employee at the cost of the employer, as well as monetary penalties, and sanctions on the labour clearances on the employer, etc.

If an employer:

1. allows its employees to work for another person;
2. employs a person residing illegally in Oman; or
3. employs a non-Omani in a position reserved for Omanis without the proper exemption,

then such employer may be subject to one month’s imprisonment and/or a fine, as may be determined by the MOM.

**Employment contracts**

All private sector employees are required to have an employment contract, which must contain minimum provisions of the names of the contracting parties, the employee’s date of birth, qualifications, place of residence, nationality, job description, entitlements, duration of the contract – whether limited or unlimited, salary and notice period (for termination), etc.

In addition to the other terms and conditions that the contract may include, the employee is required to respect the laws, customs and traditions of Oman, including the religion of Islam; and shall refrain from engaging in any activities deemed prejudicial to the country’s security.

An employment contract should be executed in duplicate originals, with each of the employer and the employee retaining an original for their records. Employment contracts may be either of a limited (specified) duration, or unlimited (unspecified) duration. It is pertinent to mention here that the specified duration of the employment contract determines the employer’s ability to immediately terminate the employee’s contract if a notice period is otherwise not stated therein. If the employment contract does not specify its duration, then it is deemed to be unlimited; however, the employment visa is normally issued for a renewable two-year period, irrespective of the duration of the contract.

The Oman Labour Law has also dealt comprehensively with probationary periods for an employment relationship. It provides that if the employment contract specifies a probationary period, then such period may not exceed three months, as per the Labour Law. It is also pertinent to mention here that either party may terminate the contract during the probationary period with a short written notice of seven days to the other party.
In the case of indefinite duration employment contracts, wherein the notice period is not specifically mentioned, either party may terminate the contract by giving a 30-day written notice to the other party.

However, the notice period may be waived if compensation equivalent to the employee’s wage for the said notice period is paid to the party waiving the notice period. Such notice must also specify the reason for such termination.

The courts in Oman have been very strict against unfair terminations, and have laid down that in the absence of sufficient reason of termination, such termination may be deemed arbitrary, and have, in many cases, awarded compensation equal to a minimum of three months’ gross salary up to an unlimited amount, depending on various factors, in addition to any other entitlements otherwise owing to the employee as per their contract or the law.

**Entrance, residency and employment visas**

Entry into the Sultanate is governed by the Foreigners’ Residence Law and its executive regulation, issued by the Royal Oman Police. Such laws cover the proper categorisation of entry visas, the length each category of visa allows its holder to reside within the Sultanate, and the conditions of entry for each category therein.

The articles in the Executive Regulation of the Foreigners Residency Act pertaining to visas have continuously undergone amendments, lastly amended by ROP’s Decision No. 129/2018. This amendment allowed for the shifting of certain types of visitation and residency visas to full- or part-time employment visas, without the requirement of exiting the Sultanate, provided the persons wishing to hold such employment visa meet the requirement for holding such visa, and have paid the fees specified for the issuance of such visa.

**Remuneration**

Under the Labour Law, employees are entitled to certain minimum benefits like basic salary and various allowance; however, an employer may provide greater benefits than those required under the law, in which case if there is a conflict in interpretation of benefit, the employee will be entitled to claim the superior benefit.

**Salary**

The minimum salary for Omanis working in the private sector is currently set at RO325, of which RO225 is constituted of the minimum basic salary, and RO100 as the minimum allowance. The law does not prescribe a minimum salary for expatriate workers. The gross salary includes basic salary in addition to allowances. The employer must deposit the employee’s wages into the employee’s designated bank account within seven days from the end of the period in which such wages become due. There have been some reports of non-payment of due wages by employers to some workers and, as such, the MOM has been taking steps to mandatorily deposit the employee’s salary into the employee’s bank account, failing which, there are provisions for penalising the employer.

**Working hours**

The law provides for a maximum 45-hour work week or nine hours in a day. However, during the holy month of Ramadan, working hours for Muslim employees is reduced to six hours a day or a maximum of 30 hours per week. This, however, does not apply in cases where the work requirements are on a rotational or shift system basis. In such cases, precedence is given to the agreement between the parties and the policies of the MOM in effect.
Overtime

The Labour Law provides that an employee cannot be compelled to do any overtime. However, if an employee agrees to work additional hours that exceed the working hours provided for in the Labour Law, then they shall be entitled to proportionate additional compensation. Such additional compensation depends on whether the overtime is worked during working days, or on week rests or national holidays, whatever days are agreed to be working days and week rests, as is satisfactory to both the employer and the employee, which may be contrary to the conventionally known weekdays and week rests. Furthermore, overtime compensation may either be in the form of additional time off from work, or additional wages equal to 1.25 to 2 times the employee’s hourly rate of compensation, based on their basic salary.

Other benefits and entitlements

The Labour Law prescribes certain other entitlements that the employee is to receive, such as:

- An employer must provide medical coverage for their employees, either in the form of insurance or as a monetary allowance.
- The employer is also obliged to bear the visa costs and travel costs of the employees, from their home country to the Sultanate of Oman.
- The employer is further obliged to provide repatriation costs of the employees to their home country upon the termination of their employment contract, unless their sponsorship was transferred to another employer within the Sultanate of Oman.

The above are the benefits ensured by the Labour Law, and are in addition to any other benefits as may be otherwise agreed between the parties.

End of service benefits/gratuity

Barring the circumstances entitling an employer to terminate an employee’s contract without any benefits, the employer is obligated to pay certain end of service benefits to expatriate employees upon termination of their employment contract. End of service benefits are calculated on the employee’s last drawn basic salary and accrue as follows:

- for the first three years of service, the employee shall be entitled to receive the equivalent of 15 days’ basic salary for each year worked; and
- from thereon, and in the subsequent years, the employee shall be entitled to receive the equivalent of one month’s basic salary.

Social security

The Social Security Law requires the employer to register an Omani employee with the insurance fund administered by the Public Authority of Social Insurance (“PASI”) within one month of the date the employee joined the company. Coming into effect from 1 July 2014, the contributions to the said insurance fund have increased as follows:

- by the employer: 11.5% of gross salary (prior to 1 July 2014, this was calculated only on the basic salary); and
- by the employee: 7% of gross salary (prior to 1 July 2014, this was calculated only on the basic salary).

Types of leave

Sick leave

Subject to the provisions of the Social Insurance Law, an employee whose sickness is medically proven shall be entitled to sick leave not exceeding 10 weeks in the aggregate in
a one-year period, whether continuous or separate. Wage payment during sick leave must be granted as follows, unless otherwise agreed between the parties:

- First and second week, with full gross salary.
- Third and fourth week, with three quarters (75%) of their gross salary.
- Fifth and sixth week, with half the gross salary.
- Seventh to the 10th week, with one quarter (25%) of the gross salary.

**Emergency leave**

Ministerial Decision No. 567/2011 provides emergency leave and entitles the employee to time off where an emergency situation beyond the employee’s control has suddenly arisen. The employee, however, is required to provide proof of the emergency to the employer, whenever possible.

**Maternity leave**

A female employee is entitled to 50 days of maternity leave, covering the periods before and after the delivery with a full gross salary; provided that such leave entitlement is limited to three occurrences during her service with the employer. An employer may not dismiss the female employee for her absence from work due to illness (authenticated by a medical certificate) which is attributable to her pregnancy or delivery which prevents her from resuming her work, provided that the total period of such absence does not exceed six months.

**Special leave**

The Oman Labour Law recognises the situations where an employee may reasonably require additional leave, and hence it lays down provisions for special leave as follows.

An employee is entitled to special leave while according them full gross salary under the following circumstances:

- Three days in case of their marriage (shall not be granted more than once during the period of service).
- Three days in case of the death of a son, daughter, mother, father, wife, grandfather, grandmother, brother or sister.
- Two days in case of the death of an uncle/aunt.
- Fifteen days for the performance of the Al-Haj pilgrimage once throughout the period of their service, provided that the employee has completed one year of service with the employer.
- Fifteen days during the year for purposes of sitting for examination in the case of an Omani worker who is an associate student at one of the schools, institutes, colleges or universities.
- One hundred and thirty days for a working Muslim wife in the event of her husband’s death.

**Weekly rest days/official holidays**

The weekly rest days and official holidays are also to be paid with full gross salary, and any work done by an employee on such days shall be considered to be overtime, and shall be compensated with double the salary for the period worked as overtime or with another day off in lieu thereof.

**Annual leave**

An employee is entitled to annual leave upon completion of a minimum of six months of continuous service with the employer. The grant of leave is, however, subject to the business needs of the employer. The employee is entitled to receive their full gross salary during annual leave periods. The annual leave entitlement is 30 days per year and is transferable for one year.
Human resources policy and redressal of grievance

An employer with 15 or more employees must have a human resources policy (including penalty regulations). Such policy must be approved by the MOM, and shall be placed in a conspicuous place in the office premises, accessible to the employees.

In case a grievance redressal procedure was mentioned in such policy’s manual, the employee is required to adhere to such procedure in case of a grievance.

However, in case the grievance is not addressed to their satisfaction after following the procedure as per the human resources manual, the employee may file a complaint as per their employment contract, generally through the MOM, unless a different mechanism is provided in the employment contract.

The Labour Law provides that the complaint should be filed within 15 days in case they want the termination to be revoked, and within one year from the date of their right to such entitlements.

Other employment considerations

Secondment

Secondment is not expressly recognised under the Labour Law; however, secondment agreements are commonly entered into between companies, whereby the employees of a company is hired by another company. This is a popular mechanism in Oman for employers, especially those who are either new establishments or are embarking on new projects. Through secondment, employers can hire an expert without going through the due procedure of obtaining visa clearances and the employment visa.

Two-year employment visa ban

Article 11 of the Foreigners Residence Law stipulates that: “For two years it is prohibited to grant entrance visa for the foreigners Labourers, who have previously worked in Oman. From the date of last leaving, and the general inspector may make an exception for such period in the case of the public interest.” Accordingly, in order to work under a different employer within Oman, the employee must obtain a non-objection certificate, popularly termed as an “NOC”, from their previous employer.

Although favoured by some employers, this rule has attracted some criticism from various sectors, and there are speculations that the government may introduce an amendment to this rule in the near future.

Immediate termination for gross misconduct

While safeguarding employees against any unfair conditions in the workplace and arbitrary dismissal, etc., the Oman Labour Law also addresses the situation where an employee may be dismissed with immediate effect and without any end of service benefits for some specified gross misconduct of the employee.

Article 40 of the Labour Law: “Termination of Employment by the Employer (Without Benefits)” provides that the employer may terminate the employment contract without notice, and without having to pay an end of service benefits, if the employee:

- assumes a false identity or commits forgery;
- commits an error resulting in heavy financial loss to the employer (provided the MOM is informed within three days of the date on which the employer becomes aware of such occurrence);
• despite notification, does not comply with instructions for worker/workplace safety (such instructions must be posted in a conspicuous place) and contravention of which is likely to cause grievous damage to employees/the workplace);
• is absent from work for 10 days without reasonable cause for one year or for more than seven consecutive days (provided such dismissal is preceded by a written notice from the employer after the employee has been absent for five days in the first case);
• discloses any secrets relating to the employer’s company;
• is subject to a final judgment entered against him for an offence or felony for breach of trust/honour or felony committed in the workplace or during the course of work;
• is determined to be drunk, intoxicated or under the influence of drugs during the working hours;
• assaults the employer/manager/superiors in the course of work, or strikes a colleague resulting in sickness or delay from work for a period exceeding 10 days; or
• commits a grave violation of the duties imposed under their employment contract.

At the same time, the Oman Labour Law also provides a termination provision where the employer can terminate the employee’s contract, while awarding them with end of service benefits. Article 43 of the Oman Labour Law, “Termination by the Employer (With Benefits)” provides that the employer may terminate the employment contract, while paying the end of service benefits, under the following circumstances:
• on expiry of the contract or completion of work, as agreed upon;
• the death of the worker;
• disability of the worker to perform their works;
• resignation or dismissal of the worker or abandonment of work in accordance with the law;
• sickness of an employee to the extent that it compels them to discontinue work for a continuous or interrupted period of not less than 10 weeks in one year. Such sickness shall be substantiated by a medical certificate; or
• if the employee reaches 60 years of age.

On the other hand, the Oman Labour Law also caters to the abandonment of the work by the employee under several specified circumstances.
• Article 41 of the Labour Law, “Termination by Employee (with benefits)” provides that an employee may abandon their work before the end of their contract period while retaining their full rights, if:
  • the employer defrauded them in respect of terms of employment at the time of entering the employment contract;
  • the employer does not perform substantial obligations towards the employee as per law or contract;
  • the employer or its representative commits an immoral act against the employee or the employee’s family; or
  • despite their knowledge of grave danger threatening the employees, the employer did not implement any safety measures, as prescribed by the relevant authorities.

Labour disputes redressal mechanism in Oman

Unless a different mechanism for labour dispute resolution was agreed between the employer and the employee, such as arbitration, the labour disputes shall first be addressed before a designated body established for this purpose, which is the Department for the Settlement of
Labour Disputes, at the MOM. The complaint is first filed online on the portal at the MOM website, and immediately upon the registration of the complaint at the website, the system automatically sends a text message and an e-mail to the employer’s phone number and email address registered with the MOM in the complaint, specifying:

- The name of the complainant, the date and time of the meeting, etc. It is also pertinent to mention here that once a labour complaint is filed before the MOM, the employer’s right to cancel the employment visa of the employee is suspended until the final settlement of the complaint.
- The parties are called for hearings before the designated labour officer who mediates between the parties and then issues an award. Such award shall not be binding upon the parties unless they agree to it. If either party does not accept the award, the case is then marked for transferring to the Primary Court, and the regular court’s procedures follow after that. However, if at some point the parties wish to enter into a settlement out of the court, they can withdraw the case and register their settlement before the court.

**Minimum and maximum ages for employment**

The minimum employment age of national employees is 18 years, except for juveniles, as explained below, whereas an expatriate shall not be below 21 years of age at the time of their application for the employment visa. The retirement age of all employees, irrespective of their nationality, is 60 years. However, there are several instances where the authorities may extend the employment visa of expatriate employees beyond 60 years of age, on a case-by-case basis.

**Protection from discrimination under the Labour Law**

The Omani Constitution guarantees Omani nationals the right to work, prohibits compulsory labour – except in extraordinary circumstances and for a fair wage – prohibits discrimination between citizens, and generally makes an effort to tackle all employment issues.

The workers may form labour unions from themselves, which shall be subject to registration with the appropriate Ministry to safeguard their interests, defend their rights and improve their social status related to their employment.

**Formation and operation of trade unions**

Article 108 of the Labour Law allows employees to form a trade union to safeguard their interests, defend their rights, and to represent them on matters relating to their employment affairs.

Article 112 of the Labour Law provides that an employer who prevents their employees from carrying out their labour union activities, or by any means hinders the formation of such, or the formation of general federation of employees, shall be punished by imprisonment for a period not exceeding one month, and a fine of not more than RO500, or one of the two penalties.

The employer’s role in the formation and operation of trade unions

Whilst there is no statutory provision that defines the employer’s rights, and the formation and operation of trade unions, it is important to note the following:

1. The Labour Law and Ministerial Decision no. 570 of 2012 provide that a trade union shall have the right to freely practise its activity without interference in its affairs or an exertion of influence over it.
2. No employer may dismiss or otherwise punish a worker’s representative in the trade union for exercising their trade union activities.

3. In the event of collective bargaining or negotiations between an employer and the trade union, the employer is obliged to provide the information necessary to conduct the negotiation.

4. Whilst the negotiations between an employer and the representatives of a trade union are ongoing, any measures or decisions taken by the company against said trade union shall be considered unlawful.

5. In the event that a collective labour agreement is concluded between a company and trade union, and in accordance with Article 5 of Ministerial Decision No. 294 of 2006, it shall be the employer’s responsibility to visibly display the collective labour agreement at the workplace.

Restrictions of trade unions’ activities

Conversely, article 17 of Ministerial Decision No. 570 of 2012 sets out restrictions that prohibit trade unions from engaging in the following activities:

1. Investments of the trade union’s fund in financial speculations, in unsafe investments, or in an investment contradicting the union’s objectives and purposes.

2. Engaging in political activities or any other activity not specified in its statutes.

3. Accepting gifts and donations, unless with the MOM’s approval, in which case, such gifts and donations must be unconditional and not contradictory to the objectives and purposes of the trade union’s activity, and to the laws in force in the Sultanate.

4. Assigning its assets whether in rem or in cash.

5. Ministerial Decision No. 575/2013 prohibits calls to or actual participation in a strike in institutions that offer essential or public services as well as oil refineries, petroleum establishments, harbours and ports.

Special provisions for juveniles

Article 75 of the Oman Labour Law establishes that the minimum age for employment is 15 years, while minors (between the ages of 15 to 18 years) are not permitted to work between the hours of 6 p.m. and 6 a.m.

Minors are also prohibited from working overtime or in certain hazardous occupations, and employers are barred from requiring minors to work on official days of rest or official holidays or for more than six hours per day, as per Article 76 of the Labour Law.

In conformity with the aforementioned, workplaces that employ minors are required to post certain items for display at a conspicuous place in the workplace, including a copy of the rules regulating the employment of juveniles, the current log with the details of the minors, such as their names, ages and dates of employment, as well as a work-time schedule detailing the juveniles’ work hours, weekly holidays and rest periods, etc.

Additionally, in parallel to the Labour Law, Article 1 of the Ministerial Decision No. 217/2016 mandates that employers must obtain prior written approvals from the person responsible for the juvenile’s care and upbringing.

Furthermore, it is understood that the juveniles are in a physical development stage, as compared to adults, and also that children seeking employment at this age might more commonly be from poorer backgrounds. For such, Article 3 mandates that they must be provided with a medical check before, during and for six months after the termination of service, at the sole expense of the employer.
Special rights of female employees

The Oman Labour Law accords special treatment to women and provides them some extra benefits as compared to male employees. Such provisions include non-discrimination in the workplace, non-assignment of women for work between 9 p.m. and 6 a.m., non-dismissal of a woman employee during her absence due to an illness confirmed by a medical certificate, as well as statutory maternity leave.

An employer who employs one or more women workers must keep a copy of the regulations of employment of women in the workplace.

Ministerial Decision No. 286/2008, promulgated in 2012, published the Regulation of Occupational Safety and Health for Establishments Governed by the Labour Law. This regulation also dealt with specific health and safety needs related to women and people with special needs. Employers, for instance, must not expose women to materials or occupational practices which could adversely impact the safe delivery of children or the health and safety of the foetus.

Omanisation

The government recognises the importance of inclusion of Omani employees in the private sector fully, and has hence been, over time, introducing policies for training and development of Omanis for the sustainable future, and for the overall growth of the country. The Omani workforce is comparatively young in volume and in occupational orientations, and is generally more inclined towards public sector jobs, which, consequently, elicited the government to enforce policies encouraging Omanis to pursue job opportunities in the private sector. “Omanisation” is essentially a set of guidelines, specifying the proportion (quotas) of Omani nationals, which is required to be employed by private companies operating in various sectors (and as a percentage of the overall work force). The Omanisation percentages are modified from time to time based on further directives issued by the MOM, and certain specified categories of employment are reserved exclusively for Omani nationals. This policy can be a hurdle for multinationals and foreign companies looking to establish a prominent business presence in Oman, as the inability to attract and retain the requisite numbers of Omani nationals can have adverse consequences. However, as part of the incentive package to attract foreign investment into the Free Zones, Omanisation quota requirements have been lowered. Nevertheless, the MOM will normally not issue expatriate labour clearances for companies that fail to hire qualified Omanis to meet the labour quota targets. In case qualified Omanis were not available, the MOM may issue labour clearances, pending future availability of qualified Omanis to fill such positions.

Non-fulfilment of the prescribed percentage of Omanisation may bring penalties on the employers, such as the suspension of their right to obtain additional employment clearances for expatriate employees or financial penalties, etc. Further, an employer seeking to hire an expatriate for any given position must obtain a prior labour clearance from the MOM, which requires the employer to demonstrate that: (i) qualified Omanis are not sufficiently available for the relevant post; and (ii) the employer has achieved the minimum Omanisation percentage for its sector.

In contrast, companies that exceed the target Omanisation percentage for their sector are entitled to preferential treatment when it comes to obtaining labour permits for additional expatriate employees.
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Singapore

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General labour market and litigation trends

The employment landscape in Singapore is a unique one, based on the concept of ‘tripartism’, which is a partnership between employer organisations, trade unions and the Singapore government to promote the adoption of fair and responsible employment practices.

More particularly, the tripartite partners consist of the Ministry of Manpower, the National Trades Union Congress and the Singapore National Employers Federation. Together, they establish tripartite guidelines which supplement labour law in Singapore and which come under the purview of the Tripartite Alliance for Fair Employment Practices (“TAFEP”).

Aside from tripartite guidelines, the tripartite partners also establish ‘tripartite advisories’ (which outline progressive workplace practices for employers to adopt) and ‘tripartite standards’ (which help organisations with good practices distinguish themselves).

The Ministry of Manpower is empowered to take action against errant employers for non-compliance with tripartite guidelines and employment law-related statutes.

As a starting point, the key employment-related statute in Singapore is the Employment Act (Cap. 91) (“Employment Act”). The Employment Act sets out basic employee rights and contractual minimums for all employees in Singapore except for:

• Managers or executives with a monthly basic salary of more than $4,500. It is to be noted that the Employment Act is going to be amended come April 2019. From April 2019, it is contemplated that the salary cap of $4,500 would be removed.
• Seafarers.
• Domestic workers.
• Statutory board employees or civil servants.

Under the Employment Act, if a term of the employment contract is less favourable to an employee than those prescribed in the Employment Act, that term shall be illegal, null and void to the extent that it is less favourable. Further, Part IV of the Employment Act extends additional basic employee rights and contractual minimums to more vulnerable classes of employees, namely those who either (i) earn a monthly basic salary not exceeding $2,500 (to be increased to $2,600 come April 2019), or (ii) are ‘workmen’ who are involved in manual labour and earn a monthly salary not exceeding $4,500 (“Part IV Employees”). There is no minimum wage concept implemented in Singapore.

An important facet of labour law in Singapore is the Central Provident Fund (“CPF”), which is a comprehensive social security system that enables working Singapore Citizens and Permanent Residents to set aside funds for retirement. Under the CPF scheme, employees and employers make mandatory monthly CPF contributions at rates established by the CPF Board.
Foreign employment is heavily regulated under the Employment of Foreign Manpower Act, with various types of work passes issued to different classes of employees. While CPF contributions are not required for foreign employees, a foreign worker levy and quota may be imposed for certain classes of foreign employees.

As for retirement, while the statutory retirement age is 62, up to 65 in the first instance, all employers must offer re-employment to eligible employees up to the age of 67 and also comply with the Tripartite Guidelines on Re-employment of Older Employees.

Apart from the Employment Act, there are other important sources of labour law, such as those regulating workplace safety, workplace injuries and foreign manpower, found in the following statutes and tripartite guidelines:

- Central Provident Fund Act (Cap. 36).
- Child Development Co-Savings Act (Cap. 38A).
- Employment of Foreign Manpower Act (Cap. 91A).
- Industrial Relations Act (Cap. 136).
- Personal Data Protection Act 2012.
- Retirement and Re-employment Act (Cap. 274A).
- Trade Disputes Act (Cap. 331).
- Trade Unions Act (Cap. 333).
- Workplace Safety and Health Act (Cap. 354A).
- Work Injury Compensation Act (Cap. 354).
- Tripartite Guidelines on Issuance of Key Employment Terms in Writing.
- Tripartite Guidelines on Re-employment of Older Employees.
- Tripartite Guidelines on Expanding the Scope of Limited Representation for Executives.

While employment litigation in Singapore appears to be increasing, mediation for smaller salary-related claims can be requested to be conducted at the Tripartite Alliance for Dispute Management, with an Employment Claims Tribunal set up as a fast and low-cost dispute resolution forum to resolve such salary-related disputes (whether under statute or contract), alongside the Court process. The Ministry of Manpower also typically refers unfair dismissal disputes brought under the Employment Act for mediation with the aim of reaching a fair and amicable settlement.

The Employment Claims Tribunal has jurisdiction to hear claims up to S$20,000 or S$30,000 (via the Tripartite Mediation Framework or mediation assisted by unions recognised by the Industrial Relations Act), although parties are required to attempt mediation with the Tripartite Alliance for Dispute Management beforehand. Under this process, a signed settlement agreement reach by parties may be registered with the Singapore Courts for enforcement purposes. Lawyers are not allowed to represent any party in proceedings before the Employment Claims Tribunal. From April 2019 onwards, the Employment Claims Tribunal will also be able to hear eligible unfair dismissal claims under the Employment Act as well. Since the launch of the Employment Claims Tribunal in April 2016, there were 1,190 claims filed in the first year of its operation and this number is expected to increase.

In terms of employment litigation trends, we expect that when the Employment Act has general application, this may bring an increase in wrongful termination claims. This is because the Employment Act contains a specific provision allowing employees to challenge the termination of their contract. The term ‘dismissal’ includes a situation where the
employment was terminated (whether for misconduct or otherwise) and will be extended from April 2019 onwards to instances where the employee has been ‘forced’ to resign because of any conduct or omission engaged in by the employer.

**Redundancies, business transfers and reorganisations**

In Singapore, redundancies, business transfers and reorganisations are generally subject to contract.

There is no statutory process for redundancies under the Employment Act. The Industrial Relations Act also excludes an agreed process for redundancies in collective agreements with trade unions. While the quantum of retrenchment benefits (if any) may be agreed upon in the employment contract or collective agreement, the Employment Act disentitles Part IV Employees who have worked for two years or less from being entitled to retrenchment benefits (if any).

That said, the Tripartite Guidelines for Fair Employment Practices requires (i) the selection of employees for retrenchment to be based on objective criteria, (ii) for the retrenchment exercise to be carried out in consultation with the trade union (if the employer is unionised), or with the employees affected (if the employer is not unionised), and (iii) reference to the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment for alternatives to avoid or minimise the need for retrenchments.

Separately, under the Tripartite Guidelines on Mandatory Retrenchment Notifications, employers who employ at least 10 employees are legally required to notify the Ministry of Manpower if five or more employees are retrenched within any six-month period.

As for business transfers and reorganisations, employees covered by the Employment Act have a legal right to: (i) receive notification of the transfer and related matters to the transfer; (ii) enjoy no break in employment during the transfer; (iii) consult the employer; and (iv) receive the same terms and conditions of employment under the new employer, failing which either party has the right to terminate the employment with notice if new terms cannot be successfully negotiated.

While trade unions may consult with the employer prior to the business transfer, the Industrial Relations Act prevents trade unions from objecting under a collective agreement insofar as the transfer does not entail a detrimental change to the employee’s terms of employment. Once the business transfer is completed, the new employer will also have to take over the previous employer’s rights, powers, duties and liabilities which are part of any contract or agreement with the employees’ trade union before the transfer.

**Business protection and restrictive covenants**

In Singapore, restrictive covenants are generally *prima facie* unenforceable unless the employer is able to show that it has a legitimate proprietary interest to be protected by the restricted covenant. In addition, the employer must also show such covenants are reasonable. This is a two-step process.

First, the Court will determine what the employer’s legitimate interests are (if any). In this regard, Singapore courts have accepted the following as ‘protectable legitimate interests’ that merit protection in appropriate circumstances:

- trade secrets;
- trade connections; and/or
- workforce stability.
Typically, the protectable legitimate interest is either stated in the employment agreement or inferred by the Court based on the surrounding circumstances (if unstated). The Court will also consider the position and seniority of the particular employee in question and may give greater weight to the employer’s interests depending on the employee’s role in the organisation.

Second, the Court will then determine whether the covenant, as drafted, does not go further than is necessary to protect such interests. In this regard, the scope, area and duration of restraint should be co-extensive with the protection of the legitimate interests of the employer, and the clause must be reasonable both in the interests of the parties concerned, and in the interests of the public.

To determine these two points, the Court will generally consider the duration, subject matter scope, and geographical range of the restrictive covenants, as well as the existence of confidentiality clauses, negotiations/additional payments between parties and public interest considerations. No one factor is decisive, and, in each case, the Court will examine all the circumstances as a whole and decide accordingly.

As for confidentiality obligations, duties of confidence may be express or implied, depending on the circumstances. While there is no general duty of good faith presently recognised under Singapore law, it is generally implied that an employee will serve his employer with good faith and fidelity during the employment.

**Discrimination protection**

Article 12 of the Constitution of the Republic of Singapore guarantees equal protection against discrimination towards Singapore citizens on the ground of religion, race, descent or place of birth, but does not invalidate employment restrictions connected with the religious affairs or of religious institutions. Further protections against discrimination are found in the Sedition Act (Cap. 290) and to a lesser extent, in the Protection against Harassment Act (Cap. 256A). Elsewhere, age-related discrimination is prohibited under the Retirement and Re-employment Act, while pregnant mothers cannot be dismissed without sufficient cause during their pregnancy under the Employment Act or the Child Development Co-Savings Act.

Further, under the Tripartite Guidelines for Fair Employment Practices, all employers must implement fair employment practices that are open, merit-based and non-discriminatory. Selection criteria should be stated clearly in job advertisements and be primarily based on qualifications, skills, knowledge and experience. There are no statutory equal pay requirements in Singapore.

While there is no office of the ombudsman in Singapore, the Ministry of Manpower may take action against employers who do not comply with the Tripartite Guidelines for Fair Employment Practices, which may result in curtailment of work pass privileges of employers. Workplace discrimination or harassment, including discriminatory job advertisements or practices, may also be reported directly to the Tripartite Alliance for Fair & Progressive Employment Practices.

For completeness, the Ministry of Manpower implements a ‘Fair Consideration Framework’ (“FCF”), which requires employers to advertise job vacancies on an online jobs bank before it can apply to the Ministry of Manpower for employment passes. The purpose of the FCF is to set out clear expectations for companies to consider Singaporeans fairly for job opportunities and is part of the Singapore Government’s overall effort to strengthen the Singaporean core in the workforce.
Generally, this advertisement must be made at least 14 calendar days in advance, be open to Singaporeans and comply with the Tripartite Guidelines for Fair Employment Practices. If changes are made to the advertisement, the advertisement must be further extended for an additional 14 calendar days. An employer may be exempted from the FCF in limited scenarios, such as when the employer has fewer than 10 employees or when the proposed job pays a fixed monthly salary of at least S$15,000. In line with the FCF, employers with a disproportionately low concentration of Singaporeans at the professional, executive and managerial level compared to industry peers, or who are repeatedly subject to discrimination-based complaints may also be called upon to furnish information to the Ministry of Manpower.

Protection against dismissal

Under the Tripartite Guidelines on Fair Employment Practices, a decision to dismiss an employee should be based on documented poor performance or misconduct. An inquiry should be conducted to allow the employee to present his or her case before any decision is made with regard to dismissing the employee.

If an employee covered under the Employment Act considers that he has been dismissed without just cause or excuse by his employer, he may, within one month of the dismissal, make representations in writing to the Minister to be reinstated. If the employee is found to have been dismissed without just cause or excuse, the employer may be directed to reinstate the employee and pay all wages up to the time of reinstatement, or pay a determined amount of wages as compensation. From April 2019 onwards, unfair dismissal disputes under the Employment Act will be dealt with by the Employment Claims Tribunal instead, with the employer bearing the burden of proven that the employee was dismissed with just cause or excuse.

In addition, the current definition of ‘dismissal’ under the Employment Act will be widened in April 2019 – this presently refers to the termination of a contract of service by an employer, with or without notice and whether for misconduct or otherwise. It will be expanded to include resignations if the employee can show, on a balance of probabilities, that such resignation was not voluntarily but was ‘forced’ because of any conduct or omission engaged in by the employer. On this issue, there will likely be a new set of Tripartite Guidelines released in due course regarding wrongful dismissal and what constitutes the same.

Employed mothers also receive specific protections against dismissal, and cannot be dismissed while they are away on maternity leave. From April 2019 onwards, if a pregnant employee protected under the Employment Act or Child Development Co-Savings Act is dismissed by her employer for ‘sufficient cause’ and disputes this, she will have the right to lodge a claim with the Employment Claims Tribunal to challenge her dismissal and seek either reinstatement or compensation, with the employer bearing the burden of proving that she was dismissed with sufficient cause.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Generally, the majority of the statutory employment protection rights in Singapore may be found in the Employment Act. For those employees covered under the Employment Act (including Part IV Employees), these protections include the following:

- **Notice period:** The minimum statutory notice period is one day for employees who have worked for less than 26 weeks and up to four weeks’ notice for employees who have worked for five years or more.
- **Right to terminate by paying salary *in lieu of notice***: Employees also have the right to terminate their employment by paying salary *in lieu* of a notice period, as well as a right to have the same notice period for both employer and employee.
- **Salary deductions**: Employers are prohibited from making deductions from their employee’s salary except in specific scenarios set out under the Employment Act.
- **Holidays**: Employees are entitled to paid holidays on 11 gazetted public holidays. If the public holiday falls on a rest day, the next working day will be a paid holiday. If the public holiday falls on a day when the employee is not required to work, the employer must either pay the employee or give the employee a day off in substitution.
- **Sick leave**: Employees who have worked for at least three months are entitled to five days of paid sick leave and up to 15 days of paid hospitalisation leave, which may be reduced by employee’s consumed paid sick leave for that year. This gradually increases up to 14 days of paid sick leave and up to 60 days of paid hospitalisation leave after the employee has worked for at least six months. Employers are also generally required to bear the medical consultation fees for such employees who are placed on sick leave.

As for parental leave and rights, these protections are provided for under the Employment Act or the Child Development Co-Savings Act depending on whether the child is a Singapore citizen, and include the following:

- **Maternity leave**: Maternity leave is conferred on mothers who have worked for at least three continuous months prior to the day of her confinement, pursuant to the Employment Act or the Child Development Co-Savings Act.
  - Eligible mothers are entitled to 16 weeks of paid maternity leave for their first two children, which is equally borne by the employer and the Singapore Government. For their third and subsequent child, mothers receive 16 weeks of paid maternity leave which is fully paid for by the Singapore Government. Up to four weeks of such maternity leave may be shared with eligible fathers.
  - Eligible fathers are separately entitled to two weeks of government-paid paternity leave, which also applies to adopted children.
  - In addition, eligible parents are also entitled to six days of government-paid childcare leave and six days of unpaid infant-care leave under the Child Development Co-Savings Act.
  - Eligible mothers of adopted children are entitled to 12 weeks of adoption leave, which is partially government-paid. Up to four weeks of such adoption leave may be shared with eligible fathers.

- **Parents of Singapore citizens**: Maternity, paternity, government-paid childcare leave, unpaid infant-care leave and adoption leave is provided under the Child Development Co-Savings Act.
  - Eligible mothers of adopted children are entitled to 12 weeks of adoption leave, which is partially government-paid. Up to four weeks of such adoption leave may be shared with eligible fathers.

- **Parents of non-Singapore citizens**: Maternity leave is provided under the Employment Act. Eligible mothers are entitled to 12 weeks of maternity leave, of which the first 8 weeks are employer-paid for her first two children, and the last four weeks are unpaid. As for child-care leave, parents receive two days of such leave under the Employment Act.

Part IV Employees receive additional protection under the Employment Act, including the following:

- **Rest days**: Part IV Employees generally cannot be required to work more than six consecutive hours without a mandatory break and are entitled to at least a 45-minute break for meals if they are required to work for up to eight hours. They must also be provided with one rest day per week.
• **Working hours**: Contractual working hours of Part IV Employees are determined by contract and commonly range from eight to nine hours a day, depending on the length of the workweek. However, working hours are ultimately subject to a daily cap of 12 hours a day or limits over a continuous two-week or three-week period.

• **Overtime**: Overtime pay is mandatory and is payable at 1.5 times the hourly basic rate of pay, with Part IV Employees allowed to work up to 72 overtime hours monthly unless an exemption has been granted by the Ministry of Manpower. Overtime is also payable for work done on rest days, at either 1.5 times or 2 times the hourly basic rate of pay, depending on the work scenario.

• **Annual leave**: Under the Employment Act, Part IV employees who have worked for at least three months are entitled to a minimum of seven days of annual leave for their first year of service, which increases proportionately up to a minimum of 14 days in their eighth and subsequent years of service. We would highlight that the entitlement to annual leave would be moved from Part IV come April 2019, and would therefore be of general application to all employees covered under the Employment Act.

**Worker consultation, trade union and industrial action**

In Singapore, trade union activities and industrial action are regulated under the Trade Unions Act, Industrial Relations Act and Criminal Law (Temporary Provisions) Act (Cap. 67) (“CLTPA”).

Trade union membership generally consists of ordinary members and general members. Ordinary members are typically those whom the trade union is granted recognition over during the collective bargaining process. Typically, the trade union will then represent its ordinary members in wage negotiations and workplace issues, whereas general members generally do not enjoy such representation rights.

In order to represent its members in collective bargaining, a trade union must first be accorded recognition by the employer under the Industrial Relations (Recognition of a Trade Union of Employees) Regulations. Once recognition has been accorded by the employer over a specified class of employees, the employer and trade union will then have to commence negotiations to enter into a collective agreement in respect of that class of employees, which is valid for a minimum period of two years and a maximum period of three years.

However, the Industrial Relations Act excludes certain matters from negotiation such as such as promotion, transfer, employment, termination by reason of redundancy, dismissal and reinstatement of an employee or assignment of duties.

In the situation where the employer has only accorded recognition to a trade union over its non-executive employees or limited classes of executive employees only (i.e. those employed in a managerial or an executive position), excluded executive employees may be individually represented by the union for a limited set of matters, including dismissal, negotiating the retrenchment benefit quantum and disputes relating to a breach of contract.

That said, union representation does not extend to all ‘executive employees’, as executive employees who hold senior management positions, and exercise decision-making powers on employment and termination, are excluded from the recognition process under the Industrial Relations Act.

In the event of a trade dispute, such disputes are first to be resolved through a conciliatory process with the assistance of the Ministry of Manpower, and subsequently to the Industrial Arbitration Court for arbitration if the dispute remains unsolved.
While strikes or lock-outs are a rarity in Singapore, such activities are not prohibited under Singapore law. However, all strikes or lock-outs must adhere to the provisions of the CLTPA. Under the CLTPA, it is illegal to strike or lock-out employees in respect of essential services involving water, gas or electricity services. For non-essential services, the CLTPA requires 14 days’ advance notice to be given to the employer/employees of any such intended action and further notified to the Commission of Labour within three days, failing which the strike or lock-out will be deemed illegal.

**Employee privacy**

Employee privacy is not specifically protected under statute or common law in Singapore, but an employee’s personal data receives some protection under the Personal Data Protection Act 2012 ("PDPA"). The PDPA is a consent-based regime for the collection, use and/or disclosure of an individual’s personal data in Singapore.

Employers should generally obtain prior consent and inform employees of the purpose for the collection, use and disclosure of their personal data. This is typically achieved by inserting the appropriate term in the employment contract or establishing a relevant data protection policy. While exceptions for employers could apply in limited circumstances, such as for evaluative purposes (e.g. a job reference or performance records) or for managing or terminating the employment relationship, these are nonetheless restricted to what a reasonable person would consider appropriate in the circumstances.

Where workplace surveillance is concerned, in order to comply with the PDPA, employers who utilise Closed-Circuit Television Cameras ("CCTVs") should indicate in an accessible notice that CCTVs are operating on the premises, and state the purpose of the CCTVs (e.g. security). In addition, if the CCTVs deployed record both video and audio, employers should further indicate that both video and audio recordings are in place. However, they do not need to notify individuals of the precise location of each CCTV camera.

As for job applicants, while employers are not required to obtain the consent of job applicants when collecting their personal data which is publicly available or his/her business contact information, such job applicants have the right to obtain access and request corrections to their personal data, as well as to submit a request to be informed of the ways their personal data was used in the past year. As a means of conducting background checks on such applicants, some employers occasionally request job applicants to obtain a Certificate of Clearance from the Singapore Police Force at the pre-employment stage.

For completeness, while employers may potentially rely on the concept of ‘deemed consent’ under the PDPA (e.g. when the employee voluntarily provides his personal data for a purpose), the onus is on the employer involved to ensure that the employee was aware of the purpose for which his personal data would be collected, used or disclosed.

Separately, employers in Singapore typically do not require their employees to undergo mandatory health checks unless this is a legal requirement under workplace safety regulations. In this regard, employers have a legal duty to send their employees engaged in specific hazardous occupations for pre-placement and periodic medical examinations (depending on the type of hazardous exposure).

**Other recent developments in the field of employment and labour law**

From April 2019, the Employment Act will be extended in scope to include all employees, including all professionals, managers and executives regardless of their salary. This would be the widest expansion of the Employment Act in its history.
However, the protections under Part IV of the Employment Act remain available only for a narrower section of employees (i.e. the Part IV Employees). That said, the number of eligible Part IV Employees in Singapore will be increased, as the eligible salary threshold will be increased from $2,500 to $2,600.

Dispute resolution will also be better streamlined from April 2019 onwards, with all unfair dismissal claims initiated pursuant to the Employment Act (which is presently adjudicated by the Ministry of Manpower) and the Child Development Co-Savings Act will be transferred to the Employment Claims Tribunal, as a ‘one-stop’ solution for the hearing of both salary and unfair dismissals at the same time. We expect employees would still be able to elect whether they want their claims determined by the Employment Claims Tribunal or through the civil courts.

Retrenchment is also expected to receive heavier scrutiny, as there are forthcoming legislative amendments which will require employers to furnish specific information to the Commissioner of Labour on the retrenchment of any employee.
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Spain

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Employment protection of false self-employment: resolutions regarding so-called riders

For the first time in our jurisdiction, an Employment Court has analysed the nature of the provision of services of a rider of Deliveroo, a British delivery company operating in Spain. This ruling has declared that these riders are falsely self-employed, that is to say, they are Deliveroo’s employees.

The Tribunal considers that it had been evidenced that the provision of services complies with the requirements that the Spanish law requires in order for a worker to be deemed an employee. Due to this, the termination of the relationship by the company’s decision has been declared an unfair dismissal and, therefore, the company has been obliged to choose between reinstating the employee or paying him/her the statutory compensation for unfair dismissal.

Amongst others, the Court has taken into account the following elements: (i) the company gives instructions to the riders; (ii) the conditions of the services are decided by the company because the rider has to download its mobile application in order to work; and (iii) the need to register with another internal corporate application owned by Deliveroo. Also, the judge has stated that it had been proved that the company decides the place of the provision of services, the schedules and the work shifts.

On the contrary, another Employment Court has resolved that workers of another company in the same sector, Glovo, are not employees.

In this case, the judge has stated that the relationship of the company and the rider complies with the legal requirements of a so-called “TRADE”. This is a Spanish term which means “economically dependent self-employed worker”. Thus, the judge has considered that Glovo’s riders are not employees, but a kind of self-employed, due to the following arguments: they do not have fixed working hours; there is no need to justify absences; they have absolute control over the orders; they have responsibility before clients; and the working tools are the riders’ property.

Nursing leave: men are entitled to use this right while women are on maternity leave

As a general rule, nursing leave cannot be enjoyed at the same time as maternity or paternity leave. However, this incompatibility only applies when one of the parents wants to use both rights simultaneously.

Therefore, and according to a recent ruling of the National Court dated 19th July 2018, if the mother is on maternity leave, the father can enjoy nursing leave at the same time, and vice versa.
In this ruling, the Court analysed whether or not it is legal for employers to refuse fathers’ formal requests to enjoy their nursing leave once their paternity leave is finished, and the mother is on maternity leave by the time of the request, because the sixteenth week after the birth of the child has not concluded.

In this analysis, the Court settled that this refusal by the employer based on the aforementioned grounds entail an obstacle for the mother’s right to share their maternity leave with the father, and also a limit on the exercise of paternity rights protected by the law, in the terms foreseen in article 48.4 of the Workers Statute. Therefore, the Court considered that Spanish law allows both parents to jointly care for their children in a very complex and demanding period of their lives, stating that another conclusion would be clear discrimination, which violates not only the Workers’ Statute, but also the Spanish Constitution’s fundamental provisions.

New judicial interpretation of the employees’ right to two days of paid leave in the event of the hospitalisation of a close relative

During 2018, employees’ leave and permits regulated in the Workers’ Statute have been one of the main topics in Spanish case-law. Therefore, as was the case with nursing leave as explained above, employees’ right to two days of paid leave in the event of the hospitalisation of a close relative has been also analysed by the National Court, particularly in its ruling of 26th July 2018.

When we refer to the term “hospitalisation”, we do not identify it as a scheduled and punctual visit to a hospital, as it is clear that this term entails a certain submission by the patient to hospital life. The same conclusion can be drawn from Royal Decree 1030/2006, which establishes a portfolio of common services provided by the National Health System, which states that specialised health care can be provided: (a) in a scheduled visit; or (b) through a hospital admission with an overnight stay.

The interpretation of the term “hospitalisation” mentioned above is crucial, according to the ruling of the National Court of 26th July 2018, in order to understand and clarify which situations are included in employees’ right to enjoy two days of paid leave in the event of the hospitalisation of a close relative, foreseen in article 37.3.b) of the Workers’ Statute. Therefore, the Court concluded that, when article 37.3.b) regulates this paid leave, it refers to situations in which the close relative stays overnight in a hospital. This conclusion was reached since the only case that gives the right to enjoy this paid leave, even if the close relative does not have to stay overnight in the hospital, is specifically foreseen in the Workers Statute, which is the case of a surgical intervention of a close relative.

The Constitutional Court has declared that the fact that the duration of paternity leave is shorter than maternity leave is not discriminatory

In the case of childbirth (biological maternity), the main aim of the legislator is the protection of the health of working women, by means of the benefit for maternity, which is intended to replace the loss of earnings of working women during this period of rest. Paternity leave is different, and has a different purpose, which is the support for the conciliation of personal, family and working life, promoting the co-responsibility of mothers and fathers in childcare. The Tribunal states that the difference of duration of these leaves and benefits does not infringe the principle of equality before law because the situations are different.

Motherhood, pregnancy and childbirth are biological facts of obligatory protection, derived directly from Article 39.2 of the Spanish Constitution, which refers to the integral protection of mothers. Thus, advantages for women cannot be considered discriminatory for men.
The Court emphasises the need to analyse the scope of the measures guaranteeing maternity and their negative impact on the equal treatment of women in the labour market. In this respect, although these measures may provide a relative guarantee for women already in the labour market, they are undoubtedly a clear barrier to entry for those who are outside and an obstacle to the promotion of those who are inside.

**The Supreme Court has rectified its doctrine regarding transfer of undertakings:** although the collective bargaining agreement states the contrary, the new company is liable for the debts of the transferor according to Article 44 of the Workers’ Statute.

There is a transfer of undertakings within the meaning of Article 44 of the Workers’ Statute if, within the succession of contracts, there is a transfer of an economic entity between the companies, provided that this economic entity retains its identity after the transfer.

In activities where the workforce is an essential factor, there should be subrogation of the staff if a relevant part of the personnel assigned to the contract is assumed (in terms of number and skills). When this happens, the provisions of Article 44 apply.

The fact that the assumption of a relevant part of the workforce derives from the provisions of the collective agreement cannot imply that the subrogation (with assumption of the rights and obligations of the outgoing employer) is not effective. Therefore, in accordance with a recent decision of the European Court of Justice (case C-60/17, Somoza Hermo), the new employer is liable for the debts of the previous employer (jointly and severally) under the terms of Article 44 of the Workers’ Statute.

**An employee cannot be dismissed for unfair competition based on the competition of the employee’s external activity with the activity of another company of the group, if it does not compete with the specific activity of his/her own employer – Ruling of the High Employment Court of Madrid**

The High Court of Justice of Madrid has ruled that the duty of loyalty cannot imply the imposition of limitations on the worker’s external activity on the basis that this activity is not in accordance with the interests of another company of the group. Given that the company group in the case was not a group of companies for labour purposes, the employer’s liability for its workers’ labour debts cannot be extended to the rest of the companies in the group. Therefore, the private activity of the employee cannot be limited according to the interests of a company that is not his/her employer. Thus, the dismissal was declared unfair because it did not have justified disciplinary grounds.

**The Supreme Court has clarified its doctrine regarding compensation for termination in fraudulent successions of temporary contracts**

In this case, the compensations corresponding to workers who had been hired under a series of fraudulent temporary contracts were analysed. If the temporary contracts are fraudulent, this means that the employment relationship is indefinite. The workers received the statutory severance pay at the end of each fixed-term contract.

The Supreme Court has changed its doctrine and understands that compensation for termination is possible, but only with respect to the last of the temporary contracts, because the final termination of the relationship between the parties is not due to the regular expiry of the last temporary contract, but an unfair dismissal, for which the legislator foresees a higher and specific compensation. This compensation includes the period of provision of services
corresponding to the same contract. The employee cannot be granted the corresponding compensation for two different reasons: unfair dismissal; and termination of the temporary contract.
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General labour market and litigation trends

The so-called “Swedish model” used to describe Swedish employment law comprising an employee-protectionist system based not on legislation but on collective agreements and a strong presence of various workers’ unions is still valid today. Swedish employment contracts are generally governed not only by various employment legislation and contract law, but also supplemented by collective agreements relevant to a specific industry. For example, there is no law governing minimum wage in Sweden. However, a minimum wage is generally provided by the applicable collective agreement, de facto setting a minimum wage for the industry in question.

Collective agreements and the influence of workers’ unions are difficult matters to avoid when conducting business that require personnel in Sweden. The workers’ unions are industry-specific and very rarely compete with other unions about members, as there is usually just one for each sector. Thus, the influence of these few workers unions is strong. In 2018, 70% of the workforce in Sweden were members of their industry-specific workers’ unions, that in turn exert influence over the working conditions for Swedish employees by being party to the collective agreements. When dealing with employment situations in Sweden, it is of the utmost importance to be aware of the applicable collective agreement as the provisions therein can sometimes be given priority over otherwise compulsory legislation.

A concern regarding how EU legislation may threaten the Swedish model has been raised on numerous occasions since Sweden’s entry into the Union in the 1990s, but has yet to be realised.

Redundancies, business transfers and reorganisations

As a general rule, an employer in Sweden has the right to reorganise its business as it sees fit. A reorganisation may have an impact on the workforce and, as a result, the employer may need to dismiss redundant employees. A redundancy situation as a result of a reorganisation is generally considered as a “just cause” (a legal requisite) for the dismissal of employees under Swedish employment law. There is generally no burden of proof for the employer to prove redundancy. The right to dismiss employees on the basis of redundancy is, however, not without its conditions.

First of all, there cannot be a “just cause” for dismissal because of redundancy if it is deemed reasonable that the employer gives the employee a replacement offer for another position within the organisation. A replacement offer can generally only be presented if the employee is already qualified for the position, in practice requiring that the employee is qualified enough to perform in accordance with the demands of the new position within four to six
months after moderate, on-the-job, training. In other words, the reallocated employee should perform as well as would be expected of a new hire for the same position.

If there are no suitable vacant positions, or if it is not reasonable for the employer to offer the employees any of the open positions within the organisation, the employer may proceed with dismissing the redundant employees. During the dismissal procedure, the employee must adhere to a certain order. This order is called the “last-in-first-out” principle and entails that the last hire must be the first to be dismissed in the case of a reorganisation. The purpose of this principle is to protect employees with seniority and to prevent the employer from using a reorganisation as a pretext to terminate certain employees. Please note that there are exceptions to this principle; for example, for employees with special competences as well as for smaller businesses.

Recent developments have shown a shift from strong employment protection to a focus on the right for companies to reorganise their businesses at their own discretion. In the Labour Court’s judgment AD 2016 no 53, an employee had accepted a replacement offer for a position with a lower salary but argued to keep the higher salary until the expiry of the notice period as set forth in the employee’s employment agreement. The employee argued that the acceptance of the replacement offer had been involuntary and, as such, was to be considered as a de facto dismissal with a notice period attached thereto. The employer, on the other hand, wanted to implement the conditions attached to the new position directly after the transfer into the replacement position had taken effect. The Court stated that the objective of replacement offers is to protect the employees’ right to employment, not to protect the right to certain conditions attached to a particular position that had been made redundant. A replacement offer of a position with a lower salary cannot automatically be considered as a dismissal.

A replacement offer may be considered to be a de facto dismissal when there is no objective, just cause for the dismissal in the first place. This was the case in the Labour Court’s judgment AD 2012 no 16, wherein a municipality gave youth workers the alternative of either taking a 25% leave of absence for a period of two years, or to accept an employment of 75% of full-time. The employees were also notified that they would be dismissed if they did not accept one of the alternatives. The Court concluded that since the municipality had not given the employees replacement offers of other full-time positions within the area, there was no just cause for the dismissals. In this regard, it is important to note that public entities more often than not have the possibility of transferring employees to other positions that would qualify as reasonable replacement offers. Private companies, especially small and medium-sized enterprises, are not under the same scrutiny to find reasonable replacement offers in cases of redundancy.

In redundancy cases, a dismissed employee who has been employed by the company for at least 12 months has the right to re-employment should a new position become available. The right to re-employment lasts for a period of nine months calculated from the end of the applicable notice period. It has yet to be tried whether a former employee preserves the right for re-employment if the former employee previously declined a replacement offer. Some argue that the employee should not be able to decline a replacement offer, only to have the right to re-employment when a better job offer is made available. Others argue that since the right to re-employment only materialises when there has been a dismissal, the right to re-employment is intact even for employees who decline replacement offers.

It should further be noted that redundancy always takes precedence over dismissal or termination for personal reasons. If there is a redundancy situation, the employee cannot
protect his or her employment by claiming that the redundancy is a pretext by the employer for a dismissal for personal reasons. However, if there is a dispute regarding the cause for dismissal, the employer must be able to show redundancy. As exemplified in AD 2017 no 7, in which a company dismissed an employee citing redundancy only four days after he had applied for paid paternity leave, an employer cannot simply state redundancy to avoid the requirement of “just cause”. The Labour Court stated that if there is a suspicion of so-called “forged redundancy”, the employer has the burden of proof to show that there was actual redundancy. This is particularly the case when the employee has requested a leave of absence to which the employee has a legal right. In this case, the Court concluded that the redundancy was forged, and the company was obligated to pay damages to the employee. A business transfer as defined by Swedish employment law, i.e. the transfer by a company, a business or part thereof, from one employer to another, has the same meaning as provided by EU 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. In the event of a business transfer, the new employer takes over all the previous employer’s rights and obligations with regard to the employees (unless the employee opposes being part of the transfer, which must then be communicated to the new employer within a reasonable time).

**Business protection and restrictive covenants**

The principle of loyalty between contracting parties is always an implied term within contracts under Swedish law. This principle becomes perhaps most applicable on employment contract wherein the parties’ relationship is over an extended period of time. The parties are expected to act in a loyal manner towards each other for the entire duration of the employment relationship, i.e. from the signing of the employment contract until the end of the notice period.

In accordance with the Swedish Act on the Protection of Trade Secrets, the loyalty can under certain circumstances be extended beyond the duration of the employment, obligating former employees not to reveal nor take advantage of information they became privy to during their employment. Many employers wish to extend this loyalty further than provided by law and on their own terms through restrictive covenants, e.g. through non-competition and non-solicitation clauses.

As restrictive covenants present a conflict of interests between the employer and the employee, the practice of the courts has been to interpret non-competition clauses restrictively to the benefit of the employee as the weaker party of the contractual relationship. The legislator has also recognised the potential issues with restrictive covenants in employment relationships and there is a specific provision within the Swedish Contracts Act wherein it is stated that employees are not bound by non-competition clauses “to the extent that the commitment goes beyond what can be considered as reasonable”. To decide whether or not a non-competition clause is “reasonable”, the courts will take the following into consideration: 1) the time period for which the non-competition clause is in effect; 2) the damages payable to the employer were the employee be in breach; and 3) other circumstances relevant to the individual case (i.e. the position the employee has had within the company, if the employee has been properly compensated to offset the effects of the non-competition clause, etc.).

Recently, there has been two cases in the Labour Court (October 2018) regarding the application of non-solicitation clauses: AD 2018 no 61; and AD 2018 no 62. Both cases concerned a computer game development company and its former employees, who the
company accused of trying to recruit former colleagues in breach of the non-solicitation clause. The company requested that the District Court through an interim judgment place a prohibition sanctioned by a fine upon its former employees citing a non-solicitation clause in the employment contract as a ground for the claim to be secured by the District Court. The District Court granted the injunction and the former employees appealed the interim judgment to the Labour Court. The Labour Court stated that the former employees’ personal relationships with former colleagues were not equal to trade secrets or such company-specific knowledge that non-solicitation clauses have the purpose to protect. Further, relationships with colleagues are not the same as relationships with customers or clients, which the company has a legitimate interest to protect through restrictive covenants.

However, the court stated there is a legitimate interest for the company that its employees are not recruited in connection with the former employee leaving, as this employee may have an advantage over other competitors when recruiting employees during the notice period or a short time thereafter. Therefore, it is considered reasonable to have a non-solicitation clause in place during the time of the former employee’s transition. Having said that, the Labour Court still concluded that the specific non-solicitation clauses in these cases were unreasonable as the non-solicitation clauses prohibited the recruitment of all personnel from the company by the former employees, including administrative staff and employees employed after the former employees had left the company. Furthermore, the non-solicitation clause did not only concern the active recruitment of employees from the company, but also a prohibition for the other company to employ employees that, on their own accord, sought employment. Formerly, non-solicitation clauses have been considered to be applied without any consideration of whether or not it is within the employer’s legitimate interest. The precedence given through both these cases is that it is not only with regard to non-competition clauses the company has to have a legitimate interest, but the same is applicable to non-solicitation clauses. The cases thus mean that many companies in Sweden should review their templates for non-solicitation clauses to ensure that they can be enforceable under Swedish law.

**Discrimination protection**

The Swedish Discrimination Act (Sw. *Diskrimineringslagen*) is a fusion of several previous acts concerning various forms of discrimination, as well as the product of several EU Directives. As such, the judgments by the EU Court concerning cases of discrimination must be taken into account whilst applying the Discrimination Act. The Discrimination Act protects individuals from both direct and indirect discrimination.

While direct discrimination is quite straightforward and easily recognisable, indirect discrimination is more difficult to establish. Indirect discrimination is discrimination that comes from applying a rule, a policy or a practice that seems neutral, but *de facto* results in certain groups of people being discriminated. Recently, the Labour Court ruled on a case of indirect discrimination after a company refused to hire a Muslim woman as an interpreter after she declined to shake the interviewer’s hand during the interview due to her religious conviction. Instead, she greeted the interviewer by smiling and placing her hand over her heart whilst explaining to the interviewer that she was religious. The interviewer abruptly ended the interview, stating that the woman was not suitable for the job. The company referred to their company policy, which stated that the employees shall shake hands. The Labour Court concluded that the woman had been discriminated on grounds of religion by the company’s policy, stating that while a company is free to have a policy for how its employees should greet each other and others, the purpose thereof must be in proportion to
what is required. Although a policy regarding how the employees are expected to greet other people may have a purpose of creating equality between the genders in the workplace, it may be disproportionate if it discriminates someone’s religious beliefs. Through comparing this case with a notable case regarding a midwife who refused to perform abortions (whose claim was denied by the Labour Court), one can draw the conclusion that when two grounds for discrimination are in collision, the requirements of the employment are key to determining whether or not religious beliefs will prevail as a reason not to conform with the employer’s instructions. In this case, the company was obligated to pay the woman SEK 40,000 in damages for indirect discrimination.

In the workplace, there are several measures employers have to undertake to avoid discrimination. Most notable is the recent legislation which increased the demands of the active actions the employer must take against discrimination. This legislation came into effect on 1st January 2017. Before, such active actions were only connected to certain types of discrimination, namely gender, ethnicity and religious beliefs. Now the employer has to take active actions regarding all seven grounds for discrimination set out in the Act: gender; gender identity; ethnicity; religion; disability; sexual orientation; and age.

Other news includes a responsibility for the employer to establish and keep a pay survey to ensure the workplace is not discriminatory. Basically, a pay survey is a list of the employees’ respective salaries which should be kept as a record regarding equal pay. Furthermore, the requirement of active actions also includes that documentation must be kept of how the employer is working to ensure that there are no discriminatory elements in the workplace. This documentation is to be ongoing and updated. If an employer fails to adhere to the documentation obligations of the Act, the employer will be sanctioned with a fine. Formerly, such sanctions were under the discretion of the Discrimination Ombudsman (Sw. Diskrimineringsombudsman) or the employee’s union. This development will have the effect that employers will be subjected to a much higher standard regarding actions against discrimination and the legislation will demand that more resources be put into such measures. Effects of the Act are, among others, that the employer may have to arrange that the employees have vacation during certain religious holidays and use formal and open recruitment channels. The rules also include instructions of how the active actions against discrimination should be carried out: explore; analyse; amend; and follow-up.

**Protection against dismissals**

Redundancy and termination for personal reasons are the only “just causes” for dismissal under Swedish law. Termination for personal reasons, however, covers a broader spectrum than redundancy and includes all possible issues relating to the employee. Unlike redundancy, termination for personal reasons or immediate dismissal demand that the employer present evidence to establish a just cause. Under Swedish law, legislation differentiates between “termination” and “immediate dismissal”. Immediate dismissal means that the personal reasons for which the employer no longer wishes to have the employee employed are so serious that the employee is dismissed without a notice period. Immediate dismissal is a very serious matter under Swedish labour law and such an action requires the employer to show that the employee is guilty of grave misconduct. Termination for personal reasons is also only allowed in a situation of misconduct on behalf of the employee, but the misconduct is not so grave that the employee should not be permitted to continue to work during the notice period. Both termination and immediate dismissal must, regardless of what issues the employer has with the employee, be based on objective reasons.
A case which demonstrates the demarcation between a termination and an immediate dismissal is AD 2017 no 1. The situation was as follows: an employee had been hired as a security guard but did not comply with the instructions given by the employer, despite receiving a warning regarding his conduct. The employee, according to the employer, also turned up late for work and displayed aggressive behaviour towards his employer. The Labour Court tried the case and found that there was no just cause for the employer’s immediate dismissal of the employee, although there was just cause for termination. As a result of the wrongful immediate dismissal, the former employee was awarded damages from the employer in the total amount of SEK 86,200.

For both terminations and immediate dismissals, the personal reasons that constitute the ground for the termination must have been known to the employer for less than two months. This means that a termination or immediate dismissal can never be based solely on events which occurred more than two months prior to the employer taking action. If the reason for the termination is recurring (frequently arriving late, for instance) and at least one of these events has taken place within the two-month time frame, then the employer may also base its decision on such misconduct that has taken place outside of the two-month limit.

For example, grounds for termination may be lack of cooperation, serious lack of competence, criminal actions conducted within the framework of the employment and similarly disruptive behaviour. In these cases, it is important for the employer to keep a record of the employee’s behaviour, as the employer carries the burden of proof that misconduct has taken place. In regular termination cases, the employee must be given at least a one-month notice period. Please note that this period may be up to six months depending on the duration of employment. If the employee is a member of a workers’ union, the union must also be given notice of the dismissal. If either the employee or the union objects to the notice, the employer must engage in negotiations before proceeding with the termination.

It is further relevant to discuss the difficulties related to the termination or immediate dismissal of an employee within the public sector, even when they give voice to less than democratic opinions. There are several cases exemplifying this. In the case AD 2007 no 20, a police officer had, through email correspondence with two people working in the municipality, made statements that included both political and racist content. The police officer in question was dismissed, yet the Labour Court found that there had been no objective ground for dismissal as the officer had only made use of his constitutional right to freedom of speech.

Please note that the rules and regulations regarding termination for personal reasons are complex under Swedish law and usually require expert legal advice.

**Statutory employment protection rights**

Under Swedish law, employees are entitled to, *inter alia*, holiday, parental and maternity leave and leave of absence for studies, taking care of a close relative, conduct another non-competing business for a limited period of time and also to test a new job due to long-term sickness.

The Annual Leave Act (Sw. *Semesterlagen*) is applicable to all employments, including part-time employees and interns. The only exception is if the employee is hired for a limited period of time, not exceeding three months. If that is the case, the employer and employee have the rights to make their own arrangement regarding the employee’s right to holiday in accordance with applicable contract law. The act stipulates five weeks of mandatory holiday per vacation year (1 April – 31 March) with or without pay depending on how long the employee has been employed during the previous year (earning year).
Under Swedish law, parents are entitled to a generous parental allowance, which is administered through the public insurance agency Försäkringskassan. Parental allowance is paid out for 480 days per child, whereof 60 days are individual for each parent and cannot be transferred to the other. The allowance amounts to 80% of the salary. In addition, maternal leave is granted during the pregnancy and in connection with childbirth under certain circumstances.

**Worker consultation, trade union and industrial action**

As mentioned above, the workers’ unions have a lot of influence over Swedish employment law. The applicable law centres around disputes between the employer and employee to be solved with the influence and involvement of the workers’ union. Under Swedish law, the parties to a dispute have to negotiate before taking any other action and the collective agreements always contain provisions with regard to industrial action, which usually entail that unsanctioned strikes are uncommon in Sweden.

The Co-Determination in the Workplace Act (Sw. Medbestämmandelagen) provides protection and transparency for employees in relation to their employers. Some of the Act’s most distinctive principles can be summarised as follows:

The employer has a responsibility to initiate negotiations with the workers’ union, so-called primary negotiations, before any decision which may have an impact on the employees is taken. In the event of a dispute, there are rules regarding the employee’s prevailing interpretation regarding their work duty and/or pay.

Another notable aspect is the existence of workers’ representatives on the board of directors in companies with more than 25 employees, which is regulated by the Representation for Employees in the Private Sector Act (Sw. Lag om styrelserepresentation för de privatanställda).

**Employee privacy**

Personal data is any data that can, directly or indirectly, identify a person. The General Data Protection Regulation (2016/679) (“GDPR”) entered into effect on 25th May 2018 and harmonises the processing of personal data within the European Union. The GDPR regulates almost all processing of personal data, including employers’ processing of their employees’ personal information. This entails that companies have to implement certain measures and procedures not only when dealing with third party personal data, e.g. clients/customer personal data, but that they also have to ensure they comply with the regulations of the GDPR for the processing of their employees’ personal data.

The processing of personal data must always have legal grounds. In the context of employment, the legal ground is mostly the employment agreement itself. It is important to bear in mind that human resource departments should start paying more attention to how they process the employees’ personal data and be more cautious with their data-processing routines. Special consideration should be given to personal data regarding matters such as health or union affiliation, as such type of information is deemed as “sensitive information” by the GDPR and must be handled with special care. All processing must be done in accordance with the general principles listed in Article 5 of the Regulation. Furthermore, information regarding former employees must be limited and records should not be kept without a legal basis for the processing thereof.
During recruitment procedures, companies should bear in mind that the processing of potential employees is not to be based on the same ground as actual employees as there is no employment agreement to speak of. Instead, the processing of personal data of potential employees is done on the basis of consent, which can be revoked by the data subject at any time. Further, the retention time should be limited to the time of the recruitment proceedings, i.e. it is recommended that the personal data of people who were not hired for the position is deleted as soon as possible.
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Introduction – General labour market and litigation trends

Overall, the economic situation in Switzerland is good. The unemployment rate is low at around 2.4%. Swiss GDP is high and increased by 0.6% in the first quarter of 2018. The leisure sector experienced strong growth, largely influenced by major international sports events that took place during the year.

Swiss employment law has not been considerably amended in recent years and remains relatively liberal. Nevertheless, there have been significant developments regarding the issues of arbitrability of domestic disputes, bonuses and protection against dismissal.

This chapter aims at covering significant recent developments in Swiss employment law and case law.

Legislative framework

The Swiss legal system is mostly based on statutory law. Employment matters are mainly regulated at a federal level, by the federal Constitution, federal laws and federal ordinances. Cantonal legislation (Switzerland is comprised of 26 cantons) covers limited employment law issues. Case law interprets and clarifies statutory provisions.

Swiss citizens may influence legislation through popular initiative (a way for citizens to amend the Constitution) or via referendum (decisions of the parliament submitted to the vote of citizens).

As Switzerland is not part of the European Union (hereinafter: “EU”), EU law does not bind Swiss Courts and has no direct effect on Swiss law. However, European law and case law can be taken into account when interpreting Swiss law.

Recent laws, regulations and ordinances

General Data Protection Regulation (EU) and the revision of the Federal Data Protection Act

The new General Data Protection Regulation (GDPR) entered into force on 25 May 2018 throughout the EU. The new rules consist of giving citizens more control over their personal data, increasing corporate accountability while reducing their reporting burden and strengthening the role of data protection authorities.

The GDPR is part of EU law and is therefore not directly applicable in Switzerland, but nevertheless it has a direct impact on a large number of Swiss companies. The GDPR can have an extraterritorial scope and is also applicable to companies outside the EU if they offer goods or services in the EU area or if they monitor the behaviour of data subjects within the EU.
In view of the entry into force of the GDPR, the Swiss Federal Council published a draft of the new Data Protection Act (DPA) on 15 September 2017. In October 2018, the draft was still being discussed in the Federal Parliament.

**Implementation of the initiative “against mass immigration”**

On 9 February 2014, the popular initiative “against mass immigration” was accepted by Swiss voters. The initiative proposed to add an article 121a to the Swiss Federal Constitution stating that the country “independently manages the immigration of foreigners”, by setting annual quotas according to the needs of the economy “in accordance with the principle of national preference”.

The Federal Parliament has since worked on the necessary laws to implement the new constitutional article. The main aim of the reform was to promote the return of Swiss unemployed persons to work instead of hiring foreigners. The parliament strove nevertheless to ensure that the new laws were compatible with the agreement on free movement of persons in force between Switzerland and the EU.

In this context, the federal ordinance on employment service was amended in December 2017 with the amendment entering into force in July 2018. In a nutshell, the new provisions provide that, in job areas where the unemployment rate exceeds the threshold value (which is 8% until 31 December 2019 and 5% thereafter), employers must communicate vacant positions to the competent public employment service. Employers cannot publish these vacant positions elsewhere during a limited period of five days after the acknowledgment of receipt by the employment service.

**Current bills, popular initiatives and referendum**

**Whistleblowing**

In Switzerland, whistleblowing is not yet regulated by specific provisions. In labour law, the admissibility of whistleblowing is currently judged from case to case in the light of the general obligations of the employee, in particular the duties of loyalty and discretion.

In 2013, the Swiss Federal Council proposed issuing legal provisions determining more precisely how and on what conditions an alert can be given by an employee. In 2015, the Federal Parliament requested the Swiss Federal Council to amend and clarify several points, as the provisions drafted by the Swiss Federal Council seemed too complicated.

On 21 September 2018, the Federal Council submitted a revised version of the initial draft to the Parliament. In a nutshell, the Swiss Federal Council proposes procedures and rules to regulate whistleblowing, so that employees actually report to their superiors and authorities the irregularities they witnessed in their job. The draft that the Federal Council has sent to Federal Parliament defines precisely when a report to the employer, the authorities or the public is lawful.

**Paternity leave**

Under Swiss law, mothers benefit from a maternity leave of at least 14 weeks (some cantons provide 16 weeks’ maternity leave). However, Swiss federal legislation provides no paternity leave. Instead, new fathers may benefit from one or two days of leave based on general provisions of law. Some employers grant a few more days on a contractual or discretionary basis. Many new fathers use vacation days after the birth of their children.

An initiative will soon trigger a national vote on paternity leave. The initiative’s text requires paid paternity leave of 20 days, which can be taken at any time within one year of a child’s birth. The payments would amount to 80% of the individual’s salary. In June 2018, the
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Federal Parliament announced that it will recommend that the people and cantons reject the initiative. Nevertheless, a commission of the Parliament is currently working on an indirect counter-proposal to the initiative which would provide for a paternity leave of two weeks.

**Recent case law developments**

**Limitation on arbitrability for domestic employment dispute**

In May 2018, the Swiss Federal Supreme Court judged the case of the dismissal with immediate effect of an employee, who was a football club coach.

The civil court of Basel-City awarded this employee damages and compensation due to wrongful dismissal based on article 337c of the Swiss Code of Obligations (CO). The football club filed an appeal with the Swiss Federal Supreme Court. The club referred to the arbitration clause contained in the employment contract providing for the jurisdiction of the Court of Arbitration for Sport (CAS), and submitted that the state court had lacked jurisdiction to render a decision on the matter.

The Federal Supreme Court affirmed the jurisdiction of the Basel civil court and dismissed the appeal. The Federal Supreme Court confirmed that the validity of arbitration clauses in employment contracts is not all-encompassing. Contrary to international matters (where, according to article 177 of the Swiss International Private Law Act, all disputes involving financial interests are arbitrable), domestic disputes can only be subject to an arbitration agreement if the parties can freely dispose of the claims in question (article 354 CPC). The parties cannot freely dispose of mandatory employment law claims under article 341 CO, which include claims related to the mandatory protective provisions for wrongful dismissal. Such claims can only be subject to an arbitration agreement one month after the termination of the employment by way of a separate agreement.

In the present case, the parties had not concluded such *post hoc* arbitration agreement. Hence, the claims for wrongful dismissal were not arbitrable. Furthermore, the Federal Supreme Court held that it is impermissible to bypass the limitation on arbitrability for domestic employment dispute by opting for the rules on international arbitration to govern the arbitration agreement in domestic employment matters.

**Qualification of the contract**

The distinction between dependent activity and independent activity is not always easy to define. In recent case law, different trends were observed from a social security perspective and from an employment law perspective.

The Swiss Supreme Court was recently requested to determine if taxi driver members of a cooperative operating a central taxi service should be viewed as independent or dependent (employees) from a social security point of view. The Swiss Supreme Court found that taxi drivers should be in principle considered as dependent if they are affiliated with a central taxi service. On the other hand, they should be viewed as independent when they bear an economic risk and do not depend to a large extent on the mission provider in the organisation of their work. In the case at hand, the Court considered that there were many contractual obligations between the central taxi service and the drivers (such as the obligation to take basic training, continuing educational courses, a notice period in case of termination of the contract and the obligation to use the vehicle under the name of the central), which suggested a subordination relationship. The Federal Court considered, therefore, the taxi drivers to be dependent on the central taxi service despite numerous other elements, in particular: that the drivers were in principle free to refuse the missions announced by the central service; that
they were free in the organisation of their work; that they could recruit themself a significant part of the customers among the passers-by; that they bear the economic risk residing in the purchase of a vehicle; and that the income of the drivers depended on the result of their work. In May 2018, the Swiss Supreme Court had to determine whether a psychotherapist working on the premises of an institute had to be registered vis-à-vis social security insurances as independent or dependent. In a nutshell, the contract between the psychotherapist and the institute provided that she could use, as an independent, a therapy room of the institute two days a week and that she would be charged monthly fees for room rental. The Swiss Supreme Court noted that the psychotherapist could freely set the fees for the psychotherapies she performed, that she was not bound by a non-competition clause prohibiting her from offering her service elsewhere and that the customers paid invoices directly to the psychotherapist’s account and not to the clinic’s account. The Supreme Court found nevertheless that the psychotherapist had to be viewed as dependent based on several criteria, in particular: that there was little investment made by the psychotherapist, as the heavy investments were ultimately supported by the clinic and the psychotherapist could use the whole infrastructure (overall, there was a lack of entrepreneurial risk for the psychotherapist); the psychotherapist was shown on the institute’s website as a member of the institute’s team; and the invoices bore the letterhead of the institute next to her name.

From an employment law perspective, the Swiss Supreme Court recently found that a contract by which a consultant received ad hoc assignments was a mandate contract and not an employment contract, despite the regularity of the payment of remuneration and the defrayal of costs.

In another recent employment law case, the Swiss Supreme Court issued a reminder that the formal criteria, such as the title of the contract, the declarations of the parties or the deductions for social insurance are not decisive for the characterisation of a contract as an employment agreement. Rather, the Court explained that material criteria relating to the manner in which the performance of work is actually performed should be taken into account, such as the degree of freedom in the organisation of work and time, whether or not there is an obligation to be accountable and/or to follow the instructions, or the identification of the party that bears the economic risk. In principle, instructions which are not limited to simple general guidelines on how to perform the tasks, but which affect the object and organisation of work and establish a right of control, reveal the existence of an employment contract rather than a mandate. In the case at hand, the absence of a contract of employment was confirmed since the fact that the majority shareholder inquired regularly about the conduct of business with his co-partner did not necessarily indicate a management power.

Contract in case of prior training

The Swiss Supreme Court recently had to deal with a case where a company required potential future employees to first receive training that it developed and then pass an exam. A potential employee suffered a myocardial infarction during the training and an accident during his recovery. He stated that the employment contract had already started with the company during the training in order to benefit from the insurances the company concluded in favour of its employees.

In a previous case concerning the training of a candidate for the hairdressing profession, the Swiss Supreme Court had found that the contract concluded between the student and the manager was an apprenticeship contract (a special employment contract), rather than a training or teaching contract. In that case, the training consisted in learning the job in a hairdressing salon, by taking care of the clients of the salon who paid for this service.
Customers received a discounted rate because they benefited from a beginner’s services. The training was almost exclusively practical; the student was part of the salon’s organisation and her activity benefited the manager directly.

The case at hand was different. The courses taken or to be followed were not directly integrated into the company’s productive and lucrative activity. Participants did not acquire the required training by directly giving financial advice to clients of the company. The potential future employees did not perform, during this training, work for which, or as a result of which, the company could receive remuneration. The acquisition of training and participation in courses were therefore not the subject of a contract of employment.

Bonus (and similar incentive payments)

Swiss law does not contain any provision that specifically defines and deals with the question of bonuses. Depending upon the agreement between the parties, as well as the nature and circumstances of the payment, a bonus will be legally defined either as a gratuity or as a part of the salary. The legal characterisation of the bonus is important, since the legal regime applicable to gratuities is much more flexible than the one applicable to salary components, which are subject to numerous protective rules and regulations.

Recent case law on gratuities helps to better define their contours and admissibility. The case law distinguishes the three notions of “variable salary”, “mandatory/agreed gratuity” and “discretionary gratuity”.

To determine in a concrete case if the amount of the bonus is a variable salary or a gratuity, one must examine whether the bonus has been defined or can be objectively defined or if the bonus is neither defined nor objectively definable.

If the bonus has been defined (for example: “You will receive a bonus of 10,000 Swiss francs if you conclude ten contracts with new clients”) or can be objectively defined (for example: “You will receive a bonus corresponding to 5% of the net profit you succeeded in making on the assets under your management”), it cannot be considered as a gratuity: it is a variable salary. As a rule, a characterisation of variable salary implies a fixed/arithmetic calculation of the salary leaving no discretion for the employer.

When the bonus is neither defined nor objectively definable, it must in principle be described as a gratuity (subject to the rule of subsidiarity: a gratuity must in principle remain secondary in comparison to the basic salary). This is the case when the quantum of the bonus is not fixed in advance but, on the contrary, fundamentally depends on the employer’s will. Two scenarios can arise: (i) the bonus is entirely optional, which means that its payment has not been agreed, either expressly or by conclusive acts – the employee is not entitled to it; or (ii) the payment has been agreed, so that the employer is obliged to set a bonus, but he enjoys a certain freedom in determining the amount to be allocated. The case law recognises that the employer has such discretion when the amount of the bonus does not only depend on the achievement of a certain operating result, but also on the subjective assessment of the employee’s performance. As long as the agreed bonus depends entirely or partially on the goodwill of the employer and is subsidiary to the salary, it is in principle a gratuity.

In April 2018, the Swiss Supreme Court reminded nevertheless that the optional character of the gratuity finds its limits in the principle of the equality of treatment. A subjective decision of the employer contravenes the prohibition of discrimination if it expresses a depreciation of the worker’s personality and thus undermines it. Such a situation is only realised if the employee is placed in a situation that is clearly less advantageous than a large number of other employees, which is, however, not the case when the employer simply favours some
employees. In the case at hand, the agreement between the parties provided that the employer could pay yearly bonuses, which remained entirely discretionary. The employee received bonuses each year, except for the year 2014. The employee found out at the beginning of January 2015 that all his direct colleagues from the same department had received a bonus for the year 2014, it being noted that both the director and the deputy director did not receive any bonus for that year. The employee was fired at the end of January 2015 and then raised several claims against the company, including a claim for a bonus related to his activity in 2014. The Supreme Court considered that the employer could not rely on the fact that the director and the deputy director of the division had not received any bonus. The Court considered that this was necessary to compare the situation of the discriminated employee with that of his direct colleagues, not that of superiors. Moreover, there was no need to compare the situation of the discriminated employee with that of all employees of the company; discrimination in relation to all employees in a department, even if it only has five employees, appeared quite relevant in the case at hand.

Whistleblowing – Breach of secrecy or privacy through the use of an image-carrying device (criminal law)

In January 2018, the Swiss Supreme Court had to examine the case of an employee who installed, without the knowledge of her line manager, a small video camera in the conference room to record the dismissal meeting. At the end of this meeting, the line manager offered the employee a “deal”: he was willing to renounce the termination of the contract if she agreed to have sex with him three to four times a year with remuneration. The proposal of the line manager was filmed by the hidden video camera. The employee showed the audio-video recording to her employer, who then fired the line manager. The line manager lodged a criminal complaint, in particular for violation of secrecy or privacy through the use of an image-carrying device.

The Swiss Federal Court found that the employee who secretly recorded the dismissal meeting was guilty of violation of privacy through the use of an image-carrying device, which is a criminal offence. The Federal Court considered in particular that, when placing the video camera, the employee could only expect a dismissal (which was not illegal), but she could not have expected the line manager’s proposal. Therefore, the employee’s behaviour remained punishable, as she could not avail herself of a legal justifying fact.

Employee’s responsibility, penalty clause and disciplinary measures

In May 2018, the Swiss Supreme Court found that a penalty clause contained in an employment contract was null and void, because this clause did not require a fault of the employee or an actual damage for the employer.

The Swiss Supreme Court explained that if the employment contract provides for a penalty clause in the event of the employee’s violation of his obligations, such a clause can only be implemented if it complies with the conditions of art. 321e CO, which governs the employee’s liability. This liability implies the existence of a contractual violation, a damage, a fault and an adequate causal relationship between the contractual violation and the damage suffered. It cannot be derogated from art. 321e CO to the detriment of the employee. If the parties to an employment contract agree on a penalty clause providing for an employee’s liability irrespective of any damage and any fault, this is viewed as an extension of the contractual liability contrary to art. 321e CO and the penalty clause is void.

On the other hand, disciplinary measures may be agreed in an individual employment contract in the form of conventional penalties. Nevertheless, for these conventional penalties to be validly agreed, the amount of the penalty must be determined and proportionate. In addition,
the behaviours that are sanctioned must be described precisely. It is necessary that each
offence leading to a penalty and the corresponding penalty are defined in a sufficiently clear
manner. The employee must be able to understand and know what behaviour is punished,
and by which sanction. A contractual clause providing that any violation of the contract by
the employee could be sanctioned by a conventional penalty regardless of the nature and
severity of the violation does obviously not meet the requirement of accuracy, which is
necessary for a disciplinary measure to be valid.

This is important to note that the decision rendered in May 2018 by the Swiss Supreme
Court only concerns clauses imposing sanctions in case of violation of obligations during
the employment relationship. This decision should not affect contractually agreed penalties
in case of violation of post-contractual duties.

**Probation period**

In February 2018, the Swiss Supreme Court provided clarification on the rules applicable to
probation periods. The Supreme Court found that, as a rule, the probation period within
the meaning of art. 335b CO starts on the day of the effective start of the employment relationship
(and not on the contractually agreed start date if that date differs from the effective start
date). The Supreme Court further stated that when the employment contract is signed on
the day when the employee starts working, this day is not counted in the computation of the
probation period.

**Period of protection against dismissal**

Under Swiss law, an employee enjoys special protection if notice of termination is given at
an improper time, e.g., during the employee’s absence from work due to illness or accident,
or during the pregnancy of an employee. Notice given at an improper time, as referred to
above, is null and void, i.e., does not have any legal effect. If the employer has duly given
notice of termination (i.e., prior to the beginning of an improper time), and if the term of
notice runs into a so-called blocked period, the notice period is suspended and will continue
to run after the blocked period has ended.

Various blocked periods may be accumulated. Each cause, i.e., sickness, accident, pregnancy,
and military service, may generate a new blocked period if they are distinct and independent
from each other (for instance: in case an employee had an accident, which was followed by
a sickness, and then again an accident, he may benefit from three different blocked periods).
The employee has the burden to demonstrate that he suffered from different causes, each
triggering a new period of protection.

In a recent case, the Swiss Supreme Court examined the case of an employee who suffered
from physical illnesses (coronary disorder and renal tumour) and then from a mental illness.
The Swiss Supreme Court considered that since nothing in the evidence collected, and in
particular in the explanations given by the employee’s doctor, indicated that the stress factor
generated by the physical health problems (and their social consequences) was marginal
enough to consider the mental illness as independent, the physical pathologies and mental
illness were linked to a point sufficient to exclude a new case of inability to work, triggering
a new period of protection.

**Termination with immediate effect – sexist comments and behaviours**

Under Swiss law, notice of termination with immediate effect can be given by the employer
or the employee at any time for good cause, i.e. circumstances which render the continuation
of the employment relationship in good faith unconscionable for the party giving notice.
Such termination must be pronounced without delay after discovering the facts justifying
The termination with immediate effect for good cause is an exceptional measure that is admitted in a restrictive manner. Only a particularly serious violation may justify such a measure. When it is less serious, the breach can only lead to an immediate termination if it has been repeated despite a warning.

In January 2018, the Swiss Supreme Court had to determine whether the attitude of an employee, who had demonstrated coarse and sexist comments and behaviours, was a serious violation justifying a termination with immediate effect. In a bar outside the company’s premises during a farewell drink, the employee made coarse comments of a sexual nature to three colleagues with regard to a female colleague who was not present, including questioning them on who would like to have sexual relationship with her using certain positions. Two of the colleagues present immediately pointed out that the remarks were inappropriate. A senior employee also told him the same after learning about the incident. After an investigation conducted by the employer, it turned out that it was not the first time that the concerned employee had committed such misconduct. In the last month, the concerned employee had made several gross or sexist comments and demonstrated behaviours towards colleagues which were inappropriate.

The Swiss Supreme Court ruled that the termination of the employee with immediate effect was not justified, but considered nevertheless that the case was borderline. The Court explained that the employer should have tried to give the employee a warning before dismissing him with immediate effect. The disapproving reactions of the colleagues could not be considered equivalent to a warning.
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Thailand

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General labour market and litigation trends
Since the first quarter of 2018, there has been a slight improvement in Thailand’s labour market due to the continued growth of the economy this year. According to a report of the National Statistical Office (NSO), it is the first time in the last six years that the unemployment rate has fallen. The unemployment rate in September was only 1.0%, compared to 1.2% in the second quarter of the previous year, with approximately 373,000 unemployed people. Furthermore, the average wage rate increased by 2.4% in the first half of the year, though the rate of increase is still low (1.1% per year in 2015–2018, compared to 5.9% per year in 2014).
The primary concern regarding the labour market is still the transition into an ageing society. According to the NSO, Thailand will become an aged society in 2021, as Thai people aged over 60 years will account for 20% of the country’s total population. While studies have indicated that more people continue to be employed well past the age of 60, such employment is typically associated with unfavourable working conditions, insecure income and limited social protection. Furthermore, the employment incomes reported by the elderly are generally much lower than the population at large. These demographic changes are likely to have a significant impact on the country’s productivity and socio-economic development.
The number of labour dispute cases decreased by 23.8% from 15,670 cases in 2016 to 11,936 cases in 2017. Most cases related to disputes on the obligation to pay statutory severance pay, payment in lieu of advance notice, claims for reinstatement or damages due to unfair termination, and working condition employment issues, the same as in the previous year.
It is also interesting to note that the number of labour court cases which were successfully settled (whether in court or out of court) or withdrawn increased from 45% to 57% of the total cases as the Thai Labour Court has been increasingly encouraging employers and employees to settle their disputes out of court.

Redundancies, business transfers and reorganisations

Redundancy/Reorganisation
Generally, Thai employment law allows an employer to terminate employment at its discretion and does not impose specific legal requirements on employers terminating employees as part of a redundancy or reorganisation. Similarly, such termination does not exempt employers from their obligations to pay statutory entitlements (e.g. statutory severance payments under the Labour Protection Act B.E. 2541 (2008), the “LPA”) or contractual entitlements (e.g. payment in lieu of notice or for unused annual leave) and due regard must be had to all statutory protection and procedures regarding termination.
The key concern will be for termination to be structured such that it is not considered as being...
an unfair termination. Generally, an employer will have to establish, to the satisfaction of the Thai Labour Court, that the termination was necessary and that the selection procedure was fair to avoid a finding of unfair termination and a consequent award of damages.

- **Necessary termination**
  A termination can be deemed to be “necessary” if it can be shown that such termination was to reduce the labour costs of a loss-making enterprise in financial difficulties and that such termination was necessary to ensure the maintenance and survival of its business in Thailand. A “necessary” termination may also be established if there has been a loss of market share or reduction in orders. Generally, the employer would be required to show that there is no other option to decrease costs or reduce losses in the employer’s business in Thailand for the purposes of maintaining the employer’s business.

- **Fair selection procedure**
  To avoid a finding by the Thai Labour Court that the selection procedures were unfair, employers should implement and adopt certain definite criteria or the same criteria among other employees whose employment would also be terminated, such as years of service, annual evaluation grading, or skills and experience.
  In any event, the negotiations between an employer and employees to reach a mutual separation arrangement would be a good solution to avoid the risk of an unfair termination claim subsequently being brought by the employee.

**Business transfer**

- **No automatic transfer of employees**
  Under Thai law, there is no procedure for an automatic transfer of employees from one employer to a new employer following a business transfer. The transferring employer is not entitled unilaterally to transfer an employee without consent from the employee. The new employer must accept both the rights and duties of the transferring employer in all respects, and the new employer must continue to provide the employee with the same rights which he/she had against the transferring employer (e.g. the new employer must recognise the employee’s years of service with the transferring employer and grant the same benefits).
  Where the employee does not consent to the transfer of employment, the transferring employer has the option to continue to employ the employee or terminate employment (with payment of the necessary statutory and contractual compensation).

- **Protection against termination arising from business transfer**
  Thai law does not provide specific protection in respect of, or specific procedures to deal with, a termination of employment that results from the transfer of a business. However, an employee who considers that the termination was made without reasonable grounds or was unfair would be entitled to file a claim against the transferring employer at the Thai Labour Court for damages for unfair termination.
  In terminating employment, the transferring employer is required to pay the relevant statutory severance pay and other contractual entitlements to the employee as required by law, and due regard must be had to all statutory protection and procedures regarding termination.

- **Harmonisation of employment terms**
  The general rule is that upon transfer of employment, the transferee of the business (i.e., the new employer) must continue to provide the employee with the same rights which the employee had against the existing employer. Any changes to the terms of employment may be negotiated among the employee, the transferring employer and the new employer, and where the new terms and conditions will give fewer benefits to the employee than
the employee had previously enjoyed, the employee’s consent would be required in order for the new conditions to be effective.

**Business protection and restrictive covenants**

**Confidentiality**

Under Thai law and guidance from Thai Supreme Court judgments, there is generally an implied duty imposed on employees to protect the confidentiality of the employer in respect of the employer’s business and know-how.

It is also common for employment agreements to include an express contractual obligation of confidentiality.

Certain statutory obligations may also be applicable, depending on the circumstances:

- Section 323 of the Criminal Code of Thailand protects against the disclosure of any secret, but only if disclosed by a competent official or members of certain professions (namely medical practitioners, pharmacists, druggists, midwives, nursing assistants, priests, advocates, lawyers, auditors, and assistants in any of the aforementioned professions).
- Section 324 of the Criminal Code of Thailand protects against the disclosure or use of secrets relating to industry, discovery or scientific inventions.
- The Trade Secrets Act B.E. 2545 (2002) protects “Trade Secrets” (defined as trade information not yet publicly known or not yet accessible by persons who are normally connected with the information, the commercial values of which derive from its secrecy, and that the controller of the Trade Secrets has taken appropriate measures to maintain the secrecy) and potential remedies include damages (both compensatory and punitive), interim injunctions, permanent injunctions and orders for the destruction of infringing materials. In certain circumstances, the disclosure of a Trade Secret can be a criminal offence (e.g. where a Trade Secret was disclosed with malicious intent to cause damage to the business of the controller of the Trade Secret).

**Duties of honesty**

Under Thai law and guidance from Supreme Court decisions, there is generally an implied duty imposed on employees to perform their duties honestly.

Although not expressly phrased as a duty, Section 119 of the LPA provides that employees may be dismissed without notice or compensation in certain situations, such as where the employee performs his duties dishonestly or causes serious damage to the employer as a result of his negligence.

**Restrictive covenants**

Thai law does not prohibit an employer from restricting an employee’s activities during and after termination of employment.

For example, it is possible for an employer to prohibit an employee from working or operating a business that is the same as or in competition with the employer’s business. It is also possible to prohibit an employee from soliciting former or existing employees or clients of the employer after termination.

Guidance from the Thai Supreme Court indicates that non-competition and non-solicitation clauses are considered to be reciprocal agreements aiming to protect commercial rights and benefits of the parties (mainly, in this case, the employer who may suffer loss if the employee breaches the restrictive covenant) to the contract, provided that the restriction:

1. must not entirely prohibit or obstruct the employee from making a living; and
2. is enforced on specific restricted businesses and/or for a restricted time period which is considered as being fair.
A restriction can be either geographical (by prohibiting the carrying out of the restricted business in a certain area) and/or for a specified time, provided that the geographical area and time specified is deemed to be fair.

In any event, the court has the power to reduce the restrictions at its discretion (i.e. the court is not obliged to find an unreasonable restriction wholly unenforceable) if the court takes the view, under the terms of the Unfair Contract Terms Act, B.E. 2540 (1997), that the restriction imposes too much of a burden on the employee.

**Discrimination protection**

**Protection from discrimination**

- **Constitution**
  Under the Constitution, discrimination based on nationality, age, gender, language, physical or social status, religion, education and political affiliation is restricted.

- **LPA**
  Under the LPA, gender discrimination is specifically prohibited. The LPA requires that an employer treat male and female employees equally in their employment unless the nature or conditions of the work do not allow the employer to do so.
  
  For example, in one case, where an employer set out different retirement ages for employees, the Supreme Court of Thailand ruled that, in respect of work with the same job description and nature, differentiation of retirement ages based on gender is a violation of the LPA and is not enforceable. However, if the retirement ages are varied based on positions, and not on the basis of gender, such differentiation would generally be permitted.

**Protection from harassment**

- **LPA**
  The LPA provides that it is prohibited for an employer or a person who is a chief, supervisor or inspector to perform an act of sexual harassment against an employee. The LPA is silent on sexual harassment in other situations.

- **Criminal Code**
  Sexual harassment can also be a criminal offence under the Criminal Code of Thailand, provided that all elements of the offence are satisfied. Criminal penalties for sexual offences under the Criminal Code of Thailand vary depending on the severity of the offence.

- **Civil and Commercial Code**
  An employee who was sexually harassed could claim compensation for any damage caused by the wrongful act (i.e. unlawful injuring the body and liberty of other persons) under Section 420 of the Civil and Commercial Code of Thailand.

**Protection against dismissal**

**Unfair termination**

Although an employer may terminate the employment of an employee whose employment term is not specified (either (i) by giving advance notice and paying severance pay under Section 118 of the LPA, or (ii) without notice and/or severance pay pursuant to Section 119 of the LPA, as discussed below), the employer must consider whether or not such termination of employment would be considered as being “unfair” under Section 49 of the Act Establishing the Labour Courts and Labour Procedure Act B.E. 2522 (1979) (“LCLPA”).

Pursuant to Section 49 of the LCLPA, the Thai Labour Court has the discretion to grant a remedy if it considers that the termination of employment was “unfair”. There is no
exhaustive definition of the meaning of “unfair” – some examples of circumstances that the Thai Labour Court has considered to amount to unfair termination include:

- Termination without reason.
- Termination without any fault on the part of the employee.
- Termination as disciplinary action, in circumstances where the penalty imposed was not in accordance with the employer’s work rules.
- Termination where the employer cannot produce witnesses or evidence to prove default by the employee.
- Discrimination.

If the Thai Labour Court finds that the termination is unfair, it has a power to order reinstatement of the employee on the same terms and conditions of employment (i.e., at the same salary and position prior to termination). However, if the Thai Labour Court decides that the parties are no longer able to work together, then the Thai Labour Court may order payment of compensation for unfair termination. The amount of compensation ordered is at the sole discretion of the Thai Labour Court, and in exercising its discretion, the Thai Labour Court takes into consideration the age of the employee, the length of employment, the hardship of the employee resulting from the termination, the reasons for the termination and the compensation that the employee is entitled to receive.

Procedural requirements for dismissal

A termination notice is not required to be in writing; an oral notification by the employer or authorised person of the employer is considered as a valid notice of termination. Additionally, there is no requirement to state the reason for termination within the notice.

However, if an employer needs to rely upon one of the grounds under Section 119 of the LPA to terminate employment without paying any statutory severance pay and/or notice under Section 118 of the LPA or to protect an employer from a claim for unfair termination, it is highly recommended that a written notice be issued, which specifies clear and sufficient reasons for termination in the termination notice.

Upon termination of employment, an employer is required to notify the Social Security Office of the termination and, in the case of foreign workers, the employer has an additional duty to return the employee’s work permit to the Department of Labour Protection and Welfare.

Employee’s entitlement upon termination of employment

Upon termination of employment, an employee is entitled to receive the following payments:

- Statutory severance pay under Section 118 of the LPA.
- Payment in lieu of advance notice (where the employer did not give advance notice, unless the termination was pursuant to Section 119 of the LPA).
- Payment in lieu of unused holidays entitled in the year of termination and accumulated unused holidays from the previous year.
- Any entitlements to which the employee is contractually entitled pursuant to the employment agreement.
- Any outstanding salary or other expenses.

Severance payments under Section 118 of the LPA

Subject to the exceptions below, an employer is required to make payment of statutory severance pay to the employee upon termination. The amount of statutory severance pay to which an employee becomes entitled is calculated according to the employee’s length of service, as set out in the following scale:
Years of Service | Severance Pay
--- | ---
120 days but less than 1 year | 30 days’ equivalent of the latest wages
1 year but less than 3 years | 90 days’ equivalent of the latest wages
3 years but less than 6 years | 180 days’ equivalent of the latest wages
6 years but less than 10 years | 240 days’ equivalent of the latest wages
10 years and more | 300 days’ equivalent of the latest wages

Exceptions for severance pay (Section 118 of the LPA)
An employer is not required to pay statutory severance pay to an employee in one of the following cases:

- Termination of employment where the employee has been employed for a continuous period of less than 120 days.
- Where the employment is considered to be a fixed-term contract (as defined under the relevant law and according to Thai Supreme Court guidance) and the termination of employment occurs on the expiry date of the contract.
- Where the termination of employment is on or more of the grounds under Section 119 of the LPA (mentioned in the section below).

Special severance pay
Separately, the LPA also provides that an employer is required to make payment of Special Severance Pay to an employee if the termination of employment is made for one of the following reasons:

- **Relocation of the employer’s place of business**
  Where an employer wishes to relocate its place of business which may affect the ordinary course of living of its employees or their families, the employer is required to notify the employee at least 30 days in advance of the relocation. If the employee does not agree to work at the new location, the employee is entitled to terminate the employment contract within 30 days from the date of the employer’s notice or relocation date (as the case may be), and would still be entitled to receive special severance pay of an amount not less than the rate of statutory severance pay under Section 118 of the LPA. If the employer fails to give advance notice as specified in the preceding paragraph, the employer must also pay special severance pay in lieu of the advance notice in an amount equal to 30 days’ wages (calculated at the employee’s latest wage rate).

- **Replacement of machinery or technology advancement**
  If the termination of employment occurs as a result of an improvement in the department, production process, distribution or service arising from the use of machinery or the change in machinery or advancement in technology and results in the reduction of employees, the employer is required to give 60 days’ advance notice of termination to the employee and to the Labour Inspection Office. If the employer fails to give the required 60 days’ advance notice, the employer is required to pay 60 days’ special severance pay (calculated based on the latest wage rate of the employee) in addition to the statutory severance pay under Section 118 of the LPA. In addition, where the employee whose employment is terminated has over six years of service with the employer, the employee would be entitled to receive an additional “special compensation” of 15 days’ wages for each year of service, up to a maximum payment of 360 days’ wages (once again based on the latest salary rate of, or rate per piece produced by, the employee).
Other contractual entitlements

Subject to the terms of the employment contract, work rules or handbook relating to employee benefits announced by the employer, the employer would also be required to make available and pay any benefit or specific arrangement agreed between the employer and the employee in addition to the statutory entitlements mentioned above (for example, compensation under the terms of any undertaking, contractual retirement scheme and employer provident fund contributions).

Retirement

The Labour Protection Act (No.6) B.E. 2560 (2017) which has been in force since 1 September 2017 provide statutory confirmation of the Thai Labour Court’s view that retiring employees are entitled to statutory severance pay and other termination payments (since retirement is not considered to be a voluntary resignation under the LPA). They also provide for a statutory retirement age of 60 (an employer’s work rules or an employee’s employment agreement may contractually provide for a higher or lower retirement age) and that on reaching such age (notwithstanding any retirement age that may be provided for in the employer’s work rules or employment agreement), employees will have the right to retire (with 30 days’ notice) and be entitled to be paid severance pay in accordance with the LPA.

The failure to make payment of severance pay to a retiring employee will be an offence punishable with a term of imprisonment of not more than six months and/or a fine not exceeding 100,000 Baht.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Notice periods

When an employment contract for a fixed-term period has expired, the employment will end without the requirement to give notice, provided that such fixed-term contract does not contain provisions allowing parties to the contract to extend the employment terms from those earlier agreed.

In the case where the employment contract does not specify the period of employment, Thai law considers that such employment contract has no expiry date and either the employer or employee may terminate the employment contract by giving prior notice to the other party. The minimum statutory notice period is at least one actual prospective pay period for the employee concerned, but no more than three months’ notice needs to be given (if the actual pay period is more than three months). For the avoidance of doubt, an agreement providing for a notice period in excess of three months is enforceable.

A termination notice is therefore usually issued on or before the agreed or usual salary payment date, to expire or take effect on the next due date for payment of the employee’s salary.

In the case where an employer would like the employment to be terminated with immediate effect, the employer is entitled to make payment in lieu of advance notice.

Under the LPA, advance notice of termination is not required if the employment is terminated under one of the following grounds in Section 119 of the LPA, as follows:

- The employee performs his duties dishonestly or intentionally commits a criminal offence against the employer.
- The employee intentionally causes the employer to suffer losses.
- The employee commits an act of negligence, which causes the employer to suffer serious losses.
• The employee violates the employer’s work rules, regulations or orders which are legal and fair, and the employer has issued a written warning to the employee (save for a serious violation, in which case the employer would not be required to issue a written warning). (Note that a warning is effective for one year from the date of the violation.)
• The employee neglects his duties for a consecutive period of three days without a reasonable cause, regardless of whether or not there is a holiday in the intervening period.
• The employee is subject to imprisonment by a final court judgment.

Protected classes of employees
The LPA and the Labour Relations Act B.E. 2543 (2000) ("LRA") protect certain categories of employees from dismissal. These include:
• A pregnant employee by reason of pregnancy (Section 43 of the LPA).
• An employee who is a member of an employee’s committee, unless permission is obtained from the Thai Labour Court (Section 52 of the LRA).
• Any employees, representatives of employees, committee or sub-committee members of a labour union or labour federation involved in a demand for an agreement relating to conditions of employment or an amendment of such agreement, during the period in which the demand submitted to the employer is being considered. Employment can, however, be terminated in certain exceptional circumstances (e.g., where the employee performs his duties dishonestly or intentionally commits a criminal act against the employer (Section 31 of the LRA)).

Worker consultation, trade union and industrial action

Worker consultation
Thai employment law has no consultation requirement imposed on an employer when deciding to proceed with a redundancy programme. However, where an employer or employee (including an employee’s association and labour union) wishes to establish or amend an agreement on conditions of employment, a written request for negotiations must be submitted by that party. Where the request is submitted by an employee’s association or labour union, the agreement will be considered as being binding on the employer and: (i) any employee who participates in the request; (ii) all employees who are members of the labour union (provided that more than two-thirds of the members participated in the request); and (iii) all employees who work in the same function (provided that more than two-thirds of total employees who work in the same function participated in the request).

Industrial action
Industrial action may take many forms, such as a strike by employees or a lock-out by the employer. Section 34 of the LRA provides that in the case that negotiation on the employment conditions cannot be reached, the party wishing to exercise the right to lock-out or strike must give notice to the Conciliation Officer of the relevant Labour Protection Department and notify the other party at least 24 hours before the commencement of such action.

Employee privacy

Employees’ data protection rights
While the Constitution generally recognises that individuals enjoy the right of privacy, Thailand does not currently have a general personal data protection law in force. As such, employees do not have specific rights on data protection, except where such data is specifically protected by other laws, such as the Criminal Code of Thailand and the Computer Crimes Act B.E. 2550 (2007) ("Computer Crimes Act").
More generally, where injury arises from the infringement of a right of privacy of an employee amounting to a “wrongful act” within the scope of Section 420 of the Civil and Commercial Code of Thailand, the employee may be entitled to compensation. In particular, if any disclosure or use of personal data of the employee is made without the consent or approval of the employee and there is damage to the employee’s liberty, property or right, such conduct could be considered as a “wrongful act”, and the owner of the personal data may be entitled to claim for compensation of actual damage incurred.

**Employers’ data protection obligations**

There is no specific provision regarding the obligations of the employer to protect the personal data of employees, unless it is provided for in the employment contract. Apart from provisions in the employment contract, the employer is also subject to the general provisions of law on certain protected classes of information, for example:

- Section 322 of the Criminal Code of Thailand prohibits breaking open or making away with any document belonging to another person in order to ascertain or disclose its contents in a manner likely to cause injury to any person.
- Section 7 of the Computer Crimes Act prohibits the undue access of computer data, which has specific preventive procedures against access and is not available to such person. Furthermore, Section 8 of the Computer Crimes Act prohibits any undue act by electronic means in order to intercept another person’s computer data while being transmitted through a computer system.

**Other recent developments in the field of employment and labour law**

**Workmen’s Compensation Fund**

On 10 October 2018, the Workmen’s Compensation Fund Act (No.2) B.E. 2561 (2018) (the “WCFA”), which made certain amendments to the existing law, was published in the Royal Gazette and will come into force on 11 December 2018.

Under the WCFA, employers are required to pay contributions to the Workmen’s Compensation Fund (“WCF”) which is set up for purpose of protecting employees’ in respect of injury, disease, disability or death resulting from employment. Contributions to the WCF are required to be paid annually by employers at rates ranging between 0.2 – 1.0% of its employees’ wages per month (depending on the risk involved for each type of business). In light of the amendments, the benefits for employees have increased in various respects; for example:

- In the event that an employee is sick or injured resulting from employment and unable to work for more than three consecutive days, the employee would be entitled to compensation at the rate of 70% of their monthly wages calculated from the first day that they are unable to work (which is an increase from 60% of monthly wages under the previous law).
- In the case of disability resulting from performing work, the employee would be compensated for at least 15 years (as opposed to a maximum of 15 years under the law previous law).
- In case of death or disappearance resulting from performing work, the employee’s statutory heir would be entitled to compensation at the rate of 70% of the employee’s monthly wages for 10 years (which is an increase from eight years under the previous law).
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Turkey

Haşmet Ozan Güner & Dilara Doğan Güz
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**General labour market and litigation trends**

According to April 2018 data, the number of unemployed people above age 15 across Turkey has reached 3,086,000, a decrease of 201,000 compared to the previous year. The unemployment rate was 9.6%, a decrease of 0.9% in the past year. The unemployment rate among the young population (aged 15–24) was 16.9%, a decrease of 0.9%.

The number of employed people reached 29,900,000 in April 2018, an increase of 852,000 compared to the previous year. Within the same period, the number of people working in the agricultural industry decreased by 15,000, while the number of people working in industries other than agriculture increased by 868,000. While 18.3% of employed people took positions in the agricultural industry, 19.5%, 7.4% and 54.8% took positions in the trade industry, construction industry and service industry respectively. Compared to the previous year, the ratio of people employed in the service industry increased by 0.5% and in the trade industry by 0.4%, while those in the agricultural industry decreased by 0.6%, and those in the construction industry decreased by 0.4%.

With the purpose of preventing unregistered employment, the below administrative fines have been regulated against unregistered employment:

(i) for employers who do not submit the employee’s employment declaration to the Social Security Institution, a fine equal to the gross monthly minimum wage (currently TRY 2,029.50) for each employee;

(ii) in case the above is discovered due to a court order, or a governmental inspection, a fine equal to twice the gross monthly minimum wage for each employee; and

(iii) in case of a repetition of (ii) above, five times the gross monthly minimum wage for each employee.

**Regulations on the appeal procedure**

With the Code of Civil Procedure that came into force in 2011, the right to appeal to the regional courts of appeal was introduced. Before this new law, the High Court of Cassation was available for appeals against local court decisions. Regional courts of appeal, however, became functional in mid-2016.

As of 2018, the appeal threshold is TRY 3,560, while the threshold for applying to the High Court of Cassation is TRY 47,530 for labour disputes. Parties, however, are entitled to apply to the High Court of Cassation irrespective of these thresholds in disputes arising from damages due to work accidents or occupational diseases and mobbing (see below), re-employment claims and lawsuits for uninsured employment.

**Changes to the statute of limitations**

With the recent changes to the Labour Courts Law, the statute of limitations is set at five
years for annual leave payment, severance and notice pay, damages due to terminations of malignity or failing to comply with the equal treatment principle. Previously, the statute of limitations was 10 years except for annual leave payments. These changes entered into force on 12th October 2017.

Mandatory mediation

With the recent changes to the Labour Courts Law, applying for mediation, which was previously optional, has become mandatory starting from 1st January 2018 in labour disputes, except for those arising from work accidents or occupational diseases. Mandatory mediation applies to disputes arising from work and employment relations, wage, overtime payment, annual leave payment, holiday payment, severance and notice pay, payments in case of reemployment, etc. Parties may apply to mediation offices at Court Houses. Afterwards, a mediator will be assigned. The mediation process takes four weeks. If the dispute is not resolved, the parties will be able to continue the dispute before the courts.

If the parties have not gone through a mediation period but the claimant has directly applied to the courts, the court will reject the application due to lack of cause of action.

So far, 127,845 issues have been taken to mediation in Turkey and 38,667 resulted in an agreement (Source: Ministry of Justice Mediation Statistics).

Redundancies, business transfers and reorganisations

Temporary employment

Temporary employment can be formed, for instance, through “private employment offices” or by making an assignment within the group companies.

A temporary employment relationship through private employment offices can be made when a private employment office makes an agreement with an employer for procurement of temporary employees and when they transfer their employees temporarily to that employer. (Within a temporary employment relationship, the private employment office is the employer.) This relationship can be formed for limited durations and in limited circumstances listed in the law (e.g. when an employee is on military duty, in seasonal agricultural works, domestic service, or when the production capacity of the workplace has unpredictably increased).

The number of temporary employees cannot exceed ¼ of the number of permanent employees, except for workplaces where there are less than 10 employees, where up to five temporary employees can be employed.

Employers cannot employ their former permanent employees as temporary employees within the six months following the termination of their employment contract.

Temporary employment relationships can also be formed within the group companies, by assigning one group member’s employee(s) to another. In this case, the initial term of the temporary employment should be limited to six months, renewable twice.

Remote employment and on-call employment

Remote employment is the employment type where the employee carries out their duties outside the workplace. Remote employees should be treated equally to regular workers except for material reasons.

On-call employment is described as a type of part-time employment contract in which it is agreed that the employee will perform their duties when they are needed by the employer for the tasks that they undertake. Unless otherwise agreed, for on-call employees, the working hours are 20 hours per week and four hours per day. Unless otherwise agreed, the employer must make the call at least four days prior to the working day.
Change of workplace, job description and other working conditions

In principle, job description, workplace and working conditions must be express in the labour contract. Material changes thereto are deemed substantial alterations. In these cases, the employee’s consent is required. Otherwise, these changes will not be binding for the employee.

Employee transfer

In case of the transfer of the workplace in whole or in part, employment contracts of the employees working therein are also automatically transferred to the transferee. In this case, the employee’s duration of employment and the rights in connection thereto are calculated starting from his/her first employment by the transferor. Additionally, the transferor is liable jointly with the transferee to the employee for the employee’s rights that originate from the period before the transfer. The transferor’s liability, however, is subject to a statute of limitations of two years as of the date of transfer.

Business protection and restrictive covenants

Post-termination non-compete provisions

Employees may undertake not to compete with the employer (or to not work for its competitors) after the termination of the employment contract. Post-termination non-compete agreements are valid if: (i) made in writing; (ii) the employee’s position enables him/her access to the employer’s client base, production secrets or the employer’s activities, and the employee’s use of this information will damage the employer; (iii) reasonably limited in terms of geography and industry; and (iv) reasonably limited in terms of its duration taking into account the employee’s position; however, with a maximum period of two years in any case.

If the non-compete obligation does not include the limitations listed in (iii) and (iv) above, the courts may revise the scope of this obligation to restrict it therewith.

A contractual penalty can be stipulated in employment contracts for employees breaching this obligation.

Protection of employers’ trade secrets

Those who have access to others’ trade secrets due to their profession or duty and who disclose them to third parties are subject to imprisonment of one to three years and a judicial fine up to TRY 500,000 days. This also applies to employees illegitimately disclosing the employer’s trade secrets. Additionally, the employer may immediately terminate the employment contract and claim damages.

Contractual penalties

Contractual penalties in employment contracts are valid if: (i) they are proportional to the linked breach; (ii) they are not contrary to general legal principles, moral values or individual rights; (iii) the employment contract is executed for an indefinite period; and (iv) they are regulated mutually, except for cases where, by their nature, mutual contractual penalty is not possible (e.g. a contractual penalty imposed only on the employee for post-termination non-compete provision).

Discrimination protection

Discrimination in labour relationships is prohibited. Employees cannot be treated differently due to their work or contract type unless there are essential reasons.
Employees cannot be paid or treated differently, through or at the termination of the employment contract, for the same or equal work or work of equal value due to their gender or pregnancy.

In case of violation of the non-discrimination rule, the employee can claim compensation of four times his/her monthly salary and the rights s/he has not been granted. The burden of proof in this regard is, in principle, on the employee.

Mobbing is not defined under Turkish laws. Turkish court precedent, however, defines mobbing as physical or psychological pressure aimed at causing the employee to terminate the employment contract, and entitles employees to indemnification in case of mobbing.

Sexual harassment of an employee by the employer or another employee grants the employee a right to terminate the employment contract immediately with just cause, thus severance and notice pay, as well as indemnification.

**Protection against dismissal**

**Termination of the employment contract with just cause and valid cause**

Turkish laws make a distinction between termination with just cause and valid cause. The type of the cause results in differences in relation to the employee’s entitlement to severance pay, notice pay and re-employment claims, which will be described in the below sections.

Employees are entitled to terminate the employment contract with just cause immediately due to:
- health reasons;
- the employer failing to comply with morals and good intention rules and similar situations; and
- acts of God resulting in the cessation of work in the workplace for more than one week.

Employers are entitled to terminate the employment contract immediately with just cause due to:
- health reasons due to the employee;
- the employee’s failure to comply with morals and good intention rules and similar situations; and
- acts of God resulting in the employee’s inability to work in the workplace for more than one week or being arrested or taken into custody for a period more than the termination notice period applicable to that employee.

Termination reasons providing the employer with valid reasons are: absence of the employee exceeding the notification period due to the condition of being taken into custody; or being arrested, in addition to the ones mentioned above.

Termination with valid cause, on the other hand, is available only to the employer and applies in cases where there are reasons which prevent the employee from fulfilling his/her duty due to reasons attributable to the employee or the workplace. For an employer employing more than 30 employees in a workplace, the employment contract of an employee who has worked in the said workplace for at least six months can be terminated only for just or valid cause; otherwise the employee may demand his/her re-employment.

**Re-employment claims: Unworked period payment and indemnification due to the employer’s breach of the re-employment obligation**

If a dismissed employee wins a re-employment lawsuit, s/he will also be entitled to an “unworked period payment” amounting to four times his/her last gross salary. If the employer does not re-employ the employee, the employer will be obligated to pay an additional indemnification amounting to four to eight times the employee’s last gross salary.
Re-employment claims must be filed within one month following the termination. The employee shall demand re-employment within 10 days following the court decision’s delivery to the employee, and the employer shall re-employ the employee within one month following such demand.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Severance pay
Employees who have worked for a certain employer for at least one year are entitled to a severance payment if they terminate the employment contract with just cause or if their employment contract is terminated by the employer without just cause. The employee is also entitled to severance pay if they terminate the contract due to being enlisted for military duty, retirement, marriage (available only for women and if the employment contract is terminated within one year following the marriage), and death.

The severance payment is calculated by multiplying the employee’s number of working years for that employer by their last gross salary. If the employee’s salary is not stable, the last year’s average salary should be taken into account. The gross salary taken into account in this calculation, however, cannot exceed a certain limit, which is TRY 4,732.48 for 2017.

Notice pay
The following notice periods apply for terminating an employment contracts with an indefinite term, except for cases of termination with immediate effect:

<table>
<thead>
<tr>
<th>Duration of employment contract</th>
<th>Notice period</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;6 months (exclusive)</td>
<td>2 weeks</td>
</tr>
<tr>
<td>6 months (inclusive) – 1.5 years (exclusive)</td>
<td>4 weeks</td>
</tr>
<tr>
<td>1.5 years (inclusive) – 3 years (exclusive)</td>
<td>6 weeks</td>
</tr>
<tr>
<td>&gt;3 years (inclusive)</td>
<td>8 weeks</td>
</tr>
</tbody>
</table>

In case of a breach of the above notice periods, the other party is entitled to a notice pay equal to the salary the employee would be entitled to for the duration of the notice period.

When the employment contract is terminated with notice, the employee should be granted two hours per day for seeking a new job. These hours can be combined by the employee. If the employee is not granted this right, the employee must be paid twice his hourly rate for these unused hours.

Indemnification for bad faith
Employees who cannot benefit from the provisions of employment security and who work with an employment contract of an indefinite duration can demand “indemnification for bad faith”. This indemnification is calculated by multiplying the notice pay by three.

Annual paid leave
To be entitled to annual paid leave, the employee should have been working for the same employer for at least one year. The right to annual paid leave cannot be renounced. It is forbidden for the employee to work in another paid job during their annual paid leave. Otherwise, the payment can be taken back by the employer.

For the calculation of the one-year working period, the days during which the employee actively works are taken into account, as well as the days which the law deems to be worked.
These are as follows:

a) Days during which the employee is unable to work due to reasons such as accident or disease.

b) Days during which female employees did not work before and after their pregnancy.

c) Days during which the employees are unable to attend to their work during their assignments in a military manoeuvre or otherwise by law.

d) Fifteen days of the time which the employee spent without working as a result of the work being suspended for more than a week, except for cases of force majeure at the workplace.

e) Week holidays, national holidays and nationwide holidays.

f) Half-day leave that is required to be given to employees, other than Sundays, during X-ray examinations.

g) Days during which the employees cannot continue their work due to reasons of:
   attendance of mediation meetings, arbitration committees, or performing employee representation duties within these committees; attending councils, boards, commissions and meetings founded in line with the legislation regarding business life; or conferences, congresses or commissions of international institutions related to labour issues as an employee or union representative.

h) Leave given to employees of up to three days in case of marriage or death of their parents, spouses, siblings or children.

Annual paid leave entitlements are as follows:

<table>
<thead>
<tr>
<th>Duration of employment contract</th>
<th>Annual paid leave entitlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 year (inclusive) – 5 years (exclusive)</td>
<td>14 days</td>
</tr>
<tr>
<td>5 years (inclusive) – 15 years (exclusive)</td>
<td>20 days</td>
</tr>
<tr>
<td>&gt;15 years (inclusive)</td>
<td>26 days</td>
</tr>
</tbody>
</table>

Employees working underground (e.g. mine workers) are entitled to an annual leave four days more than the above. Additionally, employees who are below age 18 or above age 50 are entitled to a minimum annual paid leave of 20 days.

National holidays, week holidays and general vacations which coincide with the term of leave shall not be counted as a part of the leave duration. For employees who spend their annual paid leave in a location other than the place in which the company is located, a total amount of up to four days can be given by the employer as unpaid leave for the time that will spend on the road during their round trip (departure and return), upon the employee’s request and provided that the trip is documented.

Employers are obliged to pay the employees in advance for their annual paid leave.

In case the employment contract comes to an end for any reason, payment in respect of the annual paid leave term earned but not used by the employee is made over the payment on the date that the agreement is concluded.

In case of termination of the employment contract, the employee is entitled to payment of unused annual leave, over their last salary.

Parental leave

Male employees are entitled to five days’ paid leave in case their spouse gives birth. For the treatment of a child with permanent disease or at least 70% disability, employees are entitled to 10 days of paid leave per year, which can be used in whole or in part, provided that the leave is used only by one of the working parents.
In principle, female employees shall not work eight weeks before giving birth and eight weeks after the birth. In cases of multiple pregnancy, the unworked period before the birth date is extended to 10 weeks. However, provided that her doctor approves that her health condition is suitable, pregnant employees can work until three weeks before the birthdate. In such cases, the period during which the female employee works will be added to the leave period after the birth. In cases of premature birth, the unused part of the pre-birth leave period shall be added to the leave period after the birth.

In case of adoption, one of the parents is entitled to parental leave of eight weeks following the delivery of the child to the family.

Upon the employee’s request, employees are granted unpaid leave after the paid parental leave after birth or adoption. This unpaid leave period can be 60 days for the first child, 120 days for the second child and 180 days for subsequent children. If the child has a disability, this period will be 360 days.

To breastfeed children below the age of one, female employees are granted breastfeeding leave for a total of one-and-a-half hours per day. The hours during which this leave will be used and the number of its portions are determined by the employee. This period is part of the daily working period.

**Week holiday and general vacations**

Employees are entitled to a minimum uninterrupted 24-hour resting period (week holiday) per week, provided that s/he has worked through the week. The employee is also entitled to payment for the week holiday.

The week holiday is, in principle, on Sundays; the parties may, however, agree on another day.

If the employer suspends the work at the workplace for one or more days in a week without any force majeure or economic reason, the days of the week which have not been worked through are considered as days worked in the calculation of week holiday entitlements. In case of a force majeure that requires work to be suspended for more than a week, the half-day payment paid to the employees for the unworked days shall also be paid for the week holiday.

Nationwide (general) holidays are days deemed, in principle, as worked.

The employee’s work during week holidays or general vacations is subject to the employee’s consent. If the employee works during a week holiday or general vacation, they must be paid twice the amount of their daily payment.

**Worker consultation, trade union and industrial action**

**Right of trade unions**

Employees and employers have the right to establish, become members of, and withdraw from, trade unions. Nobody can be forced to become a member of a trade union or withdraw from membership. Multiple memberships within the same line of work are not permitted.

The employment contracts of employees who leave their workplace to become managers of a union become pending. The manager may, however, terminate his/her employment contract with immediate effect on the day that s/he leaves work without being bound by the notice period and become entitled to severance pay. If the manager terminates his/her employment contract during his/her management duty, severance pay is calculated over the
salaries of similar employees on the date of the termination. Upon the end of the managerial duty, s/he can apply to the employer within one month to restart the work. The employer is obliged to re-employ him/her in his/her previous job or a similar one; otherwise, the employment contract is deemed terminated by the employer.

In case the employee representative’s employment contract is terminated by the employer, upon a court’s decision on his/her re-employment, the termination will be deemed invalid and the payments and other rights between the termination date and the court decision that become definitive shall be paid by the employer to the employee. If the employee applies for re-employment within six business days following the definitive verdict and the employer does not re-employ him within the next six business days, the employment contract will be deemed to continue and the employer will be obliged to continue paying the representative’s salary and other entitlements.

Trade union activities and collective labour agreements

Employees have the right to carry out trade union activities outside their working hours. Carrying out trade union activities within working hours is subject to the employer’s approval.

Employees and employers have the right to enter into collective labour agreements. Members of the trade union, which are party to the collective labour agreement, benefit from those agreements.

Collective labour agreements can cover one or more workplaces in the same line of work. In such cases, collective labour agreements can only be made at the enterprise level. Collective labour agreements can be made for a minimum term of one and a maximum term of three years, save for works with a duration of less than one year. The trade unions may request an authorisation within 120 days before the expiry of the collective labour agreement. However, the collective labour agreement that will be executed cannot enter into force before the expiry of the previous agreement.

Unless otherwise specified in collective labour agreements, employment contracts cannot contradict collective labour agreements. Provisions of the employment contracts that contradict collective labour agreements are replaced by the relevant provisions of collective labour agreements unless the employment contract provision is to the benefit of the employee compared to the collective labour agreement. Provisions of the expired collective labour agreements related to employment contracts continue to be the provisions of the employment contracts until the new collective labour agreement enters into force.

The following do not invalidate or terminate collective labour agreements: dissolution of the trade union which is party to the collective labour agreement; their activities being suspended; the labour union losing its authority; and changes in the employer’s line of work.

In case of workplace transfer, if the transferee employer has a collective labour agreement that is in force at its workplace(s) in the same line of work, provisions of the collective labour agreement in connection with the transferred workplace continue to be provisions of the employment contract. If there is not a collective labour agreement in place at the workplace(s) of the transferee employer, rights and obligations arising from the collective labour agreements in force at the transferred workplace continue to exist as provisions of the collective labour agreement until a new collective labour agreement is made. In cases in which a workplace without a collective labour agreement is acquired by an employer, which is a party to an established collective labour agreement, that workplace comes within the scope of the established collective labour agreement.
Trade unions are authorised to enter into collective labour agreements provided that at least 1% of the employees are working in its line of work, more than 50% of the employees in the relevant workplace and 40% of the employees of the whole enterprise (i.e. all workplaces within the said enterprise) are its members. If more than one trade union has as its members more than 40% of the employees of an enterprise, the trade union having the highest number of members is authorised to make a collective labour agreement. The number of members at the date of application for authority is considered in these calculations.

If no agreement is reached among the parties for a collective labour agreement, the matter is referred to a mediator. The mediator shall resolve the matter within 15 days, which can be extended by a maximum period of six business days. If agreement cannot be reached during mediation meetings, the mediator prepares no-settlement minutes and delivers them to the Ministry of Labour and Work Authority City Directorate or the Ministry of Labour and Social Security, depending on the case. The relevant authority then sends the no-settlement minutes to the parties. The parties then may refer the matter to the High Board of Arbitration. The decision of the High Board of Arbitration is definitive and has the force of a collective labour agreement.

Strike and lock-out

The trade union, within 60 days following the notification of the mediator’s no-settlement minutes, can decide to start a strike and start applying it with six business days’ advance notice to the other party. In cases in which a strike decision is not taken or the opposite party is not notified about the date of its implementation within this period, the trade union’s authority to enter into a collective labour agreement expires.

An employers’ union, which is party to a labour dispute, or employers who are not members of a trade union, can decide on a lock-out within 60 days following their receipt of the strike decision, and start applying it with six business days’ advance notice to the other party.

Strike and lock-out decisions must be announced at the workplace.

Strikes and lock-outs cannot be carried out in: life- and property-saving business; funeral and cemetery business; city water supply; electricity, natural gas, petrol production, dissolution and distribution business; petro-chemical business originating from naphtha or natural gas; in workplaces managed directly by the Ministry of Defence, General Command of Gendarmerie and Coast Guard Command; government fire departments; and public hospitals. Employees are free to choose whether or not to participate in the strike. Employees participating in the strike and employees exposed to a lock-out are required to leave their workplace.

Employers cannot employ other employees permanently or temporarily or make others work instead of the employees with pending employment contracts during a legal strike or lock-out.

In case of an illegal strike, employers can terminate the employment contracts of the participants, or employees who persuade others to go on or continue the illegal strike. Such reasons of termination are accepted as just causes. In case of an illegal strike, the employer’s loss due to that strike shall be compensated by the trade union which made the decision of the strike, or employees participating in that strike if the illegal strike is carried out without a trade union decision. In case of an illegal lock-out, the employer must continue to pay the employees their salaries and other rights and indemnify them for their losses.
Union compensation

Due to the no-discrimination rule, employees’ employment contracts cannot be terminated due to trade union activities or participation in strikes. Otherwise, the employer is obligated to pay a “trade union compensation” to the employee. The amounts of trade union compensation are as follows:

<table>
<thead>
<tr>
<th>Duration of employment contract</th>
<th>Trade union compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;5 years (exclusive)</td>
<td>Equal to 12 months’ gross salary</td>
</tr>
<tr>
<td>5 years (inclusive) – 15 years (exclusive)</td>
<td>Equal to 13 months’ gross salary</td>
</tr>
<tr>
<td>&gt;15 years (inclusive)</td>
<td>Equal to 14 months’ gross salary</td>
</tr>
</tbody>
</table>

The conditions for re-employment lawsuits also apply for claiming trade union compensation. The six-month employment condition required for initiating a re-employment lawsuit, however, has been abrogated by the High Constitutional Court for trade union compensation claims.

Employee privacy

Employers are obliged to use their employee’s personal data in line with good faith and laws, and not to illegitimately disclose these personal data. The information in the employee’s personal file is also deemed personal data.

Turkey has enacted the Law on the Protection of Personal Data in 2016 (“Personal Data Law”). A Personal Data Protection Authority has also been established in line with the Personal Data Law and has recently become operational. The Personal Data Law is based on and resembles the European Union Directive 95/46/EC on the Protection of Personal Data. According to the Personal Data Law, the following administrative fines apply for the following types of breach:

<table>
<thead>
<tr>
<th>Breach</th>
<th>Administrative fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach of non-disclosure obligation</td>
<td>TRY 5,000 – 100,000</td>
</tr>
<tr>
<td>Breach of data protection obligation</td>
<td>TRY 15,000 – 1,000,000</td>
</tr>
<tr>
<td>Non-compliance with the Personal Data Protection Authority decisions</td>
<td>TRY 25,000 – 1,000,000</td>
</tr>
<tr>
<td>Breach of obligations to register with and notify the data registry</td>
<td>TRY 20,000 – 1,000,000</td>
</tr>
</tbody>
</table>

Additionally, Turkish Criminal Code sets out the following criminal sanctions for breach of personal data:

<table>
<thead>
<tr>
<th>Act</th>
<th>Criminal sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal recording of personal data</td>
<td>1–3 years of imprisonment</td>
</tr>
<tr>
<td>Illegal disclosure of or access to personal data</td>
<td>2–4 years of imprisonment</td>
</tr>
<tr>
<td>Non-deletion or non-anonymisation despite being obliged to do so</td>
<td>1–2 years of imprisonment</td>
</tr>
</tbody>
</table>

The sanctions under the Turkish Criminal Code apply to individuals who are intentionally involved in the criminal act. Legal measures, however, apply to legal entities which are used in or benefit from the criminal act. These legal measures include cancellation of governmental permits and confiscation of goods used in or derived as a result of the criminal act.

Finally, employees whose personal data are breached by the employer may claim damages from the employer.
Other recent developments in the field of employment and labour law

Changes to the Sub-Employment Regulation
In August 2017, the Sub-Employment Regulation provisions were amended. The amendments relate to governmental inspections against the use of sub-employment relationships to circumvent the employee’s employment relationship with the main employer, and the employers’ objections thereto. The essential amendments are as follows:

- The inspection minutes also need to be delivered to the employers, besides the inspection report.
- The deadline for employers’ objection has been extended from six to 30 business days.
- The administrative fine in case of circumvention has been abrogated and instead it is stipulated that employees will be deemed to be employees of the main employer.

Changes to the Overtime Work Regulation
In August 2017, the Overtime Work Regulation was amended. According to these amendments, the requirement to obtain the employees’ consent to overtime at the beginning of each year has been cancelled. Now, it will be enough for employers to obtain such consent in the employment contract, or whenever necessary. The employees, on the other hand, have been granted the right to repeal such consent at any time with one month’s prior notice.

The said regulation has also been amended to prohibit mine workers from working overtime except for compulsory situations.

Changes to the Annual Paid Leave Regulation
In August 2017, the Annual Paid Leave Regulation was amended. The essential amendments are as follows:

- Previously, annual paid leave could be divided maximum into three portions. This limitation has been removed.
- The regulation has been amended to clearly state that the annual leave entitlements of employees who continue to work in the same workplace under different sub-employers should be calculated starting from the employee’s first employment in the workplace. The main employer is also liable to ensure that employees are granted the right to use their annual leave rights accordingly. Sub-employers are obliged to provide the main employers with the annual leave documents of the employees.

Changes to the Subcontracted Labourer Regulation
In December 2017, with a provision added to Decree Law No: 375 by Decree Law No: 696, subcontracted employees of government services have been transferred from private subcontractors to government-owned companies. Accordingly:

- Employees working for subcontractors of public administrations and affiliated circulating capital enterprises, provincial special administrations and municipalities and their subsidiaries by 4th December 2017 were granted a right to apply to the relevant public authorities for being employed as an employee at government-owned companies. This applied to labour-intensive subcontracted works.
- Employees fulfilling certain conditions were transferred to these government-owned companies in April 2018.
- Consequently, the relevant subcontracting agreements have been terminated. This resulted in a downsizing of labour-intensive government subcontracts.
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Haşmet Ozan Güner has advised and represented many local and multinational companies, particularly on: structuring commercial partnerships; distributorship, franchise and agency agreements; drafting, localising and negotiating their contracts; analysing the legal risks of termination of these relationships and conducting the termination process and disputes in these fields. His clients’ industries include pharmaceuticals, medical devices, food supplements, retail, automotive, food & beverages, port construction and operations and industrial machinery.

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He also has experience in competition law compliance, Competition Board investigations, clearance filings for mergers and acquisitions and individual exemption applications. He has advised many clients in merger and acquisition processes and negotiation of their agreements.

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She coordinates the Firm’s client relationships in the area of employment law and coordinates the Firm’s employment law practice. She also coordinates the Firm’s correspondent law firms in other cities in Turkey for proceedings outside Istanbul.

Dilara also advises clients on dispute-preventive and risk-reducing measures in employment law, including employment law due diligence activities, conduct of large-scale dismissals and workplace transfers.
General labour market and litigation trends

The overarching legislation regulating employment matters in the UAE’s private sector is UAE Federal Law No. 8 of 1980, as amended (the “UAE Labour Law”). Over the years, the UAE has implemented several sector-specific free trade zones designed to encourage and facilitate foreign direct investment, the majority of which are concentrated in the Emirates of Abu Dhabi (the capital) and Dubai. Some of these free trade zones have introduced their own employment regulations but these largely and broadly reflect and mirror the UAE Labour Law and, in any event, must be read in conjunction with, and not in isolation to, the UAE Labour Law being a federal law. Exceptionally, the Dubai International Financial Centre (the “DIFC”) and the Abu Dhabi Global Market (the “ADGM”) free zones, being unique financial free zones based on the English common law model, are subject to independent employment regulations: the DIFC Law No. 4 of 2005, as amended (the “DIFC Employment Law”); and the ADGM Employment Regulations 2015, as amended (“ADGM Employment Regulations”), respectively. The UAE Labour Law does not have any application in the DIFC or the ADGM.

Uniquely when compared to Western jurisdictions, the UAE has a dual employment market roughly delineated by citizenship: UAE nationals serve in the majority of public sector roles whilst foreign nationals dominate the private sector. Few countries have such a stark separation in their workforce. The employment regime is intrinsically linked to the immigration regime which is not surprising considering the UAE has an expatriate population of approximately 89 per cent: foreign nationals require sponsorship through a locally licensed and registered entity for UAE work permit and residency visa purposes. Such sponsorship is both employer-specific and location-specific and has historically operated on a rigid and static basis (third-party working is permitted but on a conditional basis). UAE and other GCC nationals only have to procure a labour card in order to work in the UAE (restrictions currently apply to Qatari nationals). The employment law framework to date has provided a broad brush minimal framework of rights, protections and standards, with the UAE’s labour courts adopting a historically pro-employee stance.

Across the past two years, the reform and updating of existing employment (and immigration) laws across the UAE, as well as the introduction of new laws, has continued to intensify – 2018 in particular has been a year of increasingly active reforms. The UAE government has been keen to facilitate the diversification of its economy (from an oil-dependent nation) by attracting inward foreign direct investment, liberalising and reviving the market for economic competitiveness (including facilitating a mobile and fluid workforce), establishing a more competitive knowledge-based economy and generally catering to the needs of the local
population. The employment law (and immigration law) regime has clearly been earmarked as key enabler for assisting short-term and longer-term economic growth and strategy. The key changes across the past 12 months or so are noted below.

**Gender parity**

**Greater female participation and gender equality**

The UAE is aiming to be in the top 25 countries on the international gender equality index by year 2021 and has already taken a number of active steps to draw itself closer to this goal. In 2015, the UAE established the Gender Balance Council with the aim of improving gender balance, achieving empowerment and equal participation of both men and women, reducing the gender gap across government sectors and promoting gender balance in decision-making positions. In September 2017, the UAE launched the Gender Balance Guide which – whilst not legal or mandatory in nature or application – provides companies operating in the private and public sectors with a general reference point for promoting gender balance, including: integrating gender into policies and programmes; promoting gender sensitive engagement of personnel; and improving the gender balance in leadership.

In keeping with the growing trend of ensuring gender parity within the workplace context, the UAE Cabinet in April 2018 approved a draft law on equal wages and salaries for men and women. The draft law – which has not been published – still needs to be approved at the federal level before it is enacted into law. The UAE Labour Law already contains express provisions mandating employers to ensure female employees receive the same pay as their male counterparts for the same work. It is unclear to what extent this new draft law will supplement the UAE Labour Law provisions, what additional obligations it will impose and the nature and extent of its application.

**Discrimination protection**

**Cabinet Resolution No.43 of 2018 in support of People of Determination**

On 29 July 2018, the UAE Cabinet introduced Cabinet Resolution No.43 of 2018 in support of “People of Determination” (the “Resolution”), representing a significant development in the protection and development of disabled employees in the workplace context. The Resolutions aims are three-fold in the context of fostering a supportive environment for disabled employees:

- equal employment opportunities;
- non-discrimination against them in any work stages or benefits – including recruitment, retention and promotion; and
- equal salaries to their peers engaged in the same role.

A disabled person is defined as including “any person with permanent or temporary disability or deficiency totally or partially in his/her physical, sensory, mental, communicative, educational or psychological abilities to the extent that it reduces the possibility of meeting his/her normal requirements in comparison of the circumstances of their peers who are non-disabled persons”. The obligation to adhere to the terms of the Resolutions falls on both public sector as well as private sector employers.

There is also a strong duty on employers to make adjustments to the workplace in order to accommodate disabled employees. Employers are subject to a positive duty to consider adjustments in the following areas:

- work environment – for example, adjusting physical areas of the workplace or providing suitable equipment or training;
• work organisation – for example, putting into place flexible working arrangements;
• performance management and assessment – including putting into place measures and mechanisms to assist the employee to meet the standards of their role; and
• career development and learning opportunities.

The Resolution also prohibits termination for disability-related reasons, although significantly it falls short of granting a statutory right to disabled employees to pursue a claim for disability discrimination and/or seek any related compensation.

The Ministry of Human Resources and Emiratisation (the “MOHRE”), the labour authority regulating labour relations in the private sector, has a duty to take into consideration several factors when assessing an employer’s compliance with the Resolution, including the size and resources of the employer, the nature and circumstances of the work environment, and the type, degree and nature of the disability. The UAE Labour Law does contain limited provisions connected to disabled employees, notably that an employer should try to reassign an employee, who becomes disabled, to a suitable operative role. However, there is no express requirement, under the UAE Labour Law, to adjust roles in order to employ or accommodate disabled employees. The Resolution is, therefore, a step in the right direction and underscores the UAE’s commitment to wanting to ensure employment standards meet best practice and generally provide a greater legislative framework.

**Recruitment and termination of UAE nationals**

Ministerial Decree No. 212 of 2018

As mentioned above, the dual labour market in the UAE is reinforced by citizenship rights. Private sector organisations are required to meet nationalisation hiring quotas which were put in place over a decade ago to ensure the availability of jobs for all UAE nationals. Continuing the theme of providing for more protective and inclusive rights for UAE nationals, the MOHRE issued Ministerial Decree No. 212 of 2018 (the “MD 212”) regulating the recruitment and termination of UAE nationals in the private sector.

MD 212 provides for a number of provisions regulating the recruitment of UAE nationals, including employing nationals under two-year employment contracts, the availability by the MOHRE of training programmes relevant to his/her role and market practice, and potentially greater monitoring by MOHRE of the employment of UAE nationals.

As regards termination, by way of background, the MOHRE had in 2009 issued Ministerial Decree No. 176 of 2009 (“MD 176”) regulating the termination of UAE nationals. MD 176 restricted the circumstances under which employers in the private sector could legitimately terminate UAE nationals (generally only for gross misconduct offences which are uniquely exhaustively defined under the UAE Labour Law) and further imposed an administrative requirement on employers to notify and obtain the prior approval of the MOHRE before terminating the UAE nationals’ employment. MD 212 now repeals MD 176 and provides for the following:

• employers can terminate UAE nationals under fixed-term or unlimited-term employment contracts, in accordance with the UAE Labour Law and, in particular, Ministerial Decree No.765 of 2015 (“MD 765”) (which came into force on 1 January 2016). MD 765 did not formally amend the UAE Labour Law but supplements the existing termination rules, processes and/or procedures and in certain instances broadens the termination framework. In other words, MD 212 broadens the circumstances under which UAE nationals can legitimately be terminated and is, to a degree, generally much less restrictive than the position under MD 176; and
under MD 212, employment will also be regarded as terminated: (a) where the employer breaches its legal or contractual obligations towards the employee (e.g. delays salary for more than 60 days), the employee is unable to attend work as the employer’s premises have been closed for more than two months and the employee has issued a complaint against the employer in this regard during such period which has subsequently been verified by an inspector from the MOHRE; or (b) upon a court ruling in favour of the employee for unpaid wages of not less than two months’ wages, arbitrary dismissal or any other unpaid contractual or statutory sums without legal justification.

MD 212 further provides that a termination will be invalid:
• where the termination circumstances have not been followed with respect to unlimited or fixed-term contracts (as under the UAE Labour Law and MD 765);
• where it is established that the employer employs a non-UAE national undertaking the same role as the terminated UAE national or where the termination has been processed in order to enable the employer to recruit a non-UAE national in place of the terminated UAE national; and
• where the termination is unrelated to the UAE national’s employment or where the termination is as a result of the UAE national making a complaint to the MOHRE against the employer which has subsequently proven true.

Relevantly, MD 212 lists various penalties and enforcement action including referral to the Labour Court, downgrading the employee’s classification on the MOHRE job seeker website, suspending (on the part of employers) the issuance of work permits for a period of six months, and financial penalty of AED 20,000 per incident. These penalties are much stricter than those which were noted in MD 176 and care should certainly be taken when proposing to terminate the employment of a UAE national. Regulations regarding the protection of UAE nationals in the workplace context are likely to continue in both the shorter and longer term.

**Reform of the DIFC Employment Law**

The DIFC Employment Law (Law No.4 of 2005, as amended) is currently the subject of a consultation paper which has proposed a number of significant changes. Changes were last made to the DIFC Employment Law in 2012, but were not comprehensive. The DIFC stands as a unique financial free zone in the UAE in that it is a common law jurisdiction subject to its own legal framework and rules, largely independent of those applicable to companies operating outside its zone (and which follows a civil law jurisdiction). The consultation paper – which closed for public comment on 22 March 2018 – proposes changes which are increasingly more in line with employment laws and protections in England and Wales, including an express concept of constructive unfair dismissal, expansion of the “protected grounds” for discrimination to include age, pregnancy and maternity, remedies and financial penalties for breach of the Law (including an express compensation regime for breach of anti-discrimination laws which is absent in the existing DIFC Employment Law), whistleblowing protections, recognition of alternative employment structures (e.g. part-time working and secondment arrangements) and a widening of the territorial reach of the DIFC Employment Law itself.

The new DIFC Employment Law is intended to come into effect during Q1 2019 although the extent of the changes is presently unclear.

**Atypical working arrangements**

In order to cater to the demands of the modern working environment and to encourage a better work/life balance, the UAE has begun to take active steps and measures to facilitate
more flexible working models, with the recent introduction of specific legislation governing remote working (specifically for UAE nationals) and part-time working arrangements.

Remote working – Ministerial Decree No.787 of 2017

Remote working is a relatively new concept in the UAE. The UAE Labour Law does not contain any express provisions mandating or regulating the terms or circumstances under which employees can request remote working. However, with increased technological advancements rendering alternative working structures more practically feasible, the MOHRE introduced Ministerial Decree No.787 of 2017 (“MD 787”), enabling eligible UAE nationals the right to apply for remote working, subject to the following conditions:

- the UAE national employee being employed by a company registered with the MOHRE;
- having six months’ service if employed on a full-time basis; or
- having one years’ service if employed on a part-time basis.

When considering an application for remote working, employers are encouraged to consider a number of factors including whether:

- the proposed remote working is compatible with the nature of the employee’s work and duties and the employer’s operational requirements;
- the proposed remote working arrangement improves the employee’s service and/or would result in additional financial cost for the employer; and
- the employee has the requisite skill level to undertake the role remotely.

Employers are required to respond to an application for remote working within 20 working days.

Where an application is rejected by the employer, an employee may re-submit the same application on a further two occasions in the same year.

MD 787 does not list the grounds under which employers can legitimately reject a request for remote working. Employers are therefore likely to rely upon grounds in comparable remote working legislation in other jurisdictions such as in England and Wales where factors such the additional cost in accepting the request, difficulty in reorganising the employee’s work and/or the inability to meet business or customer demand.

Part-time working arrangements – Ministerial Decree No. 31 of 2018

MOHRE also enacted Ministerial Decree No. 31 of 2018 (“MD 31”) permitting eligible employees to take on one or more part-time jobs. A previous system of part-time work permits existed since 2011 but was rarely utilised on account of the employee requirement to procure and obtain permission (in the form of a No Objection Certificate (“NOC”) from their first/original employer).

The new system has abolished the requirement for a NOC. Generally therefore, eligible employees have the ability to commence work with a competitor employer in the UAE (albeit, the MOHRE will notify as part of its pre-approval process all other employers when it issues the part-time work permit; and the employee himself also has an obligation to inform all such employers if he takes up another part-time role).

Eligible employees include those based in the UAE and who are classified as “skilled workers” (that is, those who have a job that requires a university degree certificate or above on their Employment Residence Permit or anyone with a diploma in any technical or scientific field). The original or first employer still retains ultimate responsibility for the employee’s salary and other legal/contractual entitlements, with the second/other part-time employer notshouldering such responsibilities. Certain other requirements apply to MD 31 including hours of work, the type of contract to be executed between the parties and the provision of any agreed upon benefits between the employee and the second/other part-time employer.
In light of MD 31 and the removal of the NOC requirement, we recommend that companies:

- undertake an audit check of, and ensure employment contractual documentation includes, clear and express confidentiality obligations, duties to disclose third-party engagement and conflicts of interest, and properly reflect working arrangements (including a review of which contracts might trigger the option of part-time working);
- introduce a comprehensive part-time working policy; and
- put in place structures to restrict employee access to company confidential information.

Other recent developments in the field of employment and labour law

Changes to the immigration and employment laws across the GCC countries, including the UAE, are likely to continue. The government is keen to develop, open and expand its economy (moving away from being oil dependent) and cater to the globalised nature of doing business and the increasing need to adopt, and adapt to, international best practice standards in the employment context. Increased legislation in the employment sphere is therefore likely to continue.
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Anir regularly speaks at external events advising on changes to employment and immigration law and policy. He also writes extensively in legal journals and numerous other publications. Anir also provides in-house training for clients.
Anir holds a degree in Law and Politics and is a dual-qualified lawyer (Solicitor of England and Wales and U.S. Attorney-at-Law, New York).

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Mandeep is the Middle East Employment and Labour Law Lead. He is a UK-qualified employment lawyer and has been based in the Middle East since 2011. Mandeep advises on all aspects of employment law arising across the employment cycle, from day-to-day HR support, employment contracts/policies, termination issues and disputes, and the employment aspects of M&As and business restructurings. He also advises on the challenges facing modern employers – from working hours, global mobility (both inbound and outbound), social media and the protection of confidential information, to team moves and post-termination restrictions and obligations.
Mandeep has been ranked as a leading employment lawyer in the UAE and an “Associate to Watch” by Chambers Global (Chambers & Partners) from 2013 to 2018, inclusive.
Worker status and the gig economy

Worker status continues to be a hot topic particularly in the so-called “gig economy”. Many gig economy business models treat individuals in the business as service providers, offering their services at low cost to customers, typically through a digital platform. The arrangements with the individuals are often flexible, short term and low paid. There have been a number of high-profile cases in this area in recent times involving businesses such as Uber and Deliveroo. These cases tend to be highly fact-specific, so do not necessarily establish new legal principles, but they are widely reported and discussed given the expansion of the gig economy and the structures that gig economy companies adopt in order to seek to limit their exposure to employment law protections. That said, in none of the gig economy cases have the individuals established employee, as opposed to worker, status, which attracts greater protections such as the right to claim unfair dismissal.

In the last 12 months, both Pimlico Plumbers and Uber have failed in their appeals (to the Supreme Court and the Employment Appeal Tribunal (EAT) respectively) against decisions that the individuals who work in their businesses are “workers” and therefore entitled to rights such as the national minimum wage and paid holiday. In *Pimlico Plumbers v Smith*, factors which were decisive included the requirement for Mr Smith to perform the work personally, and the fact that Pimlico Plumbers exercised tight control over him, such as requiring him to wear a uniform and drive a branded van. He was not, as Pimlico Plumbers sought to argue, carrying on business on his own account. In *Uber BV v Aslam*, the EAT found that while drivers were in the area in which they worked, logged into the Uber app, and willing to accept work, this was “working time” for the purposes of both the Working Time Regulations 1998 and the national minimum wage legislation. As with Pimlico Plumbers, the level of integration into the business and control exercised over the drivers was decisive. Uber is appealing to the Court of Appeal. Similar decisions were reached in relation to couriers working for *Addison Lee* and *Hermes*. By contrast, in a trade union recognition case before the Central Arbitration Committee (*Independent Workers’ Union of Great Britain and RooFoods Limited T/A Deliveroo*), individual delivery drivers were found to be self-employed contractors because they did have a genuine right to substitute another person to do their work, and there was therefore no requirement of personal service.

Following the report published in July 2017 by the Taylor Review (a Government-sponsored review of the modern British labour market), the Government responded in April 2018 proposing a number of measures to clarify the status and protection of workers in the gig economy, such as codifying and clarifying the existing case law on worker status, and

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**General labour market and litigation trends**

**United Kingdom**

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renaming workers as dependent contractors. However, the Government is at this stage only consulting on these proposals, and there is no indication of when, if at all, any proposed measures will become law.

Sexual harassment, #MeToo and non-disclosure agreements

The issue of sexual harassment at work has come into increased focus over the past 12 months not least as a result of the #MeToo campaign and the well-publicised sexual misconduct allegations against Harvey Weinstein. The publicity that the issue has attracted, including the focus on the unacceptability of employers not reacting appropriately in relation to historic cases which have subsequently come to light, has led many employers to review and update their equal opportunities, anti-harassment and bullying policies and to make sure that their staff have had appropriate training, both in terms of what is acceptable behaviour, and also how to deal properly with complaints of discrimination, harassment or bullying.

The use of confidentiality clauses or non-disclosure agreements (NDAs) in the settlement of sexual harassment and similar cases has also come under scrutiny. The NDA agreed by Harvey Weinstein’s London lawyers in one particular case was, whilst unusual in terms of its detail and severity, highly restrictive and widely criticised. In March 2018, the regulatory authority for solicitors in England and Wales, the Solicitors Regulation Authority (SRA) issued a “Warning Notice” setting out guidelines on the use of NDAs. It stated, amongst other things, that NDAs should not be used as a means of preventing or deterring a victim of sexual harassment from making a protected disclosure under whistleblowing legislation, reporting a criminal offence to a law enforcement agency, or co-operating with a criminal investigation or prosecution. However, the SRA’s Warning Notice has forced law firms to consider carefully their advice to clients on how to manage such settlements, and the wording of their standard settlement documents.

Protection against discrimination

Disability discrimination

Pressure put on a disabled employee to work long hours triggered the employer’s duty to make reasonable adjustments, and amounted to constructive dismissal

In United First Partners v Carreras, the employee qualified as a disabled person for the purposes of the Equality Act 2010 following a cycling accident, after which he suffered from dizziness, fatigue and headaches and had difficulties concentrating. Prior to the accident, he had worked 12–14 hour days. After the accident, he was initially permitted to work reduced hours. However, over time his employer made repeated requests for him to work later in the evening and this developed into an expectation that he would do so. The employee formally objected to working late in the evening. This led to a heated exchange with one of the owners of the business, during which the employee was reprimanded in front of other staff, was told to apologise and that he could leave if he did not like it. The employee felt that the owner’s behaviour was abusive and unacceptable, and he resigned. In a follow-up email, he gave a number of reasons for his resignation including being forced to work late in the evenings.

In relation to the individual’s disability discrimination claim, the Court of Appeal found that, whilst there was never any formal requirement to work the longer hours, the pressure and expectation on the employee was sufficient for the employer to have applied a “provision, criterion or practice” (PCP) to work long hours which triggered the duty to make reasonable adjustments under the Equality Act 2010.
Employer liable for unlawful disability discrimination despite being unaware that the employee’s actions were due to his disability

In Grosset v City of York Council, a teacher who had cystic fibrosis was dismissed for gross misconduct after he showed an 18-rated film to a class of 15 year olds. The teacher had been given an increased workload by a new head teacher who had not been properly informed about the agreed reasonable adjustments in place for the teacher in relation to his condition. This increased workload caused the teacher to suffer from stress which had led to his error of judgment in acting as he did. Whilst the employee’s unfair dismissal claim failed, the employer was liable for unlawful disability discrimination – by way of unfavourable treatment because of something arising in consequence of the individual’s disability – which the employer could not justify. This was the case even though the employer was not aware that the individual’s disability had caused the error of judgment. The Court of Appeal found that, for this claim to succeed, there was no need for the employer to know that the employee’s actions were due to his disability. This was an objective question of fact. It was also held that the Employment Tribunal (ET) had been entitled to conclude that the discrimination was not justified. In particular, the employer had not demonstrated that its actions were proportionate. Key to this conclusion was the ET’s assessment that, if the agreed reasonable adjustments had been put in place, it was likely that the teacher would not have been given an increased workload, would not have suffered from stress and consequently that the incident would not have occurred.

Constructive knowledge of an employee’s disability

An employer is not under a duty to make reasonable adjustments under the Equality Act 2010 for an employee when it does not know and could not reasonably be expected to know – “constructive knowledge” – that the employee is disabled. In Donelien v Liberata UK Ltd, the Court of Appeal upheld the EAT’s decision that an employer did not have constructive knowledge of an employee’s disability. The employee had a number of long and short absences for different reasons, and the employer had various communications with the employee’s GP. It also met with the employee and referred her to occupational health advisers who provided a report to the employer, which it considered critically. The employee was often uncooperative and confrontational in her dealings with the employer. The employer had concluded that the advice from occupational health was broadly consistent with the advice from other sources that the employee was not disabled. In the court’s view, the ET was right to find that the employer had taken all reasonable steps to ascertain whether she was disabled. The employer had not simply rubber-stamped the opinion of its occupational health advisers that the employee was not disabled. It therefore did not have constructive knowledge of her disability.

Definition of “cancer” under disability discrimination legislation

Under the Equality Act 2010, cancer is deemed to be a disability. In Lofty v Hamis t/a First Café, the employee was diagnosed with a type of skin cancer (lentigo maligna) variously described as “pre-cancerous” and “in situ cancer” which meant that it was only present in the top layer of her skin. Such cancer may, however, develop into malignant melanoma. The EAT found that the ET had been wrong to find that the employee was not disabled because the cancer was at an early stage. The wording of the Equality Act 2010 makes clear that any type of cancer is included. For an individual to establish that he or she is disabled for the purposes of the Equality Act 2010, it is only necessary for a claimant to have been diagnosed with cancer. It is not necessary to distinguish between different stages or types of cancer.
Giving a written warning for sickness absence could not be justified in a disability discrimination claim

In *DL Insurance v Connor*, the EAT considered whether an employer was able to justify giving a written warning in respect of 60 days’ sickness absence in a 12-month period to an employee who had high absence levels over many years. The employee claimed that this amounted to unlawful disability discrimination – by way of unfavourable treatment because of something arising in consequence of the individual’s disability. The effect of the warning was to suspend contractual sick pay for future absences. In order to defend the claim, the employer had to justify its actions by showing that the warning was a proportionate means of achieving a legitimate aim. The employer’s legitimate aim was to ensure adequate attendance levels and to improve the claimant’s attendance levels in particular. The EAT held that the ET had been entitled to find that for the employer to issue a warning was not a proportionate way of achieving those aims. In particular, other than making general statements about the impact of absences, the employer could not show that the warning would assist in achieving those aims. The failure of the employer to speak to the claimant about the possible impact of the warning, and its failure to follow some of its own policies (for example, to obtain medical evidence and occupational health reports) contributed to the employer’s inability to prove that its approach was justified.

Pregnancy discrimination

Employer not required to revisit a decision to dismiss made before it knows that an employee is pregnant

In *Really Easy Car Credit Ltd v Thompson*, the EAT held that, for claims for unfair dismissal by reason of pregnancy and pregnancy discrimination to be able to succeed, the employer must know, or believe, that the employee is pregnant when it takes a decision to dismiss. In this case, the employer decided to dismiss the employee after an incident at work. The employer wrote a dismissal letter but decided that, rather than posting it immediately, the letter would be handed to the employee when she was next in the office. Before the employer could do this, the employee told the employer that she was pregnant. The EAT found that there was no positive obligation on the employer to revisit its decision to dismiss once it found out about the employee’s pregnancy.

Dismissal and terminations

Notice of dismissal sent by post is only effective when the employee has an opportunity to read it

In *Newcastle upon Tyne NHS Foundation Trust v Haywood*, the Supreme Court considered when notice of dismissal given by post takes effect (in the absence of a specific contractual provision). Mrs Haywood’s position had become redundant. She was on holiday when her employer sent her a notice of termination, by recorded delivery on 20 April 2011, giving her 12 weeks’ notice purporting to expire on 15 July 2011. The date on which the notice expired was crucial. If it expired on or after her 50th birthday on 20 July 2011 she would receive an unreduced early retirement pension. If notice expired earlier than 20 July, her pension would be reduced. Mrs Haywood was on holiday, and did not therefore have an opportunity to read the notice of dismissal until she arrived home on 27 April 2011.

The Supreme Court decided that notice of dismissal by post starts to run when the letter comes to the attention of the employee and he or she has either read it, or has had a reasonable opportunity to do so. In Mrs Haywood’s case, this meant notice started to run when she returned from holiday on 27 April 2011, and did not expire until 20 July 2011.
Constructive dismissal and imposing a pay cut

An employee may claim constructive dismissal if he or she can show that the employer has “without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee”. In Mostyn v S and P Casuals, the employer had imposed a substantial cut in an employee’s basic pay. It concluded that an employer can never have reasonable and proper cause for breaching trust and confidence where that breach consists of the unilateral imposition of a significant pay cut on an employee.

Claims in respect of negligent employment references

In Hincks v Sense Network Ltd, the claimant, who had been an independent financial adviser engaged by Co-operative Independent Financial Solutions (CIFS), complained about a reference which had been given about him by Sense Network Limited, the company for which CIFS acted as appointed representative in relation to certain Financial Conduct Authority-regulated activities and which acted as CIFS’ compliance department. He alleged that Sense Network had committed negligent misstatement in giving the reference. His argument was essentially that, where a negative opinion is expressed about an individual based on the conclusions of an earlier investigation, the referee is obliged to be satisfied that the investigation was reasonably conducted and procedurally fair.

The reference in question referred to various issues which had arisen during the course of Mr Hincks’ engagement including a prior suspension for non-compliance with internal procedures, and a transaction which Mr Hincks had conducted in November 2016 in breach of an applicable pre-approval process and to the conclusion of the investigation conducted at the time – which led to the termination of his engagement – that Mr Hincks had “knowingly and deliberately circumvented” that pre-approval process. Mr Hincks argued that this investigation had been an “inadequate sham” and for the reference to refer to its conclusions meant that the reference was not true and accurate and gave a misleading impression.

Employers giving references need to exercise reasonable skill and care and must take reasonable care to ensure that any reference given is not misleading overall, whether as a result of the inclusion or omission of material, nuance or innuendo. In Hincks, the High Court found that this did not mean that a referee is obliged to assess the procedural fairness of a prior investigation the conclusions of which may form part of the reference to be given. The time that might have elapsed since the investigation, the fact staff might have left, potential issues concerning the recovery of relevant documents and the difficulty of such a retrospective review meant that an employer could not be expected to revisit the prior investigation as Mr Hincks argued that it should.

The court did, however, note that a reasonable reference-giver should take reasonable care to be satisfied that facts set out in the reference are accurate and true and that there is a proper and legitimate basis for any opinion expressed in the reference, and to ensure that the reference is not misleading by way of inclusion or exclusion of material, nuance or innuendo. The reference giver should take reasonable care in considering and reviewing material underlying a previous investigation on which an opinion is based so that the referee can understand the basis for the opinion in question and be satisfied that there was a proper and legitimate basis for it.

If errors in the investigation were obvious to the reference-giver or if information were to come to light which throws doubt on the facts or opinions set out in the investigation documentation, the referee would be obliged to use reasonable care to check the position.
Changes to the taxation of termination payments

New rules on the taxation of termination payments of employees in the UK were introduced with effect from 6 April 2018. These rules increase the income tax and national insurance liabilities in relation to such payments as well as making the calculation of the applicable tax considerably more complicated.

The new rules treat as taxable, and subject to Class 1 National Insurance Contributions, the portion of a severance payment which is attributable to the basic pay element of any part of the employee’s notice period to the extent that the employee does not work out the applicable notice period. Redundancy payments (whether statutory redundancy pay, or payments under a scheme approved by HMRC) remain tax-free, as will payments to registered pension schemes falling within the applicable limits. Payments *in lieu of notice* (PILONs) remain taxable as earnings. This includes PILONs made pursuant to a term in the employee’s contract, and those which HMRC categorises, due to the employer’s established approach to terminations, as an “auto-PILON”.

**Taxing basic pay in respect of the employee’s notice period**

The new rules introduce the concept of the “post-employment notice payment” (PENP):

If the PENP is greater than or equal to the total of the employee’s termination award then the full termination award is treated as taxable earnings.

- If the PENP is greater than nil but is less than the employee’s relevant termination award, the part of the termination award that is equal to the PENP is treated as taxable earnings.
- The PENP is based on the employee’s “basic pay”. This is employment income disregarding overtime, bonuses, commissions, gratuities, allowances, termination awards, benefits in kind and other amounts treated as earnings (such as share-based earnings). Dependent on whether the employee is paid monthly and whether the unworked notice period can be calculated in complete months, different formulae are applied in the calculation of the PENP.

**Employees not monthly paid**

The statutory formula determining the PENP will be \( ((BP \times D)/P) - T \) where:

- \( BP \) is the employee’s basic pay from his or her employment in respect of the last pay period to end before the “trigger date” (which is essentially the termination date).
- \( P \) is the number of days in the pay period.
- \( D \) is the number of the days in the “post-employment notice period” (which is essentially the unworked portion of the employee’s notice period).
- \( T \) is the total of payments or benefits made to the employee on termination which are taxable – for example, a taxable payment in *lieu* of notice – or do not constitute either a bonus payable for termination of employment or payment in respect of holiday entitlement prior to termination.

**Monthly paid employees**

If the employee is monthly paid, the individual’s notice period is expressed in months and the employee is either terminated immediately or the unworked notice period is a whole number of months then the formula is \( BP \times D - T \) where:

- \( BP \) is the basic pay for the last pay period to end before notice is given.
- \( D \) is the number of months in the post-employment notice period – in effect this is the number of months of the notice period which are not worked.
- \( T \) is as defined above.
Salary sacrifice arrangements

Under the new rules, if the individual’s employment terminates earlier than the end of the notice period with a PILON being made, the amount of salary which would otherwise have been sacrificed during the unworked notice period will count as “basic pay” and be taxable and subject to Class I National Insurance contributions (NICs). This can increase the overall tax liability.

Other provisions

Specific provisions in the revised legislation apply in relation to payments in respect of the balance of a fixed-term contract. There are also anti-avoidance provisions providing that, where arrangements are put in place to render the PENP lower than it otherwise would be, the PENP is deemed to be the amount it would have been but for those avoidance arrangements.

Foreign service relief abolished

Previously, if a UK resident employee had a significant period working abroad, “foreign service relief” applied to except a termination payment from income tax in full or, if the relevant criteria were not met fully, on a proportionate basis. With effect from 6 April 2018, foreign service relief is no longer available other than in respect of certain seafarers – only employees (or former employees) who are not resident in the UK for the tax year when the termination of the employee’s employment occurs will be potentially eligible for foreign service relief.

Future NIC changes

It is anticipated that, with effect from 6 April 2019, employer NICs will be payable in respect of the excess of a termination award over £30,000. Employers should keep an eye out for the detail of these proposed changes as and when they are finalised.

Statutory employment protection rights

Whistleblowing

Disclosures must contain sufficient factual content to benefit from whistleblower protection

In Kilraine v London Borough of Wandsworth, the Court of Appeal clarified the law relating to when disclosures made by an employee are “qualifying disclosures” such that the individual attracts the statutory protection afforded to whistleblowers – against being subjected to a detriment or dismissed as a result of having made such a disclosure. Previously, case law had drawn a distinction between disclosures which are merely allegations, which would not attract the protection of the legislation, and disclosures which contain information, which would.

In this case, among a number of disclosures, the employee had written a letter alleging that the employer was failing in its legal obligations to her in respect of bullying and harassment and that there had been “numerous incidents of inappropriate behaviour towards me”. She also wrote an email complaining about a lack of support from a manager when the employee had made a safeguarding allegation.

The Court of Appeal found that, in order to benefit from the statutory protection afforded to whistleblowers, the disclosure needs, as set out in the legislation, to be a disclosure of “information” which “tends to show” wrongdoing which falls within the categories listed in the legislation (such as a criminal offence, breach of a legal obligation or a health and safety breach). Such disclosures may contain both information and allegations but there is no need to draw a strict distinction between the two. The key issue is that the disclosure has “sufficient factual content and specificity” to show the wrongdoing concerned. In this case the disclosures made did not contain sufficient information to be protected.
Shared parental pay and sex discrimination

The EAT recently considered two cases on whether the payment of statutory shared parental pay to a man at a time when a female employee would be entitled to a higher amount of enhanced maternity pay amounts to direct or indirect sex discrimination.

In Capita Customer Management Ltd v Ali and another, the EAT allowed an appeal against an ET decision and found that it did not constitute unlawful direct sex discrimination to pay only statutory shared parental pay to a man taking shared parental leave to look after a newborn baby, even though a woman in the same position would be on maternity leave and paid a higher level of enhanced maternity pay. The EAT’s reasoning was that the purposes of the two types of leave are different. Maternity leave in the period immediately after birth is predominantly a health and safety measure, allowing the mother time to recover from childbirth and to bond with her newborn baby. The purpose of shared parental leave is childcare. Also relevant to this conclusion was the provision in the Equality Act 2010 that in deciding whether a man has suffered direct sex discrimination, no account should be taken of any special treatment given to a comparable woman in connection with pregnancy or childbirth.

Consequently, the EAT found that employers who pay enhanced maternity pay to female employees do not need to match that in terms of pay for men taking shared parental leave. There was some suggestion by the EAT that the position may be different when looking at the later stages of maternity leave or shared parental leave, both of which may last up to a year following the child’s birth. Towards the end of that period, arguably the purpose of both maternity leave and shared parental leave is childcare, but that was not the situation in this case.

In Hextall v Chief Constable of Leicestershire Police and another, the question was whether the same practice of paying statutory shared parental pay to a man, but enhanced maternity pay to a woman was indirect, as opposed to direct, sex discrimination. In other words, even though the practice of differential pay does not amount to direct sex discrimination, it could be indirectly discriminatory because it disproportionately affects men, who will not be eligible for enhanced maternity pay. The EAT decided that the ET had made a number of errors and remitted the case to the ET for a fresh hearing, rather than giving a substantive judgment.

Against this background there have also been calls for greater rights and pay for working fathers to allow them to take on more childcare responsibilities, for example from the work-life balance charity Working Families, which intervened (took an official interest) in these cases. A report by the Women and Equalities Committee of the House of Commons published in March 2018 also called for the Government to improve working fathers’ rights at work. Employers should therefore keep this situation under review as it is likely to develop.

Employee privacy

Employer’s liability for data breaches

In Various Claimants v Wm Morrison Supermarkets Plc, a file containing the personal details of almost 100,000 employees of WM Morrison was posted on a file-sharing website by a senior IT internal auditor who had access to the information in the course of his employment. He was motivated by a grudge he held against Morrisons arising from a verbal warning he had received in respect of an unrelated issue.
The individual was subsequently prosecuted for various offences, including breach of the Data Protection Act 1998 (DPA). The employees whose data had been disclosed brought a group civil claim for compensation for breach by Morrisons of its duties under the DPA, misuse of private information and breach of confidence. This claim was framed on the basis that Morrisons had primary liability, but was also vicariously liable for its employee’s actions. The court considered it appropriate for the employer potentially to be vicariously liable for the employee’s default. There was a sufficient connection between the employee’s acts and his employment to establish vicarious liability in relation to each of the claimants’ heads of claim even though it was clearly a breach of his duties towards the employer to act as he had done.
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General labour market and litigation trends

Predictable scheduling laws across the nation

Predictable scheduling laws, also known as fair workweek measures, are spreading throughout the United States. These laws are intended to afford employees in certain industries more predictable schedules and income stabilisation. Jay-Anne B. Casuga, Last-Minute Schedule Changes? Some Cities Say Employers Must Pay, BLOOMBERG BNA, (Dec. 2, 2016), https://www.bna.com/lastminute-schedule-changes-n73014447981. Predictable scheduling laws primarily affect retail stores, restaurants, and the hospitality industry, as these businesses have unpredictable scheduling practices that leave their employees constantly uncertain about when they will be working. Predictive Scheduling Provides Shift Notice, Income Consistency, 23 No. 8 Or. Emp. L. Letter 3 (April 2017). These laws generally require that employers give their workers advance notice of their scheduled shifts. Id. Under many predictable scheduling laws, employers must compensate employees for schedule changes made after a stated deadline, which is referred to as “predictability pay”. Id. Schedule changes include shift cancellations, shift reductions, as well as adjustments to the date or time of the scheduled shift. Id.

San Francisco was the first to pass a predictable scheduling law, which went into effect in 2015. Laura A. Stutz and Maxine Neuhauser, San Francisco California Retail Workers Bill Of Rights, THE NAT’L L. REV., July 8, 2015, available at https://www.natlawreview.com/article/san-francisco-california-retail-workers-bill-rights. Numerous cities have since followed suit, and Oregon became the first state to adopt a predictable scheduling law, which took effect in July 2018. Julia Horowitz, Oregon is now the first state to mandate when workers get their schedules (Aug. 9, 2017 4:48 PM), https://money.cnn.com/2017/08/09/news/economy/oregon-advance-scheduling-law/index.html. Oregon’s law applies to retail, hospitality, and food service employers who employ at least 500 workers. Maureen Minehan, Predictive Scheduling Rules Gaining Traction, 34 No. 25 Emp. Alert NL 1 (Dec. 18, 2017). The law requires that employers provide a “good faith estimate” of employees’ work schedule upon hire and give written schedules at least seven calendar days in advance (until July 1, 2020, when work schedules must be given at least 14 calendar days in advance). Or. Rev. Stat. § 653.428, § 653.436 (2017). Employers must compensate employees for any changes to their work schedules for which there was insufficient advance notice. Or. Rev. Stat. § 653.455. Additionally, under the new law, employees are entitled to certain rest periods, and if they work during these periods, they are generally to be paid at the rate of 1.5 their regular rate of pay. Or. Rev. Stat. § 653.442.

Predictable scheduling laws, such as the one enacted in Oregon, are important to workers who face unpredictable work schedules. Unpredictable work schedules have been found to
be detrimental to employees and their families for numerous reasons: (1) income instability; (2) difficulty arranging child care, elder care, and transportation; and (3) difficulty pursuing education or obtaining additional employment. S.F., Cal., POLICE CODE art. 33G (2015); Press Release, Mayor de Blasio, Speaker Mark-Viverito Announce That New York City Is The Largest City To End Abusive Scheduling Practices In The Fast Food And Retail Industries, The Official Website of the City of New York (May 30, 2017) (on file with author). Employers in the affected industries should familiarise themselves with these new predictable scheduling laws, which are likely to keep popping up across the nation.

Business protection and restrictive covenants

U.S. Supreme Court holds employers can enforce individualised arbitration agreements with employees

In May 2018, the U.S. Supreme Court held that employment arbitration agreements that require individualised proceedings to resolve workplace disputes do not violate the National Labor Relations Act (NLRA). Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 2018 WL 2292444 (2018). The Supreme Court’s 5-4 decision, authored by Justice Neil M. Gorsuch for the majority, requires courts to enforce arbitration agreements in which an employee agrees to arbitrate claims against an employer on an individual basis rather than as a class or collective action.

Prior to Epic System Corp., the National Labor Relations Board (NLRB) ruled in 2012 that arbitration agreements where employees waived their rights to class or collective actions violated the NLRA. See D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012). Federal courts of appeals were in disagreement on whether or not to apply the NLRB’s 2012 D.R. Horton, Inc. holding. The Fifth Circuit enforced individualised arbitration agreements in Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), whereas the Seventh and Ninth Circuits held that agreements waiving an employee’s right to bring a class or collective action violated the NLRA and were unenforceable. See Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016).

The U.S. Supreme Court’s opinion began by recognising that the Federal Arbitration Act (FAA) requires federal courts to enforce arbitration agreements according to their terms. Epic Sys. Corp. v. Lewis, 138 S. Ct. at 1621. The Court next examined the Arbitration Act’s “saving clause”, which “allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract”. Id. at 1622. The employees argued that the Court should, pursuant to the saving clause, refuse to enforce the agreements because class and collective action waivers are illegal under the NLRA. Id. However, the Court rejected this argument, explaining that the saving clause only “permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability”. Id.

The Court also rejected the argument that that NLRA and the FAA conflict and that Congress intended the NLRA to control and displace the Arbitration Act. The Court explained that it is not permitted “to pick and choose among congressional enactments” and that statutory “repeals by implication” are “disfavored”. Id. at 1624. Instead, the Court aims to provide a harmonious interpretation of statutes. Id. Applying these principles, the Court stated that Section 7 of the NLRA focuses on the right to unionise and collectively bargain and does not mention either arbitration or class or collective actions. Id. The Court found that it could not interpret Section 7’s guarantee of the right “to engage in other concerted activities for the purpose of…mutual aid or protection” to include the right to bring class and collective legal
actions”. *Id.* at 1625-29. Concluding that the NLRA provides no guidance as to procedures or forums for the adjudication of employment disputes, the Court held it must enforce the individualised arbitration agreements. This important decision is a huge win for employers as they can now require their workers to sign away their right to band together in legal actions with certainty about the enforceability of these agreements.

**Joint employment under the NLRA**

In September 2018, the National Labor Relations Board (NLRB) published a Notice of Proposed Rulemaking regarding the standard for determining joint employer status under the National Labor Relations Act, rejecting the current joint-employer standard announced in *Browning-Ferris*. 83 Fed. Reg. 46681. Under *Browning-Ferris*, a company’s right to control the employees’ terms and conditions of employment is probative of joint employer status even if the company never actually utilises its authority. *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). Indirect control exercised through an intermediary as well as control exercised in a “limited and routine” manner also support a finding of joint-employer status under this relaxed standard. *Id.*


Under the NLRB’s proposed rule, a joint employer relationship exists only where the two employers “share or codetermine the employees’ essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction”. 83 Fed. Reg. 46681. To be considered a joint employer, “an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer’s employees in a manner that is not limited and routine”. *Id.* The NLRB believes that should the proposed regulation become final, determinations regarding joint employer status will become more consistent and predictable. *Id.*

**Discrimination protection**

**States and cities enact laws banning employer inquiries into applicant salary history**

Salary history laws prohibiting employers from inquiring about an applicant’s compensation history during the hiring process have been sweeping across the nation. ROBERT J. NOBILE, State Efforts to Combat Pay Inequity, Essential Facts: Employment § 6:25 (Sept. 2018); Connecticut Enacts Ban on Inquiring About Applicants’ Salary History, 34 No. 7 Term. of Employment Bulletin NL 5 (July 2018); Employment Law Daily Wrap Up, STATE LEGISLATION—VERMONT—Employers prohibited from asking job applicants about salary history starting July 1 (June 2018). The theory behind these laws is that the gender pay gap is perpetuated when employers rely on compensation history as a factor in determining a new hire’s starting pay. ROBERT J. NOBILE, State Efforts to Combat Pay Inequity, Essential Facts: Employment § 6:25 (Sept. 2018). The salary history laws are therefore aimed at limiting pay inequality between men and women. *Id.*

Employers should remove any questions about salary history from their job application forms and inform employees involved in the interviewing and hiring process that they are not to ask applicants how much they earned in previous jobs. Employers would be well advised to review the salary history laws applicable to them to ensure they are in compliance.
U.S. Supreme Court’s same-sex wedding cake decision does not legalise discrimination


The Colorado Court of Appeals affirmed the lower Colorado Civil Rights Commission decision, holding that CADA is “a valid and neutral law of general applicability” and therefore the Constitution’s Free Exercise Clause did not relieve Petitioner Jack Phillips, who owns Masterpiece Cakeshop, of his obligation to comply with CADA. Id. at 1726. This holding tracked the language from the Supreme Court’s precedent in Employment Division v. Smith (“Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes”)). Employment Div., Dep’t of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990) (internal citations omitted).

Phillips appealed the case to the U.S. Supreme Court on First Amendment grounds. He raised two claims: that “requiring him to create a cake for a same-sex wedding [1] would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and [2] would violate his right to the free exercise of religion.” Masterpiece Cakeshop, 138 S. Ct. at 1726.

The Court discussed the interaction between anti-discrimination laws being applied to protect gay persons, and Phillips’ right to decline to “take an action that he understood to be an expression…contrary to his sincerely held religious beliefs”. Id. at 1728.

The Supreme Court ultimately found in favour of Phillips and Masterpiece Cakeshop. The decision, however, did not address the merits of Phillips’ claims. The Court noted that CADA can protect gay persons “just as it can protect other classes of individuals”. Id. at 1728. It did not strike down CADA, either as a whole or in part. It did not hold or imply that bakeries or other public accommodations are exempt from state anti-discrimination laws, or that anti-discrimination laws don’t apply to gay persons, or that sincerely held religious beliefs trump anti-discrimination laws.

The Court instead found in favour of Phillips because “[t]he neutral and respectful consideration to which Phillips was entitled was compromised… The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection”. Id. at 1729. This narrow decision created no precedent for the analysis of laws like CADA; it merely found the Commissions’ conduct in this individual case to be lacking neutrality.

The Court continued, “…the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here”. Id. at 1724.

In short, Masterpiece Cakeshop did not legalise discrimination of gay people by or in public accommodations. Purveyors of businesses that are considered to be public accommodations should comply with all anti-discrimination laws, including laws protecting gay persons. A
sincerely held religious belief may or may not be a defence if a public accommodation fails to comply with an anti-discrimination law; Masterpiece Cakeshop made no specific holding on that question so it remains open.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Whether recordings were in violation of the NLRA

The National Labor Relations Board (NLRB) released an Advice Memorandum on April 17, 2018 regarding GE Appliances, Haier, 21-CA-202535, where a union requested that its representatives be able to record the employer’s monthly team meetings and investigatory interviews. The Memorandum advised that “the employer’s refusal to permit recording was lawful because it was consistent with the Board’s long-standing policy disfavoring verbatim recording of meetings between employers and unions for collective-bargaining purposes” and because the denial was “targeted at” union representatives, not employees. The Memorandum stated: “The Board has long recognized that audio recordings and verbatim transcriptions have the potential to hamper open communications in collective-bargaining relationships.” GE Appliances, Haier, 21-CA-202535 at *4. It went on to list several previous decisions where verbatim recordings and court reporters were disfavored in collective-bargaining sessions and grievance meetings. Id. at *5. The incident in GE Appliances, Haier – denial of recording in employer monthly team meetings and investigatory interviews – “implicates the same potential adverse effects on the bargaining process”. Id. The fact that union representatives were attempting to record these meetings and interviews further cut in favour of the employer. The Memorandum noted that “an employee who records such meetings may be protected by Section 7 [of the NLRA] if the employee is recording the conversation for purposes of mutual aid and protection”. Id at *6. When the Section 7 rights of individual employees to record conversations are implicated, those rights must be determined on a “case-by-case basis”, and the Board must apply “different criteria”. Id. If an employer has a blanket no-recording rule targeted to employees, the rule is analysed under the factors described in The Boeing Co., 365 NLRB No. 154, slip op. (Dec. 14, 2017). Those factors are: “(i) the nature and extent of the potential impact on NLRA rights and (ii) legitimate justifications associated with the rule.” Id. at *3. These factors do not need to be considered when an employer has a rule against recordings made by union representatives because Section 7 does not protect their ability to record.

A NLRB decision released just weeks after the GE Appliances, Haier Advice Memorandum also addressed the issue of recordings. In this case, Brasfield & Gorrie, LLC, 366 NLRB No. 82 (May 8, 2018), the employees engaged in a protest over wages at their place of work, a construction site. During the protest, the picketers were blocking employees from safely accessing the employee entrance to the site and union agents were impeding access to the vehicle entrance at the jobsite. The Board assessed whether the employer engaged in unlawful surveillance in violation of Section 8(a)(1) of the NLRA, which prohibits “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of” their guaranteed Section 7 rights, when the manager used his phone “to take photos and videos of the employees’ union activities”. Brasfield & Gorrie, LLC, 366 NLRB No. 82 (May 8, 2018).

The decision considered (1) whether the manager surveilled employees in a manner that was out of the ordinary and thereby coercive, and (2) whether the manager had a legitimate justification for taking the photos and video of the employees. 366 NLRB No. 82 at *5. The
Board did not find the manager’s conduct to be out of the ordinary because he was usually present at that location, and it was not unusual for him to “use his phone to take photos or videos of what he perceived to be actual or potential safety risks”. *Id.* at *6. The decision also found that the manager had a legitimate justification for photographing the picketers; the manager was a Senior Safety Director and testified that he wanted to document what he believed to be unsafe conditions. 366 NLRB No. 82. Further, the manager did not take the photos and videos in anticipation of misconduct but instead did so as misconduct was occurring.

The decision noted several circumstances where it may be lawful for an employer to photograph or video employees. For example, employers may “photograph strikers as possible evidence to use in legal proceedings, particularly where there is no showing that the employer coupled the picture taking with threats or actual reprisals”. *Id.* Additionally, “employer’s photographing or videoing of picketing [is] lawful when the pickets are trespassing, obstructing traffic, and/or blocking ingress or egress to the employer’s facility, particularly when the photographing or videoing does not occur until after the employer learned of the alleged trespass, obstruction, or blocking”. *Id.* Using these legal standards, the Board found the manager’s conduct in this case had a legitimate justification and did not violate Section 8(a)(1). *Id.* at *7.

These two cases both include videotaping, but differ in key ways. *GE Appliances, Haier* found it unlawful for union agents to tape monthly team meetings and investigatory interviews because of its chilling effect on bargaining. *Brasfield & Gorrie*, however, permitted an employer to tape an ongoing employee demonstration that impeded entrance to the jobsite. Section 7 gives employees some rights to recording, and *GE Appliances, Haier* represents that those protections do not extend to union agents. Section 8(a)(1) protects employees from being recorded, and *Brasfield & Gorrie* represents an exception to those protections.

**Worker consultation, trade union and industrial action**

**Union Bargaining Units**

On December 15, 2017, the National Labor Relations Board (NLRB or the Board) released its *PCC Structurals* decision, which changed the standard for determining whether a proposed bargaining unit must add excluded employees in order to comprise an appropriate unit for collective bargaining. *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017). This decision, which evaluated a proposed bargaining unit comprised of welders, rejected the standard set forth in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (Aug. 26, 2011). *Specialty Healthcare* required that employers wishing to add excluded employees to a petitioned-for unit show that those workers have an “overwhelming community of interest” with the employees in that petitioned-for unit. *Id.* at 954.

In *PCC Structurals*, the standard reverted to that which existed for decades before the *Specialty Healthcare* decision. This traditional standard requires only that a “community-of-interest”, not an “overwhelming” one, be shown to add excluded employees to a petitioned-for unit. To determine the appropriateness of a bargaining unit under the community-of-interest standard, the Board evaluates the proposed unit under several factors: (1) departmental organisation; (2) skills and training; (3) job duties; (4) functional integration, which “refers to when employees’ work constitutes integral elements of an employer’s production process or business contact”; (5) contact; (6) interchange, which “refers to temporary work assignments or transfers between two groups of employees”; (7) terms and conditions of employment; and (8) supervision. *PCC Structurals*, 365 NLRB No. 160 at *29–35. For an employer to
prevail, the employees excluded from the proposed bargaining unit must have a community of interest with the employees within the proposed bargaining unit, as determined by a balancing test of the above factors.

The Board in *PCC Structurals* observed, “*Specialty Healthcare* created a regime under which the petitioned-for unit is controlling in all but narrow and highly unusual circumstances”. 365 NLRB No. 160 at *6. The traditional standard set forth in *PCC Structurals*, overturning *Specialty Healthcare*, is more employer-friendly. Smaller bargaining units are more likely to be successful in their collective bargaining efforts, so employers prefer larger bargaining units. “Tactically, it’s more effective for unions to organize smaller honeycombs of employees, who usually know each other and share workplace experiences, rather than larger disparate groups of on-the-job strangers.” Robert Reed, *Flagging Unions Can Win Big by Going Small*, Chi. Tri., Feb. 17, 2017.

After the December 15, 2017 decision, the NLRB remanded the *PCC Structurals* case to the Board Regional Director so this new standard could be applied. When decided on remand, however, the employer in *PCC Structurals* was still unable to add excluded employees to the petitioned-for unit; the employees prevailed. The NLRB Regional Director held that “the petitioned-for welders constitute a craft unit that shares a community of interest sufficiently distinct from excluded employees under the standard set forth in *PCC Structurals*”. *PCC Structurals*, 19-RC-202188 (May 4, 2018). This decision suggests that, while there is less deference to the union’s petitioned-for unit under this new standard, there are still hurdles for employers when arguing for a broader collective bargaining unit.

**Employee privacy**

**Ban-the-box legislation**

At least 32 states and over 150 cities and counties have passed so-called “ban-the-box” legislation, which generally prohibits employers from requesting criminal history information on an initial employment application, with the specifics varying by jurisdiction. *Gov. Snyder directive to ‘ban the box’ is good for Michigan*, the Manistee News Advocate (Sept. 20, 2018). At least 11 states have extended “ban-the-box” legislation to private employers. *Id.*

On March 13, 2018, Washington became one of the latest states to “ban-the-box” when Governor Jay Inslee signed a bill into law that prohibits an employer from asking about a job applicant’s arrests or convictions until the applicant has been deemed otherwise qualified for the job. *Employment Law Daily Wrap Up, STATE LEGISLATION—WASHINGTON—Governor signs ‘ban-the-box’ bill to bar criminal record inquiry before qualification determination* (Mar. 14, 2018). Specifically, under the new law, an employer cannot “include any question on any application for employment, inquire either orally or in writing, receive information through a criminal history background check, or otherwise obtain information about an applicant’s criminal record until after the employer initially determines that the applicant is otherwise qualified for the position”. *WA. STAT.* § 49.94.010 (effective June 7, 2018). After the employer first determines the applicant is otherwise qualified, it is then permissible to ask about the prospective employee’s criminal record. *Id.*

The law also prohibits employers from advertising their job openings in a way that disallows or discourages individuals with criminal records from applying, for example, through ads stating “no felons” or “no criminal background”. *Id.*

The law applies to all employers except the following:

- Any employer hiring an individual who “will or may have unsupervised access to children under the age of eighteen”, “a vulnerable adult”, or “a vulnerable person”. 

Any employer that is “expressly permitted or required under any federal or state law to inquire into, consider, or rely on information about an applicant’s or employee’s criminal record for employment purposes”.

“[A] general or limited authority Washington law enforcement agency” or “a criminal justice agency”.

“An employer seeking a nonemployee volunteer”.

“Any entity required to comply with the rules or regulations of a self-regulatory organization.” Id.

Washington’s ban-the-box law went into effect on June 7, 2018. Id. As the “ban-the-box” trend continues to spread, employers should monitor developments in this area of the law and consider removing questions about criminal history on job applications.

Other recent developments in the field of employment and labour law

Automobile dealership service advisors are exempt from FLSA’s overtime requirements

On April 2, 2018, the United States Supreme Court held that service advisors who worked at Encino Motorcars, LLC, a car dealership in California, were not entitled to overtime pay under the Fair Labor Standards Act (FLSA). Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018). The service advisors’ job duties included assisting concerned auto customers with car problems, advising them about repair and maintenance options, selling replacement parts and accessories, and writing service orders. Id. at 1138-39. The Court found the service advisors were exempt from overtime under 29 U.S.C. § 213(b)(10)(A), which excludes from overtime pay “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to the ultimate purchasers”. Id. at 1140. The service advisors were exempt as “salesm[e]n … primarily engaged in … servicing automobiles”. Id.

In reaching its holding, the Supreme Court rejected the principle that courts should narrowly construe the FLSA’s exemptions. Id. at 1142. Rather, the Court noted that the “exemptions are as much a part of the FLSA’s purpose as the overtime-pay requirement” and should be given a “fair reading”. Id. Therefore, the Court’s ruling is not only good news for automobile dealerships across the nation, but for all employers seeking coverage under the FLSA’s exemptions.

Minimum wage for federal contractors

The U.S. Department of Labor’s Wage and Hour Division (WHD) issued a notice on September 4, 2018 announcing the 2019 minimum wage rate for federal contractors as required by Executive Order 13658, “Establishing a Minimum Wage for Contractors”. 83 Fed. Reg. 44906. Executive Order 13658, signed by President Obama on February 12, 2014, set the minimum wage for federal government contractors’ employers at $10.10 per hour for 2015 and requires the Department of Labor to adjust for inflation each year in determining the minimum wage. Id.; 29 C.F.R. § 10.5. Effective January 1, 2019, the minimum wage for federal contractors will increase from $10.35 per hour to $10.60 per hour. 83 Fed. Reg. 44906. Employers of course must consult applicable state laws before setting these workers’ wages, as state law may require higher hourly rates of pay.

On September 26, 2018, the WHD released its final rule implementing President Trump’s Executive Order 13838, which amended Executive Order 13658 to exempt contracts with the federal government “in connection with seasonal recreational services or seasonal recreational equipment rental” from the minimum wage requirements. 29 C.F.R. pt. 10
Seasonal recreational services include “river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps” but do not include “lodging and food services associated with seasonal recreational activities”. Id.

Executive Order 13838 explained that these seasonal workers have “irregular work schedules, a high incidence of overtime pay, and an unusually high turnover rate”. Exempting these services from Executive Order 13658’s minimum wage requirements is intended to keep the cost of seasonal recreational services down to ensure reasonably priced guided tours are available to those visiting federal lands and to prevent potential job eliminations. News Release, U.S. Department of Labor, U.S. Department of Labor Issues Guidance for Seasonal Recreational Services (July 13, 2018).

United States Department of Labor’s new “primary beneficiary test” for internships

In January 2018, the U.S. Department of Labor (DOL) announced it was abandoning the six-part test it had used for years in determining whether interns working for “for-profit” employers were actually employees entitled to pay under the Fair Labor Standards Act (FLSA). The DOL adopted in its place the “primary beneficiary test” that courts have been utilising to examine the legality of internships. United States Department of Labor, Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act, Wage and Hour Division (January 2018), https://www.dol.gov/whd/regs/compliance/whdfs71.htm.

Under the prior six-part test, employers had to establish each of the following factors for courts to determine an employment relationship did not exist:

1. The internship is similar to the training that would be provided in an educational setting.
2. The experience provided by internship is for the intern’s benefit.
3. The intern does not replace any employees, and employees closely supervise the intern.
4. The employer does not gain any immediate benefit from the unpaid internship, and the intern’s activities may actually hinder the employer’s operations.
5. The intern is not necessarily hired after completing the internship.
6. Both the employer and intern understand that the internship is unpaid.

Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534-35 (2d Cir. 2015).

Under the new “primary beneficiary test”, courts look at the following seven factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The new test eliminates the rigid requirement that employers not immediately benefit from the work of an unpaid intern. Rebecca Greenfield, *Unpaid Internships Are Back With the Labor Department’s Blessing* (Jan. 10, 2018 1:18 PM), https://www.bloomberg.com/news/articles/2018-01-10/unpaid-internships-are-back-with-the-labor-department-s-blessing. Formerly, if the employer could not establish that the intern did not do any productive work that the company benefited from, the employer would be forced to pay the intern minimum wage for such work. *Id.*

The “primary beneficiary test” is a “flexible test, [where] no single factor is determinative”, and an intern’s entitlement to pay is determined on a case-by-case basis. United States Department of Labor, *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, Wage and Hour Division (January 2018), https://www.dol.gov/whd/regs/compliance/whdfs71.htm. The DOL’s changes to the unpaid internship requirements followed various court decisions that ultimately found the previous six-part test “too rigid”. The new “primary beneficiary test” reflects the standard the Court of Appeal for the Second Circuit established in 2015. *See Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015).
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