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Lex Mundi International Employment Guide

A Global Practice Guide prepared by the Lex Mundi Labor and Employment Practice Group

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About this Guide

The Lex Mundi Labor and Employment Practice Group has published the International Employment Law Guide. This guide is meant to provide in-house counsel and Lex Mundi member firm lawyers with a basic overview of major areas of employment law across multiple jurisdictions around the world. Topics covered include (but are not limited to) terms and conditions of employment, trade unions, data privacy, parental leave, termination of employment and wrongful termination, whistleblower protection, discrimination, employee classification and global mobility. An extended explanation of non-competition laws have been provided as an addition by several jurisdictions.

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The International Employment Guide

Anguilla

Prepared by Lex Mundi member firm WEBSTER

General remarks	In Anguilla employment relationships are governed by the Fair Labour Standards Act. This Act applies to all employees except the police, employees of the Crown, a person who is the father, mother, husband, wife, child, stepchild, adopted child, brother or sister of the employer and living in the employer's household, a casual employee, the master or member of the crew of any vessel if he is not paid otherwise than by a share in the profits or the director of a company who is not also an employee, any member of a partner under a partnership agreement and the manager of a co-operative who is also a member of the co-operative. It is notable that we may also rely upon English case law in all circumstances. We can also import English statutes in the event that our statutes are silent on the provisions we seek to enforce.
Employment agreement	At the time of his engagement every employee shall be informed of his terms and conditions of employment and the nature of his job by his employer. Employment contracts can be in writing or oral however where the probationary period is to exceed 4 weeks, the contract of employment shall be in writing.
Terms and conditions of employment	A written contract shall contain at least the following provisions: • The name and address of the employer. • The name and address of the employee. • The date of commencement of the employment, and if for a fixed term, the date of termination. • The employment category, rate of pay and the pay interval (not being greater than one month). • The length of any probationary period and the period of termination notice. • The hours of work and overtime and premium rates, if any. • The period of annual holidays, sick leave and, in the case of a female, maternity leave and the applicable rates of pay in each case.
Changing terms and conditions of employment	Where any change in the existing terms and conditions of employment of any employee is contemplated, such change shall only be made after consultation between the employer and any trade union recognised as representing the employee in the particular establishment or in the absence of any such trade union, with the employee concerned.

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	Save in exceptional circumstances, any change envisaged shall not be less favourable than the employee previously enjoyed and in any event shall not be in conflict with the provisions of the Act. Where the contract of employment is in writing, any such change shall be notified to the employee in writing, within 1 month from the effective date of the change.
Trade Unions and the consultation obligation	The terms and conditions of employment of each employee shall be reviewed with the employee periodically, and, in any event not less than once every 2 years, unless otherwise agreed between the employer and any trade union recognised as representing such employee.
Data privacy and personal integrity	N/A
Regulations regarding parental leave or other forms of absence regulated by law	On the production of a certificate from a duly qualified medical practitioner stating the presumed date of confinement, a female employee who has had at least 2 years service with the same employer or who has served for 2 years since she last returned from maternity leave granted by the employer shall be granted a period of maternity leave by her employer. The period of maternity leave shall not be less than 13 weeks of which not less than 6 weeks shall be taken after the date of confinement. The remainder of the period of maternity leave may be taken before the presumed date of confinement or following the period of compulsory leave, or partly before the presumed date of confinement and partly following the period of compulsory leave. Where a duly qualified medical practitioner certifies that any illness necessitating absence from work arises out of the pregnancy or confinement or both, the employer shall grant the employee an additional period of maternity leave not exceeding 3 months. Any additional maternity leave granted may be without pay.
Termination of employment	The employment of an employee may be terminated by his employer without notice in any of the following circumstances: • Where the contract is for a fixed term or to undertake a specific task, on the expiration of the period or completion of the task; • By mutual consent; • During any probationary period except as may otherwise be provided in a written contract of employment; • On the ground of misconduct by the employee where the misconduct is of such a nature that it would be unreasonable to expect the employment relationship to continue; • On the ground of repeated lesser misconduct or in relation to his employment or on the ground of failure to continue to give satisfactory performance if the employee was warned by the employer in writing, or in the presence of a credible witness, on 3 separate occasions at reasonable intervals of the nature of the misconduct or failure to perform satisfactorily and if at least on the last occasion he was informed of the consequences likely to follow a

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	repetition of misconduct or continued failure to perform satisfactorily; • Where the employee is a casual employee. The employment shall not be terminated for reasons related to his conduct or performance before he is provided with an opportunity to defend himself against the allegations made unless the employer cannot reasonably be expected to provide such opportunity. An employee may terminate his employment without notice on the ground of misconduct or his employer of such a nature that it would be unreasonable to expect the employment relationship to continue. The Act also has provisions for termination of the employee with notice or pay in lieu of notice. The Labour Commissioner is to be informed in the event that an employer contemplates terminating 5 or more employees on the grounds of redundancy.
Sanctions for wrongful termination	In any case where an employee or any person or organization acting on his behalf alleges that he has been illegally or unfairly dismissed and no settlement of the issue is reached in direct discussions with the employer, the dispute may be referred for settlement to the Labour Commissioner, in accordance with the provisions in the Labour Department Act, by either the employer or the employee or by any organization respectively acting on their behalf. The onus of proof shall rest on the employer. Where the Labour Commissioner decides that the dismissal was unfair or illegal, the Tribunal shall have the power to order either that the employee be re-instated (if it considers that remedy appropriate or feasible) or that he be paid compensation in lieu of re-instatement.
Whistleblower protection	N/A
Non-Competition Laws	N/A
Discrimination and equal employment opportunity	An employer shall not terminate the employment of an employee on the grounds or race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion or affiliation, national extraction or social origin
Transfer of business and outsourcing	Where the employer disposes of all or part of his business, whether by way of sale or otherwise, all the rights and obligations of the employee accrued or accruing at the date of such change of ownership shall be binding on the new and the previous owner jointly and severally. Where the employment of the employee continues under the new owner, the arrangements made at the time of the change of ownership in respect of each employee shall be notified to the Labour Commissioner by a statement signed jointly by the previous and the new owner.
Global mobility (brief overview of	N/A

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common issues and visa requirements)	
Criteria for independent contractor status	N/A
Corruption, regulation and sanctions	Wages shall be paid directly to the employee to whom they are due or to a person specified by him in writing. No employer shall give to any employee any intoxicating liquor by way of remuneration for his services or pay wages to any employee in any retain shop or place for the sale of any intoxicating liquor, wine, beer or other spirits or any office or place belonging to or connected to any of the places aforementioned.
Final remarks	N/A

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The International Employment Guide

Argentina

Prepared by Lex Mundi member firm Marval, O'Farrell & Mairal

General remarks	Labor relationships in Argentina are regulated by: the Argentine Constitution and International treaties and conventions; Labor Contract Law Number 20,744 (Ley de Contrato de Trabajo or the “LCL”) and further laws governing labor contracts; Collective Bargaining Agreements (Convenios Colectivos de Trabajo or “CBAs”); agreements between the parties and customs in the workplace. Labor matters are subject to a territoriality principle and, therefore, any employee who works in Argentina is subject to Argentine labor regulations. Labor Contract Law sets statutory thresholds and governs most aspects of labor relationships, such as remuneration, termination, vacations, timetables and leave of absence, among others. However, other employees such as those in the public sector, in domestic service and rural workers have their own specific statutes .
Employment agreement	Undetermined term contract: This is the most typical modality of employment. The first three months of all undetermined term labor contracts are considered a trial or probationary period, during which either party may terminate the relationship without just cause and without paying any severance for termination. However, employers must give employees a 15-day prior notice. The general principle states that all labor contracts are made for an undetermined term. However, there are other types of employment agreements, as follows: Fixed term contract: This is an exception to the general principle. A fixed term contract must be in writing, specifying the period of duration (which may not exceed 5 years), the type of work and the reasons justifying the use of this exceptional modality of labor contract. In the event that the requirements for a fixed term contract are not met, the contract will automatically be converted into an undetermined term contract. Part-time contract: The employee’s work hours cannot exceed two thirds of the full-time schedule for the same activity. The remuneration paid by the employer must not be less than the proportional salary of a full-time worker. Overtime is not permitted for part-time contracts. In case the work hours exceed two thirds of full time employment hours, the employer must pay the part-time employee the same remuneration paid to a full-time employee in that month. Temporary employment contract: This extraordinary and exceptional hiring modality aims at covering extraordinary market demands. It must not exceed six months per year up to a maximum of one year along a three-year term. If the temporary employee is hired to cover the absence of a regular employee, duration cannot exceed the term of such absence. In principle, there is no law against outsourcing that could restrain employers from hiring employees

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	through a Staffing Agency, however, certain legal requirements should be met and some situations may generate risks. Seasonal labor contract: Employers may hire workers for activities performed seasonally. These contracts are considered to be undetermined term contracts with periods of activity (the season) and periods of recess. The employee is entitled to be hired at the beginning of each season simply because he/she was employed during the previous season. During the recess period no obligations or rights exist between the parties.
Terms and conditions of employment	*Working Day*: The basic working day is eight hours with a maximum of 48 hours per week. Any hour worked between nine o'clock in the evening to six o'clock in the morning is equal to one hour and eight minutes in order to calculate the number of hours to be included in a basic working day. An employee who works between six to eight hours per day will be considered a normal full-time worker. If the work has been declared unhealthy by the Labor Ministry, working hours may not exceed six hours per day and 36 hours per week. *Overtime Pay*: Hours of work in excess of the basic working day are payable at overtime rates equivalent to a 50 per cent surcharge on the normal wage. However, after one o'clock in the afternoon on Saturdays, Sundays and holidays, the surcharge is 100 per cent. Night shift workers do not receive overtime pay for night work. Part-time workers cannot work more than two-thirds of the normal working schedule and cannot work overtime hours. *Salary Considerations*: Although remuneration is usually paid in some monetary form, payments in kind also may qualify as a form of remuneration for up to 20 per cent of the salary. Payments in kind are considered when calculating the relevant social security and union contributions. LCL contemplates different manners to calculate and pay the remuneration to the employees. These include monthly remunerations, remunerations calculated per day or hour of work and salaries per piece that an employee completes. Most employees are hired on a monthly salary basis. *Minimum Wage:* For full-time workers, the minimum monthly wage amounts to ARS 6,810 as of June 2016, ARS 7,560 as of September 2016 and ARS 8,060 as of January 2017. For daily workers, ARS 34,05 by the hour as of June 2016, ARS 37,80 as of September 2016 and ARS 40,30 as of January 2017. *Mandatory Semi-Annual Bonus (13th salary):* every semester (on June 30 and December 18 of each year) employers must pay their employees a bonus equal to 50% of the highest monthly salary of the previous six-month period. *Withholdings and contributions*: Employers are required to withhold 17% out of the employee´s gross salary and to pay such withholdings and their own contributions (23% or 27%) to the Argentine federal tax authority (AFIP) for family allowances, medical services, pensions and unemployment benefits. The base for calculating employees' withholdings has a cap of AR$ 56,057.93. Employers' contributions have no cap; thus, they should be calculated over the whole employees' remuneration. Employers are also required to withhold amounts related to income tax payable by the employees. At present, income tax ranges up to 35% depending on the employee´s level of income and tax status.

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	In addition, pursuant to many CBAs, union dues of 1% to 2.5% of salaries may be withheld in relation to employees who are covered by those agreements. *Salary receipts:* employers are required to give their employees salary receipts in two counterparts, one signed by each party, with a detail of all payments and deductions made to the employee´s salary, as expressly set forth in the LCL.
Changing terms and conditions of employment	The unilateral modification by the employer of the employee's employment terms and conditions is known as "ius variandi" and it is regulated by Section 66 of the LCL. Although Section 66 does grant the employer the power to modify labor conditions, it also imposes strict limitations. The employer is only allowed to introduce changes in the form and modalities of the services of an employee, as long as such exercise is reasonable, it only affects non-essential labor conditions and it does not imply a moral or financial damage for the employee. If such limitations are not complied with, the affected employee has the statutory right to: (i) consider himself/herself constructively dismissed and claim statutory severance for termination without cause; or (ii) request a labor court to have his/her former labor conditions restored.
Trade Unions and the consultation obligation	Trade Unions are relevant to employment matters. The Argentine Constitution protects the free and democratic organization of unions (section 14 bis). The collective right to work is regulated in Law No. 23,551 (Trade Unions), Law No. 14,250 (Collective Bargaining Agreements), Decree No. 199/88 and other applicable regulations. As regards the participation of Trade Unions in employment matters, CBAs tailor the general provisions of the LCL to particular situations such as a specific industry sector or employer. These agreements are negotiated between the relevant union representatives, on the one hand, and either the management of different industry sectors or a specific company, on the other. They typically involve issues such as vacations, bonuses, wage scales, overtime pay, health and safety conditions in the workplace and special paid leave. Employees have the right to organize and join Trade Unions or not. The employer should be registered as such with the union that represents the employees, but each employee can choose whether to be affiliated with the union or not. The employee should inform the employer of his decision in writing. Unionized employees require additional registrations and/or payments, including registration with the applicable workers' union, payment of a monthly fee to said union and any additional payments provided in the applicable CBA.
Data privacy and personal integrity	Privacy and personal data protection are regulated in Argentina by Sections 19 and 43 of the Constitution and the Argentine Personal Data Protection Law No. 25,326, as well as the regulations that enact that act. The term "personal data" is defined by Law No. 25,326 as any kind of information referring to identified or identifiable individuals or legal entities. As a general rule, the treatment, disclosure, collection, storage and amendment to personal data requires the specific consent of the data subject. Such consent must be given freely, based upon the information previously provided to the

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	data subject and expressed in writing or by any equivalent means, depending on each case. The data subject may revoke the consent at any time, albeit not retroactively. Personal data can only be assigned: (i) for the compliance of purposes directly related to the legitimate interest of the assignor and assignee and (ii) if made with the previous consent of the data owner. Additionally, the data owner must be informed of the purpose of the assignment as well as of the identity of the assignee. The employer actually may check and investigate different personal, educational and criminal references of prospective employees as long as their dignity and privacy are not affected and, to minimize risks, the individual's consent is obtained. Data related to criminal precedents may only be requested to the relevant authorities by the data subject.
Regulations regarding parental leave or other forms of absence regulated by law	The employer should grant employees the appropriate amount of vacation days and special leaves of absence for illness and important personal events. The employee will collect regular payment during leaves of absence except for maternity leave, which entitles the employee to collect a special allowance paid by the social security authority *("ANSES"*). CBAs or internal policies may create additional leaves of absence, which would not eliminate statutory leaves of absence. Therefore, as long as the provisions benefit the employees they will be enforceable. *Vacations:* The number of vacation days depends on the length of service of each employee considered as of December 31 of each year: (i) from 6 months to 5 years, the employee is entitled to 14 calendar days; (ii) from 5 to 10 years, 21 calendar days; (iii) from 10 to 20 years, 28 calendar days; and (iv) over 20 years, 35 calendar days. If the employee has worked less than half a year, he/she is entitled to one day of vacation per every 20 days worked. Vacation pay is calculated by dividing the monthly salary by 25 and multiplying this amount by the number of days of vacation taken. *Maternity Leave:* A pregnant employee is entitled to 90 days of maternity leave. Such maternity leave is divided into 45 days before birth, and 45 days after birth. The employee is entitled to subtract up to 15 days from the leave before birth and add it to the leave after birth. If a female employee provides proper legal certification of her pregnancy to her employer, and she is dismissed within 7.5 months either before or after birth of the child ("Maternity Protection Period"), it is presumed that she was dismissed by reason of her pregnancy. In such case, the employee will be entitled to collect, in addition to her regular severance package for dismissal without cause, a special compensation equal to one year of salaries. *Special Leaves of Absence:* events which allow special leaves of absence also include the birth of a child (2 days), marriage (10 days), death of spouse, son, daughter or parents (3 days), death of brother or sister (1 day), high school or university exams (up to 10 days per year but not more than 2 days each time). *Absence Due to Illness:* An employee who is absent from work due to an accident or extended illness not related to work is entitled to collect regular salary while away. The employee may receive regular salary for up to three months of illness if he/she has been working for the same employer for less than five years, or up to six months if he/she has been working for the same

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	employer for more than five years. If the employee has dependents, these periods are increased to six months and twelve months, respectively. The employer may cease to pay the employee his salary after these periods have elapsed. However, if the illness continues beyond such periods, there is an additional period (reserve period) of one year without payment of salaries. After such period, either party may terminate the employment relationship without payment of severance for termination.
Termination of employment	The following are the various causes for termination: • Mutual agreement; • Termination by the employer with just cause; • Termination by the employer without just cause and indirect dismissal; • Dismissal due to force majeure; • Dismissal due to economic events; • Bankruptcy of the employer; • Incapacity of the employee; • Expiration of a fixed-term contract; • Resignation; • Abandonment of work; • Retirement; or • Death of the employer or employee. *Prior Notice:* The employer should give the employee a reminder of the approaching end date in the form of prior notice. However, no such notice is needed in case of termination with just cause, death, or termination by mutual agreement. If the employer does not give the appropriate prior notice where relevant, the employer will be required to pay the employee's salary for the period for which no notice was given. Employers should give employees the following prior notice: • Fifteen days during the trial period; • One month's notice, if the employee has worked for the employer for less than five years; and • Two months' notice, if the employee has been with the same employer for more than five years. The employee is required to give a 15-day prior notice of termination to the employer, but this is generally not enforced by the courts. In case no prior notice is given by the employer and the dismissal takes place on a day that is not the last day of the month, the employee will also collect an amount equal to the salary corresponding to the remaining days of the month of dismissal. *Final Payment:* Final payment should be paid to the employee in one lump sum payment within four days of termination of the labor relationship. Amounts received pursuant to severance packages are generally taxable, except for seniority compensation which does not exceed the legal limits. Special severance packages exist for certain situations, such as dismissal on account of pregnancy, marriage, race, color, religion, sex, national origin or if the employee is a union representative.

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Termination by Mutual Agreement: to be legally binding, it should be contained in a public deed executed before a notary public or by an agreement signed by the employee and approved by a labor court judge or by the local labor authority having jurisdiction over the workplace. There is no need for prior notice, but the employer is required to pay the employee the corresponding amounts for any outstanding salary, proportional vacations and proportional semi-annual bonus (13th salary).

Termination with Just Cause: If there is just cause for termination, the employer may dismiss the employee without need of prior notice and will only have to pay the employee any outstanding salary, proportional vacations and proportional semi-annual bonus (13th salary).

It is important to note that not any breach of a contractual obligation justifies a dismissal, which is the maximum sanction. It must refer to damage that is serious enough to prevent the continuance of the employment relationship, that is, a very serious contractual breach. Case law and legal scholars have recognized as justified causes of dismissal the following:

- Violation of duties in rendering services: absences, lack of punctuality, abandonment of work, disobedience, participation in an illegal strike, lack of reincorporation on time, among others;

- Violation to conduct duties: loss of trust (justified on serious irregularities leading to such loss of trust), illegal competition, commission of criminal acts, abuse of e-mail accounts (misuse of internet and e-mail), physical or psychological aggression, among others.

Termination without cause: If the dismissal is without just cause, in addition to the outstanding salaries, proportional 13th salary and proportional vacations, the employer must pay to the employee a compensation for seniority (one-month salary for each complete year of service performed, or period worked in excess of three months). In the event that no prior notice (but payment in lieu thereof) is given by the employer and the dismissal takes place on a day different from the last day of the month, the employee will be entitled to receive the item Integration of the month of dismissal equal to the remaining days of the month.

Termination by the employee: The employee may terminate the labor relationship by resigning. In such case, he/she will be entitled to collect outstanding salaries, proportional 13th salary and proportional vacations.

If the employee is willing to resign, he/she must do so in writing, having his/her signature certified by a notary public or an official of the Labor Ministry. It is customary to send the resignation communication by registered telegram through Correo Argentino to the employer.

Termination by Retirement: The retirement age is 65 years old for men and 60 years old for women. Female workers may choose to continue working until the age of 65 years old. In order to obtain the retirement benefits, it is also required to have contributed to the social security system for at least 30 years. The employer is under the obligation to maintain the labor relationship until either the employee begins to receive pension benefits or after one year has passed since the notification of retirement was made by the employer,

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	whichever occurs earlier. This notification is in practice normally made by the employer as soon as the employee attains the age of retirement and has made 30 years of contributions to the social security system. *Termination due to death:* The employer's death causes the termination of the labor contract only when it is impossible for the employment to continue in his/her absence, i.e., when the employee worked directly for the employer and there is no longer any need for the employee's services. In case of death of the employee, the employee´s heirs will be entitled to collect, in addition to the outstanding salaries, proportional vacations and proportional 13th salary, an amount equal to 50 per cent of the seniority compensation.
Sanctions for wrongful termination	Upon dismissal with just cause, the effectiveness of the cause will be discussed in a likely claim. Only an Argentine labor judge would have the final decision on whether a cause for termination alleged by the employer was sufficient for termination. Argentine labor courts are highly reluctant to validate dismissals with cause. In the event that the judge understood that the cause was not valid, in addition to the statutory severance for termination without cause, an adverse judgment would involve the application of the fine set forth in Section 2 of Law No. 25,323 because the employee was forced to litigate in order to collect severance, which equal 50% of the regular severance package. Interest (36% per year) and court costs (between 28 and 35% of the judgment plus interest amount) would be added.
Whistleblower protection	There are no specific laws in Argentina protecting whistleblowers from prosecution or retaliation for disclosure of confidential information.
Non-Competition Laws	According to Sections 63, 85 and 88 of the LCL, employees have a duty of loyalty to the employer and are barred from engaging in competitive activities during the period of his employment. Key employees are normally required by their contracts to work exclusively and upon a full time basis for their employers. The above obligations, however, expire once the labor relationship has terminated. Contractual stipulations providing that the employee will not compete after the termination of the labor contract are of doubtful validity under Argentine law since they are considered to conflict with the provision in the Constitution which provides that all persons have an unfettered right to work. Absent specific regulations, such restrictive agreements or covenants effective after employment termination are only valid when they include monetary compensation and are limited in time and space. Nevertheless, even after following these guidelines, which are not codified but only result from scarce case law on the subject, specific analysis is required and the viability of the restrictive covenant is still subject to the interpretation of the relevant court.
Discrimination and equal employment opportunity	Argentine law protects employees from discrimination. This protection can be found at different levels of our legislation: (i) the Argentine Constitution, which sets forth that all individuals must receive a similar treatment, as well as similar remuneration for a similar job performed;

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	(ii) pursuant to the LCL, the employer must give all employees the same treatment in similar conditions. There is unequal treatment when arbitrary discriminations based on sex, religion, or race (among others) are made, but not when the different treatment is supported by greater efficiency, diligence, or dedication to tasks. Provisions regarding discrimination can be found concerning the following areas: sex, race, nationality, religion, politics, trade unions, age, marital status, maternity, pregnancy, marriage and illnesses. Nevertheless, legal authors consider that the enumeration of the law is not restrictive and that the law contemplates any kind of discrimination that nullifies or alters the equality of opportunities, or provides an arbitrary treatment to a worker; and (iii) Non-Discrimination Law No. 23,592 (non-labor law that could be applied to labor relationships). Under the Non-Discrimination Law, a person who arbitrarily impedes, obstructs, restricts, or in any manner deprives the plain exercise, on an equal basis, of the fundamental rights and guarantees recognized in the Constitution, will be compelled by request of the injured to remove the effect of the discriminatory act or to cease its realization and repair the moral and material damage produced.
Transfer of business and outsourcing	Transfer of business: When assets are sold by a company in the ordinary course of business or by means of a sale of fixed assets, labor relationships are generally not affected. The labor relationships shall continue with the acquirer of such business, who shall maintain the years of service and acquired rights of the employees. • The seller and the purchaser may be held joint and several liable for any labor and social security obligations arising from labor relationships before the date of transfer, while the purchaser becomes solely liable for those after the transfer. • The seller and purchaser are jointly liable for labor obligations which arise during or as a result of the transfer of the business. The employees' consent is not necessary in case of a transfer of a business unit, unless there is a material change in the labor conditions. If the transfer is one solely of personnel, then the written consent of each employee should be obtained. In view of the joint and several liabilities that arise as a result of a transfer, it is common for the seller and purchaser to agree as to who should bear these liabilities. However, this agreement is only binding between them. Outsoucing: Under LCL, whoever contracts or subcontracts services corresponding to the core activity of the hiring company, should request such contractors or subcontractors full compliance with their labor and social security obligations and keep a copy of certain documentation related to the personnel assigned to the services: • Labor Identification Number ("Código Único de Identificación Laboral") of each of the employees rendering services; • Evidence of payment of remunerations; • Signed copy of the monthly certificates of payment to the social security system;

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	• Updated bank account number; and • Certificate of affiliation to an insurance against any damage arising out of work risks, professional illness and any other disabilities required by law ("ART"). Likewise, the user company should exhaustively control the documentation provided by the Service Provider Companies and their compliance with applicable law. Failure to request and keep such copies shall result in joint and several liability of the user company and the contractor for any owed labor and social security obligation related to the employees assigned to the services. Notwithstanding, the outsourcing of activities beyond the core activity of the hiring company and the request of labor documentation reduce but do not eliminate the risk of joint and several liability. That is why it is important to contract with solvent service provider companies and have duly drafted contracts with full indemnity clauses.
Global mobility (brief overview of common issues and visa requirements)	Foreigners that come to work in Argentina must first obtain a transitory or temporary visa permit, which will depend on the length of the period they spend in the country. Any visa must be preceded by the issuance of the entrance permit ("Permiso de Ingreso") by the Immigration Department ("Dirección Nacional de Migraciones"). Transitory visa: The transitory visa is for those that will stay in Argentina for less than a year. Currently, this permit is issued for an initial period of three months, but it can vary depending on the situation. Temporary visa: The temporary visa is valid for a year and can be renewed upon three occasions and for equal periods. The expatriate must be employed with the same employer though. After the three years are completed, the employee may apply for a permanent visa. General requirements: The Immigration Department is quite strict on the formalities for obtaining any type of working visa. Therefore, the applicant must ensure that all required documentation is translated into Spanish and legalized by the Public Translators College in Argentina, and also legalized by the Argentinean Ministry of Foreign Affairs of the employee's foreign country. Depending on the country from where the employee is coming, this certification by the Argentine Consulate may not be required. If the document requires translation, it must be done by a public translator that is registered with the Argentine Consulate. Any necessary notarization must also be carried out by an authorized notary public. In most cases, a temporary visa permit takes up to approximately three months to be released. Once there are frequent changes in the rules that set forth the requirements and periods to obtain the visas, it is recommended consulting a lawyer before starting immigration procedures, even if it is not the first time the foreign entity sends an expatriate to work in Argentina.

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	There is a special program for foreign residents who are natives of the States of the MERCOSUR ("**Mercado Común del Sur**") and its associated States. The program simplifies the proceedings to obtain temporary residence, which can be requested in Argentina and is valid for two years.
Criteria for independent contractor status	Even when independent contractor agreements are actually regulated and permitted by Argentine rules and regulations, the rendering of services by any independent contractor could be construed as non-registered employer-employee relationship if the typical features of an employment contract exist. The existence (or not) of a labor relationship is not related in Argentina to a definition or to the length or content of the contracts executed between the parties but to the real nature of the services. If technical, legal and/or economic subordination existed, any independent contractor could consider that he/she holds (or held) an employer-employee relationship with the hiring company. Furthermore, upon conflict and/or notice of termination of the relationship, independent contractors may claim the correct registration of the relationship and if the lack of registration is not solved they may consider themselves constructively dismissed. For determining the existence of such relationship the following factors are usually considered: (i) the contents of the agreement; (ii) the existence of personal services; (iii) the manner in which services are provided (namely in connection with subordination); (iv) the control test, or technical, legal and economic subordination to the hiring company; (v) the economic structure of the provider, (vi) exclusivity and (vii) whether the risks of the services rendered are assumed by the provider or not. If the independent contractor proves the existence of an employment relationship or such is determined by a court pursuant to certain presumptions that would benefit the plaintiff, labor and social security contingencies may apply to the hiring company. Damages for successful individual claims could be substantial and expensive (even more if the claim is made while the relationship is in force). Furthermore, prior inspection and determination of a potential labor relationship, the Labor Administrative Authority may fix penalties. Depending on the amounts involved, risk of criminal actions may also apply.
Corruption, regulation and sanctions	Argentina has ratified the Inter-American Convention against Corruption, the United Nations Convention against Corruption and the Convention against Bribery of Foreign Public Officers in International Transactions. These international conventions and the public ethics regulations which were enacted by the Federal Government to implement them prohibit and punish offering or granting to government officers any goods or other benefits in

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	exchange for the performance or the failure to perform actions relating to their public duties. *Anti-Money Laundering Regulations:* Money laundering is defined as the exchange, transfer, administration, sale, pledge, and assimilation or through any other means incorporation into the market, of assets proceeding from a criminal act, provided that the possible consequence is to grant the assets the appearance of having been obtained by legitimate means, and given that the value of such assets is more than ARS 300,000. If the value of the laundered assets is less than ARS 300,000, the person responsible is subject to a lower criminal sanction. *Enforcement:* The Financial Information Unit (the "Unit") is the special agency responsible for issuing regulations that implement the law and monitoring compliance, with special emphasis on the prevention of money laundering related to drug trafficking, weapons smuggling, child prostitution and pornography, corruption, and racially or politically motivated crimes. The Unit is managed by a board that includes representatives of the Central Bank, the CNV, the Tax Authority, the Secretary of Drug Prevention and three experts in the relevant fields. Resolutions issued by the Unit contain specific guidelines on how to identify suspicious transactions, including a list of examples of the kind of transactions that are deemed suspicious. Such resolutions also regulate the timing and procedure for the filing of reports about suspicious activities. Companies and individuals are not able to waive their reporting obligations imposed by the anti-money laundering regulations on the grounds of legal or contractual confidentiality commitments.
Final remarks	Law No. 24,635 provides a mandatory prejudicial settlement proceeding in Buenos Aires before parties are able to file a judicial complaint before the labor courts. This proceeding takes place before a mediator appointed by the Labor Ministry. In case the parties reach a settlement, they should file the agreement for the Labor Ministry's approval. The resolution issued by the Ministry approving the agreement has res judicata (settled matter) effects. Where the parties fail to settle, the worker is entitled to file a judicial complaint before the labor courts. Parties also may file agreements for the Labor Ministry's approval without going through the mandatory prejudicial settlement proceeding. The approval issued by the Labor Ministry in such case also has res judicata (settled matter) effects. In the provinces, similar prejudicial proceedings are in force but they are not mandatory and are not required for the filing of a judicial complaint before the labor courts. Litigation issues related to employment contracts and their conflicts are decided by the ordinary justice of each province and of the city of Buenos Aires. Considering that labor litigation is free for employees in Argentina, they are encouraged to assert labor claims in order to collect additional severance or other amounts, without running major economic risks as a result.

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	In such context, upon termination of a labor relationship, it is nowadays of material importance to execute settlement and release agreements, which once approved by the Labor Ministry has res judicata (settled matter) effects and minimizes risk of future claims, especially considering the different criteria for severance calculation adopted by Argentine courts and the high litigation environment.

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Austria

Prepared by Lex Mundi member firm CHSH Cerha Hempel Spiegelfeld Hlawati

General remarks	The most important aspects of Austrian em-ployment law are regulated by statutory law and collective bargaining agreements.
Employment agreement	The employment agreement may be entered in-to either orally or in writing. In any case, em-ployees must be issued a written notification about the essential terms. Although fixed term agreements are generally permissible, most employment contracts are concluded for an in-definite time. The probationary period at the beginning of employment may not exceed one month.
Terms and conditions of employment	Austrian law foresees standard working hours of 8 hours per day and 40 hours per week. Overtime is limited to a maximum of 2 hours per day and 10 hours per week respectively. More flexibility is granted by most collective bargaining agreements. Depending on years of service, employees are regularly entitled to at least 5 weeks of paid vacation. Minimum wages are not regulated by statutory law but industry-wise by collective bargaining agreements.
Changing terms and conditions of employment	Contract clauses that allow a unilateral change of contractual provisions are admissible, may however only be exercised under stringent restrictions so that in most cases, such clauses will be void where essential aspects of the employment relationship are concerned. A unanimous change of terms and conditions will be admissible as long as minimum standards set by statutory law and collective bargaining agreements are honoured. The same is true for a dismissal with the option of altered conditions of employment *("**Änderungskündigung**").*
Trade Unions and the consultation obligation	On company level, instead of trade unions, elected works councils represent the workforce. Works councils have widespread rights to be informed of, or consulted before managerial decisions are made that affect the material, social, physical or cultural well-being of the workforce. Some measures may even only be implemented on basis of an agreement with the works council (e.g. control measures or establishment of a disciplinary code). Although the works council must also be heard prior to the termination of any employee, it is not able to prevent it.
Data privacy and personal integrity	Information relating to employees, who are identified or identifiable shall only be collected and processed for specific, explicit and legitimate purposes and must be covered by the statutory competencies or the legitimate authority of the employer. The employee must therefore either give her/his consent to use the data or overriding interests of the employer exist. Data processing without a legal basis as defined by the Data Protection Act is forbidden. In general, all data applications are subject to notification to the Data Protection Authority for registration in the Data Processing Register *(Datenverarbeitungsregister).* Applications involving sensitive data even require a prior approval by the Authority before they may be used.

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	The same is regularly true for a data transfer to countries outside the EEA.
Regulations regarding parental leave or other forms of absence regulated by law	After the protection period (starting 8 weeks before confinement and ending 8 weeks after confinement) either parent may take maternity/paternity leave until the child reaches age 2. Maternity and paternity leave may be divided between the parents but may not be taken simultaneously. During such leave, the employee is not paid by the employer but receives child care compensation from the state. Parents are also protected against termination while they are on leave until 4 weeks thereafter. Most collective bargaining agreements provide for additional paid days off for certain occasions such as weddings, funerals, relocation, etc. At the request of the employee, studies and the care of close relatives, may also give an entitlement to leave (without pay though).
Termination of employment	Any employment contract for an indefinite time may be terminated without cause, subject only to the statutory notice periods and effective dates. If a works council has been elected, it must be notified by the employer prior to an intended termination and subsequently has one week to comment on the termination. If a termination is contested at the labour court for being unfair under social aspects because the concerned employee argues not to be able to find a comparable job within reasonable time, the employer must prove an overriding interest based on personal or economic reasons. If the employee can prove that the termination is detrimental to his interests in the above sense and the employer fails to substantiate either personal or economic reasons for the termination, the employee will be reinstated in his/her employment by court decision. Ninety percent of all cases are settled by payment of one to four monthly salaries.
Sanctions for wrongful termination	If an immediate termination for cause in fact lacks good cause, the employment contract is nevertheless terminated but the employee may bring a claim for payment of the salary that he/she would have earned if notice had been duly given by the employer. Alternatively, the employee may challenge the termination as being socially unjustified. As pointed out above, if successful, the action would lead to the reinstatement of the employee. Only in cases where employees are especially protected against termination (e.g. expecting mothers) the employment relationship is not terminated by an immediate termination that lacks good cause.
Whistleblower protection	There is no specific legislation in this regard but general principles of law apply. Subject to her/his position and the specific circumstances, under her/his duty of loyalty, any employee is in general obliged to notify the employer about imminent dangers and grievances s/he is aware of in the workplace. Violations of this obligation may lead to a termination for cause. On the other side, the employer under his fiduciary duty will be obliged to protect the informant against retaliation. The direct notification of authorities without prior information of the employer will only be admissible in serious cases and where the employee on basis of the employer's demeanor in the past may assume that the employer will take no action to rectify the situation. Implementing a formal Whistleblowing System is not only subject to an agreement with the works council but also requires prior approval of the Austrian Data Protection Authority. In such case, the employer has to

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	guarantee complete confidentiality regarding the identity of employees reporting violations. Only in case of management level employees or if the wrongdoing has a severe impact on group level, a data transfer may be made to third parties, i.e. the mother company. Every employee must be bound contractually or by instruction to comply with the respective internal group guidelines and has to be informed about the obligation to report any violation to the employer.
Non-Competition Laws	Under Austrian law, the employees' duty of non-competition extends beyond the termination of employment only if explicitly agreed. Such non-competition clauses are valid if at the time of termination, the monthly salary exceeds a certain amount (e.g. EUR 2.754,00 in 2016), only applies to the business branch of the employer, is limited to a maximum of one year and does not impose restrictions on the employee which would inequitably impede his/her job opportunities. In addition, such clauses can only be invoked by the employer if the employee gives notice or prematurely terminates his/her employment without good cause. Non-competition clauses are often secured by a penalty clause which is, however, not only subject to equitable review and reduction by the court but also restricts the employer from enforcing the non-competition clause.
Discrimination and equal employment opportunity	The Austrian Anti-Discrimination Act implements European law and provides that male and female employees must be treated equally and also prohibits discrimination against employees because of their sexual orientation, age, religious believes, national origins or ethic affiliation. It prohibits both direct and indirect discrimination but applies only to discrimination in the areas of hiring, salary, access to training, promotion prospects and working conditions in general as well as the termination of employment. A main target of the Austrian Anti-Discrimination Act is also sexual harassment. Disabled persons are protected by the Engagement of Disabled Persons Act *(Behinderteneinstellungsgesetz).* They do not only enjoy certain favourable work conditions but any termination of a disabled person must be approved in advance by the Commission for Disabled Persons, a state authority.
Transfer of business and outsourcing	Austrian legislation has implemented the European Union Transfer of Undertakings Directive. It applies whenever an autonomous economic entity comprising tangible and/or intangible assets changes ownership while preserving its identity and continuing its economic activity. If such transfer takes place, the employment contracts transfer automatically to the acquiring entity. Austrian Law does not provide employees with the right to object to this automatic transfer unless the acquiring entity refuses to accept any special protection against termination applicable before the transfer of the business or individually agreed pension commitments of the transferring entity. Under rulings of the Austrian Supreme Court, a notice of termination given by the transferor or the transferee "because of the transfer" is null and void.
Global mobility (brief overview of common issues and visa requirements)	Austrian Law imposes rigorous and highly complex restrictions on immigration. Apart from EU and EEA as well as Swiss citizens, individuals must obtain a residence and a working permit if they wish to work in Austria. Such permits have to be applied for before entering Austrian territory.

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	The RWR Card (Red White Red-Card) permits an individual to take up residence in Austria and work for one specific employer for twelve months. It is only issued to highly trained individuals in shortage occupation areas and to university graduates. The RWR–Plus-Card may be applied for subsequent to the RWR-Card. It allows the individual to take up residence in Austria and offers free access to the Austrian labour market. All other residence permits are subject to quotas, annually approved by the Austrian Parliament. The Temporary Residence Permit ("**Aufenthaltsbewilligung**") is issued for a certain purpose (e.g. specific job, study, artist..) and limited to a maximum of twelve months. Depending on the purpose of the stay, a work permit may also be needed. For any longer stay, a Permanent Residence Permit ("Nieder-lassungsbewilligung") is required. This docu-ment also includes a work permit.
Criteria for independent contractor status	An independent contractor is above all not integrated into the corporate organisation, uses typically his/her own resources and is not obligated to perform the work personally. Austrian courts are not bound by the wording of contracts but will individually check the factual circumstances of any given case. The same is true of the social security authorities. On the other side, an employment contract is characterised by the employees' integration into the employer's enterprise. The employee is personally responsible to comply with the employer's orders and he/she is economically dependent on the employer.
Corruption, regulation and sanctions	The Austrian Criminal Code sets out several bribery offences. In relation to private entities, these include offering/giving or demanding/taking an advantage for an act that is incompatible with the employee's duties, as well as the acceptance and non-forwarding of an advantage provided in connection with the employee's power to represent the employer if the employee is required to forward such advantages to the employer. The penalties for individuals include imprisonment up to two years (up to three or five years if certain thresholds are exceeded), the sanctions for legal entities include corporate fines.
Final remarks	All of the above issues are outlined on a very general level, describing exceptions to the general rule only where space and the purpose of this guide would allow it. Any given case should therefore be scrutinised on an individual basis and it is not advised to rely on the general information above.

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Non-Competition Global Practice Guide

Austria

Prepared by Lex Mundi member firm CHSH Cerha Hempel Spiegelfeld Hlawati

Does your state or country recognize and/or enforce restrictive covenants against employees?

Yes, Austrian law recognizes restrictive covenants against employees during employment and after employment – provided the legal requirements are met.

During employment, employees are bound by the general duty of loyalty towards the employer, which entails an obligation to promote the interests of the employer. Moreover, the Austrian Act on White Collar Employees expressly provides that employees are prohibited from any competing activities during employment without the employer's consent. This restriction applies by force of law.

Austrian law also recognizes and enforces restrictive covenants post-termination of employment. Restrictive covenants are also regulated by the Austrian Act on White Collar Employees and adherence to these provisions is required for the restrictive covenants to be valid and enforceable.

Although there is no regulation on agreements on non-solicitation of other employees or customers, such agreements are general regarded as valid. However, customer-protection clauses are only regarded as enforceable if/insofar the regulations on the admissibility of non-compete clauses are adhered.

What are enforceable protectable business interests that courts will protect?

With regard to the validity of non-compete clauses, the employer does neither have to substantiate a particular need for protection nor a specific position of trust of the employee. However, when assessing the admissibility of a specific non-compete clause the courts will try to find a balance of interests and will take into account the business interests of the employer in e.g. confidentiality, prevention of a knowledge transfer, loss of customers etc.

What are considered reasonable restrictions as to geography, duration and scope of activity?

Duration: Austrian law only allows post contractual non-compete clauses with a duration of up to one-year (starting with the end of employment). However, depending on the circumstances of the case, also a shorter maximum duration might apply.

Geography: While the Act does not contain any restrictions with regard to geography, restrictive covenants will only be enforced within the area of business which the employer is active (or currently prepares its market entry).

Scope of activity: Restrictive convenants will only be enforced within the area of business of the employer whereby the courts usually interpret the area narrow; the admissible scope always depends on the circumstances of the case.

Can a customer-specific restriction substitute for a geographic restriction?

Yes. Austrian courts apply the legal restrictions on the admissibility of geographic restrictions mutatis mutandis on customer specific non-compete clauses.

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Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

Yes, the courts will revise a restrictive covenant to make it "reasonable" and will only enforce such clause insofar as the courts regard it as balanced. Moreover, any contractual penalties are subject to judicial mitigation.

Will the court recognize a choice-of-law provision in a restrictive covenant?

While choice-of-law clauses are admissible, Austrian mandatory regulations still apply. Therefore it is not possible to avoid the statutory restriction on the validity of restrictive covenants by such choice of law.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

Restrictive covenants can only be validly agreed with employees whose salary mets a certain threshold (twenty times the daily maximum contribution basis to social security in the final month of employment; in 2016 thus a salary of at least EUR 3,240.00/month).

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

See above, question 7.

Moreover, restrictive covenant only apply automatically if the termination is attributable to the employee (ordinary termination by the employee or termination for cause by the employer). In this case, the employer does not have to pay a consideration for the non-compete clause to apply.

In other cases of termination (e.g. ordinary termination by the employer) the clause only applies if the employer undertakes (at the termination) to pay a consideration to the employee for the non-compete clause; this consideration has to be in the amount of the employee's salary at the time of termination for the duration of the restrictive covenant.

Does a change in position, salary or responsibilities affect enforceability?

No, unless the new salary is below the threshold set down above (question 7).

Is continued employment sufficient consideration to enforce a restrictive covenant?

Employees are prohibited by force of law from any competing activities during employment without the employer's consent.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

No. The employee is under no legal obligation to sign a restrictive covenant and refusal to do so may not form the basis for termination of employment.

Are restrictive covenants assignable?

Yes. Note that the restrictions will automatically transfer to a new employer in connection with a TUPE-transfer of an undertaking.

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List any necessary language requirements.

There are no specific language requirements and English versions restrictive covenants are valid. However, if there is reason to believe that the employee does not fully understand the English language clause, a German translation should be provided.

List any other requirements of importance.

While it is possible to provide for a contractual penalty for breaches of a post-contractual non-compete clause in the amount of up to six monthly salaries, such contractual penalties prevents the employer from any other remedies. Therefore if a contractual penalty is agreed, the employer usually cannot claim for higher damages or for injunctive relief.

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The International Employment Guide

Belgium

Prepared by Lex Mundi member firm Liedekerke Wolters Waelbroeck Kirkpatrick

General remarks	Belgian labour law governs most aspects of the relation between an employer and its employees. It provides rules concerning matters such as hiring and dismissal, protection of remuneration, conditions of work, security and safety at work, etc. A lot of provisions are aimed particularly at protecting employees' rights. Next to that, collective bargaining is highly structured in Belgium, with a central level at the top covering the whole of the private sector, an industry level beneath, covering specific industrial sectors, and company level negotiations at the bottom. In each case the lower level can only agree improvements on what has been negotiated at the level above and the agreements are binding. Collective bargaining agreements may contain provisions regarding the remuneration scales, additional premiums and benefits, working time, etc.
Employment agreement	In general, Belgian law does not make any specific formalities necessary to the valid formation of an employment agreement. If an employment contract is not in writing, it is however always deemed to have been concluded for an indefinite duration. Contracts for a fixed period or for a specific project must be executed in writing as well as part-time employment contracts and replacement contracts. In order to prevent abuse, Belgian law provides for additional strict conditions for successive uninterrupted fixed-term employment contracts. As of 1 January 2014, trial periods are in principle forbidden. Special attention must be paid to the detailed legislation regarding the language which is to be used in the professional relations between employer and employee and in all official documents. The main rule is that the language to be used in social relations is Dutch, French or German, depending on the place where the employee works.
Terms and conditions of employment	Although the parties are generally free to determine the content of their employment contracts, there are a number of mandatory rules to be complied with. Most of these rules are contained in the Employment Contract Act of 3 July 1978. These rules generally constitute a minimum level of protection granted to each employee, implying that the employer may grant supplementary advantages but may not limit the rights of the employee. The normal working time is maximum 8 hours per day and 38 hours a week. Overtime hours have to go along with compensation rest and overtime pay. The rules on overtime do not apply to, amongst others, persons entrusted with supervisory or high-level positions and sales representatives. After a year’s employment, employees are entitled to a vacation of 4 weeks, or 20 working days. Of course, any commitments for more advantageous benefits for the employee are valid.

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Changing terms and conditions of employment	Neither the employee nor the employer are allowed to modify unilaterally an essential feature of the employment that was agreed upon. A contract clause that would allow the employer to make such modification is null and void. The unilateral modification of an essential element of the contract by the employer can lead to a constructive dismissal, whereby the employer has to pay an indemnity in lieu of notice. In order to lead to a constructive dismissal, the modification must: • concern an essential element of the employment contract, • be unilateral; and • be definitive.
Trade Unions and the consultation obligation	Within an undertaking, 3 possible consultation bodies can be established and can co-exist: the Works Council, the Committee for prevention at protection at work and the Trade Union Delegation. All businesses that normally employ an average of at least 100 employees must organise social elections in order to appoint a **Works Council**. The Works Council is a consultation body with mainly advisory functions. The decision-making powers of the Works Council are only limited to some matters. All businesses normally employing an average of at least 50 employees must organise social elections in order to appoint a **Committee for prevention and protection at work**. The Committee is a consultation body, which main function consists in the contribution to and promotion of a healthy and safe working environment. As of a given number of employees, trade unions can ask to install a **Trade Union Delegation** within the undertaking. The thresholds are determined at sector level. A member of the trade union delegation can assist an employee in individual discussions with the employer (e.g. in a disciplinary matter). The trade union delegations together with the local union organizations negotiate at company level with individual employers. However, agreements are only valid when signed by a trade union official from outside the workplace. In case of absence of a Works Council and/or a Committee for prevention at protection at work, the Trade Union Delegation can fulfil certain functions of these consultation bodies.
Data privacy and personal integrity	The unambiguous consent of the employee is not required by the employer to process the employee's personal data in context of the performance of the employment agreement (e.g. in order to draw up pay rolls or notify the tax or social security authorities). However, the employee must be informed about the (purposes of the) processing of personal data (regardless of whether consent is required or not) and the employee has the right of access to his personal data as well as the right to rectify any incorrect personal data. The personal data of (ex-)employees may not be kept longer than necessary to achieve the purpose(s) of the contemplated processing. Please note that whenever the employer would like to process the personal data of the employees for any reason not related to the employment agreement, in principle the employer should acquire the unambiguous consent of the employee. Such consent of the employee is not needed if, inter alia, the

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	processing of the personal data is necessary for compliance with an obligation to which the employer is subject under or by virtue of an act, decree or ordinance or the processing is necessary in order to protect the vital interests of the employee.
Regulations regarding parental leave or other forms of absence regulated by law	Parents who are employees in the Belgian system are each entitled to take parental leave. Parental leave entails: • a maximum of 4 months of full-time work, consecutively or split up into periods of at least 1 month; • a maximum of 8 months of half-time work, consecutively or split up into periods of at least 2 months; or • a maximum of 20 months working 4/5, consecutively or split up into periods of at least 5 months. The parental leave can be taken at any time until the child is 12 years old (or 21, if the child is disabled). The allowances for parental leave are paid out by the social security as per the statutory norms. There are numerous other types of leaves in Belgium, among others: maternity leave, paternity leave, marriage leave, bereavement leave, sick leave, educational leave, leaves for urgent reasons, leave for testifying in court,... All these types of leaves are subject to different terms and conditions (e.g. requirements regarding the accumulated seniority, age, working time).
Termination of employment	The employment contract may come to an end by mutual agreement between the employer and the employee. It automatically terminates at its expiration if the contract is for a fixed period or a specific task. In this case, the termination is not subject to any termination formalities. Mostly however, termination results from a unilateral decision taken by either party. In the case of a dismissal with **notice period**, the notice has to be given in writing. During the whole notice period, the employee is obliged to perform the agreed work in the same way as he did before. The length of the notice period is prescribed as per statutory law, but contractual notice periods that are more advantageous to the employee are allowed. If notice has been given, parties can still negotiate upon the modalities of the termination. If the employer decides to terminate the contract with immediate effect, he must pay to the employee an **indemnity in lieu of notice** that is equal to the remuneration of the employee during the notice period that should have been respected. In case of termination of an employment contract for **serious cause**, no notice period needs to be granted, nor does any indemnity in lieu of notice need to be paid. The law provides for a double quite constraining deadline to fulfil all procedural formalities. If the employee objects to the motives of the dismissal, the labour courts are entitled to appreciate the validity of it. Some categories of employees receive a special protection in case of dismissal. They cannot be dismissed under the general rules. Employers wishing to dismiss a protected employee will need specific grounds to do so and/or must follow special stringent procedures. The employer has the burden of proof of the reason of the dismissal.

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Sanctions for wrongful termination	Each dismissed employee has the right to know the concrete reasons which have led to his dismissal. If not communicated in writing by the employer on his own initiative, the employee can request that the employer explains the reasons for dismissal. If the employer does not respond to the request, he owes a lump-sum civil fine. The employee may challenge the reason for dismissal before the labour courts. If the unjustified — meaning "manifestly unreasonable" — character of the dismissal is established, the employer owes damages for an amount of between 3 and 17 weeks of salary. The level of the damages depends on the degree of unreasonableness. The fact that the dismissal must be 'manifestly' unreasonable implies a marginal check by the courts of the unreasonable character of the reason for dismissal; the labour courts must not determine the adequacy of the employer's policy. In the case of a manifestly unjustified dismissal, the employee may also choose to claim compensation for the actual damage suffered in accordance with the general concept of abuse of rights, instead of opting for the lump sum damages. In that case, the employee will need to prove the actual damage suffered. Employees can, in general, not claim a right for re-employment in case of wrongful termination.
Whistleblower protection	There is no specific Belgian legislation on whistleblowing: there is no legal requirement to have a whistleblowing policy in place and whistleblowers are not given any particular protection against dismissal. Some authors have suggested that a whistleblower could possibly seek protection on the grounds of ***(i)*** the contractual duty of mutual respect, and ***(ii)*** the rules prohibiting bullying and harassment at the workplace. Furthermore, an employer who dismisses a whistleblower can be held liable to pay compensation for abusing its right to dismiss its employees. A whistleblowing policy can provide more protection against detrimental consequences for employees who have made a complaint. Introducing an internal whistleblowing procedure (e.g. via hotlines, specific whistleblowing websites, etc.) always implies a balancing of interests and due care should be taken that the rights of the employees are respected in this regard. Whenever the processing of data in the context of a whistleblowing scheme occurs wholly or partly by automatic means or by automatic means which forms part of a filing system or is intended to form part of a filing system, the Belgian Privacy Act will apply. All rights (of the employees) and obligations (for the entity carrying out the whistleblowing procedure) under the Belgian Privacy Act should thus be complied with. The principles of (inter alia) transparency, proportionality and legitimacy should therefore be respected. The entity carrying out the whistleblowing procedure should also comply with the recommendations of the Privacy Commission in this regard, e.g. respect employment law and thus integrate the aspects related to the whistleblowing procedure in the Work Rules.

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	Please note that a whistleblowing scheme may not be used for signalling problems where it is obvious that they can be dealt with using the normal rules of hierarchy or where there is a procedure or body regulated by law (e.g. reporting of (sexual) harassment). Further, the entity carrying out the whistleblowing procedure ('controller') will be obliged to file a notification with the Belgian Privacy Commission before implementing such whistleblowing procedure.
Non-Competition Laws	The Belgian Employment Contract Act prescribes that employees may not divulge any secret or confidential information, nor engage or co-operate in any act of unfair competition. Moreover, the employment contract may contain a contractual non-competition clause whereby the employee is prevented, when he leaves his employer, from carrying out similar activities, either on his own behalf or by entering into service of a competitor. A non-competition clause may be agreed upon if the annual gross remuneration of the employee exceeds a certain threshold. In order to be valid the (standard) non-competition clause must: • be in writing; • relate to similar activities; • have a duration that does not exceed 12 months after the termination of the contract; • must be geographically limited to the Belgian territory; and • must provide for the payment of a lump sum indemnity equal to at least 50% of the worker's regular gross salary over the same period of time. \Any violation of the non-competition clause is sanctioned by the reimbursement of the lump-sum indemnity, the payment of a similar sum, and by the payment of additional damages if needed. Please note that specific provisions apply to non-competition clauses for sales representatives (e.g. no indemnity being due by the employer upfront). For white-collar workers, and provided that the employer carries out its activities on an international scale or have its own research and development center, there is a possibility to enter into a derogating non-competition clause (e.g. encompassing a larger territory than Belgium and/or extending its applicability beyond 12 months). In addition, Belgian employment agreements sometimes contain a contractual non-confidentiality clause and/or a non-solicitation clause.
Discrimination and equal employment opportunity	The Belgian Anti-Discrimination Act forbids discrimination on the basis of age, sexual orientation, civil status, birth, wealth, faith or personal belief, political orientation, 'trade union conviction', language, current or future health status, handicap, physical or genetic disorder, or social origin. Violation of the Anti-Discrimination Act could, in theory, result in any indemnity. There is no monetary upper limit with regards to the indemnity that a victim of discrimination can claim. Victims of discrimination can either claim a lump-sum compensation equal to a six-month remuneration (without having to give evidence of the actual damage), or a higher indemnity corresponding to the

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	actual damage suffered. Thus, if the victim concerned can prove that the actual damage exceeds the standard lump-sum compensation, the labour courts can grant a higher amount of compensation. This is however considered to be very difficult to prove. In addition, different other laws forbid discrimination. The Racism Act and the Gender Act forbid discrimination on the basis of (among others) race, colour, nationality and sex. Specific to the employment context are (inter alia) the Act of 5 June 2002 on the principle of non-discrimination toward employees with a fixed-term contract (which ensures equal treatment between fixed-term workers and comparable permanent workers) and the Act of 10 May 2007 aimed at combating discrimination between men and women.
Transfer of business and outsourcing	If a business or a division of a business, forming an economic entity, is transferred in the frame of a contract (e.g. an asset deal or an outsourcing contract), meaning that there is a "going concern" of the activity of the business division after the transfer, there is a "transfer of undertaking" as referred to in the Belgian Collective Bargaining Agreement n° 32bis ('CBA n° 32bis'), implementing the EU directive into Belgian law. On an asset sale in Belgium, there is an obligation on the transferor and transferee to inform representatives of their respective employees in relation to the transfer and, in some cases, to consult them. CBA n° 32bis provides for the automatic transfer of the employees working in the transferred business division at the time of the transfer. If employees refuse to transfer, they will be deemed to have resigned. The transferee is supposed to take over all the concerned employees on their existing terms of employment (function, remuneration in all its components, place of work, etc. laid down by the employment contract or by collective agreements). Furthermore, the change of employer resulting from a transfer of a business division may not in itself constitute grounds for dismissal.
Global mobility (brief overview of common issues and visa requirements)	EU/EEA citizens may work in Belgium without any work permit. To the contrary, as a matter of principle, any non-EU/EEA citizen who wants to work in Belgium needs a work permit, even if he/she will only work in Belgium during one day. There are 3 different types of work permit. The work permit application must be filed with the regional employment agency in the region where the foreign employee will be working. Once the work permit is granted, the employee concerned must in principle obtain a type-D visa, if he/she intends to stay longer than 3 months in Belgium. It is necessary to submit a mandatory (electronic) Limosa-declaration in relation to employees that are employed in Belgium by a non-Belgian employer, who are in principle not subject to the Belgian social security system. The employer must make this declaration before the employment in Belgium starts.
Criteria for independent contractor status	Under Belgian law, the employment contract is characterized by the meeting of 3 elements: ***(i)*** the undertaking to provide services ***(ii)*** under the authority of a person who provides the work and ***(iii)*** the payment of a remuneration. The main difference between a subcontractor contract (or other contracts for the performance of

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	services on a self-employed basis) and an employment contract consist of the absence of authority/subordination in the working relationship. As a matter of principle, the parties are free to characterize their agreement as they see fit. The effective performance of the agreement however, has to correspond with the nature of the chosen relationship. The 2006 Act on the nature of employment relationships defines the following general criteria in order to ascertain whether such factual elements exist in a particular case and thus whether or not a subcontractor contract (or another type of self-employed contract) is in fact an employment contract: • the parties' intention, it being understood that the actual performance of the agreement must be in line with the chosen nature of the employment relationship; • the freedom to organise his/her own working time; • the freedom to organise his/her own work; and • the supervisory control of one party upon the other. Thus, an independent contractor is deemed to have the possibility to work for third parties (especially if they are competitors), the freedom to accept or refuse proposed work, the possibility to hire own staff, the possibility to freely "organise" the working time, ... If the characterisation chosen by the parties (e.g. a services or management contract) is not compatible with the way the contract is being carried out, the labour court can be asked to determine the nature of the contract themselves. The court can then re-characterize the contract into an employment contract. In the event of a re-characterisation, the employer will be liable for any arrears of remuneration, benefits, damages or social security contributions and he may also be exposed to criminal or administrative fines.
Corruption, regulation and sanctions	In Belgium, the offence of bribery is governed by the articles 246 to 252 (public bribery) and 504bis and 504ter (private bribery) of the Belgian Criminal Code. **Public bribery** exists where a person directly or indirectly proposes to a person exercising public duties (in Belgium or abroad), an offer, a promise or an advantage, of whatever nature for that person or for a third party, in order to perform or omit to perform an act which falls within the scope of that person's function, or which is facilitated by that person's function. **Private bribery** exists where a person directly or indirectly proposes to a person who is a director, proxy-holder or employee of a corporate entity or of a physical person, an offer, a promise or an advantage, of whatever nature, for that person or for a third party, in order to, without knowledge or authorisation of the board of directors, the shareholders' meeting, the attorney in fact or the employer, to perform or omit to perform an act which falls within the scope of his or her function, or which is facilitated by his or her function. Paying, offering to pay and soliciting or accepting such a bribe are unlawful, whether this is done directly or indirectly. These offenses are criminalized whether or not performed during the course of an employment or at a work place. Public bribery may give rise to imprisonment up to 15 years, and/or a fine up to 600,000 EUR. Private bribery is sanctioned with imprisonment up to 3 years and/or a fine up to 300,000 EUR. For legal entities, the maximum fine is doubled.

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Final remarks	All persons employed in Belgium are subject to Belgian social security (unless provided otherwise by an international treaty) and all Belgian employers are required to register with the National Social Security Office. The employer must pay social security contributions on (at least) a quarterly basis. The employer is responsible for withholding the social security contributions due by the employees and for making the necessary payments to the Social Security Administration. The social security system covers amongst others health care (certain doctors and pharmacists costs, costs of hospitalisations,...), sick leave, unemployment benefits, family allowances, maternity leave and old-age pensions.

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Canada, Ontario

Prepared by Lex Mundi member firm Blake, Cassels & Graydon LLP

General remarks	Employment and labour law in Ontario, Canada is designed to regulate both the conditions of employment and the relations between employers and employees. While labour and employment matters are principally within the provincial jurisdiction of Ontario, 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. As a result, the vast majority of employers in Ontario are required to comply with Ontario's employment and labour standards legislation. In addition to the statutory obligations referenced above, employers are often also required to satisfy common law obligations owed to their employees in Ontario. The most significant of these obligations is to provide employees with reasonable notice of the termination of the employment relationship without cause (see further discussion below).
Employment agreement	An employment agreement can be either written or oral, and can be for either a fixed term or indefinite term. If no contractual terms provide otherwise, certain common law terms of employment are implied. Employers and employees may contract out of the common law, but all employment agreements must provide for at least the minimum statutory standards provided under the Ontario Employment Standards Act, 2000.
Terms and conditions of employment	In the absence of a contractual term to the contrary, terms and conditions of employment will be implied by the common law. The common law can imply many terms and conditions, including those governing termination entitlements, confidentiality, the duty of loyalty, and contract duration, among others. To the extent that contractual provisions exist (which may be express or implied, oral or written), they will generally govern unless they fail to provide rights or benefits that meet or exceed the statutory minimum requirements under the Ontario Employment Standards Act, 2000. If contractual provisions fail to meet the statutory minimum requirements, they will be invalid and the common law will apply. Some of the important statutory minimum standards include: • minimum wage; • hours of work and eating periods; • overtime pay; • public holidays; • vacation time and pay; • leaves of absence; and • notice of termination and severance pay.

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Changing terms and conditions of employment	Significant changes to the terms and conditions of employment must generally made with the agreement of both parties. If the new term or condition is less favourable to the employee than the one it replaces, some form of fresh consideration will be required for the change to be enforceable (such as a promotion, raise, or signing bonus). In Ontario, continuing employment is not valid consideration for such changes. While employers do have some ability to change terms and conditions of employment unilaterally, material changes made unilaterally without notice to the employee may give rise to constructive dismissal or breach of contract claims. Faced with a material change to terms and conditions of employment, an employee may resign his or her employment and claim contractual or common law termination payments from the employer, as if the employer terminated the employment relationship on a without cause basis.
Trade Unions and the consultation obligation	In Ontario, the *Labour Relations Act, 1995* regulates trade union organization, certification, and collective bargaining. The statute entrenches the right of employees to organize and to be represented by a bargaining agent, without interference from employers, through a certification process and by prohibiting conduct that interferes with the exercise of that right. The collective bargaining process is regulated to provide mechanisms for achieving collective agreements. The *Labour Relations Act, 1995* governs the conduct of unions and employers, and addresses the various rights and obligations relating to collective bargaining and industrial disputes. It is the right of every employee in Ontario to join a trade union, and to participate in any lawful activity of a trade union. Consistent with that right, employers cannot discriminate against an employee because he or she has joined a trade union or is participating in an organizing drive. Employers carrying on business in more than one province continue to be subject to provincial regulation, unless their business is subject to federal regulation as, for example, in the case of inter-provincial trucking. If a provincially regulated employer carries on business in several provinces, a union must seek certification from the labour board of each province in which the employer is located to require the employer to deal with the union in each jurisdiction.
Data privacy and personal integrity	In Ontario, the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**") applies to most private sector employers. PIPEA applies to every organization in respect of personal information that the organization collects, uses or discloses in the course of "commercial activity". However, "commercial activity" is defined so as to generally exclude the personal information of employees collected by employers. Therefore, there is no legislation that directly governs the collection, storage and use of the personal information of employees by their employers in Ontario. However, the common law tort of "intrusion of seclusion" provides a cause of action for individuals whose privacy has been invaded.
Regulations regarding parental leave or other forms of absence regulated by law	The Ontario *Employment Standards Act, 2000* contains numerous provisions dealing with leaves of absence. Pregnancy and Parental Leave provide for, in combination, up to fifty-two weeks of unpaid leave. This leave is subject to a qualifying period and is job protected. Additional job protected leaves under the statute include: Personal Emergency Leave, Family Medical Leave, Organ Donor Leave, Family Caregiver Leave, Critically-Ill Child Care Leave, Crime-

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	Related Child Disappearance or Death Leave, Emergency Leave, and Reservist Leave.
Termination of employment	There is no employment-at-will in Ontario (or any other jurisdiction in Canada). Employment is terminable for cause without notice. Upon a without cause termination, an employee is entitled to receive the minimum notice of termination, pay in lieu of notice and/or severance pay required under the Ontario Employment Standards Act, 2000, as well as any additional pay in lieu of notice as required by common law. While the statutory minimum entitlements are determined on the basis of an employee's length of service (up to a maximum of 34 months' pay for employees with 26 or more years' service), there is no fixed formula for determining common law notice in any given case. There are, however, several factors that are taken into account by courts when determining common law notice, including: the employee's age; the employee's length of service; the type of position held; and the employee's level of compensation. Common law notice entitlements are often significantly greater than the statutory minimums, and can be in excess of one month per year of service. The *Employment Standards Act, 2000* also provides for enhanced minimum notice requirements for employers that effect a mass termination of employment, which is defined as the dismissal of 50 or more employees in a span of four weeks. Other obligations, including notice to government agencies, are also imposed in such circumstances.
Sanctions for wrongful termination	Upon a wrongful termination, a former employee is entitled to wrongful termination damages (i.e. the value of the notice period to which the former employee was entitled). The former employee may also be owed unpaid wages, aggravated and punitive damages, interests and costs.
Whistleblower protection	There is currently no provincial legislation in Ontario that protects whistleblowers in the private sector. Therefore, the protections for private-sector whistleblowers in Ontario are exclusively provided by section 425.1 of the federal *Criminal Code*. Section 425.1 provides that no employer, person acting on behalf of an employer, or person in a position of authority in respect of an employee shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so, with the intent to stop the employee from providing information to a law enforcement official respecting an offence that the employee believes has been or is being committed by the employer. Section 425.1 also protects whistleblowers from retaliation or threatened retaliation on the basis that the employee provided such information to a law enforcement official.
Non-Competition Laws	During the course of employment, the common law implies an obligation on the part of an employee not to compete against his or her employer. In the absence of contractual restrictive covenants, former employees – except fiduciary employees – are free to compete with their former employer, provided that confidential information of the former employer is not used. Agreements not to compete after cessation of employment are prima facie unenforceable. Ontario 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

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	the nature of the business, its geographic reach, and the former employee's role and responsibilities in that business. Ontario courts have indicated a general preference for non-solicitation agreements over non-competition agreements. However, even non-solicitation agreements must be narrowly drawn as to time, geography, and the scope of the activities restricted. Ontario courts will not "blue pencil" or read down restrictive covenants that contain overbroad provisions to render those covenants enforceable.
Discrimination and equal employment opportunity	The Ontario *Human Rights Code* (the "*Code*") establishes, among other things, a comprehensive system for the investigation and resolution of complaints relating to discrimination. Although the *Code* deals with matters beyond the scope of the employment relationship, it also contains a number of provisions that deal with workplace discrimination. Specifically, the *Code* provides for an individual's right to equal treatment with respect to employment, and prohibits discrimination in the workplace based on certain "prohibited grounds," including: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. As a general observation, discrimination has been defined to include any distinction, exclusion or preference based on a prohibited ground as defined by the legislation. Ontario has enacted *Regulations under the Accessibility for Ontarians with Disabilities Act, 2005* ("**AODA**") which apply in conjunction with the *Code*. The Regulations contain a number of significant employment-related obligations that require Ontario employers to revise their employment-related documentation and accommodations processes. Employers are also required to invest significant resources into training programs regarding accessibility matters in order to ensure compliance with the AODA. The Ontario *Employment Standards Act, 2000* requires that no employer pay an employee of one sex less than that of an employee of the other sex when: (a) they perform substantially the same kind of work in the same establishment; (b) their performance requires substantially the same skill, effort and responsibility; and (c) their work is performed under similar working conditions. In addition, Ontario has enacted the *Pay Equity Act*, which requires most employers to correct gender discrimination in compensation practices by adjusting the compensation of employees in female job classes to be at least equal to that of employees in male job classes when the job classes in question are comparable based on skill, effort, responsibility and working conditions.
Transfer of business and outsourcing	In the case of a share purchase transaction, the employment of all employees of the target entity is automatically continued post-close with the purchaser. The employing entity does not change from a legal perspective. The result is that the purchaser inherits all obligations and liabilities with respect to the employees of the target. In an asset purchase transaction, the employment agreements of employees of the vendor are not automatically assumed by the purchaser, and new offers of employment need to be made to all employees that join the purchaser. Under Ontario employment standards legislation, however, there is a "deemed continuity of employment" provision that deems all service with the vendor as

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	service with the purchaser for the purposes of calculating termination entitlements going forward. In the case of unionized workforces, any collective bargaining agreements are automatically assumed by the purchaser regardless of whether the transaction is a share purchase or an asset purchase (by operation of statute).
Global mobility (brief overview of common issues and visa requirements)	Most individuals who are not citizens or permanent residents need a work permit to work in Canada. There are two main types of work permits: employer-specific work permits and open work permits. An employer-specific work permit allows an individual to work for a specific employer for a defined length of time. In order to successfully apply for a temporary work permit, the employer must apply for a Labour Market Impact Assessment ("**LMIA**") which will be granted if Employment and Social Development Canada ("**EDSC**") is satisfied that there is no Canadian citizen or permanent resident available to perform the job. The employer must then extend a temporary job offer to a specific individual who will apply to the EDSC for work permit. Open work permits allow individuals to work in Canada for a specified period of time for any employer except for employers falling under certain categories. Open work permits are only issued to individuals who are also exempt from LMIA such as: individuals working in jobs included in an international trade accord (i.e. NAFTA); certain permanent resident applicants and their dependent family members; spouses and common-law partners of some workers and international students; refugees, refugee claimants, protected persons and their family members; and, some young workers participating in special programs. All foreign workers applying for a work permit require a valid visa to enter Canada (if coming from a non-visa-exempt country). Under the Immigration and Refugee Protection Act, anyone who, willfully or negligently, illegally employs a foreign national is subject to a maximum fine of $50,000 and/or to imprisonment for a term of up to two years.
Criteria for independent contractor status	The classification of a worker as either an employee or an independent contractor is determined as a matter of law. The formal title that a worker possesses will have little to no bearing on that worker's classification as an employee of an organization as courts and the Canada Revenue Agency ("**CRA**") will examine not only the substance of the written arrangements establishing the nature of the relationship amongst the parties, but also the ongoing relationships expressed in the workplace. To determine whether a worker is an employee or an independent contractor, a court will focus on whether the worker is performing services on his or her own account. A court assessing the status of a worker will look at all the circumstances, including: 1. *The extent to which the organization controls the worker*. The more control an organization has over a worker, the more likely that worker is an employee. Factors relevant to determining an organization's "control" over a worker include the organization's ability to: a. select the person hired;

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	b. pay a salary or remuneration; c. determine the work methods used by the worker; d. determine the day-to-day tasks the worker will perform; e. determine who works for the worker; and *f.* dismiss the worker. 2. *Whether the worker owns the equipment used for work.* Employees are generally supplied with the equipment needed to perform their work by their employing organization. 3. *The worker's chance of profit as a result of performing their work.* Employees do not generally share in the profits of their employing organization. 4. *Whether the worker has a risk of loss as a result of performing their work*. Employees do not generally suffer losses and take risks, as they receive compensation for work performed. 5. *The degree to which the worker is integrated into the organization*. Considerations relevant to a worker's integration include whether the worker: a. is employed as part of the organization; b. is an integral part of the organization; c. does peripheral or ancillary work to the organization's business; and d. has the ability to perform other work. Determining whether a worker is an employee or independent contractor is not dependant on any one of these factors. An assessment by a court or the CRA as to whether a worker is an employee or independent contractor is entirely factual, having regarding to all the surrounding circumstances.
Corruption, regulation and sanctions	The Canadian Criminal Code contains offences for fraud (ss. 380(1)) and bribery of public offices and officials (s. 119-12). Fraud includes the defrauding of property, money, valuable service or security. The main bribery offences include the offering of a bribe to pubic officials and government employees and their families or acceptance of such a bribe. Bribes may consist of money, valuable consideration, offices, and employment. The *Corruption of Foreign Public Officials Act* ("***CFPOA***") contains offences related to bribery and fraud. *CFPOA* prohibits the offering of a benefit (including a loan, reward, advantage or other benefit), to a foreign public official in order to obtain a business advantage. Penalties for violation of the *CFPOA* includes fines and/or up to 14 years imprisonment.
Final remarks	N/A

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The International Employment Guide

Croatia

Prepared by Lex Mundi member firm Law Firm Hanzekovic & Partners Ltd.

General remarks	The Labour Act, as the general labour regulation, regulates employment in the Republic of Croatia. This regulation applies to all employers and employees in the Republic of Croatia, unless provided for differently by another act or international treaty that has been concluded and confirmed in accordance with the Constitution of the Republic of Croatia and that has been announced and enacted. In addition to the Labour Act, as the framework regulation, employment in the Republic of Croatia is regulated by a number of other regulations, e.g. regulations defining employment of state officials, regulations defining individual public services, as well as collective bargaining agreements.
Employment agreement	An employment relationship is created under an employment agreement, which is concluded in writing. If the employment agreement is not concluded in writing, the employer is obliged to provide the employee with a written confirmation on the concluded employment agreement prior to the commencement of work. If the employer does not conclude a written employment agreement with the employee prior to commencement of work or fails to provide the employee with a written confirmation on the concluded employment agreement, it shall be considered that the employer has concluded an open-ended employment agreement with the employee. Employment agreements are, as a rule, concluded for an indefinite period of time and are binding for the parties until the agreement ends in one of the manners provided for by the Labour Act. If the employment agreement does not state for which period it is concluded, it is considered that it is concluded for an indefinite period of time. When concluding an employment agreement, a probation period can be stipulated which cannot exceed six months. The employment agreement can be exceptionally concluded for a definite period of time, for the creation of an employment relationship the cessation of which is determined in advance by a time limit, the performance of a certain task or the occurrence of a certain event.
Terms and conditions of employment	An employment agreement concluded in writing has to, pursuant to the provisions of the Labour Act, contain data on the parties and their residence i.e. seat; the place of work; the job position, i.e. the nature and kind of work for which the employee is employed or a short list or description of work; the date of commencement of work; the expected duration of the agreement (in case of fixed-term agreements); the duration of paid annual leave to which the employee is entitled; the notice period that the employee i.e. employer must abide by; the basic salary, bonuses and payment periods of the remuneration to which the employee is entitled, as well the duration of regular working days or weeks. The Minimum Salary Act defines the lowest monthly gross salary amount the employee is entitled to for full-time working hours (minimum salary). The

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	amount of the minimum salary is determined under the ordinance of the Government of the Republic of Croatia once a year for the following calendar year. Full-time working hours must not exceed 40 hours per week. Part time working hours of the employee are all working hours shorter than full-time working hours. In case of force majeure, extraordinary increase of work scope and in other similar cases of urgent need, the employee is obliged, at the written request of the employer, to work longer than full-time i.e. part time working hours (overtime).If the employee works overtime, the total duration of the employee's working hours must not exceed 50 hours per week. Overtime of an individual employee must not exceed 180 hours per year, unless stipulated differently under the collective bargaining agreement, in which case it must not exceed 250 hours per year. The employee is entitled to annual leave of at least four weeks for each calendar year.
Changing terms and conditions of employment	The provisions of the employment agreement may be amended with the consent of the employee, or if the provisions of the employment agreement refer to the application of the provisions of the Employment By-Law, the employer can unilaterally amend the provisions of the Employment By-Law. The provisions of the employment agreement can also be amended through a termination with an offer of an amended agreement (the employer terminates the employment agreement and simultaneously proposes the conclusion of a new employment agreement with changed conditions to the employee).
Trade Unions and the consultation obligation	Employees are entitled, at their own free will, to establish a union and join it under the terms, which can only be prescribed by the articles of association or regulations of that union. Employees freely decide on the joining or leaving of a union and may not be placed in a less favourable position due to their union membership or due to not participating in union activities. Unions with at least five employees employed by a certain employer may appoint or elect one or more union representatives (an employee who is employed by the employer). Unions, the members of which are employed by a certain employer, may appoint or elect one or more union officials. If several unions are active at the employer, the unions have to agree on the union representative i.e. representatives who will represent them before the employer, and the unions are obliged to inform the employer of the reached agreement. Union representatives and/or union officials, are entitled to protect and promote the rights and interests of union members before the employer. Prior to passing decisions which are important for the position of the employee the employer has to consult the union representative on the intended decision and provide him with data that are important for the passing of the decision and the consideration of its affect on the employee's position. If the employer fails to conduct the consultation procedure, the passed decision is null and void. The Labour Act prescribes which decisions are considered as especially important decisions for the employee's position (e.g. the adoption of the employment by-law, schedule of working hours, night work, schedule of annual leave, termination etc.). It should be pointed out that in addition to the obligation to consult the union, under Croatian law the employer is, in certain situations provided for by law, obliged to inform the union representative of issues that are important for the

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	employee, and can pass certain decisions prescribed by the law only with the prior consent of the union.
Data privacy and personal integrity	The employee's personal data cannot be used by the employer for any purposes that are not work related, i.e. that are not stipulated by a separate regulation. The employer can collect, process, use and provide third parties with personal data only if provided for by the Labour Act or another act or if it is necessary for the exercise of rights and obligations under or in relation to the employment relationship. An employer employing at least twenty employees is obliged to adopt and announce employment by-laws which regulate salaries, the work organisation, the procedure and measures of protecting the employee's dignity and measures for the protection against discrimination and other issues of importance to the employees employed by that employer, unless these issues are regulated under the collective bargaining agreement. If the personal data of the employee need to be collected, processed, used or provided to third parties for the purpose of exercising the rights and obligations under or in respect of the employment relationship, the employer has to determine in advance under the employment by-law which data will be collected, processed, used or provided to third parties for this purpose. The personal data of the employee may be collected, processed, used and provided to third parties by the employer or a trustworthy person authorised to do so by the employer. Personal data of the employee may be collected, processed, used and provided to third parties only if the employee gives their consent which can be in oral or written form. The employee may withdraw their consent at any time.
Regulations regarding parental leave or other forms of absence regulated by law	The Act on Maternity and Parental Support regulates the right to monetary support and leave of employed, unemployed, self-employed mothers (parents) etc. Working or self-employed pregnant women and mothers are entitled to a **compulsory maternity leave** of consecutive 98 days, from day 28 before the expected date of delivery and 70 days after birth. After the compulsory maternity leave, a working or self-employed mother is entitled to an **additional maternity leave** that lasts until the child turns six months of age and that she may, with the father's prior written consent, transfer to the father of the child by a written statement in whole or in a timely limited period. After the child turns six months of age, working or self-employed parents have the right to parental leave of 8 or 30 months, depending on the number of born children and the manner of using the leave. The right to **parental leave** is the right of both working parents and it is generally used in an equal part: eight months for the first and for the second child, 30 months for twins, for the third, and for any subsequent child (each parent in the duration from 4 or 15 months). If only one parent is on parental leave, as agreed by both parents, it lasts six months for the first and for the second child or 30 months for twins, for the third, and for any subsequent child.

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	Working parents are enabled to flexibly use the parental leave until the child turns 8 years of age, as agreed by both parents, simultaneously by both parents or alternately. Parental leave may be used as the right to part-time work (half of full-time working hours) for a double duration of the unused parental leave. During maternity leave the beneficiary is entitled to compensation of salary of 100% of the salary received in the period of six months preceding the leave in accordance with regulations on mandatory health insurance. The compensation of salary during parental leave in the duration of the first 6 months or 8 months of parental leave is paid in the amount of 80% of the budgetary base per month (currently HRK 2,660.80). During the remaining part of parental leave (after the expiry of the first 6 or 8 months of parental leave) the compensation of salary amounts to 50% of the budgetary base (currently HRK 1,663.00). The Labour Act prescribes the possibility for the employer to grant the employee unpaid leave at the employee's request during which time the rights and obligations under the employment relationship or in relation to the employment relationship are suspended, unless provided for differently under the law. The reasons for which the employer is granted unpaid leave and the duration of the unpaid leave are mostly regulated by the employment by-law or the collective bargaining agreement.
Termination of employment	The provisions of the Labour Act regulate the issue of terminating the employment agreement and the minimum rights and obligations of the employer and employee when terminating the employment agreement. The termination has to be in writing, contain a written reasoning and has to be delivered to the person whose employment relationship is terminated. There are two different types of employment agreement terminations: ordinary termination and extraordinary termination of the employment agreement. The employer can terminate the employment agreement with the prescribed or stipulated notice period (ordinary termination), if there are justified reasons to do so. Justified reasons are listed in the Labour Act and pursuant to them we distinguish between termination due to business reasons, termination due to personal reasons, termination due to the employee's misconduct and termination because of unsatisfactory probation work. The employee can terminate the employment agreement with the prescribed or stipulated notice period, without indicating the reasons for doing so. A fixed-term employment agreement can be terminated by ordinary notice only if this possibility is envisaged by the agreement. If due to a gross violation of the obligations under the employment relationship or another especially important fact, while taking account of all the circumstances and interests of both parties, the continuation of the employment is no longer possible, the employer and employee have justified reasons to terminate the open-ended or fixed-term employment agreement, regardless of the obligation to abide by the prescribed or stipulated notice period (extraordinary termination). The employment agreement may be

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	terminated extraordinary only within 15 days as of the day of learning about the fact on which the extraordinary termination is based. In case of an ordinary termination of the employment agreement (except in case of a termination due to the employee's misconduct) the employee is entitled to a notice period and to the payment of severance pay. The duration of the notice period and the amount of severance pay depend on the duration of the employment with the same employer. An employee is entitled to severance pay only if he/she has been continuously employed by the same employer for at least two years. The Croatian Labour Act envisages a misdemeanour sanction for employers who, prior to the expiry of the six-month term, employ another employee at the same position without having offered the conclusion of the employment agreement to the employee whose agreement had been terminated due to business reasons. The Labour Act also prescribes a separate procedure to be implemented by the employer in case of collective redundancy, i.e. in case the need for at least twenty employees ceases to exist at the employer within a 90-day period, of which employees the employment agreements of at least five employees are terminated due to business reasons. In that case the employer is obliged to timely and as prescribed by the Labour Act consult the works council or the union representative who operates with the employer for the purpose of reaching an agreement in order to remove or reduce the need for the cessation of work of that employee.
Sanctions for wrongful termination	If the employee believes that the employer violated a right under the employment by passing the decision on the termination of the employment agreement, he may, within 15 days as of the delivery of the decision by which his right was violated or as of learning of the violation, request the exercise of that right from the employer. If within 15 days as of receiving the employee's request for the protection of rights under the employment the employer does not comply with the request, the employee may, within a further 15-day period, request the protection of the violated right before the competent court. In court proceedings, the employee asks the competent court to declare the decision on termination illegal i.e. impermissible. If the court finds that the termination was illegal, the employee is entitled to request his reinstatement at work, at the same position he previously held, as well as compensation of salary for the entire time he did not work and during which the proceedings before court took place, or if the employee finds it unacceptable to continue the employment, the court may, after passing a decision on the day of the termination of employment, award the employee compensation of damages in the amount of at least three and up to eighteen prescribed or stipulated monthly salaries of the employee, depending on the duration of the employment, the age and the maintenance obligations of the employee.
Whistleblower protection	There is no separate law which regulates the protection of the whistleblowers in Croatia. However, the employee is guaranteed protection in case of whistleblowing in the Labour Act, Trade Act, the Civil Servants Act, and the Criminal Code and the Ordinance on Reporting Actual and Potential Violations of Regulation No. 596/14 of the European Parliament and Council which protects employees against retaliation, discrimination or other types of unfair treatment which can occur due to reporting violations of the Regulation No.

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	596/14 of the European Parliament and Council or in relation to it. According to the Labour Act, which regulates the employment in general, the employee's addressing of the relevant authorities with reasonable suspicion of corruption does not represent a justified reason for his dismissal. Therefore, the employer could not validly terminate the employee's employment agreement if the employee addressed the relevant authorities due to the reasonable suspicion or if the employee filed a report in good faith. In case of a dispute regarding the discrimination of an employee who addressed the relevant authorities for reasonable suspicion of corruption or filed a report, if the employee makes such discrimination plausible, the employer must prove that he did not discriminate the employee. In addition to this, the employer can be criminally charged for terminating the employment agreement of such an employee and punished by imprisonment (not exceeding three years). A similar protection is guaranteed to the public servants whose addressing of the relevant authority, because of reasonable suspicion of corruption, is not a legitimate reason for termination of the civil service. Nevertheless, the employer can establish his own whistle-blower policy (hotline, etc.) but in accordance with the provisions of the Labour Act and the Personal Data Protection Act.
Non-Competition Laws	The Croatian Labour Act prohibits the competition between the employee and the employer. The Labour Act differentiates between the legal and contractual restraint of competition between the employer and employee. The legal restraint of competition implies that during the employment relationship with a certain employer, the employee is not allowed to perform the same activities as the employer for his own or someone else's account without the employer's permission. In case the employee violates the legal restraint of competition the employer is entitled to claim reimbursement of incurred damages from the employee; request that the employee hands over the gain from the concluded transaction or request that all claims under this transaction are transferred to the employer. The employer is entitled to assert the mentioned claims/request against the employee within three months as of learning of the conclusion of such a transaction, i.e. five years as of the date the transaction was concluded. In addition to these consequences, the violation of the legal restraint of competition can also result in the termination of the employment agreement. In accordance with the provisions of the Labour Act it is considered that the employer gave his permission, if at the time of concluding the employment relationship he knew that the employee performed transactions from the same activity, and did not request the employee to cease them. The employer may withdraw the granted permission at any moment, however, in doing so, he has to take account of and abide by the time limits prescribed for cases of the termination of the employment agreement. The contractual restraint of competition implies that for a certain period of time after the termination of the employment agreement the employee cannot be employed by another person who is the employer's competitor, that the employee cannot for his own account or the account of a third party conclude transactions which are in competition to those of the employer. The contractual restraint of competition is applicable to the employee only if the employer and employee have explicitly stipulated it in writing. The contractual restraint of competition cannot last longer than two years as of the day of the termination of employment, and is binding upon the employee only if under the

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	agreement the employer undertook the obligation to pay the employee remuneration during the restraint of competition in the amount of at least one half of the average monthly salary paid to the employee in the three months preceding the termination of the employment agreement. The employer may withdraw the contractual restraint of competition provided that he informs the employee thereof in writing. In that case the employer is not obliged to pay the employee the abovementioned remuneration after the expiry of the three-month period as of the day the employee received the written notice on the withdrawal of the contractual restraint of competition. In case the contractual restraint of competition is violated, the employee and employer can stipulate a contractual penalty in a specific amount. If only a contractual penalty is envisaged for the violation of the contractual restraint of competition, the employer can request only the payment of that penalty, and not the fulfilment of obligations or the reimbursement of damages.
Discrimination and equal employment opportunity	The prohibition of discrimination is a constitutional category in the Croatian legal system. Any kind of discrimination is prohibited under the Labour Act, the Anti-Discrimination Act and the Criminal Act. The framework act regulating the protection and promotion of equality as the highest values of the constitutional order of the Republic of Croatia is the Anti-Discrimination Act. It creates the premises for the realisation of equal opportunities and regulates the protection against discrimination on the grounds of race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, native identity, expression or sexual orientation. The act applies to actions of all state authorities, organs of local and regional self-government, legal entities with public authorities and to actions of all legal entities and natural persons, inter alia, in the field of work and work conditions; the possibility to perform independent and dependent activities, including criteria for selection and terms of hiring and promoting; access to all types of professional guidance, professional training and specialisation and retraining. Discrimination is prohibited in all forms of appearance, except in situations the Anti-Discrimination Act provides as exceptions. A person claiming that he/she is the victim of discrimination is authorised to file a claim to the competent court. If the party in court proceedings claims that his/her right to equal treatment has been violated he/she is obliged to make it plausible that discrimination occurred. In that case the burden of proof that no discrimination occurred lies with the counterparty. Pursuant to the provisions of the Anti-Discrimination Act, the victim of discrimination is entitled, inter alia, to reimbursement of damages in accordance with the regulations regulating civil obligations. The Croatian Labour Act contains a general provision on the prohibition of direct and indirect discrimination in the area of work and work conditions, as well as special procedural provisions on the protection of employees' dignity. The employer is obliged to regulate in the employment by-law, inter alia, the procedure and measures for the protection of employees' dignity and the anti-discrimination measures. The procedure and measures for the protection of employees' dignity against harassment and sexual harassment may also be regulated by the collective bargaining agreement or an agreement concluded between the works council and the employer.

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Transfer of business and outsourcing	The provision of the Labour Act regulating the issue of the transfer of employment agreements to a new employer, i.e. the protection of employees' rights in case of a transfer of business to a new employer is the result of the alignment of Croatian legislation with the legislation of the European Union. The Council Directive 2001/23/EC of 12 March 2001 on the approximation of the law of member states in relation to the protection of employees' rights in case of the transfer of business, companies or parts of business or companies was transposed by the provisions of the Labour Act into the legal order of the Republic of Croatia. The Labour Act prescribes that if under a corporate change or a legal transaction a business, part of business, economic activity or a part of the economic activity, which retains its economic integrity (collectively: business), is transferred to a new employer, also all employment agreements of the employees employed in the business being transferred are transferred to the new employer. The employee whose employment agreement is transferred to a new employer retains all rights under the employment he/she acquired until the day the employment agreement was transferred. The employer who transfers a business to a new employer is obliged to inform the new employer completely and truthfully in writing of the rights of the employees whose employment agreements are being transferred. The failure of the employer to inform the new employer in writing of the rights of the employees whose employment agreements are being transferred does not affect the exercise of the rights of the employees whose employment agreements are being transferred to the new employer. Prior to the day of transfer the employer is obliged to timely inform the works council i.e. union representative of the transfer a business to a new employer. The employer is also obliged to inform all employees affected by the transfer of the said transfer. If in the business which was transferred and which retained its independence a works council had been established, it continues its operations, at the latest until the expiry of the term of office for which it was elected. If in the business that was transferred a collective bargaining agreement had been signed, until the conclusion of a new collective bargaining agreement, and at most one year after the transfer, the collective bargaining agreement which applied to the employees prior to the change of employer continues to be applicable to them. The transfer of business to a new employer is not considered a justified reason for the termination of an employment agreement, not only by the old, but also the new employer and the permissibility of such a termination can be successfully challenged before court. As an alternative to a regular employment structure, an employee may be hired through a temporary employment agency. In such cases, the temporary employment agency is considered to be the employee's employer, and the employee is assigned for work to another employer (user undertaking) on the basis of a second agreement between the temporary employment agency and the user undertaking for which the work is performed. The agency may conclude a temporary assignment contract of fixed or indefinite duration with the employee. The agreed upon remuneration and other working conditions applicable to the assigned employees may not be lower or less favorable when compared to the remuneration or working conditions applicable to the employee employed with the user undertaking for the performance of the

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	same tasks, which would be applicable to the assigned employee should he have concluded an employment agreement with the user undertaking.
Global mobility (brief overview of common issues and visa requirements)	The Aliens Act provides the conditions for obtaining a residence and work permit for aliens, which is an essential condition for employment and concluding employment with an employer who has his/her seat in Croatia. In accordance with the Aliens Act, aliens are all persons who are not Croatian citizens, including persons not recognized as citizens by any country under their national legislation. The Labour Act differentiates aliens, citizens of a member state of the European Economic Area (hereinafter: EEA) and aliens, citizens of third countries who do not have citizenship of a EEA member state. Citizens of EEA member states and citizens of the Swiss Confederacy, as well as their family members can work in Croatia and provide services without a residence and work permit. Citizens of third countries may work in the Republic of Croatia under a residence and work permit or the certificate of registration of work, unless provided for differently in the Aliens Act. An alien can also work in the Republic of Croatian under a residency card. An employer may not employ an alien who illegally resides in the Republic of Croatia nor use his work, and prior to creating an employment relationship the employer has to request the alien to provide insight into a valid residence and work permit, i.e. certificate of registration of work. If the employer employs an alien who does not have a residence and work permit or a certificate of registration of work, the employer may be fined with a fine of HRK 10,000.00 up to HRK 100,000.00 for each illegally employed alien, depending on whether the employer is a natural person or legal entity. The employer is obliged to register the alien being employed with the competent police authority or police station within 8 days as of the creation of the employment relationship or the commencement of work of the alien. The competent police authority is determined in accordance with the temporary residence of the alien. This police authority passes a ruling on the application for the residence and work permit within 30 days. The issuance of the residence and work permit is conducted in accordance with the so-called annual quota which is established under the decision of the Government of the Republic of Croatia. It is possible to approve work of aliens outside the annual quota in cases provided for by the Aliens Act. Nationals of certain countries need to have a valid visa for the entry to the Republic of Croatia. A visa is a permit for transit through the territory of the Republic of Croatia or the entry to and stay for a maximum period of 3 months in each six-month period from the date of the first entry. The visa is issued for one, two or several entries for the purpose of transit, tourist, business, private or other travel. The validity term depends on the travel circumstances of the foreign national in Croatia and cannot be longer than five years. The possession of a visa does not guarantee the entry to Croatia, but also other legally prescribed requirements for the entry of foreign nationals have to be met. A foreign national cannot work in Croatia on the basis of a visa.

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Criteria for independent contractor status	Independent contractors are not recognized in Croatian employment law. A temporary service contract is a contract of obligations and civil law which is concluded under the Civil Obligations Act. In accordance with the Civil Obligations Act under the temporary service contract the contractor undertakes to perform a certain task, such as the manufacturing or repair of an object, the performance of manual or intellectual work etc., and the principal undertakes to pay him remuneration for this. This means that in case of a temporary service contract the contractor works for the principal independently from the principal of the services; as a rule the contractor does not perform activities during strict working hours but in accordance with his/her own organisation; the contractor performs the work in person, but can entrust third parties with the performance of work; the contractor receives remuneration, most often upon the completion of work i.e. the handover of the work; the contractor performs the work in premises of his/her choice. An employment agreement is a labour law contract concluded in accordance with the Labour Act for the purpose of creating an employment relationship. In case of an employment relationship the employee always and exclusively works in accordance with the instructions and under the supervision of the employer (superior-subordinate relationship); the employee performs work in the prescribed working hours, the stipulated working hours or the working hours determined under the decision of the employer; the employee performs work exclusively in person; for the work performed the employer is obliged to pay the employee salary in monies and within the prescribed terms (at least once a month); the employee is obliged to perform the work within the premises of the employer or at another location determined by the employer. If the employer concludes another agreement with the employee for the performance of work which according to the nature and type of work and the employer's authority has features of a work for which an employment agreement is concluded, in accordance with the provisions of the Labour Act, it is considered that an employment agreement has been concluded with the employee, unless the employer proves differently. From the tax perspective, a temporary service contract is considered second income and taxes and contributions under the Contribution Act and the Income Tax Act are levied on it.
Corruption, regulation and sanctions	The framework for anti-corruption measures in the Republic of Croatia is based on the provisions of the penal legislation, the Act on the Croatian State Prosecutor's Office for the Suppression of Organized Crime and Corruption (USKOK) and international legal instruments the Republic of Croatia has joined. The key international documents are the Criminal Law Convention on Corruption, the Additional Protocol to the Criminal Law Convention on Corruption, the Civil Law Convention on Corruption and the United Nations Convention against Corruption. The part of this guide referring to Whistleblower protection contains the provision of the Labour Act that protect the employee in cases of actions due to reasonable suspicion of corruption or the filing of reports on this suspicion with responsible persons or competent authorities of state authorities in good faith.

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	The Criminal Act prescribes a prison sentence of a maximum of three years for a person who terminates an employee's employment agreement because the employee due to reasonable suspicion of corruption in good faith addressed or filed a report to the responsible persons or state authorities. The Criminal Act also contains provisions which determine the premises of culpability and sanctions that may be imposed upon culprits of criminal acts of giving and receiving bribe, giving and receiving bribe in bankruptcy proceedings, giving and receiving bribe in commercial operations, giving and receiving bribe for trading with influence and bribing representatives.
Final remarks	In general, the Labour Act regulates the employment of all employees working in Croatia, regardless of whether they are foreign or Croatian nationals. The Labour Act regulates the conclusion of employment agreements; working hours; holidays and annual leave; night work; maternity rights; salaries; termination of employment agreements; unions and associations of employers; the participation of employees in decision-making, strike and collective bargaining agreements. The provisions of the Labour Act are mandatory, in the sense that it prescribes the minimum employment rights. The basic principal of labour law dictates that labour law regulations are always interpreted in favour of the employee *(in favorem laboratoris*), therefore also the Labour Act prescribes that, if a right under the employment is regulated differently in the employment agreement, the employment by-law, an agreement concluded between the works council and the employer, the collective bargaining agreement or the law, the right most favourable for the employee is applied.

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Non-Competition Global Practice Guide

Croatia

Prepared by Lex Mundi member firm Law Firm Hanzekovic & Partners Ltd.

Does your state or country recognize and/or enforce restrictive covenants against employees?

The Croatian Labour Act regulates restrictive covenants. The contractual restraint of competition implies that for a certain period of time after the termination of the employment agreement the employee cannot be employed by another person who is the employer's competitor, that the employee cannot for his own account or the account of a third party conclude transactions which are in competition with those of the employer. Although the Labour Act does not explicitly state that during the restraint of competition the employee may not establish a company which is in competition with the previous employer, the case law has taken the standpoint that this also is prohibited during the restraint of competition.
The contractual restraint of competition is applicable to the employee only if it has been explicitly stipulated by the employer and employee in writing. The contractual restraint of competition cannot last longer than two years as of the day of the termination of employment, and is binding upon the employee only if under the agreement the employer undertook the obligation to pay the employee remuneration during the restraint of competition in the amount of at least one half of the average monthly salary paid to the employee in the three months preceding the termination of the employment agreement.
The legal consequences of violating the contractual restraint of competition depend on what has been agreed between the parties. It is possible to agree upon the payment of contractual penalty, the fulfilment of obligations or reimbursement of damages. The right to reimbursement of damages and the fulfilment of obligations exists under the Labour Act, while the contractual penalty has to be explicitly stipulated.

What are enforceable protectable business interests that courts will protect?

With the stipulation of the restraint of competition the employer endeavours to protect himself against certain (future) actions of his employee, after the termination of the employment contract, by which actions the employee could compete with the employer's activities in an impermissible way. The purpose of the contractual restraint is the protection of reasonable business interests of the previous employer and primarily refers to the prohibition of employment by another person who is the market competitor of the employer and the conclusion of own transactions which could be in market competition with the employer. What constitutes "reasonable business interests" is determined by the court in accordance with the circumstances of each particular case.

The employee is for example prohibited from using and transmitting information that have been defined as business secrets which the employee learned during the employment with the previous employer.

What are considered reasonable restrictions as to geography, duration and scope of activity?

The contractual restraint of competition refers to the prohibition of employment at any position with any employer who is the market competitor of the previous employer.

However, the contractual restraint of competition is not binding for the employee when the contractual restraint of competition is not aimed at the protection of reasonable business interests of the previous employer or when the restraint, depending on the area, time and aim of the restraint disproportionately restricts the work and promotion of the employee. Whether a particular case concerns a disproportionate restriction of work and professional advancement of the employee is decided by the court after consideration of all the circumstances of the case.

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In accordance with the provision of the Labor Act the contractual restraint of competition cannot last longer than two years as of the day the employment has been terminated.

Can a customer-specific restriction substitute for a geographic restriction?

Yes, if it protects the reasonable business interests of the employer, provided that thereby the work and professional advancement of the employee is not disproportionately restricted.

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

If a contractual penalty is stipulated for cases of violating the contractual restraint of competition, taking account of all the circumstances, the court can reduce the amount of the contractual penalty, if it finds that there is an obvious disproportion between the value of the obligation and the amount of the contractual penalty.

Will the court recognize a choice-of-law provision in a restrictive covenant?

No, the application of the Croatian law to the employee is mandatory pursuant to the Labour Act.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

An agreement which regulates the contractual restraint of competition is null and void if it is concluded by a minor employee or an employee who at that time receives a salary lower than the average salary in the Republic of Croatia.

In addition to the aforementioned, the Labour Act does not prescribe that certain categories of employees cannot conclude an agreement on the restraint of the competition between the employee and employer, however, in practice it is concluded with those employees who have certain specific knowledge or in whom the employer has made additional investments in the form of education and professional training or employees who have access to sensitive or confidential information which are significant for the employer's business.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

The contractual restraint is binding upon the employee and is valid and enforceable if:

- it has been concluded in writing,
- it has been concluded for a period of up to two years as of the termination of employment,
- if the contractual restraint is aimed at the protection of reasonable business interests of the employer, or when, depending on the area, time and aim of the restraint and in relation to the reasonable business interests of the employer, it does not disproportionately restrict the work and the professional advancement of the employee,
- if under the agreement the employer assumed the obligation to pay the employee compensation for the duration of the restraint which cannot be lesser than one half of the average salary paid to the employee in the three months preceding the termination of the employment agreement.

The employer is obliged to pay compensation to the employee at the latest by the 15th day of the month for the preceding month. If a part of the employee's salary is intended for the coverage of certain expenses in relation to the performance of work, the compensation can be proportionally reduced by the amount of these expenses. The income which has not been stipulated in the way that it is considered part of the salary does not have to be taken account of when calculating the compensation.

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Does a change in position, salary or responsibilities affect enforceability?

In principle a change in position, salary and responsibilities does not affect the enforceability of the contractual restraint of competition.

In case the employee's salary would be reduced and if it would fall below the average monthly salary in the Republic of Croatia, we are of the opinion that the compensation the employer should pay after the cessation of employment should be aligned in the manner that it cannot be lesser than one half of the average salary in the Republic of Croatia.

However, in practice the issue could arise regarding the aim of keeping the contractual restraint of competition in force for an employee whose salary is lower than the average salary in the Republic of Croatia, who does not have specific expert knowledge and responsibilities and is a lower ranked employee in the business hierarchy. In this situation the employee could argue before the competent court that the contractual restraint of competition does not protect the reasonable business interest of the employer but that it constitutes an evidently disproportionate restriction of the employee's right to work and the employee could claim the termination or amendment of the employment agreement due to changed circumstances.

Is continued employment sufficient consideration to enforce a restrictive covenant?

The contractual restraint of competition may be stipulated in both fixed-term and open-ended employment agreements. A fixed-term employment agreement should be concluded for a minimum period of three months, since the compensation for the duration of the contractual restraint of competition is calculated pursuant to the amount of salary paid to the employee in the three months preceding the termination employment agreement.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

The refusal to sign an agreement regulating the issue of contractual restraint of competition is not a reason to terminate the employment agreement. However, in Croatia it is practice that the provision on the contractual restraint of competition is part of the employment agreement or another agreement, e.g. a managerial agreement (an agreement by which the employer and employee authorised to manage the business of the employer regulate their mutual rights and obligations), so it is possible that, if the employee refuses to sign the employment agreement i.e. managerial agreement due to the provision on the contractual restraint of competition, no employment relationship is created.

Are restrictive covenants assignable?

Yes. If by a corporate change or a legal transaction a business, part of business, economic activity or a part of the economic activity, which retains its economic integrity (collectively: business), is transferred to a new employer, also all the employment agreements of the employees employed in the business being transferred are transferred to the new employer. This means that all the rights and obligations under the employment relationship being transferred are transferred to the new employer.

List any necessary language requirements.

Employment agreements of employees working in the Republic of Croatia or another agreement regulating the employment relationship of employees in the Republic of Croatia have to be in Croatian. If the provision on the contractual restraint of competition

List any other requirements of importance.

The contractual restraint of competition ceases:

- with the expiry of the term for which it has been stipulated,

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- if the employee terminated the employment agreement by extraordinary notice due to gross violation of the obligations under the employment agreement by the employer, provided that within a month as of the cessation of the employment agreement the employee states in writing that he does not consider to be bound by the contractual restraint of competition,
- if the employer terminates the employment agreement without a justified reason, unless within 15 days as of the termination of the agreement the employer informs the employee that during the contractual restraint of competition he shall pay him remuneration in the amount of the average monthly salary paid to the employee in the three months preceding the termination of the employment agreement,
- by an agreement between the employee and employer,
- by unilateral withdrawal of the contractual restraint of competition by the employer, provided that he informed the employee thereof in writing, whereby, after the expiry of three months of delivering the withdrawal statement to the employee, the employer is released from the obligation to pay remuneration.

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The International Employment Guide

Cyprus

Prepared by Lex Mundi member firm Dr. K. Chrysostomides & Co LLC

General remarks	The employment relationship in the private sector is generally governed by the terms of the contract of employment. In addition, there are certain statutes which govern various employment issues. Furthermore, the Constitution guarantees certain fundamental rights relating to employment, such as the rights to work, to strike and to equal treatment. International treaties that were ratified by the Republic of Cyprus regarding employment issues are also applicable. European Union regulations or directives regarding employment and labour issues, are also applicable in Cyprus after the accession of Cyprus in the European Union in 2004.
Employment agreement	As a general practice, employment agreements are entered into for an indefinite duration with a probationary period of up to 26 weeks. However, a number of contracts may be entered into for a fixed term. Pursuant to section 7 of the Employees on Fixed Term Work (Prohibition of Unfavourable Treatment) Law 98(I)/2003, where an employer has employed an employee on a fixed-term contract or upon renewal of the contract or otherwise, and this employee has worked in total for 30 months or more the contract is then to be considered as a contract of indefinite duration, unless the employer can prove that the fixed-term duration is based on objective grounds, i.e. a. the needs of the company for the specific operation are temporary, b. the employee replaces another employee, c. the particularity of the work justifies the definite term, d. the employee is employed on probation, e. the employment on fixed term is upon application of a judicial decision, or f. military-related work.
Terms and conditions of employment	Employers are obliged by statute (Information of the Employee by the Employer about the Conditions Applicable to the Contract or Employment Relationship Law 100(I)/2000) to provide their employees with specific information about their terms of employment within one month from the commencement of the employment. The information may be given in any of the following ways: a. in a contract of employment, b. in a letter of appointment, and c. in any other document signed by the employer which contains at least all the information detailed below. The information given by the employer must include at least the following: a. identity of the parties, b. place of work and the registered address of the business or the home address of the employer,

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	c. the position of the employee, his grade, the nature of his or her duties and the object of his or her employment, d. the date of commencement of the contract or the employment relationship and its anticipated duration if this is for a fixed time, e. notice periods, f. the duration of any annual leave to which the employee is entitled, as well as the manner and time it may be taken, g. the time limits which must be observed by the employer and the employee in the event of a termination of the employment, either by consent or unilaterally, h. all types of emoluments to which the employee may be entitled and the time schedule for their payment, i. the usual duration of the employee's daily or weekly employment, and j. details of any collective agreements that govern the terms and conditions of the employment. The general rule with regard to remuneration is that there is no general statutory minimum and the salary is freely set in accordance with the individual employment contract or the collective agreement. However, the Council of Ministers has adopted the Minimum Wage Decree No. 180/2012, pursuant to the Minimum Wage Law, Cap. 183, which sets a minimum wage for specific professions. The number of working hours should not exceed 48 per week, including overtime. However, in certain sectors (such as the hotel industry) different limitations apply. Overtime pay is generally not regulated by law in Cyprus and is usually a matter of agreement between employer and employees. Nevertheless, in certain industries in which working time is regulated by specific legislation and regulations or any collective agreements, overtime payment may also be regulated accordingly. Employees are also entitled to a minimum of 11 continuous hours of rest per day, 24 continuous hours of rest per week and either two rest periods of 24 continuous hours each or a minimum of 48 continuous hours within every 14-day period.
Changing terms and conditions of employment	Permanent and substantial changes to the terms and conditions of employment may be effected only by mutual agreement or according to the provisions of the collective agreement.
Trade Unions and the consultation obligation	For purposes of harmonisation with the Directive 2009/38/EC, the parliament of Cyprus enacted Law 106(I)/2011 providing for the establishment of a European Works Council for the purpose of safeguarding employees' rights to information and consultation in community-scale undertakings and community-scale groups of undertakings. The purpose of this Law is to guarantee and improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings. Further, there are certain provisions on information and/or consultation pertaining to situations of collective dismissals and transfers of undertakings.

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Data privacy and personal integrity	The Data Protection Law 138(I)2001, as amended, protects the employee's privacy and personal data. However, there are no specific restrictions or prohibitions against background checks on applicants. An employer will be allowed to carry out a background check on an applicant as long as this does not violate the said Law and the rights of privacy and personal life. The safest way to do this is with the consent of an applicant. In any case, collected information must be relevant, appropriate and proportionate in relation to the purpose for which it is obtained. Employers are not prohibited from controlling the use of company emails and internet for the purpose of limiting the risk of excessive or unnecessary use of the internet by employees and for ensuring network security, provided the provisions of the Data Protection Law 138(I)2001 are observed. Such processing must also be in accordance with the Electronic Communications Law and the Guidance Note of the Data Protection Commissioner in the Context of Employment. In all cases ,employers must ensure that data is processed fairly, in accordance with the said Law, for specific and legitimate purposes and that the data is relevant, appropriate and not excessive in relation to the purpose of processing.
Regulations regarding parental leave or other forms of absence regulated by law	The Annual Paid Leave Law 8/1967 provides that the minimum holiday entitlement per year is 20 working days for employees working five days a week and 24 working days for employees working six days a week. Employees may take maternity leave up to 18 continuous weeks. Female employees who are about to adopt a child under the age of 12 years are entitled to 16 continuous weeks starting immediately from the date on which they begin to have the care of the adopted child. In addition to maternity leave, for nine months after childbirth a female employee is entitled to start working one hour later or finish work one hour earlier or take a one-hour break in the meantime for the purposes of breastfeeding or for the increased needs of child raising. In accordance with the law, that time must be considered and paid as normal working time. Employees of either gender who have completed six months or more of continuous employment with the same employer can claim unpaid parental leave for up to 18 weeks in total on the grounds of childbirth or adoption. Employees are also entitled to seven days' leave per year without pay on grounds of force majeure. The number of unpaid sick leave is a contractual matter. If there is no different provision within the contract of employment, sick pay is paid by the Social Insurance Fund for any period of three days or longer in which an employee is unable to work.
Termination of employment	There is no lawful dismissal at the will of the employer, unless the employee has been employed for less than 26 weeks. After the above said period, dismissals that cannot be justified under any one of the grounds listed in section 5 of Law 24/1967 are considered unlawful per se. These grounds are: i. unsatisfactory performance (excluding temporary incapacitation due to illness, injury, and childbirth), ii. redundancy, iii. force majeure, act of war, civil commotion, or act of God, iv. termination at the end of a fixed period, v. conduct rendering the employee subject to summary dismissal,

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	vi. conduct making it clear that the relationship between employer and employee cannot reasonably be expected to continue, vii. commission of a serious disciplinary or criminal offence, indecent behaviour, or (h) repeated violation or ignorance of employment rules. In all cases, a written letter of termination outlining the grounds for the termination, must be given to the employee. The statutory minimum notice which the employer has to give to the employee, varies from 1 to 8 weeks, depending on employee's period of continuous employment. Termination without notice is only possible during the first 6 months of employment or where the employee has been terminated for the following reasons: a. the employee's conduct indicated that the relationship between employer and employee cannot reasonably be expected to continue under the circumstances b. the employee committed a serious disciplinary or criminal offence c. the employee behaved indecently; or d. repeatedly violated or ignored his/her employment rules.
Sanctions for wrongful termination	Statutory compensation for unlawful dismissal payable by the employer depends upon the period of continuous employment. This compensation is calculated as follows: • two weeks' wages for each year of service up to four years; • two-and-a-half weeks' wages for each year of service from five to 10 years; • three weeks' wages for each year of service from 11 to 15 years; • three-and-a-half weeks' wages for each year of service from 16 to 20 years; and • four weeks' wages for each year of service beyond 20 years. In cases of lawful termination due to redundancy, the employee is not entitled to any compensation by the employer. In such case the employee is entitled to compensation from the National Redundancy Fund to which all employers pay monthly contributions. Before deciding, the Industrial Disputes Tribunal considers employee's age, his/her family situation, career prospects and all the circumstances of termination. Any compensation in excess of one year's wages is payable to employee by the National Redundancy Fund and not by the employer.
Whistleblower protection	There is no specific employment protection for whistleblowers under Cypriot law. However, employees may be protected by their constitutional right to freedom of expression, general labour legislation (dismissal on grounds of whistleblowing is potentially "unfair dismissal"), and data protection legislation. Nevertheless, employees owe an implied duty of loyalty and fidelity to their employer. Employees should offer their services in a trustworthy and faithful manner, which implies inter alia that, during employment, employees are restrained from providing services to competitors, from soliciting clients and

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	suppliers and acting in a manner that is prejudicial to their employer's interests.
Non-Competition Laws	Restrictive covenants are in most instances, considered to be an unlawful restraint from exercising a lawful profession, trade or business of any kind, and to that extent they are declared as void and unenforceable.
Discrimination and equal employment opportunity	Discrimination in employment, including harassment, is illegal under a number of legislative statutes. The grounds of discrimination regulated by these laws include sex, religion or beliefs, age, sexual orientation, racial or ethnic origin and physical conditions and disabilities. Protected categories include all private and public sector employees. Harassment at work is also considered as a form of discrimination under the relevant laws and is prohibited. Any infringement of these statutes constitute criminal offences and dismissals based on such discriminatory grounds are considered "**unfair**".
Transfer of business and outsourcing	The Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses Law 104/2000 transposed into national law the provisions of the EU Acquired Rights Directives. The Law applies where there is a transfer of an economic entity that retains its identity, meaning an organised grouping of resources that has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall be transferred to the transferee and, in case of collective agreements, the same terms and conditions have to be maintained by the new employer until the date of expiry or termination of the collective agreement, or the implementation of a new collective agreement with a minimum period of maintenance of these terms and conditions for at least one year. This, however, does not prevent dismissals for genuine economic, technical or organisational reasons.
Global mobility (brief overview of common issues and visa requirements)	The maximum period of stay for all third-country nationals for the purposes of employment is four years, with the exception of the livestock farming and agricultural sectors, where the maximum period has been set to six years. This limitation does not apply only in a few exceptional cases, such as highly skilled personnel employed in companies with a significant turnover and athletes or coaches of sports teams. EU/EEA/Swiss nationals may work in the Republic of Cyprus, provided that they comply with a relatively simple and straightforward registration procedure, without any further restrictions. On the other hand, non-EU/EEA/Swiss nationals are required to obtain a residence and employment permit prior to any employment in Cyprus. Family members and dependants of citizens of EU/EEA member states and Switzerland who are not EU/EEA/Swiss citizens themselves generally enjoy the same rights, but in order to work they need a visa and a work permit. The main precondition for the granting of permit for employment of third-country workers is the inability of the Employer to satisfy the needs of his business with local workers (Cypriot or EU/EEA/Swiss nationals). This inability will be ascertained following an investigation conducted by the competent service of the Ministry of Labour, Welfare and Social Insurance. The applications for the permit of the non-EU/EEA/Swiss national will be submitted to the District Labour Offices, which will have to confirm that the criteria for

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	employment of foreigners are being met. Moreover, the interested employer is required to publish in the daily newspapers the available position via the employment services of District Labour Offices. In case where there are no Cypriot or EU/EEA/Swiss citizens available and capable to fill the specific positions, the employer submits the special application form for employment of foreign workers.
Criteria for independent contractor status	The question as to whether the relationship of employer and employee exists, is always a question of fact and all the facts of each particular case have to be taken into consideration. The criteria for a person to be considered an employee of another is not just the payment of a salary for services rendered by him or her and the way the parties choose to label their relationship will not be conclusive. On the contrary, the court will take into account whether the employer can exercise control over the work of the employee, whether the emoluments depend on the performance of the employee and the employee's role into the employer's business.
Corruption, regulation and sanctions	The legal framework against bribery and corruption principally comprises of the following statutes: a. The Prevention of Corruption Law, Cap 161. b. The Civil Servants Law, Law 1 of 1990. c. The Criminal Code, Cap 154. d. The Law on the Illicit Enrichment of Public Officials and Officers, Law 51(I) of 2004. e. The Political Parties Law, Law 175(I) of 2012 <u>Prevention of Corruption Law</u> Under section 3 it is a criminal offence for any agent [which includes any person employed or acting on behalf of another and any person who serves the Republic or any other public body or any other foreign civil servant or employee of an international organisation] or any person to corruptly obtain, directly or indirectly, any gift or consideration, either for himself or for any other person, as an inducement or reward for doing or forbearing to do any act in relation to the affairs or business of his principal (or employer) or for showing or forbearing to show favor or disfavor to any person in relation to his principal's affairs or business. In addition, it is prohibited for any person to give to an agent (and for any agent to knowingly use), any receipt, bill, or other document in relation to which the principal has an interest and which contains any statement that is false or misleading or inadequate. All the above offences are punishable with imprisonment for up to seven years and/or a fine up to €100.000. <u>Cyprus Criminal Code</u> Pursuant to section 100 of the Cyprus Criminal Code, it is a criminal offence if (a) any person employed in the public service corruptly asks, receives or obtains or agrees to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge his official duties and (b) if any person corruptly gives, confers, procures, promises or offers to give any property or benefit of any kind on account of any

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	such act or omission on the part of such person employed in the public service. The penalty for any infringement of section 100 is imprisonment for up to three years, a fine up to €100.000 or both the above sentences. Further, section 101 prohibits any person employed in the public service from taking or accepting from any person for the performance of his duties any reward beyond his proper pay and emoluments, or any promise of such reward. The penalty for any infringement of section 101 is imprisonment for up to three years and a fine. In addition, section 102 prohibits any person employed in the public service from receiving any property or benefit for himself, on the understanding, express or implied, that he shall favour the person giving the property or conferring the benefit, or anyone in whom that person is interested, in any pending transaction, or likely to take place, between the person giving the property or conferring the benefit, or any one in whom he is interested, and any person employed in the public service. The penalty for any infringement of section 102 is imprisonment for up to two years and a fine. Under section 118 any bribery of witnesses in legal proceedings is a criminal offence punishable with imprisonment for up to three years. <u>Civil Servants Law</u> Pursuant to section 69, civil servants are prohibited to directly or indirectly receive or offer any gifts consisting of monies, other goods, free trips or other personal favours. Any infringement of this legislation will lead to disciplinary proceedings against the civil servant involved. <u>Illicit Enrichment of Public Officials and Officers</u> Any illicit enrichment by public officials and officers is punishable with imprisonment for up to seven years, a fine of €42.715 or with both of the above sentences. In addition, any assets acquired in breach of the provisions of the law may be confiscated. <u>Political Parties Law</u> Article 5 allows political parties or affiliated organisations to receive lawful private monetary contributions up to €50.000 per year. Any breach of the monetary limits in respect of donations to political parties constitutes a criminal offence punishable with a fine. In addition, administrative fines up to €20.000 may also be imposed for infringements of this legislation. Cyprus has also ratified the Criminal Law Convention on Corruption, [Law 23(III) of 2000] and the United Nations Convention Against Corruption [Law 25(III)/2008].
Final remarks	It is customary, but not obligatory, to pay a thirteenth salary at the end of the year. Employees who were made redundant have a right of priority for re-employment, where the need arises to employ persons in the future, for a period up to eight months after their dismissal.

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Non-Competition Global Practice Guide

Cyprus

Prepared by Lex Mundi member firm Dr K. Chrysostomides & Co LLC

Does your state or country recognize and/or enforce restrictive covenants against employees?

Under Cyprus law, employees owe an implied duty of loyalty and fidelity to their employer. Employees should offer their services in a trustworthy and faithful manner. This means inter alia that, during employment, employees are restrained from providing services to competitors, from soliciting clients and suppliers and acting in a manner that is prejudicial to his/her employer's interests.

With regard to post-termination restrictions, the position under Cyprus Law is the following.Under section 27 of our Contract Law – Cap 149, (hereinafter referred to as "Cap 149"), any agreement which restricts the freedom to conduct a legitimate profession, trade or business is void. The exceptions are the following:

- One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business;

- partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding subsection;

- partners may agree that someone or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

In view of the above, post-termination covenants of this kind in employment contracts are in most instances, considered to be an unlawful restraint from exercising a lawful profession, trade or business of any kind, and to that extent, they are declared as void and unenforceable.

What are enforceable protectable business interests that courts will protect?

The courts will protect a legitimate business interest, such as customer information, goodwill, trade secrets, know-how, and confidential information, to the extent necessary for the purpose of protection. In addition, non-disclosure covenants are generally enforceable in Cyprus, both during and post-termination of employment.

What are considered reasonable restrictions as to geography, duration and scope of activity?

In examining the reasonableness of a restrictive covenant, the Court will take into consideration the geographical area, duration and type of activity, and the assessment will depend on the circumstances of the case.

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Can a customer-specific restriction substitute for a geographic restriction?

The Court's assessment will focus on whether the restrictive covenant is reasonable under the specific circumstances. Therefore, a restriction will not be declared as valid and enforceable only because it will be limited to a specific customer.

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

The Court will not re-write the terms of the covenant to make it reasonable but if it decides that the terms of the restriction are reasonable and enforceable, it may limit its duration.

Will the court recognize a choice-of-law provision in a restrictive covenant?

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) provides that an individual employment contract shall be governed by the law freely chosen by the parties, unless it results in depriving the employee of the protection afforded to him by provisions that cannot be waived by agreement.

Further, in Oterom Ltd and other v Kyriakos Z. Christodoulides and others (2012) 1 C.L.R. 2072 the Supreme Court held that in cases where there is a choice-of-law provision, Cypriot Courts may adjudicate the case and implement the foreign law.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

The lower the level of an employee in the hierarchy of a company and the less the access of the employee to clients and/or confidential information, the less likely it is that a restrictive covenant may be enforceable.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

For any agreement to constitute a contract, lawful consideration is necessary. If the restrictive covenant is a clause of the employment contract, anything that forms the consideration for the entire contract is also consideration for the restrictive covenant. If, on the other hand, the restrictive covenant is a separate agreement, this will also require consideration. Moreover, whether or not a payment is made to the employee, will be one of the factors that Court will take into consideration in determining the reasonableness of the restriction.

Does a change in position, salary or responsibilities affect enforceability?

The validity of the restriction will be determined at the time of enforcement and will depend on the facts of the case. It is considered that the higher the position and the closer the employee comes to clients and/or confidential information, then the more likely it is that the restrictive covenant will be held to be enforceable.

Is continued employment sufficient consideration to enforce a restrictive covenant?

With regard to restrictive covenants during the course of the employment relationship, the continued employment suffices as consideration.

With regard to restrictive covenants after the end of the employment relationship, some form of consideration is needed. However, the employment contract or the restrictive covenant may refer to the employment relationship as the relevant consideration for the said restrictive covenant. If this is the case, continued employment may be deemed to be an adequate consideration.

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Can an employee be terminated if he or she refuses to sign a restrictive covenant?

Under the Termination of Employment Law, there is no lawful dismissal at the will of the employer, unless the employee has been employed for less than 26 weeks. Moreover, dismissals that cannot be justified under any one of the grounds listed in section 5 of the same Law are considered unlawful per se. These grounds are:

i. unsatisfactory performance (excluding temporary incapacitation due to illness, injury, and childbirth),
ii. redundancy,
iii. force majeure, act of war, civil commotion, or act of God,
iv. termination at the end of a fixed period, (e) conduct rendering the employee subject to summary dismissal,
v. conduct making it clear that the relationship between employer and employee cannot reasonably be expected to continue,
vi. commission of a serious disciplinary or criminal offence, or indecent behaviour, or
vii. repeated violation or ignorance of employment rules.

In view of the above, if there is no relevant provision in the contract and if the signing of the restrictive covenant is not a prerequisite for the employment, any termination on the ground that the employee refuses to sign a restrictive covenant, will amount to unfair dismissal.

Are restrictive covenants assignable?

As a general rule, only rights are assignable to third-parties.

Where there is a transfer of an economic entity (transfer of undertakings), the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall be transferred to the transferee.

List any necessary language requirements.

There is no specific language requirement.

List any other requirements of importance.

N/A

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The International Employment Guide

Czech Republic

Prepared by Lex Mundi member firm PRK Partners

General remarks	Employees have statutory protection under the Czech Labour Code (Act No. 262/2006 Coll.). This applies to all employment relationships involving employees habitually working in the Czech Republic. The mandatory rules of the Czech Labour Code still apply, even if the parties chose another jurisdiction as governing law. Employees from other EEA member states seconded to work in the Czech Republic are also subject to certain mandatory provisions of Czech law.
Employment agreement	Czech law requires all employment relationships to be entered into and governed by a written employment agreement, and failure to do so invalidates the employment contract; however, this can be remedied by drawing up a written agreement later. Employment agreements can be open ended or for a fixed term. Employment agreements are presumed to be open ended unless a fixed term has been expressly agreed. Fixed-term contracts generally have a maximum duration of three years and can be followed by no more than two renewals (the total fixed term is thus nine years). The following must always be agreed in an employment contract: type of work (position), place of work, date of commencement of work. Within one month from commencing the employment, the employee must be notified in writing about other information (the salary, payment day, weekly working time and schedule, notice period, holiday, etc.) if this information is not part of the employment agreement. When engaging workers part-time (up to 20 hours per week), the Czech Labour Code recognizes more flexible contracts (which e.g. may be terminated without any notice period or severance).
Terms and conditions of employment	Czech employment law prescribes a statutory minimum salary, which is set at approx. EUR 370 (the government would like to increase it to EUR 410 from January 2017). A working week consists of a maximum of 40 working hours, and the employer may, in general, demand on average a maximum of eight hours of overtime work per week, but no more than 150 hours per year. Any additional overtime work requires the employee's approval. Total overtime work may not exceed an average of eight hours per week, which means approximately 416 hours per year. Each employee is entitled to a minimum of four weeks of holiday per calendar year. Holiday time may be increased by additional days through a collective agreement, internal policy or in an individual agreement (provided that the rules on equal treatment are respected). Additionally, the Czech Republic currently has 13 statutory public holidays. Many terms are implied in an employment agreement, mainly through provisions of the Czech Labour Code. These include, for example, terms relating to trial periods, notice periods, access to certain information about the employer, non-competition during employment as well as others.

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Changing terms and conditions of employment	Generally, the terms of an employment agreement can be varied only if the employer and employee agree on the change. The employer does not in most cases have the right to unilaterally change employment conditions specified in the employment agreement. However, an employer is entitled to amend some conditions that have not been specifically determined by the contract, such as the rate of pay or working time schedule. The employer can unilaterally change or even cancel rights and benefits in excess of the statutory minimum entitlements, provided they are based on an internal policy.
Trade Unions and the consultation obligation	There are two forms of employee representation in the Czech Republic: trade unions and work councils. Because of their strong political ties, trade unions enjoy a strong position in the Czech Republic. Currently, however, membership is on the decline. Trade unions are easy to establish and, once established, they automatically represent all employees, regardless of membership. Employers must consult all recognized trade union in advance regarding measures relating to the collective regulation of working hours, overtime work, work on rest days and public holidays, and the health and safety aspects of night work. The position of work councils is much weaker (as regards their statutory rights and total number of members in the Czech Republic), and we are aware of only a few Czech companies with established work councils.
Data privacy and personal integrity	Each employer must process the personal data of its employees for HR and payroll purposes. This data processing thus does not require employee consent. In other cases, e.g. if employee photos are put on the company's website, each employee must give his or her consent to such use of their data, and the Czech Data Protection Authority needs to be notified. In all cases, employees must be informed about the main aspects of the data processing, such as the personal data to be processed, the purpose and duration of the processing. Employees' "sensitive" personal data receives special protection. "Sensitive personal data" is personal data relating to a person's nationality, racial or ethnic origin, political attitudes, trade union membership, religious/philosophical beliefs, criminal convictions, health status or sexual lifestyle, along with genetic data and certain biometric data. Sensitive data may only be processed if the employee has expressly consented to it, except in limited circumstances.
Regulations regarding parental leave or other forms of absence regulated by law	Female employees are entitled to 28 weeks of maternity leave. This is extended to 37 weeks for multiple births. Leave can begin as early as the eighth week before the expected date of childbirth; however, employees generally start their maternity leave at the beginning of the sixth week. Maternity leave must last a minimum of 14 weeks and cannot be terminated or interrupted under any circumstance for six weeks after childbirth. During maternity leave the employee is entitled to maternity benefits paid by the state. Parental leave must be granted to female or male employees on request. Parental leave is granted at any time between the end of maternity leave (for mothers) or the date of birth (for fathers) and ends when the child reaches the age of three. During parental leave employees are entitled to parental benefits paid by the state. Employees are entitled to choose how long they wish to receive parental benefits, up to a four-year period.
Termination of employment	The employer may terminate employment by notice only for reasons set forth in section 52 of the Czech Labour Code or immediately terminate employment (summary dismissal) for the reasons set forth in section 55 of the Czech Labour Code. The employee may give notice of termination to the employer for

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	any reason whatsoever (or without stating a reason) or immediately terminate employment for reasons set forth in section 56 of the Czech Labour Code. The notice period when terminating employment is two months. The parties to the employment agreement can agree to extend the notice period stipulated in the Labour Code, but it must be the same for both the employer and the employee. For dismissals for organizational reasons employees are entitled to a mandatory severance payment of one-to-three average monthly earnings, depending on the length of his or her employment. If termination is for health reasons resulting from an occupational disease or work-related injury, the employee is entitled to a mandatory severance payment of at least 12 times his or her average monthly earnings. Mandatory severance payments may be increased by virtue of a collective agreement, internal policy or in an individual agreement.
Sanctions for wrongful termination	If an employee believes that his or her dismissal is invalid, the employee must inform the employer immediately in writing that he or she insists on remaining in employment with the employer. If the employer does not reinstate the employee, the employer may then bring a court case, seeking a ruling that the dismissal is invalid. The employee must bring the case within two months after the date that the employment relationship terminated. If the employee's claim is successful, and the court finds the dismissal to be invalid, the employer must reinstate the employee, if requested by the employee. In addition, the employer must pay compensation to the employee, at the rate of his or her average earnings, for the entire period from the date on which the employee informed the employer that he or she insisted on remaining in employment until the date the employee is reinstated or the employment is terminated validly (for example, by mutual agreement between the employee and employer after the court has ruled the dismissal invalid). As employment cases can take two to three years to arrive at a ruling, the final amount of earnings compensation that the employer must pay an invalidly dismissed employee can be relatively high (unfortunately, there is no cap on this). However, the employer may ask the court to decrease the earnings compensation for any period in excess of six months. The court may reduce the compensation – although it is not obliged to do so – taking into account factors such as whether or not the employee has had another job in the meantime and the amount earned at this job, and if the employee has not taken another job, the reasons why (the employer bears responsibility for proving all these circumstances, which is practically impossible).
Whistleblower protection	There is no legal regulation on whistleblowing in Czech Republic yet. However, two recent Constitutional Court decisions involved cases where employees complained about their employer's wrongful proceedings to public as well as private subjects. Consequently, their employment was terminated. In both cases the court decided in favour of the employer and stated that the public's interest in the revealed information about the employer is not above the employee's obligation of loyalty to his or her employer. While a legislative proposal regarding whistleblower protection exists, it is uncertain when it will be passed.
Non-Competition Laws	While employed, employees must not perform any competitive activities. This obligation is by operation of law (there is no need to reach any agreement with individual employees, and they are furthermore not entitled to any compensation for not competing while employed).

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	Once employment ends, employees may not perform any activities considered to be unfair competition (e.g., former employees may not breach the business secrets of their employer). This general protection also applies by operation of law and there is no obligation of compensation. If employers wish to keep employees from engaging in legally competitive activities after termination of employment, they must sign a non-competition agreement with the employee, either as part of the employment contract or as a separate agreement signed during the course of employment. In such agreements, employees undertake, for a maximum period of 12 months after termination of the employment relationship, to refrain from performing gainful activity that is identical to, or competes with, the employer's business activity. In return, the employer must provide adequate monetary consideration of at least half of the employee's average former earnings, throughout the non-competition period. If the agreement does not provide for such compensation, it is void and unenforceable. A non-competition agreement may also provide for the employee to pay an appropriate fine to the employer for breaching the agreement. Furthermore, all non-competition agreements must be in writing. Statute provides that an employer is entitled to withdraw, by written notice, from a non-competition agreement, but only before the employment relationship terminates, while case law has additionally established that an employer may withdraw from a non-compete agreement only if the agreement expressly states the possibility of such withdrawal and the permissible reasons for it. An employee may terminate a non-competition agreement, by written notice, only if the employer fails to pay the agreed compensation within 15 days of the due date.
Discrimination and equal employment opportunity	Discrimination is prohibited in access to employment, remuneration and employment conditions. The prohibition on discrimination covers (i) direct discrimination, defined as where one person is treated less favourably than another person is being, has been or would be treated in a comparable situation, on any of the prohibited grounds and (ii) indirect discrimination, defined as where, on the basis of an apparently neutral provision, criterion or practice, one person is disadvantaged in comparison with another, on any of the prohibited grounds. Both direct and indirect discrimination are prohibited on grounds including race, ethnic origin, nationality, sex, sexual orientation, age, disability and religion. Harassment and sexual harassment constitute unlawful discrimination and are prohibited at the workplace. Employees must not be victimized for making a complaint of discrimination, reporting such behaviour or participating in any investigative process. Where this is done, with a view to ensuring equal treatment and opportunities in practice, employers are permitted to take measures to prevent or compensate for disadvantages linked to any of the prohibited grounds of discrimination. Employers are under a general obligation to ensure the equal treatment of all employees with regard to employment conditions, remuneration, vocational training and opportunities for career advancement. An employee or job applicant who has suffered unlawful discrimination or been subject to unequal treatment may bring a court case against the employer.

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Transfer of business and outsourcing	Statutory rules on the employment implications of transfers of undertakings apply generally to situations where "tasks" or "activities", or parts thereof, are transferred from one employer (the transferor) to another employer (the transferee). In this quite broad context, an employer's tasks or activities are defined as tasks related to the production or provision of services or similar activities that a legal entity (or an individual) performs under its own name and at its own responsibility, in facilities or premises dedicated to such activities or at some other usual place. The legal entity (or individual) that continues to perform the transferor's former tasks or activities is regarded as the transferee, whatever the legal nature of the transfer and irrespective of whether or not ownership rights have been transferred. The key factor in establishing if there has been a relevant transfer is whether or not the transferee continues to perform the same or similar tasks and activities after the transfer. The definition of "relevant transfer" is therefore broad and covers many business transactions, including the sale of all or part of a business, mergers, demergers/spin-offs and outsourcings. When a relevant transfer occurs, all rights and obligations arising from the employment relationships are fully transferred to the transferee. The transferee therefore becomes the employer of all the employees who were employed in the transferred tasks and activities on the date of the transfer. If the transferor was covered by a collective agreement, the transferee is bound by the rights and obligations arising from this agreement for the remaining term of the agreement, up until the end of the next calendar year at the latest. If an employee objects to the transfer, he or she may terminate the employment relationship by giving notice. In such cases, the employment terminates at the latest on the date of the transfer, even if the employee would otherwise be obliged to give longer notice of termination. Neither the transferor nor the transferee can terminate an employment agreement solely because of a transfer.
Global mobility (brief overview of common issues and visa requirements)	The principles of free movement of labour apply to all EU, EEA and Swiss nationals working in the Czech Republic, as well as their family members. Employees from these countries do not require work permits, provided they have a travel document or an identity card. Nationals of all other countries must obtain an employee card or a visa for business purposes depending on the specific activities they intend to carry out in the Czech Republic. Non-EU and non-EEA nationals with high qualification may also choose to apply for a blue card. However, there are no significant differences between an employee card and blue card – both permits allow the non-EU and non-EEA nationals to work and reside in the Czech Republic. The Czech Republic has been a member of the Schengen Agreement since 21 December 2007, which ensures cross-border movement of visitors without the need for additional visas or authorization once initial entry has been made. Holders of employment (blue) cards may be recruited and employed as long as they have a valid employee (blue) card. In such case, the only permitted activity is work in an employment relationship based on a local employment agreement, or work in the course of secondment to the Czech Republic by a foreign legal entity. Holders of visas for the purpose of business are allowed to perform their own business on the basis of a trade license, or to stay in the Czech Republic to perform the tasks arising from the activities of a corporate body procured by a partner or shareholder, statutory body or member of a statutory body. An employee card is a permit for long-time residence in the Czech Republic where the purpose of the non-EU or non-EEA national's stay (longer than three months) is employment. An employee card is most often issued for the duration of an

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	employer-employee relationship but not for more than two years, with an option to repeatedly extend its validity.
Criteria for independent contractor status	To work legally as an independent contractor, the individual must have a trade license. A trade license is an official document that allows its holder to work in the Czech Republic on a self-employed basis i.e. as an independent contractor/freelance worker without a working contract. EU citizens (including Czech citizens) and non-EU citizens who wish to become self-employed firstly need to apply for a trade license. For non-EU citizens who wish to work independently in the Czech Republic, a trade license also legitimizes the purpose of their stay in the Czech Republic and is therefore a necessary document when filing the long-term visa or residence permit application. An independent contractor must be 18 years or older in order to be legally able to enter into a contract. A contractor needs to prove that he or she does not have a criminal record of a serious nature. Most trades are so-called "free trades", where it is not necessary to prove any specific qualifications. However, in some cases a contractor needs to prove vocational education or work experience in the field where he or she wishes to work; this applies, in particular, to craftsmen. A trade license application form is filed at any of the Trade License Offices. A contractor needs to select trades that are relevant to the focus of his or her work and provide a passport and supporting documents, such as confirmation of a business seat and a criminal record check. Registration fee is CZK 1,000. A trade license is usually issued within 15 days; however, the authority can use their right to process the application within 30 days.
Corruption, regulation and sanctions	In general, corruption is illegal in the Czech Republic and is a criminal offence, regulated by the Czech Penal Code. There are three offences of corruption: accepting bribes, bribery and indirect corruption. The punishment for those can be disqualification from performing a particular activity, a financial penalty or even prison, depending on the individual circumstances of each offence.
Final remarks	Following a reform that took effect in January 2013, the pension system was made up of three "pillars". As of 1 January 2016, the second pillar of the pension system was abolished. The first pillar is the mandatory state retirement pension, financed by obligatory employer and employee contributions to the public social insurance scheme and administered by the Czech Social Security Administration (ČSSZ). The state pension consists of a basic flat-rate amount, plus an earnings-related element. It is payable when the individual reaches a certain age and has contributed for a certain number of years. In 2016, the retirement age is 63 years for men and 62 years for women without children (the retirement age is reduced if a woman has one or more children), and the required contribution history is 30 years. Retirement ages are being increased gradually, and there will be a uniform age of 68 years for both women and men by 2051, while the required contribution history will rise to 35 years. The third pillar of the pension system consists of "supplementary pension savings", whereby employees voluntarily take out private pension insurance with any provider licensed by the Czech National Bank. The state makes a contribution to the third-pillar savings, and the individual concerned receives tax benefits .

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Non-Competition Global Practice Guide

Czech Republic

Prepared by Lex Mundi member firm PRK Partners

Does your state or country recognize and/or enforce restrictive covenants against employees?

Yes, the Czech Labour Code recognizes and enforces restrictive covenants against employees, both during employment and after its termination.

While employed, employees must not perform any competitive activities; this obligation is by operation of law (there is no need to agree this with individual employees, who are further not entitled to compensation for this).

Once employment ends, employees may not perform any activities considered to be unfair competition (e.g., former employees may not breach the business secrets of their employer). This general protection also applies by operation of law and there is no obligation of compensation.

If employers wish to keep employees from engaging in legally competitive activities after employment is ended, they must sign a non-competition agreement with the employee, either as part of the employment contract or as a separate agreement signed during the course of employment. In this guide, we will focus on non-competition agreements applicable after the end of employment.

What are enforceable protectable business interests that courts will protect?

The Labour Code mentions "information, knowledge and work and technology processes" as protectable interests. As there is no case law, courts should, generally speaking, protect trade and business secrets and know-how.

What are considered reasonable restrictions as to geography, duration and scope of activity?

Non-competition agreements protect employers against employee activities which could have a serious negative impact on an employer's operations. Therefore, non-competition agreements should be geographically restricted to areas where the employer has a significant business presence. However, a non-competition agreement should be valid and binding even if there are no regional restrictions (no such restrictions need to be agreed).

Non-competition agreements can be concluded for a maximum period of one year (12 months) after the end of employment.

Employees who sign a non-competition agreement undertake to refrain from performing any gainful activity that is identical to, or competes with, the employer's business activity. The ban covers all forms of activities, such as employment, freelance, directorship and/or active shareholder involvement in the operations of another business.

Can a customer-specific restriction substitute for a geographic restriction?

Yes, non-competition agreements may refer to specific (concrete) customers or a category of customers. It is also possible to combine a customer-specific restriction with some geographic restrictions.

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Nevertheless, a non-competition agreement may only specify a field of activities (prohibited to an employee), without giving any details on either geographic region or customer(s).

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

Courts do not have a discretionary right to revise, reform, and/or "**blue pencil**" a non-competition agreement to make it reasonable. Nevertheless, we may not fully exclude that a court could consider an unreasonable agreement void (unenforceable) as a whole. Unfortunately, there is no case law at all.

Will the court recognize a choice-of-law provision in a restrictive covenant?

Even if another (more flexible) law has been chosen, an employee still would be protected by the mandatory provisions of Czech law (specified in this guide). Any purpose-built choice is thus not – from a legal perspective – relevant.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

Non-competition agreements can be agreed only with employees from whom it may be (due to the nature of information, knowledge, work and technology processes which the employee in question has learned in connection with his or her employment) justly demanded, assuming that use of the obtained information, knowledge and processes in a future competitive activity of the employee after terminating employment could cause serious harm to the employer.

We are not aware of any case law which would confirm unenforceability of a non-competition agreement against any employee. Generally, we recommend that non-competition agreements are signed only with top managers and/or key employees with access to unique know-how.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

The employer must provide adequate monetary consideration, of at least 50% of the employee's average former earnings (in addition to the employee's basic salary, average earnings also consider bonuses paid in the past), throughout the non-competition period. If a non-competition agreement does not provide for such compensation, it is void and unenforceable.

A non-competition agreement may also provide for the employee to pay an appropriate fine to the employer for breaching the agreement (without a fine, the agreement is not a fully effective protective measure). The fine may be higher than the total compensation payable to an employee for the entire period of the restrictive covenant.

Does a change in position, salary or responsibilities affect enforceability?

There is neither any regulation nor case law on this. We can imagine that a non-competition agreement may be declared unenforceable if e.g. a top manager or key employee has changed his or her position and had no access to any know-how for a substantial time before the end of employment.
On the other hand, we may not exclude that, in such a situation, the agreement would still be enforceable against the employer (i.e. an employee who has changed his or her position may still ask for statutory compensation provided he or she respected the agreement), due to the quite protective approach of Czech courts and lack of any specific regulation.

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Is continued employment sufficient consideration to enforce a restrictive covenant?

No, the statutory compensation of at least 50% of the former average earnings must be provided to the employee to have an enforceable non-competition agreement.

During employment (even continued employment) no non-competition agreements apply. However, employees may not perform any competitive activities because of operation of law.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

No, an employee cannot be terminated if he or she has refused to sign a non-competition agreement. However, non-competition agreements are usually signed before an employee is hired or promoted – in such situations employees tend to be cooperative.

Are restrictive covenants assignable?

No, with the exception of TUPE transfers.

List any necessary language requirements.

There are no specific language requirements (a local language version is not mandatory). However, we strongly recommend that a Czech version is signed if there is a reason to believe that an employee does not fully understand English (e.g. if he or she does not use English on a daily basis within his or her job). Generally, bilingual versions are recommendable.

List any other requirements of importance.

A non-competition agreement must be in writing; otherwise, it is considered void (unenforceable).
The Czech Supreme Court has recently ruled that in most cases employers may not withdraw from a non-competition agreement (in order to avoid payment of the statutory compensation). Employers – who, at least in our experience, usually do not want to apply a non-competition agreement when they separate with employees – should be aware of this and limit signing non-competition agreements to only top managers and/or key employees.

Finally, it is very difficult to prove competitive activities in the Czech Republic (in fact, employers must prove that the employee has performed competitive activities). Czech courts are very protective; generally speaking, they consider even aggressive actions of employees, e.g. soliciting colleagues and/or clients, to be in line with law, as these actions "improve the competitive environment" within the relevant market.

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The International Employment Guide

Egypt

Prepared by Lex Mundi member firm Shalakany Law Office

General remarks	The Egyptian Labour Law governs most of the aspects of the relationship between the employer and the employee. The Egyptian Labour Law contains several mandatory provisions to the benefit of the employee and the parties may not derogate from said provisions in their employment contract.
Employment agreement	An employment contract may be for a definite or an indefinite period and may commence with a probationary period of up to three months. The employment agreement shall be in the Arabic language and shall consist of three copies (a copy for each party and a third one to be deposited at the competent social security office). The employment agreement must contain the following: 1. The employer's name and the address of the place of work. 2. The employee's name, qualification, profession, his ID number and home address and necessary information for his identification. 3. Job description. 4. The salary agreed upon and the method and time of its payment as well as all the benefits agreed upon, whether in cash or in kind.
Terms and conditions of employment	The minimum wage is determined by the National Council of Wages. Egyptian Law prescribes 8 working hours per day. Overtime may be worked with no more than 2 extra hours per day (in addition to the 8 working hours per day). During overtime hours, the employee is entitled to a salary for the overtime, in addition to his normal salary. The additional overtime salary shall be at least 35% for daytime hours and 70% for night time hours. According to the Labour Law, an employee who has spent one year of service with the employer, is entitled to an annual leave of 21 days. Said annual leave is increased to 30 days if the employee has spent ten years with one or more employers or is over the age of 50.
Changing terms and conditions of employment	Any change in the employment contract shall be agreed in writing between the parties. In all cases the employer may not derogate from the employee's rights under the Labour Law.
Trade Unions and the consultation obligation	Pursuant to Egyptian law, the main purpose of trade unions is to negotiate collective bargaining agreements.
Data privacy and personal integrity	Employees' personal data may not be accessed except by those authorized pursuant to the law. The employer may not disclose said data to third parties without the employee's consent.
Regulations regarding parental leave or other forms of	**Maternity Leave:** Female employees having spent 10 months of service with the employer are entitled to 90 days paid maternity leave, up to three times. There are no paternity leaves under the Egyptian Labour Law.

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absence regulated by law	**Pilgrimage Leave:** Any employee having spent 5 years of service with the employer is entitled to one month paid pilgrimage leave. **Sick Leave:** Any employee has the right to 180 days of paid sick leaves per year.The employee will be entitled to 75% of his salary upon which social security payments are made, during the first 90 days of sick leave, increased to 85% for the following 90 days. **Annual Leave:** 21 days. For those who have spent ten years with one or more employers and for those over 50 years of age, the annual leave is 30 days.
Termination of employment	Termination of the employment relationship is regulated by law in relation to the right to terminate the employment contract, the termination procedure, the relevant notice period and the amount of compensation that may be due in cases of unfair dismissal. A dismissal by the employer shall be based on a breach of the employment contract by the employee and in particular, the types of infractions mentioned in Article 69 of the Labour Law. The Employer may also terminate the employment agreement in case of the employee's total disability to perform his work or in case the employee has exhausted all his sick and annual leaves and remains absent from work, or in cases of redundancy if the employer's establishment is suffering losses. The Employee may terminate the employment agreement by submitting his resignation. The notice period for termination shall be 2 months if the employee's period of service at the employer is less than 10 years, and 3 months if the period of service is 10 years or more. In case of unfair dismissal, the employee shall be entitled to a minimum compensation of 2 months' salary per year of service.
Sanctions for wrongful termination	If a dispute arises regarding the validity of termination, the employee may sue for reinstatement or alternatively seek damages only. If the employee sues for damages, the Judge shall grant compensation of no less than two months' salary per year of service. If the employee demands reinstatement, the Court shall decide on the employee's reinstatement within 15 days from the date of the first session before the court. If the employer - after the court has ruled that the employee should be reinstated - refuses to take the employee back in service, such refusal will be considered unfair dismissal and the employee will be entitled to compensation of a minimum of 2 months' salary per year of service.
Whistleblower protection	There are no whistleblower protection provisions in Egyptian Law.
Non-Competition Laws	Egyptian Law recognizes the importance of loyalty in employment relationships. Furthermore, the law penalizes the divulging of confidential information by the employee and if said divulging causes serious harm to the employer, the penalty may amount to dismissal of the employee.

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	Egyptian Law does not regulate non-competition clauses; however, such clauses are generally accepted but may be modified or nullified by the courts if found to be unreasonable.
Discrimination and equal employment opportunity	It is prohibited for the employer to discriminate in wages or in termination of employment based on race/color, sex, religion/creed, origin, language, pregnancy status, political affiliation, or union activity.
Transfer of business and outsourcing	Under Egyptian Law, the effect of a transfer of business varies depending on which of the following two scenarios applies: 1. Sale of shares: in case of a sale of shares, the shares may be transferred to another legal entity but the entity being the employer remains unchanged. In this case, the employees' employment contracts will remain valid and will not be affected by the sale in any way. 2. Sale of assets: Egyptian Law does not provide for automatic transfer of employees in case of a sale of assets. In other words,If an asset (for example a factory) is transferred from one legal entity to another, there will be no automatic transfer of the employment contracts to the purchaser. The Seller shall terminate the employment contracts of the employees and shall compensate those employees if the purchaser elects not to hire said employees. If however, the purchaser elects to hire the employees, the employees may be transferred to the purchaser and the employees shall sign new employment contracts with the new employer. Such contracts shall include a carry forward clause which provides for taking into consideration the employees' service period with the old employer in terms of seniority and benefits. Outsourcing is not regulated under Egyptian Law. However, an employee may be seconded to another employer for a specific period of time, with the original employer being responsible for payment of his salary and benefits, in which case he is considered to remain in the employment of the original employer. Another scenario is for an outsourcing company to provide employees to companies on a temporary basis. In such cases, the employees are employed by the outsourcing company, which remains liable for payment of their salary and benefits and for any compensation payable upon termination of employment. However, if the employee establishes the existence of an employment relationship between him and the beneficiary company (by arguing that his salary or social security payments are being paid by the beneficiary company and that he is performing work for the beneficiary company and not for the outsourcing company), the court may rule that the employer in this case is the beneficiary company and that the beneficiary company is liable for any compensation payable upon termination of employment.
Global mobility (brief overview of common issues and visa requirements)	Foreign employees may not work in Egypt without a work permit and resident visa. The percentage of foreign employees in an Egyptian establishment in comparison to Egyptian employees may not exceed 10%. Exceptions to the aforementioned percentage may be granted by a committee affiliated with the Ministry of Manpower in light of the establishment's needs to appoint foreign employees, the foreign employee's experience and whether said experience is necessary and is not available among Egyptian employees.

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Criteria for independent contractor status	The following circumstances usually characterizes an employment relationship: An employee (i) may not at the same time perform work for others (ii) is subject to the usual management and supervision of the employer (iii) shall perform all his manager's and supervisors' instructions (iv) shall follow the manager's instructions regarding working place and time (v) is paid a salary in consideration of his work, with payroll tax deducted by the employer, along with social security contributions in most cases. As opposed to the above, an independent contractor (i) is not prohibited from working with another employer (ii) performs a defined scope of work in consideration of an agreed fee (iii) is to a large extent entitled to independently decide the working time and place (iv) has a tax certificate for business income. The Egyptian Courts have the sole discretion to decide whether a contract is an employment contract or an independent contractor's contract.
Corruption, regulation and sanctions	The Egyptian Penal Code penalizes all forms of bribery. The offences include taking, giving or offering a bribe. The penalties vary depending on whether the offender is a public officer or not. For non-public officers, generally, the penalty is imprisonment for a period not exceeding 7 years and a fine ranging from EGP 500 to whatever the amount of the bribe was.
Final remarks	N/A

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The International Employment Guide

El Salvador

Prepared by Lex Mundi member firm Romero Pineda & Asociados

General remarks	In El Salvador, the regulation of employment relations have a constitutional foundation, sufficiently developed since 1950; from which it has been detailing the contents of the Labour Code to establish two main provisions: 1) employment as a social function and 2) the special regulation of the rights of employees such as the rights equal treatment, minimum wage, year-end bonus, Maximum working hours, rest days, hollydayd, vacations, compensation in case of dismissal or resignation. The Labour Code in force since 1972 develops the content given by the Constitution whose main purpose is to harmonize the relationship between employer and employee, establishing their rights and obligations and it is based on general principles that tend to improving the living conditions of the workers. Situations not specifically regulated by the Labour Code are decided based on the General Labor Principles, jurisprudence, doctrine, international treaties subscribed by El Salvador, customs and general principles of law. The Ministry of Labour and Social Welfare (Ministerio de Trabajo y Previsión Social) (hereinafter MINTRAB) and Labor Court (Juzgados Laborales) are the legal entities in charge of enforcing the law.
Employment agreement	According to the Salvadoran Labor Code, the existence of an employment contract is presumed once the person provides services to another individual or entity for more than two consecutive days. It is mandatory for employers to hire at least 90% of Salvadoran employees and pay them at least 15% of all the payroll of salaries and wages.; except if the Ministry of Labor authorizes the employers to hire more foreign employees for technical reasons. Employment agreement as well as any amendments or extensions shall be undertaken in writing and in triplicate, each contracting party shall be given one copy and the third should be submitted by the employer to the Ministry of Labor in a period of 8 days after signing. Spanish is the language to be use in employment contracts. As a general practice, employment agreements are entered into for an indefinite duration and may have a maximum probationary period of 30 days during which termination is possible without cause and without notice period. However, contracts may be entered into for a fixed term based on objective grounds (e.g. tasks qualified as temporary, casual or seasonal). The employment contract must include specific information on material provisions of the employment relation such as personal information of the contracting parties, starting date, salary and benefits, work schedule, name

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	and last name of persons who economically depend from the worker etc. Subsequent changes to such terms and conditions must be included in writing.
Terms and conditions of employment	In addition to salary, employees are entitled to the following benefits: 1. Working day and work week: An ordinary working day shall not exceed 8 hours a day, or by night, 7. The workweek hours shall not exceed 44 hours, or by night, 39. Work schedule should include time for lunch and recess periods for workers. Overtime can be arranged only occasionally and it will be paid with a surcharge of 100%. 2. Wages: The daily wage cannot be less than the minimum wage, which is set periodically by the National Minimum Wage Counsel. 3. Weekly Rest Day: All employees are entitled to one rest day per completed week of work, paid with their daily wage. Work performed during this rest day is paid at 50% surcharge plus a compensatory day of rest. 4. Paid Holidays: by law there are recognized 13 days paid holidays. 5. Paid Vacation: Every full-time employee earns at least 15 days of vacation after one continuous year of work and employees are entitled to a vacation bonus equivalent to 30% of the salary of 15 days of labor. 6. Christmas bonuses (aka Aguinaldo): The minimum amount to pay the employees in this concept is: 15 days of wage for employees with seniority of 1 - 3 years; 19 days of wage for employees with seniority of 3 - 10 years; 21 days of wage for employees with seniority over 10 years. 7. Social Security and Pension Funds.
Changing terms and conditions of employment	Terms and conditions of employment can be changed by mutual agreement between employer and employee or according to the provisions of the collective agreement. Labor rights cannot be waived.
Trade Unions and the consultation obligation	Employees have the right of self-organization and the right to form or join unions, to bargain collectively through representatives of their own choosing and the right to strikes. The main functions of trade unions are enactment of collective bargaining agreement, announcement and management of strikes and lock-outs. The employer is bound to negotiate and undersign collective bargaining agreement with the union that encompasses fifty-one percent of the employees of the company or business. The collective bargaining agreement covers all employees, employer´s decision shall comply with the agreements and conditions during the validity term. There is no consultation obligation to trade unions under salvaoran Law.
Data privacy and personal integrity	Regulation regarding Data privacy and personal integrity has been developing very slowly.

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	Currently, the Congress has decreed regulation on Protection of personal data, which comprehend information used to determine the identity of an individual, such as the name, last name, date of birth, address or e-email, phone number, to name a few. 1. The "Law on Access to Public Information" in force since 2011, is a regulation applicable to public, mixed or private entities managing public funds, resources or information from the State, regardless of the functions they perform. Title III of this law describes the right to the protection of personal data, the duties of the obligated entities including but not limited to adopt measures to protect the security of personal data, prevent alteration, loss, transmission and unauthorized access. 2. The "Law for the Regulation of Information Services Regarding People's Credit History" in force since October 2011 regulates entities providing credit information records of individual or entities, obliged to protect the “honor and privacy" of individuals and its default could lead to significant financial penalties. 3. The Labor Code regarding personal data protection of workers prohibits employers to neither disclose the diagnosis of HIV / AIDS workers nor committing any act which directly tends restrict workers' rights 4. The “Special Law against Computer and Related Crimes” in force since march 2016 aims, among others, the prevention and punishment of crimes committed by means of information and communications technology, affecting interests associated with honor, identity, property, privacy and image, intimacy, sexual integrity, intellectual property and public safety. This law defines the terms "personal data" and "sensitive personal data". Article 24 of the Act defines as a crime the unauthorized use of personal data through the use of information and communications technology. Article 24 of the Act defines as a crime the unauthorized disclosure of data obtained in violation of such systems, which is aggravated if the conduct falls on data protected by the "Law on Access to Public Information". Although none of these laws apply directly to the use of data protection used by private companies, that does not mean that these are not required to ensure the protection of data personal of their workers, clients or else, because according to local regulation and in accordance to Article 2 of the Constitution, privacy and data protection and informational self-determination are fundamental rights, regardless of the nature of the entity. Therefore, these laws can give a clear idea of how to conduct the protection of personal data of workers.
Regulations regarding parental leave or other forms of absence regulated by law	**Maternity Leave:** pregnant workers are entitled to a period of 16 weeks, including 10 weeks after childbirth. The Social Security System is the obligated to pay the employee 100% of the basic wages up to a maximum amount of US$1,000, for the entire duration of maternity leave. To receive this benefit worker must provide a medical certificate specifying her pregnancy and the expected date of delivery.

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	Paternity Leave: Fathers employed are entitled to 3 working days paid leave following the birth or adoption of their child. This paid leave is granted at the discretion of the employee, continuously or distributed within the first 15 days after birth or adoption. To receive this benefit worker must provide birth certificate or certification of the adoption decree.
Termination of employment	The employment contract may terminate for several reasons, the main ones are. a. mutual agreement, b. resignation of the employee c. dismissal d. death e. expiry of a limited duration employment contract f. by force majeure or unforeseeable circumstances (close of business, bankruptcy or insolvency of the employer, the employee court conviction). In cases of voluntary termination on the part of the employee (resignation), the employer will pay severance equivalent to 15 days basic salary for every year of service up to a maximum amount of one minimum wage per year. Staffs that voluntarily terminate employment also have the right to any other requirements under the law, including the proportional amount of the Christmas bonus. To receive this benefit, staff are required to 1) notify the employer in writing 15 calendar days in advance of termination unless the employee holds a management position or is considered an specialized employee in which case a 30 days pre-notice will be required; 2) having at least 2 years of continuous and effective service for the employer; and 3) sign a labor release before a notary public or before the Ministry of Labor. In case of justified dismissal or disciplinary, the employer must not pay any additional employment benefit, other than the salary. Just causes for dismissal include: employee's repeated negligence, failure to fulfill his duties for more than 2 consecutive full days, lack of labor discipline, intoxication or other misconduct in the workplace, disrespect to the employer or a fellow worker, among others. In cases of termination without just cause, employees will be entitled to payment of one month's salary for each year of service, plus proportional annual bonus and vacation bonus.
Sanctions for wrongful termination	In cases of wrongful termination or termination without just cause, employees will be entitled to payment of one month's salary for each year of service, plus proportional annual bonus and vacation bonus. All contract employees hired indefinitely and who are dismissed without just cause (as specified in the law), shall be given a severance package which shall include a sum equivalent to one month's salary for each year of work. However, for these purposes, by law, no monthly salary will be more than 4 times the minimum wage in force for each year of service; such compensation shall be subject to the minimum wage for the sector that he belongs to (trade, services, industry or textiles). The severance package granted under law also includes payment of the Christmas bonus and vacation pay proportional for time worked. Also, if at the

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	time of dismissal the employee has completed one year of work for his employer, and is entitled to paid vacation time, but still has not enjoyed it, he must be compensated with an amount equal to the corresponding vacation period. In El Salvador, the employer has no obligation to reinstate a dismissed employee, this only applies as a conciliatory measure agreed between the parties. It is important to mention there are special protection against dismissal for certain employees: union leaders and pregnant employees. In these cases the termination of the contract has no effect and the employer must pay wages and other employment benefits, as long as the protection condition persists.
Whistleblower protection	There is not specific protection for whistleblowers as such in local labor legislation; however every employee is protected against wrongful termination and misconducts from employers.
Non-Competition Laws	Salvadoran Constitution establishes and protects the right to work, as consequence of this constitutional provision; nobody could prohibit another person to render services in favor of any employer. However, it is possible to enter into a confidentiality agreement to protect the know-how of the company for the worker is disabled from use confidential information for his own benefit or for third parties.
Discrimination and equal employment opportunity	According to the provisions of the Constitution and the Labour Code, employees in the same company developing the same work under identical circumstances, shall be entitled to earn equal salary regardless of sex, age, race, color, nationality, political opinion or religious belief. In case of default by the employer, the employee is entitled to require leveling of wages before the Ministry of Labour.
Transfer of business and outsourcing	Where the employer disposes of all or part of his business, whether by way of sale or otherwise, all the rights and obligations of the employee accrued or accruing with the former employer (seller) shall be binding on the new owner. Local labor law regulates employer substitution in a single article included in the Labor Code, which regulates specifically the legal effects of the "employer substitution" which is, to maintain the continuance of the employment contract despite the existence of the employer substitution. Although consultation with government authorities is not mandatory in case of employer substitution, the former employer (seller/transferor) can request a notice of substitution to the employees through the General Direction of Labor Inspection of the Ministry of Labour, in order to avoid joint liability with new employer (buyer/transferee) for labor obligations that arises after the substitution within limitation period for starting a legal claim, being those the sole responsibility of the new employer (buyer/transferee). Salvadoran legislation recognizes the possibility that a company supplies the labor force through outsourcing services, regulating these situations also a single provision of the Labour Code.
Global mobility (brief overview of	For employees working abroad, the general principle is that they are subject to the applicable law of the jurisdiction where they are working. However, there

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common issues and visa requirements)	are some provisions stating that the Ministry of Labour has the authority to authorize or prohibit the hiring of Salvadoran workers to provide services abroad, but the application of this provision in practice is still unclear and the Ministry of Labour does not regulate such a situation. Foreign employees must have either a temporary work permit that is renewed annually or a permanent residence card to be able to work in El Salvador. It is possible to enter into El Salvador with a tourist visa and then change the migratory status to the work permit. Employees will not render any service until obtaining the migratory status granted by the Migratory Authority. Salvadoran Companies may hire foreigners with the following two limitations: i. foreigners may not exceed the 10% of all the personnel and ii. ii) the remuneration may not exceed the 15% of all the payroll of salaries and wages. There are exemptions to hire more foreign employees for technical reasons prior approval of the Ministry of Labour. Timing and procedures can vary on a case-by-case basis; but in general it takes 4 - 6 months for permits to be issued however this term may be shorter or longer depending on the workload of the offices involved in the process The following documents (amongst others) will need to be supplied to the Salvadoran Immigration Authority and the Labour Authority, as required in the application: a. Birth certificate. b. Criminal record. c. Passport (with no less than six months' validity). d. Labour contract (for review and approval). e. Degree or certification of specialized experience f. Health certificate issued by Salvadoran doctor
Criteria for independent contractor status	It is possible to hire Independent contractor that in El Salvador are known as Professional Services contractors. The parties should meet specials requirements and it is intended for the appointment of a supplier to provide professional, technical or management consulting services as exchange for a price. The Professional Services Contract is a civil or commercial contract, the parties in this type of contract are completely independent of one another (independent contractor) and there is no exclusivity in the relationship between the parties, there is no schedule and the independent contractor is not subordinate to the entities' directives and regulations, having total independence and only subject to the responsibilities written in the contract. In this type of contract there is no working employment relationship and therefore no social security or labor benefits, because it is only a commercial relationship. Salvadoran law does not set a maximum amount of time or deadline for which consultants can be hired; it will always depend on factual circumstances that must be presented in a contract The consultant must not meet the characteristics of an employee, because Salvadoran labor law is very protective.

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	Professional Services contractors shall comply with the following elements: a. The service to be provided must be professional, technical or management consulting services to execute a particular work; b. Pay services and must withhold the amount of personal income tax of 10 % if he/she is domiciled in the country, and if he/she is not it will be 20 %; and require to the professional receipts of payment related to the payment of the provision of services; c. Characterize the non-hierarchical subordination and lack of a specific time for the professional related to his entrance and exit from the company meaning DAI and the consultant are independent of each other and have no exclusive relation and does not attend every day at the same time to work, receiving constant direct orders from DAI or its representatives. If these elements are met, the consultancy contract would be valid and it will not be considered an employment relationship.
Corruption, regulation and sanctions	El Salvador does not have any employment-related laws concerning corruption between private individuals, it is no considered a crime under the law and therefore it is not sanctioned. Corruption acts in Salvador require the participation of at least one public official who requests or accepts a bribe, promises or similar benefits to carry out an act or to omit to carry out acts proper of his duty. The Salvadoran Penal Code defines and establishes penalties generally to all figures that may constitute corruption. An entire chapter is devoted to corruption and it defines and establishes penalties generally to all figures that may constitute corruption. An entire chapter is devoted to corruption. In addition many administrative laws contain rules on the matter, but are only a complement that usually repeats provisions of the Penal Code and establishes the conduct referred to an additional administrative sanction to the punishment. Also, El Salvador is part of different anti-corruption international conventions. As well, the anticorruption provisions of CAFTA-DR require each participating government to ensure under its domestic law that bribery in matters affecting trade and investment is treated as a criminal offense or subject to comparable penalties.
Final remarks	All of the above issues are outlined on a very general level, describing the general rule.

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The International Employment Guide

Finland

Prepared by Lex Mundi member firm Roschier, Attorneys Ltd

General remarks	Finnish employment legislation governs most aspects of the employer and employee relationship. However, traditionally the Finnish labor market is to a large extent self-regulated by its parties and the collective bargaining agreements ("CBAs") practically define the minimum terms of employment. There are few industries that are not covered by CBAs. Consequently, roughly 90% of the employees are within the scope of a CBA. Unless expressly agreed to the contrary, the employment legislation (except for few exceptions) is not applicable to managing directors, as their status is that of a corporate organ, not an employee.
Employment agreement	Employment agreements can appear in written, digital and oral form or even as implied. The main rule is that an employment agreement is entered into for an indefinite term and if expressly agreed, may commence with a probationary period up to four months (or up to six months if a specific training period is included). In general, fixed-term agreement requires justified reasons and if it is entered into for a period exceeding five years, after five years it can be terminated similarly as an agreement entered into for an indefinite term. The employer is obliged to give the employee written information regarding the material provisions of the employment (such as terms of salary, working hours, annual holiday, notice period etc.) at the latest within one month from the commencement of the employment (if not included in a written employment agreement, for example).
Terms and conditions of employment	Finnish employment legislation does not prescribe any statutory rules on minimum wages, which are often governed by CBAs. The maximum amount of overtime work is 138 hours over a period of four months, subject to an annual maximum of 250 hours per calendar year. In addition, the employer may agree locally with employee representatives or personnel groups on additional annual overtime work for a maximum of 80 hours per calendar year, still not exceeding the limit of 138 hours per four months. The accrual of statutory annual holidays is 30 vacation days per holiday credit year (1 April–31 March) (however, 24 vacation days for the first year of employment). In addition to the statutory holiday pay, most CBAs provide for a holiday bonus, usually equaling 50% of the employee's holiday pay.
Changing terms and conditions of employment	If the change of the terms and conditions of the employment is not substantial or permanent, the employer's right to direct work typically entitle to effect the change unilaterally. However, if the change is permanent and substantial, the change is subject to mutual agreement, a change in the CBA provisions, or to conditions entitling termination of the employment and concluding of a new employment agreement with new terms.
Trade Unions and the consultation obligation	An employer with at least 20 employees employed regularly has a statutory obligation to consult with the employee(s) or their representatives prior to e.g. deciding on any redundancies, lay-offs or substantial changes that may affect

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	the employees. The employee representatives are usually shop stewards elected in accordance with the applicable CBA. If the employer is bound by a CBA, the provisions of the particular CBA concerning employee consultations are also to be applied. In general, the consultations do not have to lead to an agreement, i.e. the employer is free to take any kind of decision (subject to mandatory law) after having fulfilled its obligation to consult the employees.
Data privacy and personal integrity	Personal data may generally be processed only if the registered person has given his/her consent (which may be withdrawn at any time). Nonetheless, the consent of an employee is not needed if processing of personal data by the employer is necessary for purposes of the employment, for example paying of salaries and social contributions. However, the employee must be informed about the processing of personal data (regardless of whether consent is required) or implementing of any technical surveillance on employees. The privacy of communication is well-protected in Finland. As a general rule, employers are not entitled to access employee e-mails. An employer may only access an employee's work-related e-mails in exceptional and urgent cases involving the employee's absence from work. This right is conditional to fulfilment of strict prerequisites in order to avoid situations requiring accessing of the employee's e-mails. However, the employer is not entitled to access or read an employee's private e-mails under Finnish law.
Regulations regarding parental leave or other forms of absence regulated by law	A mother is entitled to a maternity leave for a maximum of 105 days per child and a father to a paternity leave for a maximum of 54 days per child. After the maternity leave, either the father or the mother is entitled to a parental leave for a maximum period of 158 days. Further, the employees are entitled to take child-care leave in order to take care of a child living permanently in their household until the child reaches the age of three. During the aforementioned periods, the employee may receive allowance from the Social Insurance Institution of Finland (Fi. kansaneläkelaitos). The employer does not have an obligation to pay salary during these leaves unless otherwise provided for in an applicable CBA. Under some CBAs a mother is entitled to her full salary for the first three months of the maternity leave. In addition to aforementioned leaves, an employee is also entitled to (i) statutory paid sick-leave up to 9 days (or for a longer period according to a CBA) after which the employee is subject to general sickness allowance, (ii) for temporary childcare which is usually received for child sickness (up until the child is 10 years old). The employee is not entitled to any statutory compensation or his/her salary during the temporary childcare leave, but if a CBA is applicable, the employee is usually entitled to his/her salary for a period of three or four days. Further, an employee may also be entitled to leave e.g. because of (iii) studies (a maximum of two years during a five year period), (iv) military service, (v) urgent family reasons, (v) care of close relatives, (vi) employee representative work, (vii) work related to municipal positions of trust and (ix) a job alternation leave of 180 calendar days.
Termination of employment	Termination of employment by the employer is thoroughly regulated by law. A dismissal by the employer must be based on proper and weighty reasons

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	(whether based on redundancy-grounds or individual reasons). In a redundancy situation, some CBAs have provisions regarding the priority when selecting employees to be made redundant. The employment legislation does not have such provisions but merely prohibit termination of employment on discriminatory grounds. An employer employing regularly at least 20 employees is obliged to conduct employee consultations prior to taking decisions on the redundancies. Employees, who are made redundant and are registered as job-seekers with the unemployment office, have a right of priority for re-employment in the event the employer has a need to employ personnel to similar tasks (as the redundant employees had) for a period of nine months after the expiry of the notice period. In case of termination of employment due to individual grounds, the employer is obliged to notify the employee and provide him/her with an opportunity to be heard on the reasons of the dismissal. The notice periods to be observed by the employer varies from 14 days to 6 months depending on the length of employment or the terms of the employment agreement/provisions of an applicable CBA. During the notice period the employee is obliged to perform work and entitled to salary and other benefits. If the employee terminates the employment, the notice period varies from 14 days to 1 month, unless otherwise agreed.
Sanctions for wrongful termination	An employee may claim compensation for wrongful termination of employment. According to the Finnish Employment Contracts Act, the compensation may range from 3 to 24 months' salary (and from 0 to 24 in case of termination on redundancy-grounds), taking into account, among other, the length of the employment, the employee's age and duration of unemployment and the individual features of the termination. In case of wrongful termination of a shop steward, the maximum compensation is 30 months' salary. Depending on the particular circumstances of the wrongful termination, the employer may be obliged to pay additional compensation under different laws. Such compensations include indemnification for not observing the consultation procedure in connection with contemplated redundancies, compensation for violating gender equality or other form of discrimination or a fine for breaching applicable CBA's provisions concerning redundancy order, if any. Furthermore, as a rule the employer must compensate the employee's legal fees if the employee's claim is successful.
Whistleblower protection	There is no specific employment protection for whistleblowers under Finnish law. Employees are protected by the constitutional right of freedom of expression and by the Finnish data protection legislation covering the processing of personal data. By virtue of the employment relationship, employees have a statutory duty of loyalty towards their employer and an obligation not to disclose employer's trade secrets. In accordance with the duty of loyalty, an employee is usually not entitled to disclose information which is harmful to the employer or the business of the employer. As a general rule, such disclosure is admissible only if it constitutes justified whistleblowing, which is generally regarded as an exception from the duty of loyalty. It is possible to introduce internal whistleblowing procedures (such as hotlines, specific whistleblowing websites etc.) where personal data (e.g. names of individual employees subject to whistleblowing) is processed and recorded by automatic means. Such system is considered as a personal data register

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	controlled by the employer. The employer is thus responsible for the collected data being accurate, up-to-date and necessary both for the pre-defined purposes of the register and for the employment relationship. Further, the employer has a duty to inform the employee before any data is used to make decisions concerning him/her. In addition, the employee has right to access his/her data in the whistleblowing system on request. The Finnish Data Protection Ombudsman (Fi. *Tietosuojavaltuutettu*) has published a memorandum regarding data protection and whistleblowing (Fi. *Työelämän tietosuoja ns. Whistleblowing ilmiantojärjestelmissä*). Implementing of any Whistleblowing systems must be done by observing the procedure of employee consultations and within the limits of the employer's right to direct work. To conclude, such systems must comply with the Finnish data protection legislation (especially the necessity requirement) and also with the occupational health and safety legislation (prohibition of harassment and inappropriate behavior).
Non-Competition Laws	It is well-established practice and statutory law that an employee is obliged to remain loyal to the employer during the employment, which include observing confidentiality and refraining from competing business. Furthermore, especially a key employee's employment agreement may include a specific non-compete clause, restricting the employee from competing for a certain period following the expiry of the employment. Finnish employment legislation has certain requirements for such restrictive covenant to be enforceable. The employer must have particularly weighty grounds for the non-compete, deriving from the employee's position and duties or/and from the employer's business. The covenant must be limited in time, a maximum period of six months from the expiry of the employment – or a maximum of one year if the employee is paid a reasonable compensation for the restriction. Usually non-compete clauses are also accompanied by non-solicitation clauses that are not regulated by law. The non-compete and non-solicitation clauses can be supported with liquidated damages with a maximum amount equal to the employee's salary for six months. The non-competition restriction is not binding if the employment is terminated on grounds deriving from the employer, e.g., due to redundancy. The aforementioned limitations concerning the duration of the non-compete and the maximum amount of liquidated damages are not applicable to managing directors or to employees who, in view of their duties and status, belong to the management of a company or an independent part thereof or to have an independent status immediately comparable to such managerial duties. However, the restrictive covenants of such individuals are to be assessed in the light of the legislation concerning reasonability of contractual terms in general.
Discrimination and equal employment opportunity	The Finnish Non-discrimination Act prohibits discrimination based on ethnic background, religion or other beliefs, disability, sexual orientation or expression and age. In addition, the Finnish Act on Equality between Women and Men prohibits gender-based discrimination, covering transgender identity and parenthood. An employer is prohibited from discriminating against an employee or a job applicant, directly or indirectly, on the above mentioned protected grounds. The Finnish Act on Equality between Women and Men is applicable also to managing directors. In addition, with regard to employees who are employed on a part-time basis or who are employed on fixed-term agreements, an employer is prohibited from, directly or indirectly, applying less

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	favorable salary benefits or other employment benefits for these types of employees than the employer applies (or would have applied) for employees in a similar situation employed for an indefinite term. The discrimination prohibitions apply, among other things, when an employer makes decisions during a recruitment procedure, takes a decision regarding the management of the company's business, or other decisions with respect to salary or other employment conditions. Finally, the prohibitions naturally apply when an employer gives notice of termination, dismisses or takes any other action against an employee. Employer's breach of the aforementioned rules may result in an obligation to pay compensation for discrimination or compensation for violating gender equality (or also compensation for wrongful termination). Should the conduct cause financial loss for the employee(s) concerned, such loss is to be compensated in accordance with the employer's liability on damages for breaching the Finnish Employment Contracts Act. Discrimination can also lead to criminal charges on work discrimination.
Transfer of business and outsourcing	The Finnish rules regarding transfers of business derive from the Transfer of Undertakings Directive 2001/23/EC and shall be applied where a company or business, or part thereof, is transferred to another legal entity. This means that the rules do not apply to transactions where shares of a company are transferred but the employer entity remains unchanged. In order to determine whether a particular scenario falls under the rules for transfer of business, one must analyze and evaluate all circumstances at hand, for example the nature of the business, what tangible or intangible assets are transferred, whether or not the acquiring employer takes over the majority of employees from the previous employer, whether or not customer contracts are transferred and the degree of similarity between the activities or business before and after the transaction, i.e. has the transferred business maintained its identity? According to the Finnish Employment Contracts Act, in a transfer of business the rights and obligations of the employment relationship, valid at the time of the transfer, shall be automatically transferred to the acquiring employer. An employee has no right to refuse to transfer, but may only resign if he/she is not willing to transfer. A transfer as such does not constitute objective grounds for termination of employment by the employer but redundancy situations may of course arise both with the acquiring employer and the transferring employer (such redundancy situations must be handled as any other redundancy situation).
Global mobility (brief overview of common issues and visa requirements)	Working in Finland as a foreigner is regulated by the residence permit system of the Finnish Aliens Act. Citizens of EU and EEA countries may work in Finland without any separate residence permit. Also individuals that fall under the following categories, among others, may work in Finland without a residence permit, provided that certain requirements are fulfilled: a) an expert, an umpire / a referee or a teacher coming to work for a period of a maximum of three months based on an invitation or an agreement; b) an athlete or an artist coming to practice his/her profession for a period of a maximum of three months based on an invitation or an agreement; and c) permanent employees of a company operating in another member state of the EU or the EEA coming to perform temporary contracting or subcontracting under the freedom to provide services, on the condition that they hold permits entitling them to reside and work in the said other state, and that the permits remain in force

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	once they have completed the work in Finland. Other than that, working in Finland is generally subject to different types of residence permits (independent or connected to another permit). The level of salary and benefits for foreigners working in Finland should be comparable to normal Finnish standard for a comparable position. Under the Finnish Posted Workers Act, the provisions of Finnish law concerning the minimum terms of employment (e.g. working hours, salary, and annual holiday) are applicable to posted employees, in so far as they are more favorable to the employee than the legislation that would be applicable otherwise. Under the Finnish Aliens Act an employer who willfully or by gross negligence employs a foreigner without a valid residence/work permit, may be sentenced to a fine or, in case of aggravating circumstances, imprisonment. In addition, citizens from certain non EU/EEA countries are required to obtain a valid visa before entering Finland.
Criteria for independent contractor status	The following circumstances usually characterize an employment relationship on one hand and an independent contractor on the other hand. An employee (i) is subject to the management and supervision by the employer and must follow the instructions of the employer regarding performance of work, the working place and time; (ii) performs the work based on an employment agreement on behalf of the employer; (iii) usually uses the employer's equipment and machines at the risk of the employer; (iv) may not usually work for multiple employer's during the term of the employment; and (v) works on a salary. An independent contractor (i) is not usually restricted from concurrently performing similar tasks for other companies; (ii) may have made notable investments on the working equipment at his/her own risk; (iii) is not obliged to personally perform the actual work, i.e. the independent contractor may delegate other persons to fulfil the assignment, unless otherwise agreed; (iv) is to a large extent entitled to independently decide the working time, place of work and the means and methods for the performance of the duties under the assignment, (v) is usually registered into the preliminary tax withholding register and (vi) the compensation for the assignment is fee-based (Fi: työkorvaus). The parties' expressed or implied intentions with respect to consultancy agreement and the wording thereof do not decisively determine the status of the party performing the work. Finnish courts and authorities may, based on the factual circumstances of the case, establish that there actually is an employment relationship between the parties.
Corruption, regulation and sanctions	The Finnish Criminal Code includes four bribery offences in connection with commercial relations. The following offences can be committed when, among other, acting as a representative of a company or acting on behalf of a

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	company or as an arbitrator in a dispute between undertakings. The offences include giving of a bribe in business (and aggravated form) and acceptance of a bribe in business (and aggravated form). Furthermore, bribing of authorities is also criminalized as a separate from of bribery. The penalties for individuals found guilty in commercial bribery include fines or imprisonment up to two years (up to four years if aggravated form). The sanction for legal entities includes corporate fine (Fi. *yhteisösakko*) which is defined by taking into account the offence, the company's size and financial status as well as other features.
Final remarks	On 14 June 2016 the Finnish central labor organizations concluded a so called Competitiveness Pact (Fi. *kilpailukykysopimus*) that is an agreement to enhance the Finnish economy and exports and to create more beneficial prerequisites for enterprises to act as employers. Under the Pact, e.g. the employer's pension insurance payment contribution is decreased and the annual working hours are increased by 24 hours without salary compensations. The Pact covers 86.5% of the Finnish labor market.

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Non-Competition Global Practice Guide

Finland

Prepared by Lex Mundi member firm Roschier, Attorneys Ltd

Does your state or country recognize and/or enforce restrictive covenants against employees?

Competing activity during the term of the employment is directly prohibited under the Finnish Employment Contracts Act if it will clearly cause damage to the employer. In addition, the employees have a statutory obligation not to disclose the employer's business and trade secrets to third parties during the term of the employment. If the employee has accessed such information unlawfully, this restriction is extended also to cover the period following the expiry of the employment. Furthermore, the Finnish Criminal Code prohibits the unauthorized exploitation of the employer's trade and business secrets by the employee during the employment and two years after the expiry of the employment. An employee found guilty for violation of a business secret can be sentenced to a fine or imprisonment for up to two years.

Post-employment non-compete restrictions on employees (and the use of a liquidated damages clause to sanction them) are subject to an express agreement. Such agreements are also recognized and strictly regulated by the Employment Contracts Act. Post-employment non-solicitation or confidentiality clauses, on the other hand, are not specifically regulated. It is not clear whether non-solicitation clauses are covered by the rules concerning post-employment non-compete agreements or merely general contract law. To conclude, restrictive covenants against employees are enforceable as long as they comply with the applicable mandatory legislation. Restrictive covenants against managing directors are governed by general contract law since managing directors are not considered as employees, but independent corporate organs.

What are enforceable protectable business interests that courts will protect?

Restrictive covenants protect such business interests as trade and business secrets and know-how. There is no exhaustive list of admissible business interests in law.

What are considered reasonable restrictions as to geography, duration and scope of activity?

The Employment Contracts Act indirectly regulates the post-employment non-compete undertaking's scope in terms of geographical area and activities by stipulating that such a clause can only restrict the employee from engaging in activities (on the employee's own account or for a competitor) that de facto compete with the former employer. A geographically excessive restriction could be considered unforceable. The post-employment non-compete restriction's duration is expressly regulated. The maximum duration is six (6) months following the expiry of the employment, and up to twelve (12) months provided that a reasonable compensation is paid to the employee. The non-compete clause can be supported by liquidated damages up to a sum equal to the employee's salary for six (6) months.

The aforementioned limitations do not apply to employees who are engaged in the management of the employer company, or an independent part thereof or employees in comparable independent positions, but a non-compete restriction up to twelve (12) months following the expiry of the employment sanctioned with liquidated damages up to a sum equal to the employee's twelve (12) months' salary, is considered customary. To conclude, the reasonableness and validity of the post-employment non-compete clause are always finally determined in a case-by-case assessment.

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Can a customer-specific restriction substitute for a geographic restriction?

Customer-specific restrictions can be a substitute for a geographic limitation. However, if the phrasing of the customer-specific restriction identifies the clientele as it is in the beginning of the employment, the said clientele might not necessarily be relevant when the employment expires. It is also possible to agree the restriction to cover such clients the employee has been in connection with during the last twelve (12) months preceding the expiry of the employment.

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

Without particularly weighty grounds, a post-employment non-compete restriction is void as a whole. If particularly weighty grounds exist, but the duration of the restriction or the amount of connected liquidated damages exceed the statutory limits or the limits of reasonableness, the clause is not enforceable to the extent that it is in conflict with the Employment Contracts Act. The courts can revise, reform and "blue pencil" restrictive covenants in general.

Will the court recognize a choice-of-law provision in a restrictive covenant?

In principle, the employer and employee can agree on the law applicable to the employment relationship. However, the applicable mandatory provisions of the Employment Contracts Act cannot be superseded when the work is performed in Finland or if the employment is most closely connected to Finland. The Employment Contracts Act does not apply to non-compete clauses that are concluded after the employment. In such case general contract law governs the clause.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

No classes of employees are expressly exempted. In practice, the requirement of particularly weighty grounds limits the applicability of post-employment non-compete undertakings to employees with a more senior position/duties. In principle, post-employment confidentiality and non-solicitation clauses are enforceable more easily as there is no specific regulation related thereto.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

The existence of particularly weighty grounds as a prerequisite for a post-employment non-compete restriction is assessed on a case-by-case basis. The assessment takes into account, among other, the employer's need to protect the business against competitors and the employee's possibility to earn a living by practicing his/her profession. When assessing the employer's need for protection, potential confidentiality clauses and patent protection, among other, are taken into account in addition to the position of the employee.

In addition to the existence of the particularly weighty grounds, the post-employment non-compete restriction's duration and the amount of liquidated damages are to be assessed (please see above questions 3. and 5.). Furthermore, the cause for the expiry of the employment is also essential as a post-employment non-compete clause does not bind the employee in case the employment expires due to reasons attributable solely to the employer (e.g. redundancies or breach of contract by the employer).

Does a change in position, salary or responsibilities affect enforceability?

The particularly weighty grounds required by the Employment Contracts Act need to exist both when concluding and when invoking the post-employment non-compete undertaking. For example, a key sales person may be promoted from client work to administrative duties and if the post-employment non-compete undertaking was based on the employer's need to protect its clientele, the change in the employee's responsibilities could affect the right to invoke the said undertaking.

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Furthermore, if the employee's duties are amended by resorting to termination grounds attributable solely to the employer (i.e. redundancy grounds) the non-compete restriction based on the employee's former position could be deemed to expire. Therefore, it is recommendable to expressly agree (or at least notify the employee) that the restriction survives despite the amendment to the duties (provided that the prerequisites for the post-employment non-compete undertaking still exist in the new position).
To conclude, specific attention should be paid to the nature of the change and to the existence of the particularly weighty grounds also after the change in responsibilities/position.

Is continued employment sufficient consideration to enforce a restrictive covenant?

The Finnish law does not recognize such sufficient consideration as referred in the question. Continued employment cannot be considered as reasonable compensation to enforce a post-employment non-compete undertaking in a case where the post-employment non-compete undertaking would exceed six (6) months with an employee who does not work in a managerial position (please see question 3.). There is no regulation concerning the amount of reasonable compensation. Depending on the circumstances, compensation amounting to e.g. 50% of the employee's monthly salary for each month exceeding six (6) months could be considered reasonable.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

The employer is not entitled to unilaterally amend the terms of employment in a substantial and permanent manner. Consequently, a refusal by an employee to agree on restrictive covenants during the course of the employment cannot be considered as a proper and weighty reason to dismiss the employee.

Are restrictive covenants assignable?

As a rule, the employee's rights and obligations (including restrictive covenants) transfer as such in a transfer of business. However, the validity of a post-employment non-compete undertaking is to be re-assessed against the new employer's need for protection. The particularly weighty grounds required by the Employment Contracts Act need to exist also after the transfer of business and if they do not exist due to the changed circumstances, the non-compete undertaking is not valid. An employment agreement cannot be assigned separately from the business, due to the personal nature of the agreement.

List any necessary language requirements.

There are no statutory language requirements. Nonetheless, the employee should understand the terms of the employment agreement and the employer is prohibited from exploiting the employee's limited language skills.

List any other requirements of importance.

The phrasing of the restrictive covenant clauses should be unambiguous as under the principles of general contract law any standard clause considered to be ambiguous is interpreted to the detriment of the party that has drafted the clause i.e. the employer.

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The International Employment Guide

Germany

Prepared by Lex Mundi member firm Noerr LLP

General remarks	German employment law governs most aspects of the employer and employee relationship, especially employee protection rights. Collective bargaining agreements ("**CBA**") and works agreements with the works council allow deviations in some parts.
Employment agreement	Most employment agreements are entered into for an indefinite term. It may commence with a probationary period of up to six months during which termination is possible without cause and with a notice period of two weeks. Fixed term agreements can be entered into for a period not exceeding two years without grounds if the employee has not been employed with the same employer before. Longer periods or limitations with employees who have been employed with the same employer before can only be agreed on in fixed term agreements based on objective grounds (e.g. the operational need for the work involved is only temporary). Within one month from commencement, the employer is obliged to give the employee written information regarding the material provisions of the employment (such as job description, salary, working hours, vacation, notice period etc.). Therefore, employment contracts should be in writing.
Terms and conditions of employment	German employment law prescribes a minimum wage of EUR 8.50 per hour. In certain sectors, CBAs establish a minimum wage. The maximum daily working time is 8 hours per day based on a 6-day-week. However, it can be extended to up to 10 hours per day, if, within 6 calendar months an average of 8 hours per day is not exceeded. Iit is therefore admissible to work up to 48 hours per week (e.g. 10 hours from Monday until Thursday and 8 hours on Friday). The statutory minimum vacation is 24 days per year. This is, however, calculated on the basis of a 6-day week. The statutory minimum vacation based on a 5-day week is therefore 20 days. In part-time employment, the paid vacation is calculated on a pro rata basis. Vacation has to be taken by the end of each calendar year, otherwise it is forfeited. Only, if the employee has not been granted vacation by the employer due to operational reasons or personal reasons may vacation claims be transferred to the next calendar year (until 31 March). After that date, any untaken holiday is forfeited unless the employer allows the employee to transfer such holiday to the next year. Untaken vacation due to illness lapses 15 months after expiry of the vacation year. The employer has to pay out any untaken vacation at the end of the employment.
Changing terms and conditions of employment	Terms and conditions of employment can be changed by agreement between employer and employee, by works agreement between the management and the works council or by a CBA unless the employment agreement is more favourable for the employee compared to the works agreement or the CBA. A unilateral decision of the employer is possible within the employer's right to give instructions. The extent of such right depends on the content of the employment contract. For unilateral changes beyond the right to give instructions a termination to change conditions is necessary ("***Änderungskündigung***"). Otherwise an unilateral change of working conditions by the employer is only possible if and insofar the employment

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	agreement contains a limitation of certain conditions or a revocation clause. The revocation clause must state objective grounds for the revocation.
Trade Unions and the consultation obligation	Trade unions conclude CBAs with the employer in order to establish industry related salaries and working conditions. Consultations, for example regarding terminations and operational changes, have to be conducted and concluded with the works council. In personnel matters (e.g. recruitment, grading, re-grading and transfer) and social matters (e.g. general rules and policies on the behaviour of the employees in the plant, start and end of the daily working hours including breaks, overtime, time, place and method of payment of remuneration), the works council has a co-determination right. The employer in that case, cannot act without the consent of the works council.
Data privacy and personal integrity	Personal data of an employee may be collected, processed or used for employment-related purposes where necessary for hiring decisions or, after hiring, for carrying out or terminating the employment contract. In other cases, personal data may only be collected, processed or used if the employee has given his/her voluntary consent (which may be withdrawn at any time). There is a high data protection level in Germany .
Regulations regarding parental leave or other forms of absence regulated by law	Both parents are entitled to parental leave of up to three years. 24 months of the parental leave can be taken after the third birthday and before the eighth birthday of the child. Compensation is paid by the state for up to 14 months. Each parent can get compensation for a minimum of 2 months and a maximum of 12 months. Compensation for 14 months therefore is only possible if both parents take parental leave. A single parent can get compensation for the complete 14 months. The compensation is based on the former salary of the parent and ranges between EUR 300 and EUR 1,800 per month. During parental leave, the parent may work up to 30 hours per week. The employment cannot be terminated during parental leave. Only in exceptional cases may a termination be declared admissible by the authorities. An employee is also entitled to paid leave for temporary childcare in case of child sickness. The absence must not exceed a relatively trivial period of time. There is, however, no fixed period. In case of unpaid leave, the employee receives sickness benefits paid by the state until the child is 12 years old for a period of 10 days per child per year (20 days for a single parent) and a maximum of 25 days (50 days for a single parent). An employee is also entitled to leave without pay to care for close relatives during a maximum of six months. Works council members can be released from work with continued remuneration to the extent necessary. In some German states, employees are entitled to paid or unpaid leave because of youth work. An entitlement for unpaid leave also exists with regard to political honorary positions. CBAs or employment agreements may contain further entitlements to leave without pay.
Termination of employment	For an ordinary termination (i.e. termination with notice) by the employer, it is crucial whether the employment is subject to the German Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz): If an employee has been employed in a company with more than 10 employees in Germany for longer than 6 months, he/she is protected under the Protection Against Unfair Dismissal Act. This means that the employment can only be terminated for three reasons: personal reasons (i.e. long-term illness or repeated short-term illnesses), misconduct (i.e. breach of duties, usually after one or two written warnings) or redundancies (i.e. if the concerned position is made redundant for operational reasons). In case of redundancies, a social selection has to be made between comparable employees

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	(who have comparable positions according to their employment contracts and who are interchangeable under the employer's right to give directions) according to age, seniority, maintenance obligations and handicap. Amongst comparable employees those have to be dismissed who are least worthy of social protection. The employer has to offer other vacant and acceptable positions to the affected employees if such vacant positions exist in the company at the time when the termination is issued. If the Protection Against Unfair Dismissal Act is not applicable, the termination does not require such strict reasons. However, it must not be discriminatory, arbitrary or otherwise against the law. A statutory or contractual (if more favourable) notice period has to be observed. The statutory notice period is from 4 weeks to 7 months to the end of a calendar month depending on the length of employment. There is no statutory entitlement to severance pay in addition to the notice period. The employee is in general obliged to perform work during the notice period, with entitlements to salary and other benefits. Terminations with immediate effect require good cause. This is a severe breach of duties by the employee which makes it unacceptable for the employer to employ the employee one day longer. The employer has to issue the termination within two weeks from the date the employer gained knowledge of such good cause, otherwise only an ordinary termination with notice is possible. If a works council exists, it has to be informed at least one week before the termination is issued. The works council can accept or object to the termination. The employer can terminate the employment even if the works council objects to it, but the employee can claim continued employment until the trial for protection against unfair dismissal is completed with legal effect.
Sanctions for wrongful termination	The employee can file a claim against unfair dismissal if he/she thinks that the termination is not valid. The aim of an unfair dismissal claim is the continuation of the employment. The proceedings, however, often end with a settlement agreement which states that the employment ends with effect as of a certain date and that the employee receives a severance payment (0.5 monthly salaries per year of employment as a rule of thumb). Under German law, the employee cannot seek punitive damages and the law does not provide any right to severance payment either. If the court rules that the termination was invalid, the employer has to employ the employee and also pay the remuneration he/she would have received from the invalid termination date until the end of the proceeding, even if the employee has not worked for the employer in this period. The employee has the right to perform his/her duties during the proceedings only if he claims this and the works council has objected to the termination or if he/she won the proceedings at first instance or if he/she can present predominant interests in performing his/her duties.
Whistleblower protection	There is no specific employment protection for whistleblowers under German law. When disclosing information, the loyalty to the employer and the duty to keep trade and business secrets on the one hand and the right to inform the public about irregularities as well as freedom of expression on the other hand, have to be weighed. Internal whistleblowing, if possible and reasonable, always takes precedence over external whistleblowing. The employer can introduce a whistleblowing system which states obligations to report and the procedure how to report irregularities. When introducing such system, the employer has to observe co-determination rights of the works council regarding general conduct rules and technical surveillance systems. Such whistleblowing systems have to comply with

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	the German Data Protection Act. A statutory justification would require a weighing , on the one hand, of the employer's interests against the data subjects' interests on the other hand. Pursuant to a common statement of the German data protection authorities on whistleblowing hotlines ("***Arbeitsbericht der Ad-hoc-Arbeitsgruppe "Beschäftigtendatenschutz" des Düsseldorfer Kreises:Whistleblowing-Hotlines: Firmeninterne Warnsysteme und Beschäftigtendatenschutz***"), the reporting of violations of law, human rights and/or environmental concerns is, as a general rule, justifiable under German data protection law. However, the circumstances of the individual case are decisive.
Non-Competition Laws	During the employment, the employee is legally obliged not to compete with the employer. A post-contractual non-competition clause can be agreed on. It may not unfairly jeopardise the employee's further career. Therefore, it is generally only enforceable in areas in which the employee worked during his employment or in areas to which his work was at least somehow related. The restriction period must not exceed two years after the termination date of the employment. During the period of the non-compete, the employer has to pay compensation of at least 50% of the employee's last contractual salary (including bonus, commissions, value of private use of a company car etc.). If the clause does not provide for such compensation, it is not legally binding on the employee. He/she may, however, choose to observe the non-compete and will then be entitled to compensation. Before the end of the employment, the employer can waive the restrictive convenant with the effect that the employer is obliged to pay compensation for a period of one year from the date of the declaration of the waiver. After a waiver of the post-contractual non-compete, the employee, however, is no longer prohibited from engaging in a competitive activity, even if he receives compensation.
Discrimination and equal employment opportunity	The German General Equal Treatment Act prohibits direct or indirect discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. It applies to employees, trainees, persons of similar status on account of their dependent economic status, including those engaged in home work and those equal in law to home workers and job applicants. Discrimination is inadmissible especially in relation to conditions for access to employment, including selection criteria and recruitment conditions, employment conditions and working conditions, including pay and reasons for dismissal. In the event of a violation of the prohibition of discrimination, the employee can claim damages and compensation. The Part-time Work and Fixed-term Employment Contracts Act prohibits treating a part-time or fixed-term (temporary) employee less favourably than a comparable fulltime or unlimited term employee for that reasons unless there are objective grounds justifying different treatment. Especially remuneration has to be paid corresponding to the proportion of his/her working time or employment period. Actions which violate the prohibition of discrimination are invalid and the employee can claim to be treated equally.
Transfer of business and outsourcing	The Transfer of Undertakings Directive 2001/23/EG is incorporated into German law, i.e. Sec. 613a German Civil Code. The rule regarding the transfer of a business applies where a business or part thereof is transferred to another legal entity and the transformed business unit keeps its identity thereafter. The rules do not apply to transactions where shares of a company are transferred but the entity, being the employer, remains unchanged. Whether a transaction is classified as a transfer of undertaking has to be determined according to the nature of the business, transfer of tangible and intangible assets, takeover of the major part of the employees, takeover of customers and/or suppliers, similarity between the products or services

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	before and after the transfer, duration of an interruption in the business coinciding with a transfer. Where there is a transfer of business (or a part of a business), by operation of law, the employment contracts of the employees of the acquired business unit are transferred with all rights and obligations to the acquiring party. Any terms and conditions of the employment contract continue to apply to the acquirer. Any terms and conditions contained before the transfer in CBAs and works agreements will be converted as part of the employment agreements of the employees and cannot be changed before one year after the transfer has expired, unless such terms and conditions are already regulated in CBAs and/or works agreements applicable at the acquirer. The previous employer or the new owner must notify employees affected by a transfer in text form prior to the transfer. The employee may object in writing to the transfer of the employment within one month after the receipt of notification. In that case, he/she remains employed by the previous employer but risks termination of his/her employment because of redundancy.
Global mobility (brief overview of common issues and visa requirements)	Citizens from EU, EEA countries and Switzerland (with limitations) may work in Germany without a residence and work permit. Other individuals generally need a residence (including work) title for employment which fundamentally requires the consent of the German Federal Employment Agency (BA). For consent to be granted, the following requirements must be met: 1) a legislative provision grants access to the German labour market; 2) a specific job offer exists; 3) no preferential employees are available for the specific job, and the working conditions are comparable to those of local employees. In many cases, however, the residence title for the purpose of employment can also be granted without the BA's consent. For details hereto, please visit the German Federal Employment Agency's webpage (https://www.arbeitsagentur.de/web/content/EN/WorkingandJobSeeking/WorkinginGermany/Detail/index.htm?dfContentId=L6019022DSTBAI776745). Beside the above, there are many constellations which affect the requirements for a residence and work permit (approval of the BA) in a number of ways. Generally (some exceptions exist), individuals must have a university degree which is comparable to a German degree in order to receive a residence and work permit for Germany. For some kind of activities (management body of a legal entity, executives at the level of the executive board, directorate and senior management in a company that is also active outside of Germany, business travellers that enter the country within the framework of their employment abroad in order to undertake business activities for a short period of time, such as to attend meetings or negotiations, conclude contracts or purchase goods intended for export or to establish, monitor or control a German part of a company for an employer established abroad) individuals do not need a residence and work permit if their work in Germany is limited to 90 days within a 180 day period. Other activities may be performed without a title up to 90 days within 12 months, e.g. science and research, internships for the purpose of advanced training, journalists. Usually, for these activities, a Schengen visa is required. Only for some excepted nations (US, Canada, Australia, Japan and others) not even a Schengen visa will be required. They are allowed to stay and perform such activities without any visa and residence title.

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	It is an offence especially for an employer to employ a foreign national without the necessary residence (and work) title, as well as for the employee himself. This administrative office is punishable by a fine (up to EUR 500,000 for the employer, up to EUR 5,000 for the employee).
Criteria for independent contractor status	The differentiation between employee and independent contractor is important for the company. If a contract states that someone is an independent contractor but in fact is an employee, the company will be held liable for social security contributions and may be exposed to penalties. What matters are the actual circumstances of the situation, not the content or wording of a contract. The criteria mentioned below have to be considered. An independent contractor must be able to act free from instructions, particularly regarding time, place and the kind of work and its performance. He/she must not be included in the business organisation and operational procedures of the company. Typical for an independent contractor is that he/she bears his/her own entrepreneurial risk, he/she can refuse to perform certain tasks or have them performed by third parties and has several customers. An employee usually only works for one employer and gets a guaranteed remuneration which is independent of his/her working results, illness or holidays. He/she gets instructions regarding working time and working place and is included in operational procedures of the employer. The employee typically uses the employer's work equipment.
Corruption, regulation and sanctions	The German Criminal Code includes different offences for corruption. In respect of public officials, the offences include demanding and accepting a bribe. If no public official is involved, the offence includes taking and giving bribes in commercial practice, fraud, embezzlement and abuse of trust, and restricting competition through agreements in the context of public bids. The penalties for individuals include fines or imprisonment of up to five years. The sanction for legal entities includes corporate fines up to 10 million Euro for intentional behaviour and up to 5 million Euro for negligent behaviour. Furthermore, for both individuals and legal entities, confiscation of what was obtained is possible.
Final remarks	There is special protection against dismissal for certain employees: Pregnant employees, employees on parental leave, severely handicapped persons or those with equal status to severely handicapped persons can only be dismissed with the prior consent of the authorities. Works council members can only be dismissed for good cause or in case of a company shutdown.

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The International Employment Guide

Hungary

Prepared by Lex Mundi member firm Nagy és Trócsányi

General remarks	Hungarian labour and employment laws govern most aspects of employment relationships. Collective-bargaining agreements and agreements concluded with works councils may deviate from the general rules of the Labour Code.
Employment agreement	An employment relationship is deemed established by entering into an employment contract. Under an employment contract (i) the employee is required to work as instructed by the employer, and (ii) the employer is required to provide work for the employee and to pay wages. Employment contracts may only be concluded in writing. Invalidity on the grounds of failure to set the contract in writing may only be alleged by the employee within a period of 30 days after the first day on which s/he commences work.
Terms and conditions of employment	As far as establishing employment relationships is concerned, Hungarian labour law provides a dual system of (i) concluding an employment agreement, and (ii) making notifications towards the employees in a separate information sheet. Emloyment agreement must at least contain the base wage and the job title (position). If the parties fail to agree on the duration of the employment in the employment contract the the employment relationship shall be considered as established for an indeifinite period of time. If the parties fail to agree on the place of work in the employment contract then the usual place of work of the employee shall be considered as the place of work agreed by the parties. Notifications shall at least cover the daily working time, wages above the base wage and other benefits (if any), rules regarding payroll accounting, the frequency of payment of wages and the day of payment, the tasks of the employee, the number, calculation and allocation of annual leave days, rules applicable to notice periods, information whether a collective agreement applies to the employer, and the name of the person entitled to exercise the employer's rights.
Changing terms and conditions of employment	The main difference between having something settled in the employment contract or in a notification (see item "Terms and conditions of employment") is that if a term/condition was agreed in the employment agreement then that term/condition may only be amended by the mutual consent of the parties. On the other hand, as a general rule, those information/data that are included into the notification may unilaterally be amended by the employer. As a special

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	rule, obligations that were unilaterally undertaken by the employer and notified towards the employee may only be either *[i]* terminated or *[ii]* cancelled by the employer, with the following conditions: (i) termination with immediate effect in the event of subsequent major changes in the circumstances of the employer whereby fulfilling the given obligation is no longer possible or it would result in unreasonable hardship, (ii) icancelling the given obligation provided that the employer reserved the right of cancellation when it informed the employee(s) about the obligation concerned.
Trade Unions and the consultation obligation	Employees are entitled to set up trade unions at their employer. Trade unions are entitled to conclude collective-bargaining agreements with the employers. Trade unions may request information from employers on all issues related to the economic interests and social welfare of employees in connection with their employment. Trade unions are entitled to express their position and opinion to the employer concerning any actions/decisions of the employer, or the draft of such decision, and to initiate consultation in connection with such actions. Employers are not obliged to undertake consultation if the nature of such consultation covers facts, information, know-how (etc.) that, if disclosed, would harm the legitimate economic interests or operation of the employer.
Data privacy and personal integrity	An employee may be requested to make a statement or to disclose certain information only if it does not violate his personal rights, and if deemed necessary for the conclusion, fulfilment or termination of the employment relationship. An employee may be requested to take an aptitude test if one is prescribed by employment regulations, or if deemed necessary with a view to exercising rights and discharging obligations in accordance with employment regulations. Employers shall inform their employees concerning the processing of their personal data. Employers shall be permitted to disclose facts, data and opinions concerning an employee to third persons in the cases specified by law or upon the employee's consent. In the interest of fulfilment of obligations stemming from an employment relationship, the employer shall be authorized to disclose the personal data of an employee to a data processor as prescribed by law, indicating the purpose of disclosure, of which the affected worker shall be notified in advance. Information and data pertaining to employees may be used without their consent for statistical purposes and may be disclosed for statistical use in a manner that precludes identification of the employees to whom they pertain.
Regulations regarding parental leave or other forms of absence regulated by law	Mothers shall be entitled to 24 weeks of maternity leave. Maternity leave shall also be provided to a woman who has been given custody of a child for the purpose of adoption. In the absence of an agreement to the contrary, maternity leave shall be allocated so as to commence 4 weeks prior to the expected time of birth.

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	Upon the birth of his child, a father shall be entitled to 5 extra business days of annual leave (or 7 extra business days of annual leave in the case of twins), until the end of the second month from the date of birth, which shall be allocated on the days requested by the father. Fathers are entitled to the above described faternity leave in full, irrespective of whether their employment relationship commenced or terminated during the given calendar year. As a minimum, 20 business days of (paid) annual leave shall be provided to all employees. In addition, employees are entitled to 1 to 10 extra business days of annual leave, depending on their age. Employees shall be entitled to extra business days of annual leave relating their children under 16 years of age (if any), too: i. two business days for one child, ii. four working days for two children, iii. a total of seven working days for more than two children. Employees shall be entitled to 15 business days of sick leave per calendar year for the duration of time during which the employee is incapacitated to work. In respect of employment relationships commencing during the calendar year, the number of days of paid sick leave shall be calculated on a proportionate basis. If this period of 15 business days expires but the employee is still sick, the employee will be entitled to sickness allowance ("***táppénz***") for a maximum period of one year. Please note that, of course, there are several other forms of absence regulated by law.
Termination of employment	Employment relationships may be terminated either with notice ["**dismissal**"], in which case a notice period applies and the employment relationship terminates at the end of such notice period, without notice ["**dismissal with immediate effect**"], in which case a notice period does not apply and the employment relationship terminates on the day on which the notice of dismissal with immediate effect was taken over by the employee, by mutual consent of the parties, in which case the employment relationship terminates on a day agreed by the parties. In addition, employment relationships terminate ipso iure, for example, among others, if the employee dies, if the employer is dissolved without legal successor, etc. As a general rule, employers are required by law to give reasons for their dismissal. Such reasons may only be related to the abilities or the work related behaviour of the employee concerned, or to the operations of the employer, and must be clear, real, timely, causable and functional. Dismissal with immediate effect may only be done if the other party either (i) wilfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship, or (ii) otherwise engages in conduct that would render the employment relationship impossible. The right of dismissal with immediate

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	effect may only be exercised within a period of fifteen calendar days of gaining knowledge of the grounds therefor.
Sanctions for wrongful termination	The employer shall be liable to provide compensation for damages resulting from the wrongful termination of an employment relationship. <u>Compensation for loss of income</u> Compensation for loss of income from employment payable to the employee may not exceed 12 months' absentee pay. <u>Severance pay</u> In addition, the employee is entitled to severance pay as well, if (i) the employment relationship was wrongfully terminated without notice (dismissal with immediate effect) or by mutual consent, or (ii) the termination with notice (dismissal) was unlawful and the employee did not receive any severance pay because s/he was not entitled to that due to the reason of the ordinary dismissal being his/her behavior. <u>Restitution ("***sérelemdíj***")</u> The employee may claim restitution payment if the employer violated his/her personal rights. As far as termination related violation of personal rights are concerned, judicial practice establish that the amount of restitution varies normally between HUF 100,000 (cca. EUR 325) and HUF 1,000,000 (cca. EUR 3,250). As a threshold, according to the court practice, it can be established that non-pecuniary damages are 'capped' at HUF 2-5 million (cca. EUR 6,500-16,200) one-time, per capita – these amount normally occur in connection with the death of an employee (payment to remaining family members).
Whistleblower protection	Employers may set up a whistleblowing hotline with a view to investigating reports relating to the breach of the employer's code of conduct, and to control the personal data of both the person making the report and those of the person to whom such report relates, too, for the purpose of investigating the reported wrongdoing. The hotline must be based on the employer's publicly available code of conduct and procedural rules which should also specify the conducts in relation to which reports may be submitted. Employers are free to regulate the conduct they wish to monitor so long as they are deemed to breach public interests or significant private interests (e.g., accounting, internal audit controls, anti-bribery issues or antitrust / competition law related matters, etc.). Persons to whom the reports relate shall also be informed of the allegations relating to them as well as their rights. Also, they shall be given the chance to defend themselves even through legal counsel. The notification to the accused person(s) may be delayed if the prompt notification were to frustrate the investigation. As a general rule, the employer shall investigate all reports within 30 days. In exceptional cases this period may be longer, but may not exceed 3 months. Whistleblowing hotlines shall in all cases be notified to the Data Protection Authority for registration in the Data Protection Registry, and the hotline may only be launched following such registration has been completed. (If there is

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	no response from the DPA during such period, the hotline is deemed to have been approved for registration by the DPA.)
Non-Competition Laws	The employer and the employee may agrre that the employee shall not engage in any conduct for up to 2 years following termination of the employment relationship by which to infringe upon or jeopardize the rightful economic interests of the employer. In exchange for honoring such non-competition obligation, employers shall pay adequate compensation. In determining the amount of such compensation, the degree of impediment the agreement has on the employee's ability to find employment elsewhere in the light of his education and experience shall be taken into consideration. The amount of compensation for the term of the agreement may not be less than one third of the base wage due for the same period of time. The employee shall have the right to withdraw from the agreement if having terminated his employment without notice (dismissal with immediate effect).
Discrimination and equal employment opportunity	In connection with employment relationships, such as the remuneration of work, the principle of equal treatment must be observed. Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other workers. For the purposes the above rules, "remuneration" shall mean any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship. The equal value of work for the purposes of the principle of equal treatment shall be determined based on the nature of the work performed, its quality and quantity, working conditions, the required vocational training, physical or intellectual efforts expended, experience, responsibilities and labor market conditions.
Transfer of business and outsourcing	Rights and obligations arising from employment relationships, existing at the time of business transfer / transfer of an economic entity (organized grouping of material or other resources) by way of a legal transaction are by force of law (automatically) transferred from the transferor to the transferee. Accordingly, employees belonging to the transferring business can not object to being transferred. Nevertheless, an employee may terminate with notice (dismissal) his/her employment relationship on the grounds that the transfer of employment involves a substantial change in working conditions to his/her detriment and in consequence maintaining the employment relationship would entail unreasonable disadvantage or would be impossible. In this case, despite the employment relationship is terminated with notice by the employee, the legal consequences of dismissal by the employer are applicable (longer notice period may apply, the employee has to be exempted from work duty for at least half of the notice period, severance pay has to be paid, etc.). When it comes to deciding whether there has been business transfer (transfer of an undertaking) or not, Hungarian courts must consider all the facts that characterize the transaction in question, including: • the type of undertaking or business,

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	• whether or not the business's tangible assets, such as buildings and movable property, are transferred, • the value of its intangible assets at the time of the transfer, • whether or not the majority of employees are taken over by the new employer, • whether or not its customers are transferred, • the degree of similarity between the business carried on before and after the transfer, and • the duration of any interruptions in that business. All these circumstances are merely individual factors in the overall assessment to be made and therefore cannot be considered insolation. Of course, the weighting of the factors may be different in each case. Specific notifications must be done both pre-transfer and post-transfer, too. The transferor and the transferee shall be jointly and severally liable towards the employees in respect of obligations which become due before the date of transfer, if the employee submits the claim within one year from the date of transfer. In case of a business transfer, the rights and obligations arising from non-compete agreements and study contracts transfer to the transferee ipso iure. As a general rule, the transferee is required by law to maintain the working conditions specified in the collective-bargaining agreement covering the employment relationship existing at the time of transfer (if any) for a period of one year after the date of transfer.
Global mobility (brief overview of common issues and visa requirements)	Citizens of EU Member States qualify as 'persons entitled to the right of free movement and residency' in Hungary. Employers are required by law to inform the competent labour centre about the employment of a person entitled to the right of free movement and residency. The notification shall include the number of people employed, their age, qualification, citizenship, the HSCO number [FEOR number in Hungarian, meaning standard classification number as set out in publication No.7/2010. (IV. 23.) of the Hungarian Central Statistical Office on the Hungarian Standard Classification of Occupations] of the position, the form of the employment relationship, in case of relatives the 'relative' status, the statistical core number of the employer and data whether the employment relation just commenced or ceased, all in a way that the employees cannot be identified based on the above information. With certain exceptions, for the employment of third country foreign employees, work permit ("**munkavállalási engedély**") has to be obtained by the employer from the labor centre competent based on the seat of the employer. In addition, the employer shall file a so-called workforce claim ("**munkaerőigény**") with the competent labour centre. The details of the

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	workforce required (skills, educational requirements, etc.) has to be indicated in the workforce request so that the labour centre can examine whether there are any persons registered as unemployed ("**álláskereső**") in Hungary who could fulfil the position in question. The labour centres are required by law to finish such examination within a period of 15 days. Third country foreign employees may be employed only if there are no persons registered as unemployed in Hungary who could fulfil the position in question.
Criteria for independent contractor status	Judicial practice and commentary establish that the *main* characteristics are i. the nature of the activity/position (in case of employment, the position, the job description and the employer's instructions determine the activity to be carried out, while in case of an independent contractor the task is predetermined by the client and the contractor shall deliver a certain result), ii. the obligation to carry out work personally (in case of employment, the employee must carry out its duties personally, he cannot appoint a substitutor, while in case of a client/contractor relation contractors may normally use subcontractors), iii. the obligation of the employer to employ, the obligation of the employee to be available (in case of employment, both obligations apply, while in case of an independent contractor, there is no obligation to employ and there is no obligation to be available), iv. hierarchy of the relationship (in case of employment, the employee works in the hierarchy of the employer's organization, while in case of an independent contractor there is not such a hierarchy, the client and the contractor are side by side instead).
Corruption, regulation and sanctions	The Hungarian Criminal Code specifies the following activities as corruption related criminal offenses ("*korrupciós bűncselekmények*") i. private bribery (active and passive) [CC Sec. 290-291] ii. public bribery (active and passive) [CC. Sec. 293-294] iii. bribery in court or administrative proceedings (active and passive) [CC Sec. 295-296] iv. influence peddling (active and passive) [CC Sec. 298-299] v. failure to report any of the above listed criminal offenses [CC Sec. 300]. Potential sanctions include imprisonment. Additionally, Act CIV of 2001 on Measures Applicable to Legal Entities under Criminal Law ("**LECA**") provides further specific rules for measures that may be applicable to legal entities. The measures defined in the LECA are applicable to legal entities in the event of committing any intentional criminal act defined in the Criminal Code if the

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	perpetration of such an act was aimed at or has resulted in the legal entity gaining benefit, and the criminal act was committed by *(i)* the legal entity's executive officer, employee (etc.) within the legal entity's scope of activity, or *(ii)* its member or employee within the legal entity's scope of activity, and it could have been prevented by the executive officer, supervisory board (etc.) by fulfilling his/her/its supervisory or control obligations. [LECA Sec. 2(1)] *(iii)* Moreover, the measures defined in the LECA shall be applicable even if committing the criminal act resulted in the legal entity gaining benefit, and the legal entity's executive officer, its member, employee (etc.) had a knowledge on the commission of the criminal act. [LECA Sec. 2(2)] If the court has imposed punishment on the person committing the criminal act defined in the above referenced s2(1) and s2(2) of the LECA, or apply censure, confiscation or probation against this person, it may take the following measures against the legal entity, according to further detailed rules specified in the LECA.: *(i)* dissolution of the legal entity, *(ii)* limiting the activity of the legal entity, *(iii)* imposing a fine.
Final remarks	None.

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Non-Competition Global Practice Guide

Hungary

Prepared by Lex Mundi member firm Nagy és Trócsányi

Does your state or country recognize and/or enforce restrictive covenants against employees?

Yes, it does - nevertheless, please note that post-term non-competition obligations only apply if the employer and employee conclude a non-competition agreement in accordance with the Hungarian Labour Code. In other words, there are no post-term non-competition obligations ipso iure (except for that, of course, employees are required by law to keep the business/trade secrets of their - then former - employers even after the termination of the employment relationship).

What are enforceable protectable business interests that courts will protect?

Hungarian labour law does not provide any specific rule for restriction of potectable business interests covered by non-competition agreements, and courts shall honour the provisions of non-competition agreements.

It shall be noted, nevertheless, that the term of non-competition obligations may not exceed a period of 2 years (calculated from the termination of the employment relationship).

What are considered reasonable restrictions as to geography, duration and scope of activity?

Generally speaking, so long as the compensation is adequate (and also reaches the statutory minimum, see the answer to question #8) and the duration does not exceed a period of 2 years (see the answer to question #2), no restriction may be considered unreasonable.

Can a customer-specific restriction substitute for a geographic restriction?

Yes, it can, if the parties agree (amend the non-competition agreement) accordingly.

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

It may, depending on the characteristics of the given case.

Will the court recognize a choice-of-law provision in a restrictive covenant?

It shall, in accordance with applicable rules of private international law, incl. the Rome I Regulation.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

No.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

As a general rule, the compensation must be adequate and, as a special rule, it may not be less than one-third of the base wage due for the same period of time as the term of the non-competition agreement.

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In case of public employers, the amount of compensation may not exceed fifty per cent of the absentee pay due for the same period period of time as the term of the non-competition agreement.

Does a change in position, salary or responsibilities affect enforceability?

A change in salary may - please see the answer to question #8.

Is continued employment sufficient consideration to enforce a restrictive covenant?

No.
During the term of the employment relationship, employees are required by force of law not to compete with their employers.

After the termination of the employment relationship, such non-competition obligation applies only if the parties conclude a (post-term) non-competition agreement - in which they set out (among others) specific restrictive covenants.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

Purely and simply because of this - no.

Are restrictive covenants assignable?

No.

List any necessary language requirements.

In general, it is not required by Hungarian labour law that employment related documents (employment agreements, etc.) shall be written in the Hungarian language. Consequently, theoretically speaking, employment related documents can be lawfully drafted a

List any other requirements of importance.

In general, the parties may rescind the non-competition agreement only if such right to rescind was stipulated in the agreement. On the basis of several recent court decisions the last possibility for the employer to rescind

i. in case the employer gives notice, is at the time of giving notice, regardless to that the employment relationship terminates at the end of the notice period,
ii. in case the employee gives notice, is at the time the employer become aware of that, again regardless to that the employment relationship terminates at the end of the notice period
iii. in case of mutual agreement at the time of the agreement.

Of course, if any of the parties exercises its right to rescind in due time, then

(i) the employer is not obliged to pay financial compensation and
(ii) the employee is not obliged to keep the noncompete restrictions.

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The International Employment Guide

Ireland

Prepared by Lex Mundi member firm Arthur Cox

General remarks	As in most jurisdictions, there is extensive legislation governing the employment relationship in Ireland which affords, inter alia, statutory rights to employees. Employee rights also derive from the individual contract of employment and, for employees who are members of trade unions, from collective agreements.
Employment agreement	A written statement of employment must be provided to employees within two months of commencing employment. This statement must contain certain statutorily prescribed information (e.g. in relation to remuneration, working hours, place of work, leave entitlements, notice period etc.). Employment contracts can be issued for fixed or indefinite terms, however, fixed-term employees can accrue a statutory right to indefinite employment in certain circumstances (e.g. if they are employed on more than one fixed-term contract for a continuous period of 4 years or more and there continued employment on a fixed-term basis cannot be objectively justified).
Terms and conditions of employment	It is common for employers to issue statements of employment/contracts that contain more terms than the statutory minimum terms. By way of example, employers frequently include provisions in their statements of employment/contracts relating to confidentiality, intellectual property, data protection, bonus entitlements and post-termination restrictions. In unionised environments, employee terms and conditions are often set out in collective agreements, the terms of which are then incorporated into individual employee contracts of employment. Terms can also be implied into employee contracts by custom and practice and by law. Some of the more prominent legislative protections for employees include: • That employees, with few exemptions, may not work in excess of an average of 48 hours per week (ordinarily calculated over a 4 month period); • An entitlement to the national minimum hourly rate of pay which is currently €9.15 for experienced workers over 18; • An entitlement to paid annual leave; • An entitlement to a minimum period of notice in the event of termination.
Changing terms and conditions of employment	Changes to employees terms and conditions are typically agreed with individual employees or, in unionised environments, collectively agreed. Unilateral variation of contractual terms is permissible where provided for in individual employee contracts, however, such variation is rare in practice,

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	except perhaps for changes to non-fundamental terms. Changes to terms and conditions can also take effect by reason of employee acquiescence. If consent to necessary changes cannot be agreed with employees/trade unions, employers can dismiss and seek to re-engage the employees on new terms and conditions, however, such an aggressive approach is subject to considerable litigation risk.
Trade Unions and the consultation obligation	The Irish Constitution guarantees the right of citizens to form associations and become members of trade unions. Currently, employers are not obliged to recognise a trade union or engage in collective bargaining with them. Irish legislation does however provide for legally binding collective agreements (i.e. sectoral employment orders and registered employment agreements). Sectoral employment orders are approved by the Department of Jobs, Enterprise and Innovation and are applicable to a specified type, class or group of workers whereas registered employment agreements are collective agreements registered with the Labour Courts, entered into between trade unions and employers and applicable to individual companies. Employers may be statutorily obliged to engage in collective consultation processes with employee representatives whenever they are effecting transfers of undertakings and/or collective redundancies. There is no obligation to reach an agreement with such representatives at the end of these processes, however, there is an obligation to engage in the consultation processes with a view to reaching agreement.
Data privacy and personal integrity	Employers are subject to extensive statutory obligations in processing personal data of their employees. While consent is typically sought from employees to process their personal data, personal data may processed without express consent where necessary for the purposes of the employment relationship. Express consent is required to the processing of sensitive personal data. There are statutory restrictions on the transfer of personal data outside of the EEA unless certain safeguards are in place to protect that data once exported. Employers are obliged to ensure employee personal data is safe, secure, kept up to date and retained for no longer than is necessary. Employees are, subject to certain exceptions, entitled to be provided with copies of documents held by their employers that contain their personal data.
Regulations regarding parental leave or other forms of absence regulated by law	An employee is entitled to avail of parental leave (18 weeks per child) and carer's leave (13 to 104 weeks), provided they satisfy certain statutory criteria. There is no statutory obligation to pay employees while on parental or carer's leave. An adopting employee has an entitlement to ordinary adoptive leave of 24 weeks and additional adoptive leave of 16 weeks. An employer is not statutorily obliged to pay an employee while on adoptive leave. A pregnant employee has a statutory entitlement to maternity leave. Ordinary maternity leave is for a period of 26 weeks. An employee has the option to avail of additional maternity leave for a period of 16 weeks. Employers are not statutorily obliged to pay employees during maternity leave but many have

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	some form of pay arrangement for some or all of the 26 week period as an employee benefit. Statutory paternity leave is to be introduced with effect from 1 September 2016. Eligible employees will be entitled to avail of two weeks leave. An employer will not be statutorily obliged to pay an employee while on paternity leave.
Termination of employment	Termination of employment by employers is regulated by statute, employees contracts of employment and employers HR policies. Employees have a statutory right not to be unfairly dismissed and accordingly, in order to lawfully terminate an employee's employment, their dismissal must be for one or more of the following reasons: 1. capability, competence or qualifications of the employee; 2. conduct of the employee; 3. redundancy; 4. the employee being unable to work or continuing to work without breaching the law (whether by the employee or the employer); 5. other substantial grounds. Aside from establishing a valid reason for the dismissal, employers must be able to establish the dismissal was fairly effected. In the absence of a fair process being followed, an employee will be found to have been unfairly dismissed even if the reason for the dismissal is accepted as valid. On termination, other than a summary termination for gross misconduct, employees are entitled to receive the greater or their statutory or contractual notice.
Sanctions for wrongful termination	Employees with 12 or more months of continuous service with an employer can bring an unfair dismissals claim against their employer in which they can challenge the basis for their dismissal and/or the process followed in effecting their dismissal. Successful claimants can generally be awarded (i) reinstatement (ii) re-engagement (iii) compensation of up to two years' remuneration, depending on financial loss. If the employee did not suffer financial loss, up to 4 weeks' remuneration can be awarded. Employees with less than 12 months' service are not entitled to bring a claim for unfair dismissals against their employer, unless the employee can demonstrate that they were dismissed by reason of trade union membership/ activity, pregnancy (or related matters), breastfeeding or exercising their rights under maternity protection legislation, or were dismissed for having made a protected disclosure. Employees who are dismissed in breach of their contractual rights can bring a claim for wrongful dismissal as an alternative to bringing a statutory unfair

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	dismissal claim. The award of damages in such claims is typically confined to the monetary value of their notice period. Employees who believe they have been (or are to be) unlawfully dismissed can also bring interlocutory injunction applications to the Irish High Court in which they seek to restrain those dismissals taking effect pending the hearing of the plenary action in which the question as to whether they have been (or are to be) unlawfully dismissed is addressed. If such an application is successful, the Court generally orders that the employee remain on payroll until the plenary action is determined.
Whistleblower protection	There is statutory protection for employee whistleblowers in Ireland in both the public and private sectors, in circumstances where they have made a disclosure of information which they reasonably believed tended to show one or more "relevant wrongdoings" and which came to their attention in connection with their employment. A relevant wrongdoing includes: • the commission of a criminal offence; • the failure to comply with a legal obligation; • the occurrence of a miscarriage of justice; • the endangerment of the health or safety of an individual; • damage to the environment; • misuse of public funds; • mismanagement by a public body; and • the concealment or destruction of information tending to show any of the above. The legislation provides the following protections for employee whistleblowers who make protected disclosures: • Protection from dismissal – An employee who is dismissed as a result of having made a protected disclosure may claim up to 5 years' remuneration from his employer. An application may also be made to the Circuit Court for relief pending the determination or settlement of an unfair dismissals claim, which may include re-engagement of the employee. • Protection from penalisation – An employee who is penalised by his employer for having made a protected disclosure may bring a complaint to the Workplace Relations Commission. If the complaint is upheld, the employer may be required to pay compensation of up to 5 years' remuneration. "Penalisation" means any act or omission that affects a worker to his detriment, and includes suspension, dismissal, demotion, unfair treatment, discrimination, harassment or the threat of reprisal. • Immunity from civil liability – No civil proceedings (save for defamation) may be taken against a person for having made a protected disclosure. In defamation cases, a protected disclosure will attract qualified privilege. • Defence in criminal prosecution – In a prosecution for an offence prohibiting or restricting the disclosure of information, it is a defence to show that the disclosure was reasonably believed to be a protected disclosure.

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Non-Competition Laws	Irish law does not prohibit employers imposing restrictions on employees from competing with them and/or soliciting their customers or staff during employment and/or for reasonable periods of time post the termination of employment. However, in order for such restrictions to be enforceable in practice, an employer must be able to show they are designed to protect legitimate commercial interests (e.g. trade secrets, confidential information, customer databases, workforce etc.) and that the restrictions go no further than is necessary to protect those interests. In considering the latter, a Court will have regard to the duration of the restrictions, their geographic scope and the definition of the business the employer is purporting to protect. Courts will rarely rewrite unenforceable restrictions and therefore such restrictions must be carefully and narrowly drafted in order to be enforceable.
Discrimination and equal employment opportunity	Under Irish law, prospective and serving employees are protected against discrimination (direct and indirect) on any of the 9 protected grounds: gender, civil status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. Employees who experience discrimination in the workplace whether in respect of their conditions of employment, training or experience or promotion/re-grading, can bring discrimination claims against their employers and if successful be awarded up to 2 years remuneration by way of compensation. There is no service threshold for such claims to be brought. Employees are also protected by law from harassment on any of the 9 protected grounds. Employers are also prohibited by law from treating part-time and fixed-term employees less favourably than their permanent comparators. Statutory causes of actions exist for employees who are subjected to such less favourable treatment.
Transfer of business and outsourcing	The Acquired Rights Directive (Council Directive 2001/23/EC) has been transposed into Irish law and the Irish legislation applies whenever there is a transfer of an undertaking, business or part of a business or undertaking from one employer to another employer as a result of a legal transfer or merger. Where the transfer of undertakings legislation applies, the transferor and transferee must inform, and if measures are envisaged, consult, impacted employees (via their representatives) about the transfer. The legislation sets out certain statutorily prescribed information that must be provided to employee representatives not later than 30 days prior to the transfer date. If the consultation obligation is triggered, that process must also be commenced not later than 30 days before the transfer date. Employees who transfer under the transfer of undertakings legislation do so on their current terms and conditions of employment, save in respect of rights to old age, invalidity or survivors benefits. Continuity of service is also preserved. The Irish legislation does not specifically provide for a right to object to a transfer, however, case law confirms that employees can object to a transfer. Where they do, the current legal position is that they are deemed to have resigned their employment with effect from the transfer date.

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Global mobility (brief overview of common issues and visa requirements)	EEA and Swiss nationals are entitled to work in Ireland without an employment permit. However, non-EEA/Swiss nationals generally require an employment permit to work in Ireland. The following types of employment permit can be applied for: • Critical Skills; • Intra-Company Transfer; • Dependant /Partner/ Spousal; • General • Contract for Services; • Reactivation; • Internship; • Sports and Cultural; and • Exchange Agreements. The application requirements for the above permits vary from permit to permit, however, a common rule that applies across all categories is that the applicant for a permit must be in a position to demonstrate that their future employer complies with a "50:50 rule" i.e. that their employer maintains a workforce of at least 50% EEA nationals, (save for some limited exceptions, such as start-up companies). A Labour Market Needs Test, meaning that employers must exhaust efforts to recruit EEA nationals and demonstrate same, now applies to General and Contract for Services employment permit applications. Non-EEA nationals also typically require a visa in order to live and work in Ireland. It is a criminal offence for an employer to employ an employee in Ireland who is not lawfully entitled to work in the State without an employment permit. On conviction conviction on indictment, a fine not exceeding €250,000 and/or imprisonment for a term not exceeding 10 years can be imposed.
Criteria for independent contractor status	There is no definitive legal test that can be applied to determine whether or not a contractor engaged on a contract for services basis should be more properly considered as an employee engaged on a contract of services basis. Among the factors taken into account whenever the Irish Revenue or a Court is asked to consider this issue include: • whether there is mutuality of obligation between the parties; • the level of control exercised by the company over the individual; • whether or not the individual is in business on his or her own account; • the tax arrangements in place; • provision of any tools or equipment to carry out the services; • who bears the risk/reward for performing the services; • the ability of the individual to subcontract the work; and • the contractual agreement between the parties. Irish Revenue and the Courts will not be bound by the labels attached by parties to a relationship and will, in considering a deemed employment claim, consider the factual reality of the relationship.

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Corruption, regulation and sanctions	Irish law on corruption and bribery is contained in a series of statutes dating back to 1889. This legislation covers corrupt acts committed outside of Ireland by Irish citizens, individuals ordinarily resident in Ireland, companies registered in Ireland, other corporate bodies established under the laws of Ireland, and other relevant agents, in addition to Irish office holders or officials. However, the legislation does not extend to non-Irish commercial organisations which carry on part of their business in Ireland. The principal statutory offence in Irish law is the offence of "corruption of agents", which provides that it is an offence to "corruptly" give or accept any gift or consideration or advantage, as an inducement to, or reward for, an "agent" doing any act, or making any omission, in relation to his or her office, position, or his or her principal's affairs or business. An "agent" is "any person employed by or acting for another". Penalties for breach of Ireland's corruption and bribery laws include up to 10 years' imprisonment and an unlimited fine. Where an offence has been committed by a company, and is proved to have been committed with the consent or connivance of, or to be attributable to any wilful neglect on the part of a director, manager, secretary or other officer of the company, or a person who was purporting to act in any such capacity, that person as well as the company, shall be guilty of an offence. Significant legislative change in this area is expected in the short term, with the anticipated enactment of legislation that will, inter alia, consolidate Ireland's bribery and corruption laws into one statutory instrument.
Final remarks	N/A

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The International Employment Guide

Latvia

Prepared by Lex Mundi member firm Klavins Ellex

General remarks	The Latvian Labour Law governs all aspects of the employment relationship between the employers and employees. Work safety issues are governed by the Labour Protection Law and various governmental regulations issued on the basis of that law. Collective bargaining agreements, generally, are not very common in Latvia, except for some specific manufacturing industries. Unionisation is also not very developed, only approximately 10% of all employees being members of trade unions.
Employment agreement	The employment agreements must be concluded in a written form before the employee commences working. The employment agreement enters into force as of the moment it is signed by both parties. The employer has to ensure safekeeping of the concluded contracts and immediate submission thereof to the supervisory institutions upon their request. Generally, the employment agreements are entered into for an indefinite period. Parties are allowed to agree in the employment agreement on a probationary period of up to three months during which both parties may freely terminate the employment agreement by notifying the other party three days in advance without indicating a reason. Fixed-term employment agreements can be entered into for a period not exceeding five years. Fixed-term agreements can only be concluded in the circumstances exhaustively prescribed in the Labour Law. Parties can freely agree on both full and partial work time. Typically, the parties also sign employee's job description describing their position and general work obligations.
Terms and conditions of employment	The Labour Law provides for mandatory requisites that have to be included in the employment agreement. Pursuant to an imperative provision of the Labour law if any provision of the employment agreement worsens the employee's work conditions in comparison with the statutory regulation, such provision of the employment agreement is considered null and void, and the employer is additionally exposed to administrative liability for infringement of the statutory labour regulation. The parties are free to agree on terms that are not explicitly regulated by the law. Governmental regulations stipulate the minimum wage for normal working time (40 hours per week) and minimum hourly wage in Latvia. In 2016 the minimum wage is 370 euro.

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	The statutory supplemental payment for overtime is at least double amount of the normal wage of the employee. Overtime cannot be compensated by free time. Overtime may not exceed on average 8 hours within a period of seven days during a reporting period of 4 months. Annual paid leave amounts to up to 4 weeks (20 working days) a year. At least 2 consecutive weeks of leave must be used within the year of accrual, but the rest can be transferred to the following year. Parents of children are entitled to days of additional leave in specific cases. The annual leave may not be compensated in money, except for, in case of termination of the employment relationship.
Changing terms and conditions of employment	All changes in terms and conditions of the employment that relate to the employment agreement, especially the ones worsening conditions of the employee, in comparison to the previous ones, have to be executed in a way of written amendments to the employment agreement. The changes can take place after the amendments have been mutually signed, unless the parties agree otherwise. The employee is free to decide whether to agree to the proposed amendments. However, the employer is entitled to unilaterally, by way of orders, specify the official obligations of the employee as long as the specified obligations are not beyond the scope of the contracted official obligations and the position of the employee.
Trade Unions and the consultation obligation	The representation of employees is provided by trade unions or elected employee representatives. Neither the trade unions, nor elected employee representatives are widespread in Latvia. There are various consultation obligations in relation to trade unions or elected employee representative in the company. While exercising their rights, the trade unions and elected employee representatives are entitled to request and receive information and documents related to the scope of their authority. The most important occasions when mandatory consultation procedure must be undergone are the following: before setting and changing work standards, before adopting and changing work regulations, before undergoing collective redundancy, before transfer of undertaking, before setting aggregated working time for employees. The consultations do not have to lead to an agreement, i.e. the employer is free to take any kind of decision after having fulfilled its obligation to consult.
Data privacy and personal integrity	The employer is only allowed to process personal data about employees in matters that pursuant to the aim of processing (establishing, maintaining or terminating the employment relationship) are not excessive. Since, these are contractual obligations, rights to process personal data about employees result from these obligations and laws, and no separate agreement from the employee is necessary in case the employer uses these data within the scope of employment relationship and does not give data to any third party. The employer is liable for processing, updating and deleting of personal data. The employer must ensure safety and protection of employee's data and also must ensure that only specifically authorised personnel, who are involved in administering the processing of data have access to the data.

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	Employers need to evaluate whether it is necessary for them to register as a personal data operator with the authorities (Data State Inspectorate).
Regulations regarding parental leave or other forms of absence regulated by law	There are various leaves available to employees in relation to childbirth. Women are entitled to a paid pregnancy leave of 56 calendar days and a childbirth leave of 56 calendar days. Both these leaves shall be added, and 112 calendar days granted irrespective of the number of days used as prenatal leave prior to child-birth A father of the child is entitled to a 10-day leave after the childbirth. After the childbirth leave both parents are entitled to a parental leave for a period up to 1.5 years that must be used before the child's 8th birthday. However, only one of the parents is entitled to use the parental leave and receive the social child-care benefit (60% of the employee's average earnings if the leave is used for a period of to 1 year, or 43.75% if the leave is used for a longer period). The employer must ensure that the employee can return to the same (or equal) position he/she left when he/she went on the parental leave. The benefits related to birth of children are covered by the state social security. Employees are also entitled to go on a leave, for example, for studies (finishing the graduation thesis at a university) with or without retention of work remuneration and on an unpaid leave for serving in the National Guard. The employer and the employee can freely agree also on additional event for unpaid leave.
Termination of employment	Employees may freely terminate the employment relationship by giving a notice one month in advance (a 3-day notice during the probationary period). If the employee has a good cause, such employee may terminate the employment relationship with an immediate effect. Parties may also freely agree on termination the employment relationship on the basis of a written mutual agreement. However, the Labour Law strictly limits the cases, when the employer can unilaterally terminate employment relationship after the probationary period. Employees may only be dismissed due to circumstances related to the conduct of the employee, his or her abilities, or due to economic, organisational, technological measures or measures of a similar nature in the company in the circumstances exhaustively provided in the Labour Law. In the event of redundancy, if more than one employee holds the position that is to be cut, evaluation of employees must be done. Priority is given to those employees who have higher qualification and better performance. If the employer wishes to terminate the employment relationship with a member of a trade union, the employer must acquire consent of the respective trade union, except in cases when the employee, while performing work, was under influence of alcohol, narcotic or toxic substances; the employee who had previously performed the relevant work has been reinstated to the position; the employer is being liquidated. If the trade union denies its consent, the

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	employer can only bring a claim to the court for termination of the employment relationship with the employee. It is forbidden to terminate an employment agreement (also during the probationary period) with a pregnant woman, a woman during postnatal period up to 1 year and a woman, who is breastfeeding her child, for all the period of breastfeeding (but not exceeding 2 years) except due to misconduct of the employee or liquidation of the employer. The same protection applies to disabled people, except they can also be dismissed due to inability to perform work because of their health condition (if confirmed by a doctor). If employees are dismissed due to reasons other than misconduct they are entitled to receive a severance pay. The amount of the severance pay depends on the seniority of the employee and may vary from 1-4 average monthly earnings of the employee.
Sanctions for wrongful termination	Employee can bring an action to the court to contest validity of the employer's notice of termination within one month after the notice was received. Employer has the burden of proof that the notice of termination is legal and complies with the procedure of termination. If the court establishes that the employer's notice of termination is illegal or the procedure for termination has been violated, it declares the notice of termination null and void. If the employer's notice of termination is declared null and void, the employee is reinstated to the previous position by the judgement of the court. If the employee requests the court to terminate the employment agreement, employment relationship is terminated by the judgement of the court. If the termination notice is declared null and void, the employee is entitled to average earnings for the entire period of forced idleness. The employer may also be liable for losses incurred by the employee due to unlawful termination, but those are difficult to prove.
Whistleblower protection	There is no specific regulation in the Labour Law regarding the whistle-blower protection. However, one of the general principles of the Labour law stipulates that the employer is forbidden from directly or indirectly causing negative consequences to the employee due to the reason that the employee has exercised its rights in good faith. This principle also applies to employee's rights to report on wrongdoings ongoing at the company. If the management of an employee would turn against the whistle-blower after the employee has reported on the manager, the whistle-blower may be liable under the said principle. The obligation to protect the whistle-blowers also indirectly arises from the employer's general obligation to ensure safe and healthy work environment for all employees.
Non-Competition Laws	According to a general principle incorporated in the Labour Law, during the employment relationship the employee must be loyal to the employer and be bound by confidentiality obligations. The parties are also allowed to agree in the employment agreements that employees are precluded from entering into parallel employment relationships

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	(or pursue their own business) both with employer's competitors and other employers. However, such limitation can only be imposed as long as it is justified by legitimate interests of the employer (especially, if the second work may negatively affect performance in the primary job). No additional compensation must be paid to employees for following such obligation. The parties are also allowed to enter into a non-competition agreement that would preclude employee for working for former employers competitors after termination of the employment relationship. Such agreement must be executed in a written form and it can be concluded simultaneously with the employment agreement (integrated) or after conclusion of the employment agreement. The maximum period of restriction is two years after termination of the employment agreement. The limitations imposed on the former employee may not me excessive, unfairly and disproportionally limiting further professional activities of the employee. For the non-competition agreement to be binding, the former employer must pay an adequate compensation to the former employee for complying with the competition restrictions. The amount of the 'adequate' compensation depends on the position of the employee and the level of restrictions. Thus, the compensation may vary from 10% of employee's salary for limitations narrow in scope to more than 70% for very strict and extensive limitations. Parties are also entitled to additionally agree on contractual penalties to be imposed on the former employees who fail to comply with the non-competition restrictions. An employer may withdraw in writing from an agreement regarding restriction of competition prior to the termination of employment relationship.
Discrimination and equal employment opportunity	Discrimination is generally forbidden under the Latvian Constitution. The Labour Law expressly forbids discrimination on the grounds of race, colour of the skin, age, disability, religion, political and other beliefs, national and social background, financial or family status, sexual orientation and other discriminatory criteria. Under the Latvian Law, both the direct and indirect discrimination is forbidden. The law states that everyone has equal rights of access to work and right to fair, safe and healthy work conditions, as well as to fair work remuneration. This principle applies also to the part time employees and employees with a fixed-term employment agreement. The prohibition of discrimination applies throughout the employment relationship starting with recruitment and ending with the termination of the employment relationship. The Labour Law provides that in the discrimination cases and disputes there is the reversed burden of proof imposed on the employer. It means that if in the event of a dispute where the employees refer to a circumstances that may be potentially discriminative, the employer is obliged to prove that the differential treatment is based on objective circumstances, and not related to personal traits of the employee. In the discrimination cases (especially if direct discrimination has taken place) the employers are openly exposed to constructive termination claims from the

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	employees. In those cases employees may terminate the employment relationship immediately. They are also entitled to receive a severance pay. Furthermore, in the discrimination cases the employees may also claim damages and compensation for moral damage. However, the Latvian courts very rarely grand the moral compensation that exceeds average earnings 1-3 months of the employee, unless there has been severe and continuous mistreatment.
Transfer of business and outsourcing	Transfer of Undertakings Directive 2001/23/EG is incorporated into Latvian Labour law. The rules regarding the transfer of a business are triggered where a company or business, or an identifiable part thereof, is transferred to another legal entity. Regulation of the transfer of undertaking does not apply to company's share purchase deals when the company's shares are acquired by a different entity. In order to evaluate whether a transfer of undertaking has been effected, one must take into account all the actual circumstances of the changes in business, e.g. the amount of assets that are transferred, whether or not the acquiring employer takes any of employees from the previous employer, whether or not customer contracts are transferred along with or without the employees who were working on these contracts. Although the Latvian law prescribes for an automatic transfer the employees can refuse to be transferred, but the current employer can dismiss them after on the basis of redundancy. The Latvian law provides that the employees cannot be dismissed due to the reasons 'associated' with the transfer of undertaking. The protection applies to both the transferred employees and the employees of the recipient. However, these restrictions do no prohibit the employer from laying off employees on the basis of economic, organisational, technological or similar measures performed at the company. The transfer of undertaking may also be triggered in the event of outsourcing the functions that have previously been covered by the employer. In these situations the outsourced service provider may be required to employ the employee of the former employer who previously performed the now outsourced function. However it should be noted that the current case law on the transfer of undertaking issues is rather underdeveloped and the Latvian courts are somewhat reluctant to establish transfers of undertaking in more complex cases than the typical transfer of a business unit to another company.
Global mobility (brief overview of common issues and visa requirements)	Citizens from EU, EEA countries and Switzerland may live and work in Latvia on the same conditions that the Latvian nationals, and no work permit is required for them. However, the nationals of these countries are required to register at the Office of Citizenship and Migration Affairs if they wish to stay in Latvia for more than 3 consecutive months (no registration is required if the person stays in Latvia for up to six months for a purpose to find a job). Nationals of countries outside of EU, EEA and Switzerland who enter the Republic of Latvia with or without a visa are not allowed to perform economic activities in an employee capacity. These foreign nationals can be employed only in cases if they have received a visa for employment and a work permit.

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	Citizens of these countries are required to acquire a visa before entering Latvia. Visas can be obtained at Latvian consular missions in foreign countries or at the consulates of other Schengen Member States, which are competent to process Schengen visa application for travelling to Latvia. The list of countries whose citizens may enter Latvia without a visa and stay in Latvia for up to 90 days within a six-month period, counting from the day of entry can be found here: http://www.pmlp.gov.lv/en/home/services/visas-and-invitations/list-countries.html.
Criteria for independent contractor status	In order to distinguish between employment relationship and status of an independent contractor, actual circumstances of the persons' engagement must be taken into account. Pursuant to the Personal Income Tax Law, it is considered that a natural person acquires income on the basis of an employment relationship if at least one of the following criteria is established: • the payer has economic dependence on the service recipient; • non-assumption of financial risk; • the integration of the person into an undertaking to which services are provided. Integration into an undertaking means existence of work or recreational areas, a duty to comply with the internal policies of the undertaking and other similar features. • existence of holidays and leaves in association with the internal procedures of the service recipient; • provision of services takes place under the management and control of the recipient, and the payer does not have possibility of using his/her own personnel and sub-contractors; • the payer is not the owner of fixed assets, material or other assets, which are used in provision of services.
Corruption, regulation and sanctions	The Latvian Criminal Law covers both corruption in the public and private sector, the corruption in the public sector being a more serious offence. The punishable offences include giving a bribe, taking a bribe, acting as an intermediary in the bribery, embezzling the bribe, trading in influence, unlawful giving and accepting of benefits (giving material values to an employee of a public authority who is not considered state authority) and commercial bribery. The criminal penalties vary depending on seriousness of the offence. The bribe-giving in high amounts (more than 50 minimum wages in Latvia) might be punishable by imprisonment for up to eight years. Coercive measures can be imposed on legal entities for offences committed by their employees and representatives in the company's interests or due to lack of supervision on the part of the companies. The coercive measure include monetary fines, confiscation of property and limitation of rights, e.g. right to participate in public procurements. The monetary fine depends on the seriousness of the offence. The maximum monetary fine for bribe-giving in high amounts is 75,000.00 minimum wages in Latvia (in 2016 – 27,750,000.00 EUR).

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Final remarks	In Latvia the employer always needs to keep in mind that in the event of an unlawful termination there is a risk that the employee would be reinstated to the position that he or she previously had. The Latvian Labour Law does not provide that employers could pay a specific amount of money in order to ensure that the employee does not return to work after the litigation. Considering this, dismissal of employees of the protected categories, such as disabled individuals, can be extremely difficult and costly, if the employer wishes to reach a mutual agreement on their termination. At the same time, there are also changes in the case law, and the courts have become more rigorous also regarding employees; therefore, despite the fact that employees are the weakest party in the employment relationship, it does not mean that courts would, a priori, judge in favour of the employee. Furthermore, in June 2016 the Supreme Court passed a rather ambiguous judgment stating that in the redundancy disputes the courts are somewhat allowed to verify whether there have been economic reasons for performing the redundancy. This is a very different approach from the previously well-established position of the Supreme Court that the courts are only entitled to verify whether redundancy has actually taken place without looking into the economic aspects of the restructuring. The said judgment of the court may add a whole new dynamic to redundancy procedures in future.

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The International Employment Guide

Malta

Prepared by Lex Mundi member firm GANADO Advocates

General remarks	Maltese Employment law is based on the contractual relationship between the employer and employee, with certain controls being imposed by statutory intervention. Some conditions of employment are unregulated and therefore parties can agree on whatever terms and conditions are acceptable to them and which are reasonable in the eyes of the judicature. The Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta (EIRA), which regulates certain conditions of employment and contracts of service, currently governs the Maltese labour law.
Employment agreement	Maltese law stipulates that a contract of employment need not be necessarily in writing and an oral agreement is valid at law. It must be said at the outset that an oral contract of employment, although valid, leaves room for misinterpretation and confusion and this may be the cause of difficulty in terms of evidential proof if a dispute relative to an oral contract of employment goes to court. Hence, although a written contract of employment is not mandatory, it is most certainly desirable since it provides certainty to both the employer and the employee. The law in fact stipulates that if the contract is not in writing, the employer has an obligation to give the employee a letter of engagement or a signed statement containing a number of minimum terms and conditions agreed upon by both parties. Moreover, employment contracts in Malta may be categorized according to the duration of the contract or term of the contract of employment, or according to the hours worked.
Terms and conditions of employment	The Information to Employees' Regulation Subsidiary Legislation 452.83, states that the following information must be included in the contract of employment: a. the name, registration number and registered place of business of the employer and a legally valid identification document number, sex and address of the employee and the place of work: Provided that in the absence of a fixed place of work it should be stated that the employee will be employed at various places together with the registered place of business: Provided further that if there is no registered place of business, the domicile of the employer is to be stated; b. the date of commencement of employment; c. the period of probation; d. normal rates of wages payable; e. the overtime rates of wages payable; f. the normal hours of work; g. the periodicity of wage payments; h. in the case of a fixed term contract of employment, the expected or agreed duration of the contract period; i. the paid holidays, and the vacation, sick and other leave to which the employee is entitled;

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	j. the conditions under which fines may be imposed by the employer; k. the title, grade, nature or category of the work for which the employee is employed; l. the notice periods to be observed by the employer and the employee should it be the case; m. the collective agreement, if any, governing the employee's conditions of work; and n. any other relevant or applicable condition of employment.
Changing terms and conditions of employment	In case where the employer would like to change the terms and conditions outlined in the contract of employment, the employee needs to agree to the changes in writing. Moreover, the EIRA provides that if a contract of service between an employer and his employer, or a collective agreement entered into between the employer and the recognized union representative, provides for any conditions of employment less favourable to employees than those specified in or under the EIRA, they shall have effect as if for those conditions less favourable to the employee there were substituted the conditions specified in or under the EIRA. Moreover, in exceptional circumstances, the employer, with the explicit consent of the employee, may provide for different conditions than those specified under the EIRA as long as such agreement is a temporary measure to avoid redundancies, and as long as it is approved by the Director responsible for employment and industrial relations, which approval needs to reviewed every four weeks.
Trade Unions and the consultation obligation	There are at present no formalised requirements for employee participation in Malta, although some employers operate share schemes as an additional remuneration incentive. However, obligations do arise with respect to consultation and the provision of information to appropriate representatives (these are usually either elected employee representatives or representatives of a recognised trade union). The obligations are: Where a collective redundancy (as defined in the Collective Redundancies (Protection of Employment) Regulations, Subsidiary Legisaltion 452.80) consultation with appropriate representatives must take place. Minimum time limits for consultation are laid down and failure to consult or comply with the time limits gives the Director of Employment and Industrial relations the right to issue a fine per employee declared redundant. Employers are required to provide certain information to appropriate representatives upon the transfer of an undertaking as defined in the Transfer of Business (Protection of Employment) Regulations, Subsidiary Legislation 452.85. Employers must consult with employees on health and safety matters. Consultation has to be with the Worker's Health and Safety Representatives as elected by the workforce or with employees directly. Under the European Works Council Directive, any undertaking or group of undertakings with at least 1,000 employees in the EU and 150 employees in

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	more than one EU state may have to set up a Works Council or a procedure for informing and consulting employees at European level. Following the European Parliament's approval of the Workers Participation Directive, Malta has implemented legislation in 2004 in respect of worker involvement in the affairs of European Companies. This provides for regular consultation of, and provision of information to, a body representing the employees of the companies that have formed the European Company, in respect of current and future business plans, production levels, management changes, collective redundancies, closures, transfers, mergers and so on. The Maltese government has also implemented the Employee Information and Consultation Regulations, Subsidiary Legislation 452.96, that oblige employers who employ 50 employees and above to have a system of information and consultation with the employee's representatives on matters which are likely to lead to substantial changes in the work organisation or contractual relations.
Data privacy and personal integrity	The collection, storage and use of information held by employers about their employees and workers (prospective, current and past) are regulated by the Data Protection Act, chapter, Chapter 450 of the Law of Malta (DPA), which implements the EU Data Protection Directive. Essentially employers, as data controllers, are under an obligation to ensure that they process personal data about their employees (whether held on manual files or on computer) in accordance with specified principles including the principles of proportionality and transparency. Employees, as data subjects, have the right to make a subject access request. This entitles them, subject to certain limited exceptions, to be told what data is held about them, to whom it is disclosed and to be provided with a copy of such personal data. Subject access requests cover personal data held in manual and electronic records such as email.
Regulations regarding parental leave or other forms of absence regulated by law	The Parent Leave Entitlement Regulations, subsidiary legislation 452.78, provide that four months of unpaid parental leave are granted to both male and female employees on the grounds of birth, adoption, fostering or legal custody of a child, until the child has attained the age of eight years. Employees are also entitled to 15 hours of paid time off in case of urgent family leave arising in relation to persons related to them up to the first degree. Subject to statutory provisions, a woman is entitled to 18 weeks' of maternity leave on full pay. If complications or illnesses arise related to pregnancy, the employee may apply for special maternity leave maternity leave. Sick leave entitlement and other special leave entitlements are often regulated according to the sector by a Wage Regulation Order, however, the Minimum Special Leave Entitlement Regulations, Subsidiary Legislation 452.101 of the Laws of Malta apply by default in such absence. It provides that an employee is entitled to sick leave equivalent in hours of two working weeks per annum. It further provides that every employee shall on employment, be entitled to be granted by his employer: (a) one working day of bereavement leave; (b) one working day of birth leave, (c) two working days marriage leave; (d) up to one year of injury leave; (e) jury service leave for as long as necessary.
Termination of employment	An employer wishing to terminate the employment relationship must be careful to comply with both the statutory and contractual requirements with regard to reasons for and procedures leading to dismissal.

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	Statute lays down a minimum period of notice that will apply where the contract of employment does not make any provision for notice. Notice periods only apply in cases of redundancy or resignation. There are no notice periods for termination for good and sufficient cause (e.g. gross misconduct). The statutory minimum period of notice depends on the length of time the employee has been in employment with a particular employer. The notice cannot however exceed a maximum of 12 weeks. These notice periods apply to all categories of employees irrespective of seniority. If an employer prefers that an employee does not work his or her notice period, the general practice is for employers to pay salary in lieu of the notice period. Although the employer is always free to terminate the employment, it may only do so for a good and sufficient cause or in cases of redundancy. Even so, the employee may always contest the redundancy or the actual termination in the Industrial Tribunal. In cases where the employee is engaged on a fixed-term contract, the law stipulates that if either party wishes to terminate the employment before the time stipulated at law, the defaulting party has to pay to the other an amount which is equal to half the wages that the employee would have earned in the period remaining. Also, according to statute, fixed-term contracts may not be terminated on the basis of redundancy. Generally, it is accepted that theft, misconduct, insubordination are a good and sufficient cause for termination. As with most common law jurisdictions, the employer must show that he has a good reason for the dismissal and that a fair and reasonable procedure has been followed when implementing the dismissal.
Sanctions for wrongful termination	There is no minimum or maximum cap on the award that the tribunals may give. The most common type of tribunal award is financial compensation although if the employee was not in a position of trust, he may ask for, and be granted, reinstatement.
Whistleblower protection	The Protection of the Whistleblower Act, Chapter 527 of the laws of Malta is the specific legislation protecting those employees who make a disclosure to the proper public authority regarding any violations, illegalities or corrupt practices being committed by the employer. Protection is afforded to the whistleblower if the disclosure of information is done in good faith and not for personal gain, if the whistleblower reasonably believes such information to be true and the information shows the conduct of improper practice conducted by the employer, another employee or persons acting in his name and interests. The granted protection is against any detrimental action and against revealing the whistleblower's identity, which can only be revealed with his/her written consent. An anonymous disclosure is not given protection but it is nonetheless taken into consideration when deciding whether there is improper practice or not. The EIRA also grants protection to whistleblowers in relation to termination of employment. In fact, an employer cannot use as ground for good and sufficient cause the fact that the employee has disclosed information to a public authority regarding alleged illegal or corrupt practices being committed by such employer or by persons acting in his name and interests.

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Non-Competition Laws	It is quite common for employers in Malta and elsewhere to include clauses in contracts of employment that seek to impose a restriction on employees which attempt to restrict employees from working with the competition of the employer following termination of the employee's contract of employment. It must be said that the Courts of Malta have consistently interpreted such clauses restrictively, on the basis of public policy in that the courts felt time and time again that the liberty of employees to find suitable employment should supersede such restrictive covenants in employment contracts. Such clauses have in fact been seen as contracts in restraint of trade and therefore susceptible of close examination, as well as being felt to be contracts that unreasonably restrict employees from seeking to better themselves. Having stated the above, from the court decisions on the matter that were decided from 2006 to date, it still would appear to be possible for an employer to agree with an employee that in the event of a termination of contract by resignation without cause, there shall remain in effect certain reasonable restrictions both in time and in space, on the employee preventing the said employee from competing directly with the employer if the employer has a legitimate interest to protect his property (for example confidential information or trade secrets). The Maltese courts have emphasized that the limitations of time and market have to be reasonable within a small area such as Malta as an ex-employee cannot be forced to leave his country in order to pursue his vocation. Recent jurisprudence on non-compete clauses, has in fact held enforceable a clause which prohibits the employee from soliciting clients of the employer with whom he had contact. It follows from this that clauses enforcing non-solicitation of customers especially those with whom the ex employee had direct contact with, whether or not backed up by a penalty or pre-liquidated damages provisions would be easier to enforce. It is also worth noting that two recent judgments of the Maltese courts have also affirmed that an employee owes fiduciary obligations to his/her employer in relation to confidential information. These cases have confirmed that the job title of the employee is irrelevant to determine whether he owes a fiduciary duty to the employer, but one has to analyze whether he received confidential information. In these two cases, the Maltese courts found the employees liable for damages when confidential information was used to solicit clients and suppliers of the employers to a new employer or business venture.
Discrimination and equal employment opportunity	The Constitution of Malta and other Maltese employment statutes protect employees from discrimination on the grounds of sex, religion, race, disability, age and sexual orientation. Discrimination against part-timers and persons employed in fixed-term contracts is also regulated. Discrimination is unlawful in the stages of recruitment, the duration of employment and in termination. Chapter Four of the Constitution of Malta protects individuals from discrimination against various aspects of life, including work life. European Union provisions were also inserted in the EIRA and other statutory instruments were introduced to expand upon the existing principles. For instance, the Equality for Men and Women Act , Chapter 456 of the Laws of Malta, focuses on sexual discrimination and the Equal Treatment in Employment Regulations, Subsidiary Legislation 452.95, focuses on the principle of equal treatment in relation to religion and religious belief; racial or ethnic origin; disability; age and sexual orientation. The Protection of Maternity (Employment) Regulations 452.91, also protects female employees from

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	discrimination, such as pregnancy as a cause for termination, during the course of employment.
Transfer of business and outsourcing	Upon the transfer of an undertaking, the contracts of employment of the transferor's employees are automatically transferred from the transferor to the transferee unless some employees can genuinely be made redundant. Any dismissal connected with such transfer is generally considered to be unfair and gives rise to an entitlement to claim compensation. Changes to terms and conditions of employment by reason of the transfer are voidable, even if agreed to by the employees. The EIRA also provides that the transferor and the transferee shall inform the employees' representatives of their respective employees affected by the transfer of the proposed date of transfer; the reasons for the transfer; the legal, economic and social implications of the transfer for the employees and the measures envisaged in relation to the employees. Statute provides that such information is to be made in writing and delivered to the employees' representatives at least fifteen working days before the transfer is carried out or before the employees are directly affected by the transfer as regards their conditions of employment, whichever is the earliest. In the event that the conditions of employment of the affected employees will change as a consequence of the transfer, consultations between the transferor, the transferee and the employees' representatives shall begin within seven working days from the day on which the employees' representatives have been notified of the intended transfer. Such consultations shall cover the impact of the transfer on the employees' conditions of employment. Following the transfer, the transferee is to continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the agreement or the entry into force or application of another collective agreement.
Global mobility (brief overview of common issues and visa requirements)	The freedom of movement principles in relation to citizens of the European Union ("EU") are respected in Malta, this means that EU nationals are exempt from applying for an employment permit to work in Malta. However, it is important to note that the employer is still obliged to register the new employee with the Employment Training Corporation. EU nationals residing in Malta for more than three months need to apply for a residence permit. If a non-EU citizen wishes to be employed in Malta, he/she must be in possession of a single permit. A single permit allows a third country national to work and reside in Malta. The fee for single-permit applications is €280.50. Based on experience, the process to acquire the single permit usually takes three months .
Criteria for independent contractor status	Since 2012, in accordance with the Employment Status National Standard Order, Subsidiary Legislation 452.108, a rigid legal test is applied to determine whether a worker is an employee. According to this legal test, an individual will be considered an employee for all intents and purposes at law, if at least five (5) of the following criteria are satisfied in relation to the person performing the work: (a) he depends on one single person for whom the service is provided for at least 75% of his income over a period of one year; (b) he depends on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out; (c) he performs the work using equipment, tools or materials provided by the

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	person for whom the service is provided; (d) he is subject to a working time schedule or minimum work periods established by the person for whom the service is provided; (e) he cannot sub-contract his work to other individuals to substitute himself when carrying out work; (f) he is integrated in the structure of the production process, the work organisation or the company's or other organization's hierarchy; (g) the person's activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and (h) he carries out similar tasks to existing employees, or, in the case when work is outsourced, he performs tasks similar to those formerly undertaken by employees.
Corruption, regulation and sanctions	There are no specific rules governing the corruption of employees and reference must be made to the general rules on bribery found in the Maltese criminal code.
Final remarks	N/A

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The International Employment Guide

Nicaragua

Prepared by Lex Mundi member firm Alvarado y Asociados

General remarks	The main labor related law, is Law 185 “Labor Code”, Published on the Gazette, Official Newspaper, No. 205 of October 30th, 1996. The Labor Code establishes the rules that govern labor relationships. Cases not covered by the Labor Code are decided based on the General Labor Principles, jurisprudence, doctrine, international treaties subscribed by Nicaragua, customs and general principles of law. The Labor Department (Ministerio de Trabajo) (hereinafter MITRAB) and Labor Court (Juzgados Laborales) are the legal entities in charge of enforcing the law. Additionally, Law No. 625 “Law of minimum wage”. Other special regulations may apply regarding regulations or acquired rights, ministerial agreements that aims to regulate specific matters and so on, which you will find accross our following answers.. The minimum guaranties of the Nicaraguan labor rights are privileged with constitutional protection and include the right to: 1. Equal salary for equal work in the same conditions without discrimination on political, religious, social, gender reasons or any other kind; 2. 8-hour workday, weekly rest, vacations, remuneration for national holidays and Christmas bonus in accordance with the law; and 3. Social security for full protection and livelihoods in cases of disability, old age, occupational hazards, sickness and maternity; and their families in cases of death, in the form and manner prescribed by the Law.
Employment agreement	The Labor Code is mandatory for all natural or legal person established in Nicaragua. Workers cannot waive to their rights in favor. Spanish is the default language to use in all labor relations. In case of those carried out the Caribbean Coast of Nicaragua, the languages of its communities will be used. It is mandatory for employers to hire at least 90% of Nicaraguan employees; except if the Ministry of Labor authorizes the employers to hire more foreign employees for technical reasons. The written employment contract in Nicaragua must contain at least:

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	a) Place and date; b) Identity and address of the parties and, if applicable, the name and surname of the legal representative of the employing entity; c) Description of work and place or places to be made; d) Daily and weekly hours and whether it is daytime, mixed or night; e) Indication of whether the contract is for a fixed or indefinite duration; f) The amount of remuneration, , period and place of payment, and if it is agreed per unit time per unit of work by task or piecework, commission or participation in receipts from sales or profits and any salary supplement and the method for calculating the remuneration; g) signatures of the grantors or their legal representative, or print or digital signature for those who do not know or can not sign, in the presence of two witnesses.
Terms and conditions of employment	The Labor Code establishes that only certain labor contracts can be made verbally. Verbal labour contracts can be made only for the following types of work: • Fieldwork. • Housekeeping work. • Temporary or occasional work that does not exceed of ten days' duration. In all other cases labour agreements must be written. The main terms to be included in a labour agreement, among others, are as follows: Date and place of the agreement. • Identity and domicile of the parties. • Description of the work and the place of performance. • The duration of work (for the day, and for the week). • Whether the work is completed in the daytime or the night time • (or a mixture of the two). • Whether it is a fixed-term or indefinite period agreement. • Compensation payable, and the form and place of payment. • Signatures of the parties. Collective agreements can apply, provided that they are properly issued and approved by the Labour Ministry. There are certain rights implied in a labour relationship even though they are not expressly included in the labour agreement, such as (among others): • The right of employees to earn wages no less than the minimum. • The right to labour benefits such as severance, vacations, 13th month payment, and any additional benefits granted by employers to employees deemed as acquired labour rights under the applicable law.

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Changing terms and conditions of employment	There is not an express regulation for modifications in a contract, however based on the rights of a employee an existing contract of employment can be varied only with the agreement of both parties. Changes may be agreed on an individual basis or through a collective agreement (ie: agreement between employer and employee or their representatives (trade unions or workforce representatives)). Every modification must be consulted with the employee or his or her representative(s) and explain and discuss the reasons for the change. Under any circumstances, the modifications can represent a decrease in working conditions, salary or some labor law.
Trade Unions and the consultation obligation	Whenever by means and for lawful purposes, unions are entitled to: a) Write freely their statutes and regulations; b) elect their representatives; c) To elect its organizational structure, administration and activities; d) To formulate their programs. Labor unions shall be composed of no fewer than twenty members and employers with no less than five. Strikes are allowed if employees meet certain requirements, including a preventive attempt of mediation in the Ministry of Labor. The directors of a union enjoy union immunity. To be dismissed, the law requires employers to demonstrate a rightful cause and obtain the approval of the MITRAB. Those employers who violate this disposition can be forced to reinstate the worker. It is the obligation of trade unions to: a) Update minute books, accounting and registration of members, duly stamped by the Ministry of Labour; b) Authorize the respective minutes before the end of each session; c) Inform the Ministry of Labour within fifteen days prior to the changes in the Board, the appointment of union representatives and reforms of the statutes; d) Deposit in a bank the funds of the organization; e) Appoint in its Board of Directors only persons over sixteen years old. The causes for dissolution of unions are: a) The expiry of the term established in the constitution or the extension agreed by the general assembly; b) Termination of the company; in corresponding cases, but not in cases of transformation or fusion thereof; c) The express will of at least two thirds of its members and an agreement with the formalities established in the statutes; and for any reason to leave the number of members below the legal minimum. However, the dissolution of a union shall continue the relationship of rights and obligations between the employer and workers.

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Data privacy and personal integrity	The Political Constitution of Nicaragua provides certain general rights concerning privacy and data collection. The main specific law on this matter is Law No. 787 "Personal Data Protection Law" (Law 787) and its regulations. Law 842 also establishes certain provisions relating to customers' data protection, and certain laws enacted under the Political Constitutional of Nicaragua establish specific rights and forms of recourse (the "**habeas data**" recourse) which affected parties can exercise in connection with these matters.
Regulations regarding parental leave or other forms of absence regulated by law	The Labor Code stipulates that the Employee has license or permission in the following cases: a) For a death in the family (parent, child or husband/wife), the employee is entitle to receive his/her normal wage for 3 consecutive days; b) Marriage, receiving his/her normal wage for 5 consecutive days; c) When an employee's family has an illness that require the presence of the employee, he/she will receive a 50% of his/her wage during 6 consecutive days, unless the employer consent to pay 100% of his/her wage. d) To take his/her child or ill family relative to a medical appointment; in this case the employee has permission during the time of the medical appointment without any deductions on his/her wage. If the employee works in days of license or permission mentioned in literal a. and b. he/she has right to receive 200% of the normal rate of pay for that/those day(s). Additionally the Internal Regulation of work or company manual generally establishes other types of licenses or permissions with wage enjoyment. The Employee should agree with the Employer the type of license or permission that it requires. For example, personal matters and others agreed with the employer. If this permission or license is granted (by agreement) without affectation of the wage, the employer cannot discount those days of permission or license from vacation or liquidation.
Termination of employment	The individual contract or employment relationship ends: a) By expiry of the agreed period or completion of the work or service which gave rise to the contract; b) Death or permanent disability of the employer; or death or permanent disability of the worker; c) conviction or custodial worker penalty; d) definitive cessation of industry, trade or service based on economic reasons, legally founded and duly verified by the Ministry of Labour; e) final judicial decision which result in the ultimate demise of the company; f) termination of the contract in accordance with the law; g) worker retirement; h) force majeure having as a result the closure of the company. Upon termination or expiration of the contract of the employee, the employer must pay the employee the full sum of the remaining paid leave she/he has not taken, including vacation time, 13th month and any other pending labor payment.

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	Additionally, the Employer must pay the equivalent to one to five months pay when the contract is indefinite and depending on duration of employment and the circumstances of termination of employment. If termination is made without a justified cause (release) or by resignation or waiver of employee submitting a written notice at least 15 days in advance, it is necessary for the employer to pay one month for each of the first three years of employment and twenty days of salary for each year worked as of the fourth month with a maximum of five months of salary. In no event, shall it be less than a month. In the case of dismissal or termination of a labor relationship as result of having the employee exercise his or her labor related rights, then the employee that is not a trusted employee (trabajador de confianza) can request reinstatement before the judge, and if granted and if the employer does not comply with this order, then the employer must pay an additional amount of 100% more of the amount paid at the time of termination. Additionally, the employer must pay the employee for the time that the employee did not work until the time his/her reinstatement was ordered by the Ministry of labor.
Sanctions for wrongful termination	In the event of termination with justified cause, which has to be approved by the Ministry of Labor (MITRAB), prior to the actual termination, the employer must pay the amount equal to vacation and thirteenth month, but no additional compensation based on actual time worked. Regarding the trusted employee (trabajador de confianza) reinstatement is not applicable, but the employer must pay an indemnification equivalent to two to six months of salary, as long as the trusted employee (such as managers, senior employees) has over a year of employment at the time of the termination.
Whistleblower protection	There is not specific protection for whistleblowers as such in our labor regulations, but every worker has acquired rights that protects him against any wrongful termination, and misconducts from employers. Our Ministry of Labor has even a direct telephone law in which you can make anonymous complaints or simply report any kind of misconduct from any workplace.
Non-Competition Laws	The rules regarding such matter are established by the Law Number 601 “Law to Promote Competition published in the Gazette, Official Newspaper, Number 206 dated October 24th, 2006, and its Regulation. In general this law stipulates in its article 17 the general prohibition of anticompetitive practices, prohibiting all behavior or acts, agreements, contracts between competitors economic agents and not competitors to limit or restrict the competition or impede the access or eliminate from the market any economic agent in the terms stipulated by such law. The main competition authority in Nicaragua is the National Institute for the Promotion of Competition (Instituto Nacional de Promoción de la Competencia) (Procompetencia) (www.procompetencianic.org), which provides guidance on the competition law rules. However, given the recent development of competition law, competition-related matters concerning the regulated sectors should be resolved by the corresponding regulatory entities, and Procompetencia's scope for providing guidance in such sectors is limited.

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Discrimination and equal employment opportunity	As we stated before, Equal salary for equal work in the same conditions without discrimination on political, religious, social, gender reasons or any other kind; is guaranteed by the Political Constitution. In the same way is established in our Labor Code as part of the Fundamental Principles for workers.
Transfer of business and outsourcing	For the last few years some companies in Nicaragua, have been using outsourcing or subcontracting, as a strategy to improve the efficiency and productivity of their business. As a result of the constant use of this contractual mechanism by local companies, a bill was submitted in the National Assembly in 2009 to regulate outsourcing, however, to date such bill has not been approved. In spite of this commercial practice, to date, outsourcing is not specifically regulated or prohibited in Nicaragua, but there are certain regulations provided for in the Labor Code and related laws that must be complied with since they are related with the common practice of outsourcing in Nicaragua. To date, the commercial practice of using outsourcing or subcontracting has been used without major complications by the parties involved as long as the employee or worker receives all applicable labor compensations as provided for by the law. The problems arise when the outsourcing company (Employer) does not comply with applicable legal obligations as provided in the law. This is the point where discussions begin as to whether or not, the Contracting Party is responsible before the employee or worker subcontracted by the Contracting Party in the event of noncompliance of corresponding labor obligations. The private sector hiring the services of the Outsourcing Company sustain that the Contracting Party should not be responsible before the Outsourcing Company´s employees, since officially this company is the Employer and has the formal labor relationship with the outsourced employees, and should be legally responsible. However, current labor legislation in Nicaragua, expressly provides a shared responsibility among the Outsourcing Company and Contracting Party to comply with obligations in safety and security regulations as well as social security as subsequently explained. Some of the pertaining regulations can be found in labor hygiene and security, Law No. 618 “Ley General de Higiene y Seguridad del Trabajo” (General Law for Labor Safety and Hygiene) which provides as obligations for the employer who uses the services of contracting and subcontracting (subcontracting Company) the following : • Both have to be registered in the Social Security Entity (Instituto Nicaragüense de Seguridad Social (INSS), and they should comply all applicable obligations with this entity; • Both must comply with applicable legal obligations in preventing labor risks.

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	In the event of noncompliance of above mentioned obligations, the Contracting Party of the outsourcing services will be jointly liable for damages caused to the employees or workers and other obligations that such contracting party or subcontracting party have with their employees or workers as per the Labor Code or the Social Security Law. If we review article 81 of the Law 815 “Código Procesal del Trabajo y de la Seguridad Social de Nicaragua” (Labor Procedure and Social Security Code) published in the Official Gazetter No. 229 dated November 29, 2012, it is established that in the event of filing a claim in the case of a outsourced job, the plaintiff could request from the Judicial Authority the appearance of the company main user of such service to determine in the judicial ruling if there is a subsidiary responsibility as provided for in the applicable law. However, it seems this article has been issued as lege ferenda since to date there is no specific law that regulates this matter.
Global mobility (brief overview of common issues and visa requirements)	For employees working abroad, the general principle is that they are subject to the applicable law of the jurisdiction where they are working. However, there are some provisions in the Labour Code which prohibit the execution of labour contracts with Nicaraguan employees in Nicaragua, which provide for those Nicaraguan employees to render services or perform tasks abroad without the prior approval of the Labour Ministry, which should dictate the necessary conditions and requirements for these cases. Please note that the application of this provision in practice is still unclear. Foreign employees must have either a temporary work permit or a working residency card to be able to work in Nicaragua. Timing and procedures can vary on a case-by-case basis; but in general it takes between two to six months for permits to be issued. The following documents (amongst others) will need to be supplied to the Immigration Authority and the Labour Authority, as required in the application: • Birth and health certificates. • Criminal record. • Passport (with no less than six months' validity). • Labour contract (for review and approval). The main governmental authorities responsible for issuing permits are the Immigration Authority and the Labour Authority.
Criteria for independent contractor status	Independent contractor status is know as Professional Services in Nicaragua. This type of independent contractor status is design for professionals who are self employed and are characterize for no having any labor relationship with any employer. This type of persons dont have an specific The major advantage is that this contractor doesnt receive any tipe of fringe benefits from the employer, so the contract is much cheaper for the employer, with the employer having to deduct 10% for tax, so that the professional pays some income tax to the authorities. There are several issues with this situation in Nicaragua since most companies tries to mask a labor relationship with a professional service from

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	particulars so the authorities are really severe in applying different means to confirm the nature of the relationship. There is not an specific regulation for this type of professional but commonly authorities try to identify it by determine the following: • If the worker supplies his or her own equipment, materials and tools • If all necessary materials are not supplied by the employer • If the worker can be discharged at anytime and can choose whether or not to come to work without fear of losing employment • If the worker control the hours of employment thus indicating they are acting as an independent contractor • Whether the work is temporary or permanent
Corruption, regulation and sanctions	Public sector corruption, including bribery of public officials, remains a major challenge for Nicaragua. The Penal Code (amended 2007/641) and the Special Law on Bribery and Crimes Against International Trade and Foreign Investment (2006/581) define corruption offenses and establish sanctions. Offering or accepting a bribe is a criminal act punishable by a fine and a minimum three years in prison. The anticorruption provisions of CAFTA-DR require each participating government to ensure under its domestic law that bribery in matters affecting trade and investment is treated as a criminal offense or subject to comparable penalties.
Final remarks	Our previous answer are a very general overview; if specific assistance is required, please provide us with applicable information to be able to render our legal opinion accordingly.

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The International Employment Guide

Norway

Prepared by Lex Mundi member firm Advokatfirmaet Thommessen AS

General remarks	The Norwegian Working Environment Act governs most aspects of Norwegian employments. In addition, the Norwegian labor market is to a large extent self-regulated and the influence of collective agreements is significant.
Employment agreement	The employer must provide a written employment contract within one month of commencement of the employment. If the employment has an expected duration of less than one month, a written contract must be entered into immediately. The employment contract must include specific information on material provisions of the employment such as salary and benefits, working hours and overtime compensation, holiday, notice periods etc. Subsequent changes to such terms and conditions must be included in the employment contract . The main rule is that the employment is entered into for an indefinite period of time. The first six months can be made a probationary period. Fixed-term contracts is strictly regulated in Norway and is generally only permitted to replace absent employees or if there is a temporary need for the labor. Temporary employees become permanent employees after 3 or 4 years (depending on the legal basis for the fixed-term contract) on fixed-term contracts.
Terms and conditions of employment	**Minimum wage:** There is no general minimum wage under Norwegian law. Exceptions do however apply when determined by: 1. a collective bargaining agreement binding on the employer; 2. in industries where a collective bargaining agreement has been made generally applicable (e.g. construction work, cleaning, ship yards, electro work, agriculture, fishing industry etc); and 3. As a requirement for work permits: The applicable minimum wage will vary with the collective agreements and will be adjusted annually. **Overtime compensation:** By law, the overtime compensation is 40% of the regular hourly rate. Collective agreements will generally determine a higher overtime rate, ranging from 50% to 150% depending on number of hours worked and the placing of such overtime work (e.g. night, weekends etc). **Working hours:** By law, the normal working hours must not exceed 9 hours per day and 40 hours per week. Collective agreements determine the normal working hours to

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	7.5 hours per day and 37.5 hours per week, and this is also the practical main rule for companies not bound by collective agreements. There are strict limitations on the number of overtime hours permitted on a daily, weekly, monthly and annual basis. **Vacation:** By law, employees are entitled to 4 weeks and 1 day of annual leave. Collective agreements determine the employees' right to 5 weeks annual leave, and this is also the practical main rule for companies not bound by collective agreements. Employees above the age of 60 are entitled to an additional week of annual leave.
Changing terms and conditions of employment	The mechanisms for changing terms and conditions of employment include unilateral decision in accordance with the employer's management prerogative, employee consent, through a collective bargaining agreement, by law and by termination of employment in combination with an offer of employment on revised terms.
Trade Unions and the consultation obligation	Employers bound by collective agreements are generally obliged to inform and consult with the local union representatives before making decisions. Employers who are not bound by collective agreements have similar obligations in certain situations, e.g. if the undertaking has more than 50 employees or if required by law in e.g. in connection with collective redundancies (more than 10 employees being made redundant), implementation of control measures and transfers of undertakings. There is no general requirement that the consultations result in an agreement, and it is the employer's prerogative to make the final decision in the matter.
Data privacy and personal integrity	Processing of personal data must comply with statutory regulations, implementing the relevant EU legislation on the matter. Generally, the subject's consent is required for processing, however and employee's consent is not considered required for the employer to process personal data for the purposes of administrating the employment relationship. The employee is nevertheless entitled to information about the processing. Restrictions will also apply to transfer of personal data outside the EU/EEA and notification to the Norwegian Data Protection Authority may be required.
Regulations regarding parental leave or other forms of absence regulated by law	**Parental leave:** The Norwegian rules on parental leave are generally quite generous and include periods specifically reserved for the mother and father respectively (10 weeks each). Parents are entitled to 49 weeks of paid parental leave with a parental leave pay of 100% and 59 weeks of paid parental leave with a parental leave pay of 80%. For adoption, the parental leave periods are 46 and 56 weeks respectively. Parental leave pay is capped at 6 times the National Insurance Basic Amount and it is quite common for employers to cover the difference between the employee's full salary and the parental leave pay. Parents are also entitled to 12 months each of unpaid leave to be taken immediately after the paid parental leave.

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	Nursing mothers are entitled to paid time off to breastfeed and parents are also entitled to a number of days of paid leave each year to care for sick children under the age of 12. The number of days is 10 days per year for one child, and 15 days per year if the employee has two or more children in his/her care. Additional days are granted for chronically ill children. **Sick leave:** Employees are entitled to sick pay if they are sick. The employer covers the first 16 days after the which the National Insurance will cover the sick pay. Sick pay is capped at 6 times the National Insurance Basic Amount and it is quite common for employers to cover the difference between the employee's full salary and the sick pay. Employees can receive sick pay for up to 52 weeks. **Other leaves of absence:** The employee is also entitled to unpaid leave to care for close relatives, studies and military service. Collective agreements also tend to include additional provisions on paid and unpaid leave of absence in connection with weddings, funerals, moving etc.
Termination of employment	Termination of employment by the employer is strictly regulated by law and adherence to both material and procedural requirements is essential. **Valid cause for termination:** A termination initiated by the employer must be objectively justified in reasons relating to the employer or the employee; this is referred to as the *valid* cause for termination. Reasons relating to the employer will typically include redundancy situations, whereas reasons relating to the employee typically includes performance and conduct issues. The employer must be able to document the reason for the termination, and in the event of a redundancy, the employer must document that there are no vacant positions to offer and that the selection of the redundant employee(s) has been based on fair criteria. If the employer is bound by a collective agreement, the selection must primarily be based on seniority (last in, first out). Employers not bound by collective agreements have more freedom to determine the selection criteria, but these will typically include seniority, qualifications and social aspects. **Procedural requirements:** If the employer is bound by a collective agreement, consultations with the local union representatives will be required before initiating a redundancy process. Consultations are in all events required if terminating more than 10 employees. In addition, each potentially redundant employee must be invited to a discussion meeting before the employer makes its decision. **Notice period and severance:** By law, notice periods range from 1 to 6 months depending on the employee's tenure and age. In practice, most employees have a contractual 3 months' notice period. The employee is entitled and obliged to work during the notice period and there is no pay in lieu of notice. There is no statutory right to severance pay.

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Sanctions for wrongful termination	If the courts find that the employee has been wrongfully terminated, he/she would be entitled to: • reinstatement; • damages for economic loss, which would include suffered economic loss and assumed suffered future economic loss capped at 2 years' salary; and • damages for non-economic loss which will reflect the offence caused. Employees contesting the validity of a termination are entitled to remain in the position during the dispute, which means a right to work and receive salary until the dispute is settled.
Whistleblower protection	By law, employees are entitled to notify concerning censurable conditions in a company (*whistleblowing*), and the employer has, under the circumstances and obligation to facilitate such notification. Employees who have notified of censurable conditions in line with the statutory requirements, or who make it known that such right will be invoked, are protected against retaliation from the employer. Employees who have been subject to unlawful retaliation are entitled to compensation determined by the courts.
Non-Competition Laws	Pursuant to the general loyalty principle which applies to Norwegian employments, the employee is obliged to remain loyal to the employer during the employment and refrain from activities which may conflict the employer's interests. Agreements concerning non-competition and/or non-solicitation obligations post-termination are permissible, but must comply with specific requirements to be valid and enforceable. Generally, non-competition obligations can only be enforced towards employees with knowledge of confidential information which has a competitive value to the company, the employee is entitled to compensation during the restrictive period, and the period may not exceed 12 months from the end of the notice period. The employer must also actively invoke the restrictive covenants at the time of termination of employment.
Discrimination and equal employment opportunity	The Norwegian Discrimination Acts prohibit direct and indirect discrimination based on age, ethnicity, disability, gender identification, gender expression, sexual orientation, religion and other beliefs, national origin, skin color, language, part-time employment and temporary employment. The prohibition applies to all aspects of the employment, including recruitment, terms and conditions of employment (e.g. salary), promotion and termination of employment. Discrimination is permitted if it has a justifiable cause, is necessary for achievement of the purpose and is not unreasonable intrusive. Employees who have been unlawfully discriminated against may claim compensation.
Transfer of business and outsourcing	The Norwegian Working Environment Act implements the EU directive on transfers of undertakings (2001/23/EC). The transfer of undertaking legislation applies where a business, or part of a business, is transferred to another employer. Consequently, share sales are excluded. To assess whether a

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	transfer constitutes a transfer of undertaking the all circumstances at hand must be analyzed, including the nature of the business, which tangible and intangible assets are transferred, whether the new employer assumes a not insubstantial part of the employees, the degree of similarity between the businesses, i.e. whether the transferred business has retained its identity. If the transfer constitutes a transfer of undertaking, employees transfer automatically on unchanged terms and conditions. Employees may object to the transfer and in certain circumstances they may have a right to elect to remain with the transferor. The transfer as such is not a valid cause for termination. Collective agreements transfer unless the transferee declares itself not bound by the collective agreements. Collective pension schemes transfer, but the transferee may elect to include the transferred employees in the transferee's existing pension schemes.
Global mobility (brief overview of common issues and visa requirements)	Citizens from EU/EEA may work in Norway without a work permit. Non-EU/EEA citizens will generally require a work permit to work in Norway, and there are different permits depending on the employment and the employee's skills. Certain residence permits also entitles the holder to work. A work permit must be granted before the employee can commence work (with some exceptions) and some work permits are limited to specific positions which means that the employee's mobility is limited. Citizens from certain nations must also obtain a visa before coming to Norway. The Norwegian Directorate for Immigration has comprehensive information about work permits and the application process which can be adjusted for the relevant country of origin. We refer to the official website for up to date information: https://www.udi.no/en/ Employer's who unlawfully employs an individual without a valid residence/work permit may be liable for fines and imprisonment.
Criteria for independent contractor status	The following circumstances are generally relevant for determining independent contractor status vs. employee: • The nature of the work (specific and time-limited tasks vs. continuous work); • Exclusivity (contractors may generally work for others whereas employees are generally prevented from performing similar work for others); • Instruction and control (contractors are generally not subject to the employer's management, instructions and control, whereas the opposite would be the case for an employee); • Organization and personal performance (the contractor will generally not be dependent on the employer's organization to deliver the services and will generally not have a personal obligation to perform the services); • ownership to machinery and equipment (the contractor will generally provide its own machinery and equipment for the delivery of the services); • Fee structure and tax/VAT handling. • Risk of the result (the contractor will typically carry the risk for the result of the services, whereas the employer carries the risk for the result of the employee's work)

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	• Freedom to chose efforts required, working hours, place of work and method for performance. The parties' expressed or implied intentions will only be relevant to a certain degree and the courts will determine the de facto nature of the relationship between the parties based on the factual circumstances of each case.
Corruption, regulation and sanctions	The Norwegian Penal Code prohibits • Active corruption: giving or offering an undue advantage for performance in a position, madate or services; • Passive corruption: requesting, receiving or accepting an offer of undue advantages for performance in a position, madate or services; • Trading in influence: including giving or offering a third party an undue advantage and the third party's request, receipt or accept of such offer of an undue advantage. The rules includes both public servants and private companies, positions/mandate or services abroad and contribution to corruption. The corruption is considered gross if it a) is conducted by a public servant or others in positions of particular trust, b) implies, or may imply, a significant economic gain, c) implies risk of significant economic or other damage and d) implies registration of incorrect financial information or drafting of incorrect financial documentation and annual accounts. The penalties include fines and imprisonment up to 10 years depending on the severity of the offence.
Final remarks	Employees who are made redundant have a preferential right to re-employment for a period of 12 months after expiry of the employment. The right requires that the employee has been employed for at least 12 months during the last two years prior to the termination and only applies to positions which the employee is qualified for. Similar rights also applies to employees who have objected to a transfer of undertaking.

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Non-Competition Global Practice Guide

Norway

Prepared by Lex Mundi member firm Advokatfirmaet Thommessen AS

Does your state or country recognize and/or enforce restrictive covenants against employees?

During the employment, employees are bound by the general duty of loyalty towards the employer, which entails an obligation to promote the interests of the employer and refrain from activities which may conflict with the interests of the employer (e.g. competitive activities).

Norwegian law recognizes and enforces restrictive covenants post-termination of employment. Restrictive covenants are regulated by the Norwegian Working Environment Act and adherence to the provisions are required for the restrictive covenants to be valid and enforceable.

Although there is no regulation of agreements on non-solicitation of employees between the employer and the employee, such agreements are prohibited between companies, save for a period of up to six months in connection with negotiations of and completion of a transfer of business.

What are enforceable protectable business interests that courts will protect?

A: Non-competition obligations

The employer must substantiate that it has a "particular need" for protection against competitive actions from the employee. The protected interests are the employer's business secrets, knowhow and other confidential information, and the employer must demonstrate that the employee, through his/her employment and or length of service, has sufficient knowledge of such protected information to justify a need for the employer for protection.

B: Non-solicitation of customers

Norwegian law allows restrictions on contacting of existing customers, which the employee has been responsible for or has had contact with during the last 12 months of the employment. Other restrictions may not be imposed.

What are considered reasonable restrictions as to geography, duration and scope of activity?

Norwegian law permits restrictions on commencement of employment with another employer, as well as starting running and participating in a business.

Restrictions may only be enforced within the area of business which the employee has worked and within the geographical area which the employee has worked. By law, the duration of the restrictive covenants is limited to 12 months from the expiry of the notice period.

For obligations on non-solicitation of customers, only active contacting of existing customers which the employee has been in contact with or has been responsible for is permitted.

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Can a customer-specific restriction substitute for a geographic restriction?

The fundamental requirement of the employer's particular need for protection would apply also to customer specific restrictions, and geographical scope would be one of the relevant aspects to determine the extent of the obligation. Please also note the limitations which apply to non-solicitation of customer agreements.

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

Yes, the courts will revise a restrictive covenant to make it "reasonable". However, if consideration is not provided, or the agreement is not in writing, the courts will consider the restrictive covenant void.

Will the court recognize a choice-of-law provision in a restrictive covenant?

No, it is likely that the courts would disregard choice of law provisions in restrictive covenants.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

There is no general exemption of classes of employees against whom restrictive covenants cannot be enforced. However, the statutory requirement which entails that the employer must substantiate a particular need for protection, will naturally exclude enforcement against employees who have not had access to confidential information. Similarly, obligations on non-solicitation of customers cannot be enforced against employees who do not have customer responsibility/relations.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

Compensation is a requirement for the non-competition obligation to be valid and enforceable.
The minimum compensation level is determined by law and equals the total of:

100% of the remuneration up to 8 times the National Insurance Basic Amount; and 70% of the remuneration between 8 and 12 times the National Insurance Basic Amount.

The consideration is based on all cash compensation (incl. base salary, overtime compensation, bonus, holiday pay etc, but excluding expense coverage) paid to the employee during the last 12 months. The National Insurance Basic Amount is adjusted with effect from 1 May each year, and we refer to the websites of the Norwegian National Insurance for up-to-date amounts:
https://www.nav.no/no/NAV+og+samfunn/Kontakt+NAV/Utbetalinger/Grunnbelopet+i+folketrygden

No consideration is payable for non-solicitation obligations.

Does a change in position, salary or responsibilities affect enforceability?

A change in responsibility may affect enforceability. It is a requirement that the employer has a particular need for protection (with regards to non-competition obligations) and that the employee has had customer responsibility or relations (with regards to non-solicitation of customer clauses) for the said restrictive covenants to be enforceable. If an employees moves to or from a role which does not have customer responsibility/relations and/or access to protected information, this may affect the enforceability of the obligations.

Is continued employment sufficient consideration to enforce a restrictive covenant?

No. The minimum consideration required by law (section 8 above) must be provided.

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Can an employee be terminated if he or she refuses to sign a restrictive covenant?

No. The employee is not under a legal obligation to sign a restrictive covenant and refusal to do so may not legally form the basis for termination of employment.

Are restrictive covenants assignable?

Yes. Note that the restrictions will automatically transfer to a new employer in connection with a transfer of undertaking.

List any necessary language requirements.

There are no specific language requirements and English versions are acceptable. However, if there is reason to believe that the employees will not fully understand the English language clause, translation to local language should be considered.

List any other requirements of importance.

The employer must actively invoke non-competition obligations and obligations on non-solicitation of customers in connection with termination of employment. To invoke the said covenants, the employer must provide a written statement outlining the legal basis for invoking the restrictions, including, but not limited to, the particular need for protection, duration of restrictions and specific list of which customers are encompassed by the restrictions. The employee can also request such statement at any time during the employment. The written statement must be given within specific timelines, from together with the notice letter (if the employer terminates the employment) to within four weeks from receiving the employee's resignation.The statement is binding on the employer for three months and, if given in connection with termination of the employment, until the end of the notice period.

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The International Employment Guide

Peru

Prepared by Lex Mundi member firm Estudio Olaechea

General remarks	Rules set forth in the Sole Unified Text of Legislative Decree Nº 728 – Law of Labor Productivity and Competitiveness, approved by Supreme Decree Nº 003-97-TR, (hereinafter, LPCL)) are mandatory. The LPCL sets forth the minimum rights and guarantees granted to employees of the private sector in Peru. Consequently, any agreement between the employer and the employee affecting, restricting or denying employee's rights is void, taking into account the inalienable and non-renounceable character of labor rights. In addition, the employee cannot waive or assign the rights and guarantees provided under the Law. Under the LPCL, when facts are in conflict with the agreement's provisions, the facts prevail over the terms of the agreement.
Employment agreement	Exceptionally, employers may hire employees under a fixed term employment agreement but only in specific cases and subject to special conditions provided by law: i) it shall be done in writing and in 3 counterparts; ii)it shall expressly state the term and the purpose of the agreement and other labor-related conditions; and, iii)it shall be reported to the Labor Authority. Fixed term employment agreement subject to special conditions are as follows: Temporary: • Due to the commencement of activities or launching of a new activity; • Due to market needs; and, • Due to a corporate restructuring. Incidental: • Ocasional agreements; • Supplementary agreements; and, • Emergency agreements. Work or service: • Task work agreements; • Intermittent agreements; and, • Seasonal agreements. The maximum period permitted for labor term agreements is 5 years, as long as they do not exceed the maximum terms established for the different special conditions. Employees hired under fixed term agreement or employees hired under non fixed term labor agreement are entitled to receive the same benefits and rights.
Terms and conditions of employment	Peruvian labor legislation does not specify mandatory or minimum clauses for labor agreements. Thus, the parties could freely regulate their obligations and

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introduce additional and higher benefits than those legally established, provided that those recognized under or legislation are not affected, eliminated or reduced.
However, it is usual to include the following clauses: i) the parties' obligations, ii) the subject matter of the agreement, iii) the duties of the employee, iv) the term, v) the remuneration, vi) the labor benefits, vii) trial period, viii) confidentiality, ix) jurisdiction, x) applicable law; among others.

In this sense, whenever an employment agreement exists, in addition to salary, the employer must pay the following legal benefits to its employees:

(i) Compensation for time served (CTS): It is granted biannually (May and November). As much as one twelfth of the applicable remunerations earned by employees in the months of April and October will be deposited by employers, according to the number of full months worked. Fractions of the month must be deposited proportionally. Deposits must be made at institutions pertaining to the Peruvian financial system.

(ii) Legal Bonuses: Employees are entitled to receive 2 bonuses per year; one for Independence Day and one for Christmas. They must be paid on the 15th of July and December, respectively. The bonus include the basic remuneration plus any other fixed and permanently amount earned by the employee.

(iii) Annual Vacations: For each full year of service, employees working a minimum of 4 hours per day are entitled to 30 natural days of vacation. The payment for the vacation period will be equivalent to the monthly remuneration the employees would receive if they were working.

(iv) Family Allowance: Employees of private companies which do not have their remunerations regulated by collective bargaining will receive monthly the equivalent of 10% of the Minimum Vital Remuneration.

(v) Profit Sharing: Companies with more than twenty (20) employees, earning incomes and subject to the private activity regime are obliged to share their profits with their employees, according to the percentages set forth by law.

(vi) Life Insurance: Employees are entitled to a life insurance, if they have been working for 4 years in the company.

(vii) Complementary risk at work insurance: Companies performing risky activities are obliged to contract a Supplemental Security Work Risk Insurance for the employees involved in the activities.

(viii) Workday: The workday is usually eight (08) hours a day or forty-eight (48) per week as a maximum.

(ix) Overtime: The time worked exceeding the hours abovementioned shall be considered as overtime and shall be paid with surtax that cannot be less than 25% per the first two (02) hours and 35% for the next hours calculated over the ordinary remuneration received or compensating with periods of rest.

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Changing terms and conditions of employment	Employers in Peru have the reasonable faculty or power to modify the labor related conditions of the employment, provided that the modification does not imply the reduction of the remuneration and/or the professional categoy of the employee, among others. Our labor legislation establishes several assumptions in which an action and/or conduct of the employer changing the previously agreed labor related conditions, may constitute an act of hostility against the employee that equals to dismissal, which are the following: • The lack of payment of the monthly remuneration, except in cases of fortuitous and force majeure events duly proven by the employer. • The unprompted reduction of remuneration or category. • The displacement of the employee to a different place in which he/she habitually renders his/her services in order to cause the employee a prejudice. • Failure to comply with hygiene and safety measures that might affect or endanger the life or health of the employee. • The act of violence or serious slanderous of word in tort of the employee or his family. • Acts of discrimination on grounds of sex, race, religion, opinion or language. • Acts against morality and those that may affect the dignity of the employee.
Trade Unions and the consultation obligation	The right to collective bargaining is protected in the Peruvian Constitution, which, under Article 28 recognizes that every employee has the right to join unions, collective bargaining and strikes. Collective bargaining is the agreement to regulate wages, working conditions, productivity and others, concerning the relationships between employees and employers, held by one or several trade union organizations of employees or, in the absence of these, by representatives of the employees concerned, expressly authorized and elected, and by an employer, a group of employers, or several employers' organization. The collective bargaining has mandatory force for the parties that celebrate it and for the employees that embrace it subsequently, employer´s decision shall comply with the agreements and conditions during the validity term.
Data privacy and personal integrity	The processing of personal data shall be done with respect to the guiding principles provided by the Law. Basically, data have to be processed in accordance with the Law, adequately, for a particular purpose, after getting the data subject´s express consent. Concerning personal data, the consent may be "verbal" or "written" but only written in case of sensitive data. Sensitive data benefit from a greater protection since they are related to the data subject´s intimacy (data related to the race, ethnicity, income; religious, political, philosophical or moral opinions, union membership, and information related to

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	health or sex life.). Thus, the consent may be expressed by written signature, digital signature or other authentication mechanism. The consent is not required when personal data are necessary for the execution of data subject´s contractual relationship (i.e., employee), or when data are required for activities such as user authentication, service improvement and support, monitoring service quality, support for maintenance and account billing and other activities that the contractual relationship requires. However employee has to give consent when data are transferred abroad.
Regulations regarding parental leave or other forms of absence regulated by law	The most relevant parental leaves, accoding to our legislation, are the following: Pre and post maternity Leave.– The pregnant employee is entitled to forty nine (49) days of pre maternity leave, and forty nine (49) days of post maternity leave; being possible to accumulate both leaves, but subjected to special requirements. • Adoption Leave.- The employee adopting a child under twelve (12) years old is entitled to 30 calendar days of leave. The term initiates the next day which has been issued the Family Placement Resolution and once the new parents obtained the Child Delivery Act. • Lactation Leave.- Once the post maternity leave concludes, the working mother is entitled to one (01) daily hour of leave until her child reaches one (01) year old. In case of a multiple birth, the employee is entitled to one (01) more daily hour of leave. • Paternity Leave.- The employee who becomes a father is entitled to a paid leave during four (04) consecutive working days. The term of this leave initiates with the birth date of the child until the date when the mother and the child are discharged from the medical center. • License to employees with direct relatives with serious or terminal illness, or who had suffered a serious accident.- This license is given to the employee with direct relatives (mother/father, or son/daughter, or wife/husband, or concubine) suffering of a serious or terminal illness, or had suffered of a serious accident, in which cases, the employee will be able to assist his/her relative. It is granted for a maximum of seven (07) calendar days.
Termination of employment	According to Peruvian labor legislation, the following are causes of termination of a labor relation: • Death of the employee. • Death of the employer. • Resignation of the employee. • Expiration of the fixed term agreements. • Mutual agreement of the parties. • Permanent disability of the employee. • Retirement. • Objective Causes. • Dismissal.

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The protection against arbitrary dismissal is recognized by the Peruvian Constitution. However, this protection applies only after the trial period has expired.

Peruvian labor legislation considers as a trial or probation period the first three (03) months of the labor relation, and may be extended up to six (06) months per trusted personnel and in the events where the employee has to be trained, or, it may be equal to one (01) year in the cases of management personnel.

In this order of ideas, once the trial period has expired, employees are entitled to employment stability and cannot be dismissed at any time or circumstance, unless there is a fair reason, which strictly relates to the capacity or conduct of the employee, and by following the legal procedure.

The fair reasons for a dismissal related to the capacity of the employee, are the following:

a) The detriment of physical or mental faculties or the sudden and decisive ineptitude to the performance of the tasks.
b) The low performance related to the capacity and the average work performance of the employee under similar conditions.
c) The unjustified refusal of the employee to undergo to medical exams previously agreed or stated by law, which are determinants to the employment agreement, or to comply with prophylactic and healing measures prescribed by a doctor in order to prevent diseases and/or accidents.

Also, it can be considered as fair reason for a dismissal related to the conduct of the employee: i) the commission of the serious offenses; ii) criminal conviction for fraud; and iii) disability of the employee.

The following are considered as serious offenses:

a) Non-compliance with working obligations involving the breach of labor good faith, the repeated resistance to orders related to the work, repeated and untimely stoppage of the tasks and the non-compliance of internal regulations.
b) Deliberate and reiterate decrease in performance in the undertaking of the employee's tasks or their volume or quality.
c) Consummated or frustrated appropriation of property or services of the employer.
d) Use or delivery to third parties of confidential information of the employer.
e) Unauthorized removal of property.
f) Reiterated attendance under the influence of alcohol, drugs or narcotics.
g) Acts of violence, serious lack of discipline, perjury or verbal or written statements made on detriment of the employer.
h) Intentional damage to facilities, works, equipment and other property belonging to or in the possession of the company.
i) Unjustified absence to work for more than three (03) consecutive days, five (05) days within a period of thirty (30) days or fifteen (15) days during a period of hundred eighty (180) calendar days.
j) Sexual Harrasment

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	In cases of dismissals related to conduct of the employee, the employer shall inform the employee the faults given to the employee a period no longer than six (06) calendar days in order to present his/her written discharges, except in the cases of flagrant grounds. In cases of dismissals related to the capacity of the employee, the employer shall inform the employee the faults given to the employee a period of (30) calendar day term in order to correct their deficiency. During the procedure, the employer may exempt the employee to attend to the work place provided that his/her right of defense is not affected, nor the payment of the monthly remuneration as well as other legal benefits. Once the employee present his/her discharges, the employer can proceed with the dismissal, which must be informed in written to the employee with the accurate explanation of the cause and the date of termination of employment.
Sanctions for wrongful termination	According to several case laws, the non-compliance of the legal procedure to dismiss and to not impute an accurate fair reason to dismiss, could generate that the affected employee could request the reinstallation to the employment and/or the payment of the legal indemnity. The lack of fair reason to dismiss should be observed in order to promote a negotiation of the termination of employment with the relevant employee. The legal indemnity is equal to 1.5 remunerations per year of service where the employee was hired under a non-term labor agreement and to 1.5 remunerations per each remaining month until the end of the labor agreement where the employee was hired under a fixed-term labor agreement. In both cases there is a maximum of 12 remunerations and periods lesser than 1 years will be paid proportionally.
Whistleblower protection	There is no specific employment protection for whistleblowers under Peruvian law. The Peruvian Constitution recognizes the right of expression, opnion and communication. Superintendence Resolutions No.019-2007/SUNAT and 075-2003/SUNAT regulate the procedure by virtue of which an individual (not necessarily, an employee) or a legal entity can denounce before the Peruvian Tax Administration an unlawful or irregular conduct of a taxpayer which suppose the breach of tax obligations. The Tax Authority keeps in reserve the identity of individuals who make the denounce (whistleblowers).
Non-Competition Laws	The Peruvian Constitution establishes and protects the right to work, as consequence of this constitutional provision; nobody could prohibit another person to render services in favor of any employer. Exceptionally, the employer might pay its former employee a reasonable amount of money to undertake himself/herself to not to render his/her personal services in favor of a specific company during a specific period of time.
Discrimination and equal employment opportunity	Peruvian Constitution recognizes every person´s right to equality before the law. No one should be discriminated on grounds of origin, race, sex, language, religion, opinion, economic status, disabilities or any other. Consequently, any discriminatory act is absolutely prohibited and null as it is considered to violate any person´s fundamental rights.

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Transfer of business and outsourcing	There is not specific employment or labor regulation which rules the implications and circumstances nn the case of business transfer. However, there is a principle of continuity based on the protection of arbitrary dismissal. Thus, when all the assets are transferred to a new company that includes the transference of the goods, it does not imply the transference of the employees. The purchaser of the business, the seller and the employees must agree with the transference of the employees. For that reason, the employer must inform to the personnel to be transferred regarding their transference, in order to obtain their consent. The employees must accept the transference; otherwise, it is not possible to transfer them. In this the employer, the Purchaser and the employees must agree with the transference signing a Tranfer Agreement. The purchaser will be the new employer and will substitute the former employer before the employee; it means the purchaser will recognize the seniority, all the labor benefits the employees receive from the employer. In this scenario, the new employer assumes all the contingencies, the eventual unpaid social benefits of all the employees because there is not a termination of the employment agreement according with the law. Please be aware that in Peru the prescription of the social benefits are four years since the labor contract finishes. It means that the employee could claim for any unpaid benefit no matter when it happens. The employee could claim in the next four years after the labor contract finishes. Outsourcing is the hiring of personnel to develop specialized activities or works, providing the following requisites meet: i) the company hired or outsourced assumes the services rendered by its own account and risk; ii) have their own financial, technical and material resources; iii) be responsible for the results of their activities; and iv) their employees work under their full subordination. The outsourcing should be made with constant displacement of personnel to the facilities of the principal company or to its operational centers. Regarding the labor liability, the main company that hires the work or service of the displacement of personnel from the outsourcing company will become jointly liable with this one for the payment of the labor benefits and social security obligations accrued during the time the employee was assigned.
Global mobility (brief overview of common issues and visa requirements)	Foreigners may work in Peru with a work permit/visa without exemptions. It may be possible to enter into Peru with a tourist visa and then change the migratory status to the work visa, in which case employees will not render any service until obtaining the migratory status granted by the Migratory Authority. The type of work visa will depend on the term of hiring, so in case the employees are hired by a Peruvian Company for less than one (01) year, they will obtain a temporary work visa which will be stamped on their passport. By the other hand, if the foreigner is hired for a period greater than one (01) year, he/she will be entitled to a resident work visa and will obtain a Peruvian foreign card (Carné de Extranjería). Peruvian Companies may hire foreigners with the following two limitations: i) foreigners may not exceed the 20% of all the personnel, including employees

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	and workers of the employer; and ii) the remuneration may not exceed the 30% of all the payroll of salaries and wages. There are exemptions from those limiting percentages that employers may request. Labor agreements of foreign personnel shall be in writing and for fixed terms of time up to three (3) years, which could be successively renewable for equal periods.
Criteria for independent contractor status	Pursuant to article 1764º and those following of the Peruvian Civil Code, as a result of the conclusion of a service agreement, an independent contractor undertakes to render services in favor of a person or legal entity for a specific period of time or for a specific task in exchange of an economic compensation. Taking into consideration the mentioned definition, the characteristic components of this type of relationship are the following: - Autonomy: The independent contractor has the sufficient knowledge in order to satisfy the interest of the company, who in turn values the quality of the services provided by the contractor, which is actually why the agreement has been concluded. It is important to mention that the company does not interfere in the form and way of the development of the provision of services by the independent contractor. Unlike a labor agreement in which it is important the personal capacities of the employee, an independent contractor is being hired because of an objective which shall be accomplished regardless of the time involved and at an own-risk basis of the latter. - Lack of subordination: Only basic instructions oriented to the type of services required may be possible under this assumption which does not mean the existence of supervision of the company and/or a situation of dependence of the independent contractor to the company. The independent contractor must not be subject of work schedule, company orders or disciplinary measures; and, must count with his/her own means and implements in order to provide the services duly. - Specific period of time: A consultancy agreement is temporary as this type of document tends to avoid any simulation of employment agreement situation. In this regard, it is worth noting that article 1768º of the Civil Code stipulates a maximum term of six (06) years in the cases where the services are professional; and, a maximum term of three (03) years in the cases of any kind of services. - Economic compensation: the perceived and total payment by the independent contractor for his/her services according to the agreement. As it can be noted, an independent provision of services should be made under the contractor´s independence, direction, at an own-risk basis; and, more importantly, under no indication and/or sign of subordination. Effectively, the determination of existence of subordination may generate that the contractual relation could be considered of a labor nature. Considering the above mentioned, it is important to note that in Peru as in many other Latin American countries, the principle of primacy of reality is enshrined by our legislation by which a better approach of the nature of the

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	provision of services can be reached. In this sense, in the cases where there is inconsistence between the reality of facts and formality of documents, the reality of facts shall prevail. Thus, in application of this principle, the existence of subordination and personal services between a company and a contractor will generate the presumption of existence of a labor relation regardless of how the parties had named this relation. For these purposes, it is worth noting that any labor relation has three essential elements: (i) personal provision of services, (ii) remuneration, and (iii) subordination; being that the subordination, as mentioned before, is the key element in determining if the service is rendered under submission and/or obedience by the contractor to the company or not. From subordination, it is inferred the faculties of every employer: Directive: By which the employer orders the employee for an adequate rendering of services in relation with place, term and how to render the work. This is to say, establishes a labor schedule or may modify the way and modality for rendering services within a reasonable criteria and having into consideration the needs of the company. Verification: By which the company supervises the work in accordance with the orders given. One demonstration of this faculty consists in the establishment and assistance control and punctuality of the employee. Disciplinary: By which the company sanctions any unjustified non fulfillment of the employee keeping relation with the fault committed. In Peru as in many other Latin American countries, it is applicable the principle of the primacy of reality, by which reality prevails over formality, in order to determine the labor character of a relationship. In this sense, in the cases where there is inconsistence between the reality of facts and formality of documents, the reality of facts shall prevail. Thus, in application of this principle, the existence of subordination and personal services between a company and a contractor will generate the presumption of existence of a labor relation regardless of how the parties had named this relation.
Corruption, regulation and sanctions	Corruption acts carried out within a labor relationship (between private individuals) are not considered a crime under Peruvian law and there there are not sanctioned. Corruption acts in Peru require the participation of at least one public official (who requests or accepts a bribe, promises or similar benefits to carry out an act or to omit to carry out acts proper of his duty.
Final remarks	In case of an unjustified dismissal, the employee can claim the payment of the legal indemnity or his/her reinstallment to the workplace.

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Non-Competition Global Practice Guide

Peru

Prepared by Lex Mundi member firm Estudio Olaechea

Does your state or country recognize and/or enforce restrictive covenants against employees?

During the labor relationship, the employee shall not compete directly or indirectly against the employer. In fact, in accordance with our labor legislation, unfair competition is considered as a reasonable cause to dismiss the employee.
At the termination of the labor relationship, the employer may celebrate with the employee an agreement to establish the non-competition of the employee; however, it may be consider as an invalid agreement. The agreement may be considered by the court or Labor Authority as a violation of the employee's right to work protected by the Peruvian Constitution.
Furthermore, the employee shall not use or disclose confidential information of the employer. In accordance with Peruvian law, the employer may dismiss an employee who uses or discloses confidential information of the employer to third parties.
The employer may sign with the employee a confidentiality agreement to prohibit/limit the use or disclosure of confidential information by the employee after the termination of the labor relationship.

What are enforceable protectable business interests that courts will protect?

There is no exclusive list of protectable business interests but it is common that the employers protect trade secrets, know-how and confidential information, among others.

What are considered reasonable restrictions as to geography, duration and scope of activity?

As we have mentioned before, the post-employment non-compete restriction may be consider invalid since the right to work is recognized by the Peruvian Constitution. Nonetheless, it may be possible to enter into a non-compete agreement and pay an indemnity to the employee to not compete directly with the former employee. In relation with the length of the agreement, there is no legal period, so it will depend on the agreement of the parties. However, the agreement generally has a period of one or three years from the termination of the labor relationship. The amount of money that the former employer pays to the person should be reasonable. There are no law or judicial resolutions that regulate this matter.

Can a customer-specific restriction substitute for a geographic restriction?

The customer-specific restriction substitute is unusual in our country, non-compete agreements are used to restrict the employee not to compete within the territory of Peru.

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

No. Peruvian courts have not "blue penciled" an unenforceable restrictive covenant.
The non-competition agreement may be considered by the court or Labor Authority as a violation of the employee's right to work. Therefore, it is highly recommended that the employer pay an indemnity to the employee according to the term of the agreement and the territorial restriction and the amount should be reasonable.

Currently, there is no jurisprudence about the amount of the indemnity to be paid for the employer or the reasonable limits to be considered in these agreements.

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Will the court recognize a choice-of-law provision in a restrictive covenant?

Peruvian Labor courts will apply since the services are rendered in Peru.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

Our legislation does not regulate restrictive covenants, thus classes of employees are expressly exempted. It will depend on the agreement of the parties.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

Compensation is a requirement for the non-competition obligation to be valid and enforceable.

Does a change in position, salary or responsibilities affect enforceability?

A change in position, salary and responsibilities does not affect the enforceability of the contractual restraint of competition.

Is continued employment sufficient consideration to enforce a restrictive covenant?

No, Peruvian legislation does not recognize seniority to enforce a restrictive covenant. Its enforceability will be applicable if there is an agreement signed by the parties and a considerable payment shall be made.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

The refusal by an employee to agree on restrictive covenants during the labor relationship may not be considered as a fair reason to dismiss the employee. Please note that, in accordance with Peruvian Labor legislation, employees may only be dismissed by a fair reason established and following a special procedure. As we have mentioned, the person has the right to work and if the employer wishes to apply a provision that forces the non-compete, then the former employer should pay a reasonable amount for that provision.

Are restrictive covenants assignable?

The employee's rights and obligations (including restrictive covenants) shall be transfer and agreed at the Transfer Agreement of employees. However, it will be advisable that the new employer be aware of the restrictive covenant to be protected.

List any necessary language requirements.

It will be advisable that the documents be issued in Spanish, specially, if they shall be submitted to Peruvian Authorities.

List any other requirements of importance.

N/A

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The International Employment Guide

Scotland

Prepared by Lex Mundi member firm Maclay Murray & Spens LLP

General remarks	UK employment rights arise from varying sources including the contract of employment (both express and implied terms), collective agreements (for employers subject to collective bargaining arrangements with a recognised trade union) and statutory rights. A number of important statutory provisions are mandatory and apply regardless of any choice of law in the employment contract, such as in relation to redundancy pay, minimum notice periods, family-friendly rights and the right not to be unfairly dismissed.
Employment agreement	A written statement of certain employment terms must be given to each employee within two months of starting employment. Employment contracts may be permanent or fixed-term in nature but a limit is generally placed on the use of successive fixed-term contracts for a maximum period of 4 years. Probationary periods are commonly used usually for periods of 3 to 6 months but are governed by the contract of employment rather than any required legislation in this respect.
Terms and conditions of employment	As well as the contract of employment, terms of employment can be also found in employee handbooks, collective agreements or arising through custom and practice or implied into the employment contract by the operation of common law (such as the obligation to maintain mutual trust and confidence). Statutory provisions set out minimum wage requirements which apply. Rate of pay is otherwise determined either by the contract of employment or collective agreements. Contracts are also subject to certain requirements in relation to working time arrangements. Employees may not work on average in excess of 48 hours per week (over a reference period which is normally 17 weeks) unless they have signed an opt-out agreement in advance. Workers are entitled to a minimum of 5.6 weeks' paid annual leave per year. In addition, there are working time restrictions which apply in relation to rest breaks, daily rest, weekly rest and night work.
Changing terms and conditions of employment	The main mechanisms for changing terms and conditions of employment are (1) consent, (2) agreement of the trade union (for those employers with collective bargaining arrangements), (3) exercising reserved contractual rights to alter terms and conditions (subject to implied terms) and (4) as a last resort for changes which cannot be agreed, terminating and re-engaging on new terms (which if 20 or more employees are impacted at one establishment will be subject to the same required consultation processes set down by UK law as are required in collective redundancy exercises).
Trade Unions and the consultation obligation	UK law requires employers to consult recognised trade unions or other appropriate representatives in a number of different situations. These include minimum consultation periods in relation to proposed redundancies (or dismissals and re-engagement on new terms) in relation to 20 or more employees at one establishment within a period of 90 days. In addition, there are mandatory consultation requirements which apply where a transfer of an

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	undertaking (known as a TUPE transfer) will take place, or where an employer proposes certain changes to pension schemes. While these are the most well-known consultation obligations, others may apply from information and consultation legislation or may be collectively agreed.
Data privacy and personal integrity	Detailed statutory requirements apply in relation to the processing of personal data, arising from the Data Protection Directive. It is common for employers to seek specific informed consent for the processing of personal data in the employment relationship, but consent (since it can be withdrawn) may not be needed where the processing is necessary for the purpose of the employment relationship, such as administering pay and benefits or processing health information to comply with legal requirements. Employers must generally be transparent in relation to what personal data they hold and process for the purpose of the employment relationship. Personal data may not be transferred beyond the European Economic Area (EEA), unless adequate protection is in place in relation to the personal data transferred.
Regulations regarding parental leave or other forms of absence regulated by law	The main rights which apply include a right to 26 weeks' ordinary maternity leave and a further 26 weeks' additional maternity leave. The right to statutory maternity pay is subject to eligibility requirements and applies for a period of 39 weeks (the first 6 weeks being paid at 90% of normal weekly earnings; the remaining 33 weeks paid at a fixed statutory level). There is a right to 2 weeks' paternity leave (paid at a fixed statutory level). It is also possible for parents to elect to take shared parental leave (SPL) by curtailing maternity leave in relation to all but the first 2 weeks of that maternity leave period (and a similar system of sharing statutory pay applies). Similar rights apply to adoptive parents and there is also a further right to unpaid "parental leave" which applies up to a child's 18th birthday. Where an employee is absent from work on grounds of ill-health a minimum level of statutory sick pay may apply.
Termination of employment	Employees are protected by legislation from being unfairly dismissed: employers must show that a potentially fair reason applies (capability, conduct, redundancy, breach of statute or "some other substantial reason") and that the dismissal is otherwise fair. It is important to follow a fair procedure in relation to a dismissal and for example, consult over a proposed redundancy, before any decision is taken. An employer must follow the Acas Code of Practice when carrying out dismissals on grounds of misconduct or performance (or risk a 25% uplift to any compensation payable). Employees generally require 2 years' service before unfair dismissal rights apply; however this is not required where the dismissal has been for an "automatically unfair" reason such as whistleblowing, trade union membership or pregnancy etc. Statutory minimum periods of notice apply and provide for one week's notice of termination for each year of service up to a maximum of 12 weeks. Contracts of employment may also provide for enhanced notice periods.
Sanctions for wrongful termination	The primary remedy for unfair dismissal is compensation, which aside from a fixed "basic" component based on age/length of service and pay (up to a maximum of £14,370 from 6 April 2016 to 5 April 2017), is largely based on a "compensatory" element, calculated on the loss of earnings sustained by the

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	employee arising from the dismissal. A statutory cap normally applies to this "compensatory" element, of either 12 months' gross pay or a fixed amount (currently £78,962 from 6 April 2016 to 5 April 2017), whichever is the lower. It is also possible to be awarded reinstatement or reengagement for unfair dismissal but these remedies are less common. Where the claim is based not on the statutory right not to be unfairly dismissed, but a claim for wrongful dismissal in breach of contract, including, for example, a failure to pay notice, the primary remedy will be seeking damages for the breach of contract.
Whistleblower protection	UK law includes specific protection for workers in relation to any detriment or dismissal they might suffer as a result of whistle-blowing. This applies where a qualifying disclosure is made by a worker who reasonably believes, for example, that a breach of a legal obligation is taking place. There is no requirement for the disclosure to be made in writing, although generally disclosures have to be made to the employer or a prescribed person (such as to a statutory regulator). Any such dismissal for whistle-blowing does not require 2 years' qualifying service to bring an unfair dismissal claim, is automatically unfair and in addition is not subject to the statutory cap on compensation.
Non-Competition Laws	During their employment, employees owe their employers certain obligations implied as a matter of law. These include an implied duty of fidelity and an obligation not to act in such a manner as to destroy the obligation of mutual trust and confidence, without reasonable or proper cause. However, it is common for the employment contract to specify detailed obligations as to confidentiality, non-conflict of interest, return of property on termination and also post-termination restrictions (for example, in relation to non-compete or non-solicitation of clients, customers or employees) in the form of restrictive covenants. Such covenants must be carefully drafted and be appropriate to the circumstances, as UK courts will not enforce them unless they go no further than is reasonably necessary in order to protect legitimate business interests.
Discrimination and equal employment opportunity	The UK Equality Act 2010 prohibits discrimination on grounds of sex, race, disability, sexual orientation, gender reassignment, pregnancy or maternity, marriage or civil partnership, religious or other belief or age. This encompasses direct and indirect discrimination, as well as specific protection against harassment on such grounds or victimisation for raising such issues. Claims do not require any qualifying service and can be brought at any stage of the employment relationship, from recruitment decisions through all aspects of work, to conduct after employment has terminated, such as the provision of a discriminatory reference. There is also specific further protection for employees with disabilities in the workplace, including a positive duty on employers to make reasonable adjustments, where such employees would otherwise face disadvantage arising out of existing arrangements. In additions, such employees are also protected from less favourable treatment arising from their disability. Separate protection exists in relation to discrimination on the ground of part-time or fixed-term status. The main remedy is an award of compensation, including components for loss of earnings and injury to feelings and is not subject to any financial limit.

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Transfer of business and outsourcing	UK law applies the Transfer of Undertakings (TUPE) Directive 2001/23/EC which protects employment rights on the transfer of an undertaking. This typically applies to the sale of a business (or part thereof) with employees through asset purchase, or to similar transfers of economic entities. Moreover, UK law goes further and by legislation formally extends this protection to service provision changes, which include contracting out services to contractors, changing contractors, and taking services back in-house, where there is an organised grouping of employees assigned to the work. Where TUPE applies, employees are entitled to transfer on their existing terms and conditions (except for most pension rights which are separately regulated), with continuous service recognised and restrictions on the circumstances in which terms and conditions can be changed after a transfer. A transferee also becomes generally liable for any claims or liabilities in relation to the employees, so indemnity protection is normally sought, where possible. There is also a requirement for employers to inform and consult trade unions or appropriate employee representatives in advance of a transfer.
Global mobility (brief overview of common issues and visa requirements)	European Economic Area (EEA) and Swiss nationals can enter and live in the UK without applying for permission and start work without a permit. Transitional arrangements for Croatian nationals were introduced from 1 July 2013 and generally require the individual to apply for a registration certificate (worker authorisation). Non-EEA nationals must usually obtain permission to work or train in the UK under a points-based system. Grant of permission to work or train in the UK includes permission to enter or remain for a limited period. There are five tiers as follows: • Tier 1: entrepreneurs, investors, graduate entrepreneurs and individuals who demonstrate exceptional talent in the fields of art or science. • Tier 2: sponsored skilled workers with a job offer, including those transferring from an associated company overseas. • Tier 3: unskilled workers, although this category has not been opened to date. • Tier 4: students. • Tier 5: temporary workers and the youth mobility scheme. Applicants under tiers 2 and 5 must be sponsored by a licensed sponsor. Employers must apply to register as licensed sponsors. This separate application involves a fee and a processing time of about twelve weeks. The license must be renewed every four years. Applicants are awarded points based on, for example, sponsorship by a registered sponsoring employer (or educational institution); salary; available funds to maintain and accommodate the applicant and any dependants and English language abilities. The cost of applications varies depending on the type of application made and whether the applicant is inside the UK when applying. Business visitors from visa national countries must obtain a visa before entering the UK and it can be advisable for non-visa nationals to apply for a visa prior to entry depending on their circumstances and planned purpose of

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	their trip. There is an online tool on the UK Visa & Immigration website which allows you to check whether or not you need a visa (https://www.gov.uk/check-uk-visa). Employers must carry out right to work checks before an employee begins work. There is a civil penalty regime with fines of up to £20,000 per illegal worker if the appropriate checks have not been carried out and an employer is found to be employing an illegal worker inadvertently. In addition, it is a criminal offence to employ an illegal worker knowingly, or where the employer has reasonable cause to believe that the individual is an illegal worker. The maximum penalty is five years' imprisonment and/or an unlimited fine.
Criteria for independent contractor status	There are certain employment rights reserved for "employees" (including unfair dismissal and redundancy rights) and other employment rights which both "employees" and "workers" benefit from (such as holiday pay and not to suffer unlawful deductions from wages). To establish independent contractor status, a number of different factors are likely to be considered including (a) whether the person is in business on their own account with other clients/customers, (b) degree of control and autonomy over the work carried out and where/when it is carried out, (c) the written agreement between the parties, (d) provision of any tools or equipment necessary for provision of the services, (e) who bears the risk and reward of the services, (f) whether the independent contractor is treated as such for tax purposes, (g) whether the contractor has the right to provide a substitute, and (h) whether the contractor has insurance in relation to services provided. It should be noted that the intention of the parties and terms of the written contract (or tax position) are not determinative factors and a court or tribunal can find "employee" or "worker" status where not satisfied on the facts that independent contractor status is met.
Corruption, regulation and sanctions	The Bribery Act 2010 creates new criminal offences in relation to bribery in the UK. The offences include bribing another, being bribed, bribing a foreign public official and failing as a commercial organisation to prevent bribery by an associated person for its benefit. The definition of "associated person" is wide and will include anyone performing services for or on behalf of any employer, including employees, consultants, agency workers and others. Employers are therefore potentially liable for the actions of many other individuals within this definition. Penalties are severe. Companies can face unlimited fines and individuals can face up to ten years in prison. An employer will have a defence if it can show that it had adequate procedures in place to prevent bribery.
Final remarks	N/A

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The International Employment Guide

South Africa

Prepared by Lex Mundi member firm Bowmans

General remarks	Employment in South Africa is regulated primarily by the law of contract. There is, however, a network of legislation providing minimum protection for employees out of which employers and employees may not contract. The legislation regulate, for example, working hours, leave, notice of termination, strikes and lock-outs, protection against unfair dismissal and unfair labour practices, and the prohibition of unfair discrimination .
Employment agreement	The Basic Conditions of Employment Act, 1997 (BCEA) regulates the minimum conditions of employment for the majority of employees. In certain industries, collective agreements or sectoral determinations regulate minimum conditions. While an employer and an employee may not agree to terms that are less favourable to the employee than what is provided in the BCEA, they may provide for conditions that are more favourable to the employee. They do this by means of a written employment contract. Verbal employment contracts are enforceable. Of course, the exact terms and conditions may be cause for dispute if they are not in writing, but the absence of a written employment contract does does not mean that a valid employment contract had not come into being. The BCEA does, however, provide that the employer should, upon commencement of employment, provide the employee with all the prescribed particulars of employment in writing. These particulars include, inter alia, the full name and address of the employer, the employee's position, place of work, hours of work, remuneration, leave and the period of notice required to terminate the contract. Written particulars must be kept for a period of three years after the termination of the employment relationship. Although failure to provide employees with written particulars of employment does not have the effect that no employment relationship exists, it does constitute a violation of the BCEA, which may expose the employer to enforcement proceedings under the BCEA. An employment contract can be for an indefinite period or a limited duration. Where an employee is engaged for a limited duration, the employment relationship expires on the agreed end date. Such expiry does not amount to a dismissal and the employer is not required to follow any pre-expiry process with the employee concerned. However, where the employee has a reasonable expectation of continued employment (either for another fixed term or indefinitely) reliance on the agreed end date to bring the employment contract to an end would constitute a dismissal and may expose the employer to unfair dismissal proceedings. Employees earning below the prescribed earnings threshold, currently ZAR205,433.30 per annum) may in certain circumstances be deemed to be employed indefinitely. This would be the case where they are employed for more than 3 months and there is no justifiable reason for fixing the term.

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Terms and conditions of employment	The Basic Conditions of Employment Act, 1997 (and in certain industries, sectoral determinations or collective agreements) regulate the minimum terms and conditions of employees. For example, the BCEA regulates the hours of work and overtime that certain categories of employees may be required to work, the leave to which employees are entitled and the notice periods that apply in the event of termination. **Working hours** In terms of section 7 of the BCEA, an employer must regulate the working time of every employee a) in accordance with the provisions of any legislation dealing with occupational health and safety; b) with due regard to the health and safety of employees; c) with due regard to the Code of Good Practice on the Arrangement of Working Time; and d) with due regard to the employee's family responsibilities. Section 7 is the only provision dealing with working time in the BCEA that applies to all employees. The remaining provisions do not apply to the following categories of employees • employees who are senior managerial employees; • sales staff who regulate their own hours of work; • employees who work for less than 24 hours per month for the employer; and • employees who earn in excess of the prescribed earnings threshold (currently ZAR205,433.30 per annum). In terms of section 9 of the BCEA, an employer may not require or permit an employee to work more than 45 ordinary hours per week (i.e. 9 hours per day, if the employee works a 5-day week, and 8 hours per day, if the employee works a 6-day week). Employees may be required to work overtime, but only in terms of an agreement and only up to 10 hours' overtime per week. An employee who works overtime is entitled to be paid at least one and a half times the employee's normal hourly wage in respect of each hour overtime worked. Parties may, however, agree that the employee will be given time off in respect of overtime worked. The BCEA sets out the formula that applies to paid time off in respect of overtime worked. An employee who works continuously for more than 5 hours is entitled to a meal interval of at least one continuous hour. This may, by agreement, be reduced to 30 minutes. If an employee works for less than 6 hours, the parties may in writing agree to dispense with the meal interval. The employer must allow an employee a daily rest period of at least 12 consecutive hours between ending and recommencing work, and a weekly rest period of at least 36 consecutive hours which, unless otherwise agreed, must include Sundays. The BCEA regulates work, and payment for work, on Sundays and public holidays. It also contains the framework for the averaging of working hours over a certain period. **Leave**

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	Chapter 3 of the BCEA entitles employees to annual leave, sick leave, maternity leave and family responsibility leave. These provisions apply to all employees except those who work for less than 24 hours per month for the employer. Any other form of leave is a matter for negotiation between the employer and the employee. The Labour Laws Amendment Bill (25 November 2015) contemplates the amendment of the BCEA to also provide for paternity and adoption leave. **Notice of termination** The BCEA prescribes the following minimum notice periods: • 1 week, if the employee has been employed for 6 months or less; • 2 weeks, if the employee has been employed for more than 6 months but less than 12 months; and • 4 weeks, if the employee has been employed for more than 12 months. Notice of termination may not be given during a period of statutory leave and may not run concurrently with any period of statutory leave, except sick leave. An employer may, at its election, waive the notice period and release the employee immediately. However, in these circumstances, the employer must pay the employee in lieu of notice. While the employee may resign and thus terminate the employment relationship without any reason, the employer may only give notice of termination (or terminate summarily and without notice in appropriate circumstances) once it has complied with the requirements of a fair dismissal. Please see below. The BCEA regulates the payments to which an employee is entitled on termination of employment. These include, for example, payment of accrued but untaken annual leave, as well as severance pay in the case where the employee's employment is terminated as a result of the employer's operational requirements.
Changing terms and conditions of employment	Changes to terms and conditions may, generally speaking, only be effected with the employee's agreement. Unilateral changes may put the employer at risk of strike action, claims for specific performance or constructive dismissal.
Trade Unions and the consultation obligation	The South African Constitution confers on all employees the right to form, join and participate in the activities of trade unions. Depending on the percentage membership the trade union has in respect of the employer's workforce, the Labour Relations Act, 1995 (LRA) confers various organizational rights on trade unions. If a union is "sufficiently representative" at a particular workplace, the union is entitled to access the premises and the payment of union fees, which the employer is required to deduct from the union member's wages and pay over to the union. Representative trade unions' office bearers (who are employees at the workplace) are also entitled to reasonable paid leave during working hours for the performance of union activities. The concept of "sufficiently representative" is not defined in the LRA but is generally regarded as anything above 25%

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	membership at the employer. If a registered union is a "majority union", i.e. has as its members the majority of the employees in a particular workplace, in addition to the rights above, the union is entitled to require the employer to recognize its elected representatives (shop stewards) and is entitled to the disclosure by the employer of all relevant information needed to allow its representatives to perform their functions effectively and to allow the union to engage effectively in collective bargaining. There is no duty to bargain over terms and conditions with a trade union, unless such duty is contained in a collective agreement with the union concerned. The employer is required to consult with trade unions in circumstances prescribed by any applicable collective agreement. Also, in terms of section 189 of the LRA, the employer must consult with the relevant trade union where the employer contemplates the potential dismissal for operational requirements of employees who are union members. The topics for consultation in these circumstances are set out in section 189(2) and include, for example, appropriate measures to avoid or minimize the number of potential dismissals, change the timing of the dismissals and mitigate the adverse effect of the dismissals, the method for selection employees who may potentially be dismissed, and the severance pay that is proposed to be paid to employees whose dismissal cannot be avoided. The requirement is to engage in a meaningful joint consensus-seeking process and the employer must accordingly approach the process with an open mind and give due regard to the representations by the union (or employees or their representatives, where there is no union). Ultimately, provided the employer has consulted in good faith, the employer is entitled to make and implement decisions.
Data privacy and personal integrity	Data protection in South Africa is currently regulated by the Constitution and the common law, which both recognize the right to privacy. An important aspect of the right to privacy concerns personality rights which include the right to have control over who knows what about one. The Protection of Personal Information Act, 2013 (**POPIA**) has been enacted but, save for a small number of sections, is not yet in effect. There is general consensus that, once in effect, the provisions of POPIA will to a large degree amount to the codification of the current legal position. POPIA sets out a number of conditions for the lawful processing of personal information. One of these principles is that personal information may only be processed with the consent of the data subject or where necessity so dictates. Where processing is *necessary* for pursuing the legitimate interests of the responsible party (e.g. the employer), employee-consent is not required and the processing will be permitted. Many employers do, however, request employees to sign appropriate consents, which are sometimes contained in the employment contract. Other conditions for lawful processing include, for example: • that the information must be collected for a specific and lawful purpose and that the data subject should be aware of the purpose; • that the information should not be retained for any longer than what is necessary for achieving the purpose for which the information was collected; • the regulation of further processing; • the putting in place of security safeguards; • the regulation of data subject participation; and

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	• regulation of notifications to the data subject. POPIA contains specific provisions regarding "special personal information", which includes information pertaining to the data subject's race, health and trade union membership. POPIA will regulate the cross-border transfer of personal information. POPIA contemplates the establishment of an Information Regulator to monitor and enforce compliance with the provisions of POPIA.
Regulations regarding parental leave or other forms of absence regulated by law	Chapter 3 of the Basic Conditions of Employment Act, 1997 (BCEA) entitles employees to annual leave, sick leave, family responsibility leave and maternity leave. These provisions apply to all employees except those who work less than 24 hours per month for the employer. Any other form of leave, or any enhancement to what is provided in the BCEA, is a matter for negotiation between the employer and the employee. **Annual leave** An employee is entitled to at least 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle. An annual leave cycle is each period of 12 months' employment with the employer. (Employees who work a 5-day week are accordingly entitled to about 15 working days' annual leave, and those who work a 6-day week, are entitled to 18 working days' annual leave per annum.) The employer must grant annual leave not later than the 6th month following the end of the annual leave cycle. Annual leave must be taken by agreement or, if there is no agreement, at a time determined by the employer. An employer may not pay an employee instead of granting leave, except on termination of employment. An employer may grant annual leave in addition to the BCEA minimum. Such additional annual leave may be regulated by agreement is not subject to the limitations set out in the BCEA. **Sick leave** In every sick leave cycle, i.e. each period of 3 years' continued employment, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a 6-week period. Employees who work a 5-day week are accordingly entitled to 30 days' paid sick leave in every 3-year period. Untaken sick leave is forfeited unless the employer's sick leave policies provide otherwise. During the first 6 months of employment, the employee is only entitled to 1 day's sick leave for every 26 days worked. If an employee is absent for more than 2 consecutive days or on more than 2 occasions in an 8-week period, the employee may be required to submit a medical certificate stating that the employee was unable to work due to illness. **Family responsibility leave** Employees who have been in employment with the employer for more than 4 months and who work for the employer at least 4 days a week are entitled to 3 days' paid family responsibility leave per annum. Family responsibility leave may be taken when the employee's child is born or sick, or in the event of the

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	death of the employee's spouse or life partner, parent, grandparent, adoptive parent, child, grandchild, adopted child or sibling. Unless otherwise provided in the employer's policies, untaken family responsibility leave is forfeited. **Maternity leave** Employees are entitled to 4 consecutive months' maternity leave. This does not only apply to female employees, but also male employees in homosexual relationships who become parents through surrogacy and who are the primary caregivers. Maternity leave may commence at any time from 4 weeks before the expected date of birth or from a date on which a medical practitioner or midwife certifies that it is necessary for the employee's health or the health of the unborn child. No employee may work for 6 weeks after the birth of the child unless a medical practitioner or midwife certifies that she is fit to do so. An employee who has a miscarriage during the third trimester or who bears a stillborn child is entitled to 6 weeks' maternity leave after the miscarriage or stillbirth. Maternity leave is unpaid. However, employees who are contributors to the Unemployment Insurance Fund (UIF) may claim maternity benefits from the Fund. These benefits are determined in accordance with a sliding scale: those employees who earn less get a higher percentage of their salary in maternity benefits than those who earn more. In addition, benefits are capped at a certain threshold amount. Employees earning in excess of this amount may only claim a percentage of this threshold amount as maternity benefits. In the circumstances, many employers grant paid maternity leave in order to enable their employees to supplement the maternity benefits they may get from the UIF. The Unemployment Insurance Act permits employers to do so, as long as the total amount received (i.e. from the UIF and the employer) does not exceed 100% of the employee's salary. If an employer pays 100% of the employee's salary, s/he does not receive any amount from the UIF. **Suggested legislative amendments** The Labour Laws Amendment Bill, which was published on 26 November 2015, seeks to amend the BCEA to provide for a) 10 days' parental leave; b) 10 weeks' adoption leave; and c) 10 weeks' commissioning leave (which would apply in the case of surrogacy).
Termination of employment	The employment relationship can come to an end in various ways such as: • termination by the employee (resignation) • retirement • death • expiry of a limited duration employment contract • termination by the employer (dismissal) • termination by mutual agreement **Resignation - termination by the employee** An employer may bring the employment relationship to an end without any reason and simply by giving notice in writing. A resignation is a unilateral act and does not require the employer's acceptance in order to be valid. It is, however, good practice for an employer to acknowledge an employee's

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resignation in writing. If the employee resigns without giving the employer the required notice, the employer's remedy is to sue the employee for breach of contract and claiming the damages it suffered as a consequence of the breach.

Retirement

The employment relationship terminates by reason of retirement when the employee reaches the agreed retirement age. Retirement on the agreed retirement age is not regarded as a dismissal and the employer is accordingly not required to follow any pre-retirement process with the employee. Termination upon the agreed retirement age also does not amount to unfair discrimination on the basis of age.

Expiry of a limited duration employment contract

Our law recognizes limited duration employment contracts. Such contracts expire automatically on the agreed expiry date; they are not "dismissals"; and the employer is not required to follow any pre-expiry process with the employee concerned. However, in circumstances where the employee has a reasonable expectation of continued employment, reliance on the expiry date is regarded as a dismissal and in such circumstances, the employer may be at risk of unfair dismissal claims. In addition, in certain circumstances, fixed term employees earning below the prescribed earnings threshold (currently ZAR205,433.30 per annum) may be deemed to be employed indefinitely and reliance on the agreed expiry date in order to bring the contract to an end may put the employer at risk of unfair dismissal claims. These circumstances are where the employee is employed for more than 3 months without a justifiable reason for fixing the term.

Dismissal - termination by the employer

South African employment law does not recognize employment-at-will and in terms of section 185 of the Labour Relations Act, 1995 (**LRA**), every employee (irrespective of level of seniority or remuneration) is entitled not to be unfairly dismissed. Any dismissal must be substantively and procedurally fair. Substantive fairness relates to the employer's reason for terminating the employee's services and procedural fairness relates to the manner in which the termination is effected. Broadly speaking, there are four reasons that may justify the dismissal of an employee, namely:

- the employee's misconduct;
- the employee's incapacity due to poor work performance;
- the employee's incapacity due to ill health; and
- the operational requirements of the employer.

The procedural fairness requirements depend on the reason for the dismissal, but in essence, the underlying requirement is that the employee should be given an opportunity to be heard before a decision is made to terminate the employment relationship. A failure by the employer to observe the substantive and/or procedural fairness requirements, puts the employer at risk of unfair dismissal claims.

Termination by mutual agreement

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	Our law recognizes the termination of an employment relationship by mutual agreement. To the extent that the agreement requires the employee to waive the right to institute action against the employer on the basis of an alleged unfair dismissal, the payment of a gratuity is required. The gratuity is an amount or benefit in addition to what the employee is legally entitled to, and is a matter for negotiation between the parties.
Sanctions for wrongful termination	In the event that an employee alleges that her/his dismissal is unfair, s/he may refer an unfair dismissal case to the Commission for Conciliation, Mediation and Arbitration (**CCMA**) or a bargaining council with jurisdiction. This referral must be made within 30 days of the date of the dismissal, but the CCMA/bargaining council has the power to condone late filing upon good cause shown. The CCMA/bargaining council is required to first schedule the matter for "conciliation", which is aimed at allowing the parties an opportunity to settle their dispute. If the dispute is not resolved and if the reason for the dismissal is the employee's misconduct, poor work performance or ill health, the employee may refer the dispute to arbitration under the auspices of the CCMA/bargaining council. If the reason for the dismissal is the employer's operational requirements or alleged unfair discrimination, the employee may refer the dispute to the Labour Court for adjudication. The primary remedy in respect of a dismissal that is held to be substantively unfair (i.e. without a fair reason) is reinstatement. Reinstatement may be ordered retrospectively to the date of the dismissal which means that, in addition to having to employ the employee the employer will be liable to pay the remuneration the employee would have received during the period for which the order is made retrospective. Reinstatement is not available if the dismissal was only procedurally unfair; the employee does not seek to be reinstated; the surrounding circumstances are such that a continued employment relationship would be intolerable; or reinstatement is not reasonably practicable. In these circumstances **compensation** may be ordered. In the event of a dismissal for misconduct, poor work performance, ill health or operational requirements, the compensation that may be ordered is limited to 12 months' remuneration. Where the dismissal is automatically unfair and the employee is thus dismissed for a prohibited reason, such as unfair discrimination or participation in a protected strike, compensation of up to 24 months' remuneration may be ordered.
Whistleblower protection	The Protected Disclosures Act, 2000 (**PDA**) regulates the manner in which employees in both the private and public sector should disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers, and grants protection to employees who make such protected disclosures. In addition, section 187(1)(h) of the Labour Relations Act, 1995 (**LRA**) provides that where an employee is dismissed on account of having made a protected disclosure in terms of the PDA, such dismissal is automatically unfair. In these circumstances, the employer is at risk of a reinstatement order or compensation of up to 24 months' remuneration. The employer may also

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	face urgent proceedings aimed at interdicting the employer from dismissing the employee as a result of the employee having made a protected disclosure.
Non-Competition Laws	The common law duty of good faith and loyalty permit an employer to require its employees, during their employment, not to be engaged in businesses that compete with the employer. Agreements not to compete with the employer after termination of the employment relationship, or not to solicit customers, suppliers or other employees/consultants away from the employer, are enforceable provided that there is a proprietary interest justifying protection and that the restrictions are reasonable and not contrary to public policy. The party seeking to avoid the restraint bears the onus to prove that it is not enforceable. Proprietary interests include, for example, the employer's trade secrets, confidential information, customer and trade connections, and confidential know-how. Whether a restraint is reasonable depends on all the facts of the case, including the duration of the restraint, its scope and the geographic area in which it applies. Payment of consideration is not required in order for a restraint to be enforceable. It is, however, a factor which is taken into account in determining the reasonableness of the restraint.
Discrimination and equal employment opportunity	The Employment Equity Act, 1998 (**EEA**) prohibits direct or indirect unfair discrimination against any employee (or applicant for employment) in any employment policy or practice on a wide variety of grounds, such as race, gender, sex, sexual orientation, HIV status, language, religion, age and belief. Harassment of an employee is regarded as a form of discrimination and is prohibited on any one or a combination of the prohibited grounds. Likewise, a difference in terms and conditions of employment between employees of the same employer performing the same or similar work or work of equal value that is directly or indirectly based on any of the prohibited grounds, is unfair discrimination. It is not unfair discrimination to take affirmative action measures consistent with the purpose of the EEA, or to distinguish, exclude or prefer a person on the basis of an inherent requirement of the job. Claims concerning alleged unfair discrimination must be referred to the Commission for Conciliation, Mediation and Arbitration (**CCMA**) within 6 months after the act or omission that allegedly constitutes unfair discrimination. If the dispute remains unresolved, the employee may refer it to the CCMA for arbitration, but only if the dispute concerns alleged sexual harassment or if the employee earns below the prescribed earnings threshold (currently ZAR205,433.30 per annum). In all other cases, unless the parties agree otherwise, the dispute must be referred to the Labour Court for adjudication. Chapter 3 of the EEA requires designated employers to implement affirmative action measures. Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer. A "designated employer" is

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	an employer who employs 50 or more employees, or who employs less than 50 employees, but who has an annual turnover in excess of the prescribed turnover. "Designed groups" are black people, women and people with disabilities. In order to comply with their obligations in terms of Chapter 3, designated employers must consult with their employees as contemplated in section 16, conduct an analysis of their workforce profile as contemplated in section 19, prepare an employment equity plan as required by section 20 and report to the Director-General of the Department of Labour on progress made in implementing its employment equity plan, as required by section 21 of the EEA. The employer must also assign one or more senior managers to take responsibility for monitoring and implementing the employment equity plan. A designated employer who fails to comply with the obligations set out in Chapter 3 is at risk of enforcement procedures and, ultimately, the imposition of fines by the Labour Court. In certain cases, such as the requirement to prepare and implement an employment equity plan, failure to comply puts the employer at risk of fines linked to the employer's turnover.
Transfer of business and outsourcing	Section 197 of the Labour Relations Act, 1995 (LRA) governs the statutory employment consequences of the transfer of a business as a going concern. Where a business (which is defined as "the whole or a part of a business, trade undertaking or service) is transferred as a going concern, the employment contracts of those employees of the old employer who are predominantly assigned to the transferring business are transferred to the new employer. The new employer is accordingly automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of the transfer, and the transfer does not interrupt the employee's continuity of employment. The transferring employees must be employed by the new employer on terms and conditions of employment that are "on the whole not less favourable" to what they enjoyed at the old employer. However, if the employees' conditions of service are regulated by a collective agreement, the new employer is required to honour the terms of the collective agreement as they are. Where the new employer employs the transferring employees on terms and conditions that are substantially less favourable and the employee resigns as a result thereof, such a resignation is regarded as a dismissal and the new employer would be at risk of an unfair dismissal claim. The dismissal of employees in order to avoid the consequences of section 197 is prohibited. Section 187(1)(g) of the LRA provides in this regard that where the reason for a dismissal is "a transfer or a reason related to a transfer" such a dismissal is automatically unfair. The employer is accordingly at risk of a reinstatement order or an award for compensation of up to 24 months' remuneration. It is possible for the old and/or the new employer to contract out of the consequences of section 197, but such contracting-out requires the written agreement of the employee/s concerned (or their representative union). Section 197 contains specific provisions relating to collective agreements and retirement funds. Section 197(7) further requires the old employer to conclude an agreement with the new employer in terms of which, inter alia, the value of

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	the accrued annual leave pay, severance pay and other amounts accrued to the employees as at the transfer date is set out and in terms of which it is agreed which of the old or new employer would be liable for the payment of these amounts. Unless the old employer complies with these obligations, it is liable, jointly and severally with the new employer, for a period of 12 months after the date of transfer, to any employee who becomes entitled to receive such an amount. It is fairly common for the old employer to indemnify the new employer in respect of any employment-related claims that arose prior to the transfer date; and for the new employer to provide a similar indemnity in respect of employment-related claims arising after the transfer date.
Global mobility (brief overview of common issues and visa requirements)	Foreigners (who are not permanent residents) require a work permit to work in South Africa. The Immigration Act makes provision for various types of permits, such as a general work permit, an exceptional skills permit and an intra-company transfer permit. It is an offence under the Immigration Act to employ a foreigner who is not in possession of a valid work permit. Notwithstanding the fact that an employee may not be in possession of a valid work permit, s/he is nevertheless entitled to the protection of South African employment law and the manner in which such employment relationships are terminated must therefore be carefully considered. Careful consideration must also be given to the mechanism by which foreigners are required to work in South Africa. They could, for example, remain employed by their home company and be seconded to the South African subsidiary; or they could become employed directly by the South African subsidiary. These options each have their advantages and disadvantages and it is recommended that employment and tax advice is obtained in structuring these engagements.
Criteria for independent contractor status	South African employment law distinguishes between employees and independent contractors. Only employees are entitled to the protection of our employment law. Section 200A of the Labour Relations Act, 1995 (**LRA**) and 83A of the Basic Conditions of Employment Act, 1997 (**BCEA**) contain a number of presumptions as to who is an employee. If these factors are present, then it is presumed that the person is an "employee" and the onus then lies on the "employer" to show that the relationship is in fact an independent contractor one. The factors are as follows: • the manner in which the individual works is subject to the control or direction of the other party; • the individual's hours or work are subject to the control of the other party; • where the individual works for an organization, the individual forms part of the organization (e.g. appears on organograms, holds business cards with job titles, etc) • the individual has worked for the other party for an average of at least 40 hours per month over the last 3 months; • the individual is economically dependent on the other party for whom s/he renders service;

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	• the individual is provided with the tools of the trade or work equipment; • the individual only works for that other party. This presumption only applies in respect of individuals who earn below the prescribed earnings threshold, currently ZAR205,433.30 per annum. An individual who earns in excess of this amount and who alleges that s/he is actually an employee and not an independent contractor will accordingly bear the onus to prove this. The fact that a contract describes the individual as an "independent contractor" or "consultant" is not the end of the inquiry and our courts do not hesitate to look beyond the terms of the contract to determine the true nature of the relationship.
Corruption, regulation and sanctions	The Prevention and Combating of Corrupt Activities Act, 2004 provides, *inter alia*, for the offence of corruption and offences relating to corrupt activities. In terms of section 3 of this Act, anyone who accepts (or offers to accept), or receives (or offers to give) any gratification in order to influence another to act illegally, dishonestly or biased, or to achieve an unjustified result, is guilty of the offence of corruption and may be liable for a fine or imprisonment. Any person who holds a position of authority and who knows, or ought reasonably to have known or suspected that another person has committed an offence under the Act involving an amount of ZAR100,000 or more, must report such knowledge or suspicion to the South African Police Service. A person who fails to do so, is guilty of an offence. In the employment context, the offence of corruption committed in the course and scope of the employee's employment would amount to misconduct, which would entitle the employer to take appropriate disciplinary steps against the employee (including dismissal).
Final remarks	There are registration requirements that employers in South Africa should comply with. For example: **Employees' Tax** An employer is required to register for employees' tax with the South African Revenue Service (**SARS**) within 21 business days of becoming an employer. The employer is required to deduct employees' tax (PAYE) from its employees' monthly salaries and to pay over the relevant amounts to SARS each month in accordance with the provisions of the Income Tax Act, 1962. **Unemployment Insurance Fund Contributions** An employer is required to register and make compulsory contributions towards the Unemployment Insurance Fund (**UIF**). In this regard, the employer is required to deduct 1% of the employee's monthly salary from the employee's salary and to match this amount and then pay over these amounts to the UIF (i.e. 1% from the employee and the corresponding amount from the employer). There is, however, a threshold amount, currently ZAR14,872 per month, and where the employee earns in excess of this amount, the contribution is capped at 1% of the threshold amount (matched by the employer).

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In the event that the employer is required to register for employees' tax, then the employer must register for UIF payments with SARS. If the employer is not required to be registered for employees' tax under the Income Tax Act, it must register as an employer with the UIF Commissioner and must make payment of the required contributions to the UIF directly.

Skills Development Levies

The Skills Development Levies Act, 1999 requires every employer who is required to register in terms of the Income Tax Act, 1962 to register for Skills Development Levy purposes, and to pay 1% of its total remuneration costs as a levy towards skills development. There are certain exceptions, such as where the total amount of remuneration payable to the employer's employees in the next 12 month period is not believed to exceed ZAR500,000.

COIDA

An employer is required to register in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) within 7 days of the date on which it employed its first employee; and to pay assessments as advised by the Compensation Fund. The assessment is based on the annual earnings of the employees but is capped at the COIDA annual earnings limit, which is about ZAR380,000 per employee per annum.

COIDA provides a system of no fault compensation for employees who are injured in accidents that arise out of or in the course of their employment, or who contract occupational diseases. The employer is relieved of delictual liability for damages arising out of such injuries and diseases, and the employee is required to claim compensation directly from the Compensation Fund (and without the obligation to prove fault), provided that the employer has complied with its obligations under COIDA.

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Non-Competition Global Practice Guide

South Africa

Prepared by Lex Mundi member firm Bowmans

Does your state or country recognize and/or enforce restrictive covenants against employees?

Yes, provided there is a proprietary interest, which justifies protection, and that the restrictive covenant is reasonable with reference to, inter alia, its duration, the area in which it applies, whether the restrainee still has the ability to earn a living, and its scope, i.e. the conduct which is restricted.

What are enforceable protectable business interests that courts will protect?

Protectable business interests (or proprietary interests) include, for example:
customer or supplier relationships;
confidential trade secrets, know-how and pricing.

Information is confidential if:
it is capable of application in the trade or industry;
it must not be public knowledge or in the public domain; and
it must, objectively, be of economic value to the person seeking to protect it.

A protectable customer or supplier relationship exists when an employee has personal knowledge of, and influence over, the customers or suppliers of the employer so as to enable her/him, if competition were allowed, to take advantage of the former employer's trade connections. A protectable customer connection will therefore exist where a customer "belongs" to the employer and the employee obtains influence over the customer by virtue of her/his employment.
A restrictive covenant will be unreasonable if it is designed merely to eliminate legitimate competition by an erstwhile employee. The mere prevention of competition for skilled labour is therefore not a proprietary interest that justifies protection, and employees may use the general knowledge and skills acquired during employment with a particular employer once they leave its employment, even if the new employer benefits from such knowledge and skills.

What are considered reasonable restrictions as to geography, duration and scope of activity?

Restrictive covenants of 12 months are generally regarded as reasonable. An 18 or 24 month restraint is long and the courts are reluctant to enforce lengthy restraints unless there is a significant proprietary interest justifying protection.
As far as geographical area is concerned, the wider the geographical area of the restrictive covenant, the more difficult it is to establish reasonableness. What is reasonable will depend on the dictates of public policy.

Can a customer-specific restriction substitute for a geographic restriction?

Yes.

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Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

The courts are reluctant to re-write contracts, but where the terms of the restrictive covenant permits its revision in order to make it reasonable, the courts have the power to do so.

Will the court recognize a choice-of-law provision in a restrictive covenant?

Our courts retain a discretion as to the law that applies to the interpretation of an agreement. Our courts are reluctant to give effect to a choice of law clause where the chosen law bears no connection to any of the parties or the place where the contract is performed.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

No. It is, however, unlikely that lower-level employees would hold customer connections or have access to protectable confidential information, and thus there may very well not be a proprietary interest worthy of protection when seeking to restrict these employees.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

Restraint payments are not required in order to render a restrictive covenant enforceable. Whether or not a restraint payment is made to the restrainee is therefore only one of the factors that the court will consider in determining the reasonableness of the restrictive covenant.

Does a change in position, salary or responsibilities affect enforceability?

The enforceability of a restrictive covenant is determined at the time of enforcement. If an employee has changed roles since the time when the restraint agreement was initially concluded, the restraint will only be enforceable if, at the time of enforcement, a proprietary interest, which justifies protection, is still present.

Is continued employment sufficient consideration to enforce a restrictive covenant?

As stated above, the absence of a restraint payment does not necessarily mean that the restraint is unenforceable and our courts frequently enforce restraints where no such payments are made to employees.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

No. Restrictive covenants may not be unilaterally imposed by an employer without the employee's agreement and a restrictive covenant accordingly requires the employee's consent. South African employment law does not recognize employment-at-will and any dismissal must accordingly be substantively and procedurally fair, failing which the employer would be at risk of a reinstatement or compensation order. The failure to sign a restraint of trade agreement is not recognized as a fair reason for dismissal. In fact, a dismissal in these circumstances may be regarded as automatically unfair on the basis that it is designed to compel the employee to accept an employer-demand. In such circumstances, the employer would be at risk of a reinstatement order or an award for compensation of up to 24 months' remuneration.

Are restrictive covenants assignable?

Restrictive covenants are generally only assignable with both parties' consent. In circumstances where there is a transfer of a business as a going concern, there is an argument that the restrictive covenant transfers to the purchaser automatically by operation of section 197 of the Labour Relations Act, 1995.

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This section provides for the automatic transfer of the employment contracts of the employees who are predominantly assigned to the transferring business to the new employer. In terms of s197(2)(b), all the rights and obligations between the old employer and a transferring employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the transferring employee.

List any necessary language requirements.

None. English is one of South Africa's official languages and is widely used in the conduct of business.

List any other requirements of importance.

The onus is on the party that seeks to avoid the restrictive covenant to prove that it is unreasonable and against public policy. In practice, however, the party seeking to enforce the restraint normally needs to do more than simply invoking the terms of the restraint and must therefore meet an evidentiary burden that there is a proprietary interest worthy of protection and that the restrictions are reasonable and justifiable.

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The International Employment Guide

Sweden

Prepared by Lex Mundi member firm Advokatfirman Vinge KB

General remarks	Swedish employment law governs most aspects of the employer and employee relationship. However, traditionally the Swedish labour market is to a large extent self-regulated by its parties and the influence of collective bargaining agreements ("CBA") is significant.
Employment agreement	The main rule is that an employment agreement is entered into for an indefinite term, and may commence with a probationary period of up to six months. Fixed term agreements can be entered into for a period not exceeding two years. Within one month from commencement, the employer is obliged to give the employee written information regarding the material provisions of the employment (such as salary, working hours, vacation, notice period etc).
Terms and conditions of employment	Swedish employment law does not prescribe any statutory rules on minimum wage or overtime compensation. Such issues are often governed by CBAs. Overtime may be worked with not more than 48 hours over a period of four weeks, or 50 hours over a calendar month, subject to a maximum of 200 hours per calendar year (general overtime). According to mandatory legislation, employees are entitled to a minimum of 25 vacation days per full year of employment. Salaried employees without any entitlement to overtime compensation are usually entitled to 30 days' vacation.
Changing terms and conditions of employment	The mechanisms for effecting a change to terms and conditions of employment include unilateral decision in accordance with the employer's managerial prerogatives; employee consent; through a CBA or by law; operating a clause in the employment contract which permits the change in question; custom and practice; and termination and re-hire on new terms (through a so-called 'technical redundancy').
Trade Unions and the consultation obligation	An employer which is bound by a CBA is obliged to consult with the relevant trade unions *before* making decisions with material effect with respect to the business of the company. An employer without CBA is in certain other situations (such as terminations due to redundancy), obliged to conduct and conclude consultations. The consultations do not have to lead to an agreement, i.e. the employer is free to take any kind of decision (subject to mandatory law) after having fulfilled its obligation to consult.
Data privacy and personal integrity	Personal data may generally only be processed if the registered person has given his/her consent (which may be withdrawn at any time). The consent of an employee is not needed if an employer's processing is necessary for purposes concerning a normal relationship between an employer and an employee, for example drawing up pay rolls or notifying the tax authorities. However, the employee must be informed about the processing of personal data (regardless of whether consent is required or not).

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Regulations regarding parental leave or other forms of absence regulated by law	The parental leave legislation in Sweden is generous and a parent is entitled to a maximum of 420 paid parental leave days per child (out of a total of 480, 60 days must be taken by the other parent). During 390 (of the 480) days, the compensation paid by the state amounts to approximately 80 per cent of the salary up to SEK 333,750 per year. For the remaining 90 days, compensation is SEK 180 per day. Such paid parental leave must be used before the child's 8th birthday if the child is born before 2014 and before the child's 12th birthday if the child is born after 2013. Further, irrespective of the right to paid parental leave, the employee is always entitled to unpaid parental leave until the child is 18 months old. If CBA applies, the employee may be entitled to additional parental leave pay, paid by the employer. An employee is also entitled to paid leave for temporary childcare which is usually received for child sickness and normally during a maximum period of 120 days per child and year (up until the child is 12 years old). Further, an employee may also be entitled to leave without pay because of studies, military service, urgent family reasons, care of close relatives, union representative work and even in order to carry on a non-competing business during a maximum of six months.
Termination of employment	Termination of employment by the employer is thoroughly regulated by law in relation to both the right to terminate the employment relationship and the termination procedure. A dismissal by the employer must be based on objective grounds (redundancy or personal reasons). In a redundancy situation, the seniority principle of "last in-first out" applies, in certain cases subject to modifications. The same rules apply regardless of the number of employees affected. If the employee is a member of a trade union (or if the employer is bound by a CBA), the employer must initiate and complete consultations with the relevant trade union *before* terminating an employment due to redundancy. In case of termination of employment due to personal reasons or summary dismissal, the employer is obliged to notify the employee and any relevant trade union two weeks (or one week in the case of summary dismissal) in advance of executing the termination. The employee and the trade union then have a right to confer with the employer regarding the planned termination. There is no statutory entitlement to termination indemnity in addition to the notice period. The notice period is 1-6 months depending on the length of employment. The employee is obliged to perform work during the notice period, with entitlements to salary and other benefits.
Sanctions for wrongful termination	If a dispute arises regarding the validity of the termination, the employee may sue for reinstatement (and punitive damages) or alternatively seek damages only (punitive as well as financial damages). A claim for financial damages includes loss of salary and other employment benefits and punitive damages reflect the offence caused. If the employee sues for reinstatement, the employee will remain employed (with an obligation to perform work) during the proceedings until the court has ruled its decision. If the employer - after the court has ruled that the employee should be reinstated - refuses to take the employee back in service, the employer can resolve from the employment relationship by paying the employee a fixed amount. The amount, which is paid in addition to the punitive and financial damages awarded, is based on the employee's length of service and is also the maximum financial damages that can be awarded to an employee. The amount is 16 months' salary if employed

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	less than 5 years, 24 months' salary if employed at least 5 years but less than 10 years, or 32 months' salary if employed for more than 10 years.
Whistleblower protection	There is no specific employment protection for whistleblowers under Swedish law, however it may be noted that there is a legislative proposal regarding whistleblower protection which the Swedish government shall decide upon during the near future. Employees are protected by the constitutional right of freedom of expression, general Swedish labour legislation (including good practice on the labour market) in relation to employment and Swedish data protection legislation covering the processing of personal data. By virtue of the employment relationship, employees have a duty of loyalty towards their employer which, among other things, includes a confidentiality undertaking. Accordingly, an employee is usually not entitled to disclose information which is harmful to the employer or the business of the employer. As a general rule, for employees in the private sector, employees' duty of loyalty takes precedence over their constitutional right of freedom of expression, unless the disclosure constitutes justified whistleblowing, which is generally regarded as an exception from the duty of loyalty. It is possible to introduce internal whistleblowing procedures (hotlines, specific whistleblowing websites etc.) where personal data is processed by automatic means, but such systems must comply with the Swedish data protection legislation which prohibits processing personal data concerning the commission of a criminal offence. The Swedish Data Inspection Board (Sw. *Datainspektionen*) has established a number of conditions that must be upheld in order for whistleblowing systems to be lawful. The requested conditions are that (i) the information being processed must only be used for the purpose of the investigation into the irregularities or suspected wrongdoing; (ii) this exemption only applies to information concerning key or highly placed employees; (iii) this exception only applies to certain categories of information; and (iv) the general data protection rules must be complied with.
Non-Competition Laws **Please also see our more detailed guide on non-competition**	It is well-established practice that an employee is obliged to remain loyal to the employer during the employment, which include that the employee must observe confidentiality and refrain from competing business. An agreement for a key employee may include an undertaking by the employee in question not to enter into, or be otherwise concerned with, any competing business for a certain period after the expiration of the employment. Swedish employment law does not prohibit such undertakings. However, these types of restrictive covenants may be modified or set aside by a court if such are found to be unreasonable under the Swedish Contracts Act. For a restrictive covenant to be legally enforceable, the position of the employee must be of such a nature that the employee typically gains knowledge about the company's business that has a high level of competitive value for the company. The covenant must be limited in time (under normal circumstances not more than one year) and compensation must be paid for the inconvenience caused to the employee during the restrictive period. Further, the scope of the undertaking may not be so wide that it constitutes a de facto prohibition for the employee to work actively within his/her professional field.
Discrimination and equal employment opportunity	The Swedish Discrimination Act covers gender, ethnic background, religion or other beliefs, disability, sexual orientation, transgender identity or expression and age. In summary, an employer is prohibited from discriminating against an employee, trainee, temporary or borrowed labour or a job applicant, directly or indirectly, on the above mentioned protected grounds. These prohibitions apply, among other things, when an employer makes decisions during a

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	recruitment procedure, takes a decision regarding the management of the company's business, or other decisions with respect to salary or other employment conditions. Finally, the prohibitions naturally apply when an employer gives notice of termination, dismisses or takes any other action against an employee. Neither may an employer disfavor an employee (or an applicant) for reasons connected with parental leave. In addition, and following from the Act Prohibiting Discrimination of Employees that are employed on a part-time basis or who are employed on fixed-term agreements, an employer is prohibited from, directly or indirectly, applying less favourable salary benefits or other employment benefits for these types of employees than the employer applies (or would have applied) for employees in a similar situation employed for an indefinite term. The remedy in case of the employer's breach of the rules is damages (punitive as well as financial). An employee who has been dismissed due to discriminatory reasons may also be reinstated.
Transfer of business and outsourcing	The Transfer of Undertakings Directive 2001/23/EG is incorporated into Swedish law. The rules regarding the transfer of a business shall be applied where a company or business, or part thereof, is transferred to another legal entity. This means that the rules do not apply to transactions where shares of a company are transferred but the entity, being the employer, remains unchanged. In order to determine whether a particular scenario falls under the rules for transfer of business, one must analyse and evaluate all circumstances at hand, for example the nature of the business, what tangible or intangible assets that are transferred, whether or not the acquiring employer takes over the majority of employees from the previous employer, whether or not customer contracts are transferred and the degree of similarity between the activities or business before and after the transaction, i.e. have the transferred business maintained its identity – is it a "going concern"? Where there is a transfer of a business (or a part of a business), the Employment Protection Act states that existing rights and obligations, pursuant to the terms and conditions valid at the time of the transfer shall be automatically transferred to the acquiring employer. However, the employee has a right to refuse to transfer. If so, the employee remains employed by the transferring company. The transfer as such does not constitute objective grounds but redundancy situations may of course arise both with the acquiring employer and the transferring employer (such redundancy situations must be handled as any other redundancy situation).
Global mobility (brief overview of common issues and visa requirements)	Citizens from EU- and EEA-countries may work in Sweden without any work permit. Individuals that fall under the following categories, among others, may work in Sweden without a work permit, provided certain requirements are fulfilled: a) specialists who work in Sweden for an international group of companies for less than a total period of one year; b) employees who participate in practical experience, internal training or other skills development at a company in an international group of companies for up to a total period of three months during a twelve months period; and c) individuals who participate in training, testing, preparation or completion of deliveries, or similar activities within the framework of a business transaction for a total period of three months during a twelve months period. If the period under a) is longer than three months, the individual must apply for a residence permit. All individuals

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	who are not exempted need a work permit to be entitled to work in Sweden. The system is the same for all applicants and the level of salary and benefits should be comparable to normal Swedish standard for a comparable position. Under the Aliens Act (2005:716), an employer who willfully or negligently employs an individual without a valid residence/work permit, may be sentenced to a fine or imprisonment in case of aggravating circumstances. In addition, certain citizens from non EU- and EEA-countries are required to obtain a valid visa before entering Sweden. As the countries vary, please visit the Swedish Government's official webpage for updated information (http://www.government.se/government-policy/migration/list-of-foreign-citizens-who-require-visa-for-entry-into-sweden/).
Criteria for independent contractor status	The following circumstances usually characterize an employment relationship on one hand and an independent contractor on the other hand. An employee (i) may not at the same time perform similar work for others, (ii) shall perform the duties on a continuing basis, (iii) uses the employer's equipment and machines, (vi) is subject to the continuous management and supervision by the employer and shall follow the instructions of the employer regarding performance of work, the working place and time and (v) has some form of guaranteed salary. An independent contractor (i) is not restricted from concurrently performing similar tasks for others, (ii) shall perform a limited assignment restricted to certain agreed tasks, (iii) is not obliged to personally perform the actual work, i.e. the independent contractor may delegate other persons to fulfil the assignment, (iv) is to a large extent entitled to independently decide the working time, place of work and the means and methods for the performance of the duties, and (v) has a tax certificate for business income and receives compensation for the assignment carried out. This applies irrespective of the parties' expressed or implied intentions with respect to an agency/consultancy agreement and the wording thereof. Swedish courts may, by reviewing such arrangements and based on the circumstances in the case, establish that there actually is an employment relationship between the parties.
Corruption, regulation and sanctions	The Swedish Penal Code includes four bribery offences. The offences are criminalized whether or not performed during the course of an employment or at a work place. The offences include giving a bribe, taking a bribe, trading in influence (receipt of an undue advantage for the purpose of influencing a third person in connection with the exercise of public authority or public procurement), and negligent financing of bribery (providing of assets to a representative and thereby through gross negligence furthering a bribery offence). The penalties for individuals include fines or imprisonment up to two years (up to six years if gross). The sanction for legal entities includes corporate fines (Sw. *företagsbot*) up to MSEK 10.
Final remarks	Employees who are made redundant have a right of priority for re-employment in the event there is a need to employ persons in the future. This right arises when notice of termination is given and subsists for a period up until nine months after the expiry of the notice period. The right of priority is conditional upon the employee having been employed for more than 12 months during the

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	last three years, that the employee claims such priority and that the employee has the necessary qualifications for the new employment.

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The International Employment Guide

Thailand

Prepared by Lex Mundi member firm Tilleke & Gibbins

General remarks	Labor matters in Thailand are mainly governed by the Labor Protection Act (LPA), the Labor Relations Act, and the Civil and Commercial Code (CCC), Sections 575-586—Hire of Services. The CCC sets out the principles of the contractual relationship between an employer and employee. The Labor Relations Act provides for supervision of the establishment of labor unions and other similar employer and employee associations, including their administration. While freedom of contract is generally recognized, it is not possible for the parties to contract around the minimum standards imposed by applicable Thai labor law, which address matters of public order and morality.
Employment agreement	The law does not require employment contracts to be made in writing. An employment agreement exists upon one person agreeing to work for another who agrees to pay wages to the first-mentioned person, the terms of which need not be memorialized in a written contract signed by the parties, but may exist verbally or be implied. Unless stipulated otherwise, the employment period lasts for an indefinite term. The parties may agree on fixed-term employment.
Terms and conditions of employment	The LPA sets a limit of 8 hours per day and 48 hours per week for normal work; however, flex time allows for an additional 1 hour per day, with the weekly limit of 48 hours remaining applicable. Working overtime may be permissible with the employees' prior consent, except where such work is of a continuous or urgent nature, or is otherwise necessary. Employees working overtime are entitled to overtime pay amounting to 1.5 times their normal wage rate for overtime work performed on a normal working day, holiday pay at 2 times their normal wage rate for work performed during normal working hours on holidays, and holiday overtime pay at 3 times their normal wage rate for overtime work performed outside normal working hours on holidays; however, certain employees are not entitled to overtime pay or holiday work pay, such as certain management personnel with specific kinds of authority. The current minimum wage is THB 300 per eight-hour workday. An increase of the minimum wage has been in discussion, and may be implemented in the near future. Other applicable minimum wage rates vary depending on the category of skilled labor, as set by the Wage Committee. After one year of service with the same employer, employees are also entitled to annual holidays of at least six working days per year, which may be accumulated and postponed for use in future years by mutual agreement.
Changing terms and conditions of employment	Terms and conditions of employment may be amended by the employer unilaterally without the employee's consent, but only if such amendment will confer greater benefits to the employee. Employees may also submit a request for amendment of the conditions of employment, provided that at least 15 percent of the employees participate in the request. A change to the terms and

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	conditions of employment may also be achieved through a collective bargaining agreement (where applicable), and other operating clauses in the employment contract, to the extent consistent with relevant statutes.
Trade Unions and the consultation obligation	A trade union may be formed by way of an election by at least ten employees of Thai nationality of the same employer or of the same industry, with effect from the date of registration at the relevant government office onward. Trade unions are permitted to provide consultation on and negotiate settlements of employment disputes, acknowledge arbitral awards, and call and assist in employee strikes. To the extent of their lawful participation in these activities, unions and their members are exempt from criminal prosecution and civil liability. Employers are obligated to submit requests for change in conditions of employment to the trade unions for mutual agreement.
Data privacy and personal integrity	At present, there is no unified/comprehensive personal data protection regime that is applicable across all commercial/industrial sectors; however, legislation on protecting personal data is under consideration and is anticipated to be implemented in the near future. The protection of individual privacy rights is generally recognized and protected under the Thai Civil and Commercial Code on torts, where a wronged person may bring an action against a responsible party for compensatory damages, and under laws specific to certain sectors, such as healthcare. For instance, personal health information must be kept confidential—no person may disclose it in such a manner as to cause damage to the data subject, unless it is done according to the data subject's will, or is required by a specific law to do so. Therefore, employee consent should be obtained before the contemplated disclosure/processing/transfer of employee information.
Regulations regarding parental leave or other forms of absence regulated by law	Various forms of leave are provided under the LPA. A female employee is entitled to 60 days of maternity leave, 45 days of which are with pay, per pregnancy. Employees are also entitled to, among other things, 30 days of paid sick leave in a calendar year, and paid military leave for a period not exceeding 60 days per year.
Termination of employment	Termination of employment without cause subjects the employer to an obligation to give the terminated employee advance notice, the timing of which is important. According to statute, this notice must be given at or before a payday, in order to take effect as of the following payday (i.e., at least one payment cycle in advance of the effective date of termination). To meet this requirement, there must be one complete payment cycle between the date the employee is notified of termination, and the date the termination takes effect. Failure to give due advance written notice would entitle the terminated employee to a payment in lieu of advance notice of an amount equal to one month's salary at the latest wage. The terminated employees are also entitled to statutory severance at rates that vary depending on the length of their service in years, with a maximum amount equal to ten months' pay at the employee's latest wage rate. Unlike a case of termination without cause, employees whose employment is terminated on statutory grounds (commonly referred to as "termination with cause"), are not entitled to advance notice of termination and statutory severance. The statutory grounds include, among other things, circumstances where an employee: (1) acts dishonestly in the performance of duties; (2) intentionally commits a criminal offense against the employer; (3) willfully causes damage or negligently causes gross or serious damage to the

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	employer; and (4) abandons work duties for three consecutive working days without a justifiable reason. For employment under a fixed-term employment agreement, the employment ends at the end of the term described in the agreement. Therefore, a fixed-term agreement will normally expire at the end of the agreed period without need to give advance notice of termination. Fixed-term employees are, however, still entitled to statutory severance unless otherwise exempt under the LPA.
Sanctions for wrongful termination	Termination of employment without cause often gives rise to legal action for an unfair dismissal/wrongful termination. In such case, an employee may file complaints with the Labor Court. If the Court finds such termination to be unfair or unjustified, the Labor Court may order reinstatement of employment. However, if the Court is of the opinion that the parties can no longer work together, or if reinstatement is otherwise impractical, the Labor Court may order the employer to pay compensatory damages, considering the age of the employee, the length of the employee's service, the hardship suffered due to termination, and the reasons for termination. The Labor Court may also order the employer to pay any severance pay and any other payments to which the employee is entitled.
Whistleblower protection	Thailand does not have specific laws that provide employment protection for whistleblowers. Nevertheless, an employer may not arbitrarily penalize its employees, merely for disclosing/reporting any malpractices or wrongdoings to the Labor Authority, as the employees are still protected under of the general provisions of statutes.
Non-Competition Laws	Non-competition agreements are governed mainly by the Unfair Contract Terms Act and Section 14/1 of the LPA. As a general matter, restrictive covenants are enforceable in Thailand, to the extent that they are reasonable. The Unfair Contract Terms Act provides that valid contractual terms that restrict the person's right or freedom such that one shoulders more of a burden than a reasonable person could have anticipated under normal circumstances shall only be enforceable insofar as they are fair and reasonable in the circumstances. Factors to be considered in assessing whether an agreement is fair and reasonable includes, among other things, the geographic scope of the specified area and the period of restriction of right or freedom, as well as the ability and opportunity of the employee to carry on his or her occupation or otherwise engage in business, as well as all legitimate advantages and disadvantages of the contracting parties.
Discrimination and equal employment opportunity	The LPA prohibits discrimination in employment decisions, based on gender, unless equal treatment is inappropriate due to the nature of the work. The LPA also prohibits an employer, supervisor, or inspector from committing sexual harassment, making sexual threats, or sexually disturbing any employee. Discrimination based on race and ethnic background is not specifically addressed under Thai labor laws, as such does not often occur. As a practical matter, equality of all individuals of different race, origin, and religion are recognized and promoted at workplaces.
Transfer of business and outsourcing	Thai labor laws mandate that an employees' prior consent is obtained to transfer his or her employment from one employing entity to another. A transfer of business and a merger effectively results in the transfer of

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	employment from one employer to another, therefore fulfilling the employee's consent requirement. This means that consent is not required in the event of a share acquisition, as this transaction does not lead to a change in employer. The employment relationship is therefore left untouched. In the case of an amalgamation, it has been held that an employee's consent is not required, because conceptually, the restructuring process does not result in a transfer of employment. In any event, an employee is entitled to reject the transfer of employment, in which case his/her employment would be deemed terminated, and the existing employer would be subject to the statutory severance obligation. Further, the LPA also mandates the new employer (or the amalgamated company, in the case of amalgamation) to accept all rights and benefits pertaining to the pre-existing employment relationship, and employees' benefits cannot be reduced without having first obtained their prior consent. With respect to outsourced employees, following the recent amendment to and the judicial decision on the LPA, an employer is to treat outsourced employers as their directly hired employees. Consequently, outsourced employees are entitled to enjoy the same benefits as those that the directly hired employees are entitled to.
Global mobility (brief overview of common issues and visa requirements)	At present, there are 34 occupations that are reserved for Thai nationals, which foreigners are prohibited to engage in. Where permitted, foreigners wishing to work in Thailand are required to first obtain work permits from the Ministry of Labor, prior to engaging in work in Thailand. Related immigration law also requires such individuals to maintain valid visas while staying in Thailand. The term "work" is defined very broadly—"working by exerting one's physical energy or employing one's knowledge, whether or not for wages or other benefits." Therefore, work permits are required even to engage in volunteer or charity work. An individual work permit is tied to a particular occupation, particular employer, and particular locality. When these particulars change, employees require new or amended work permits.
Criteria for independent contractor status	Issues of control and discipline are main determining factors in considering if a particular arrangement constitutes an employment relationship or an independent contractor status. Typically, the court would look to four main elements, as follows: 1. Purpose of the agreement: a hire-for-work agreement would be primarily concerned with the completion of a finished product or service, whereas an employment agreement has the ongoing provision of services to an employer. 2. Method of work: a genuine independent contractor would be able to exercise a significant degree of independence in completing the work. In such a relationship, the hirer may issue general rules or directions, but would not have control of the independent contractor's daily activities or operations, such as determining working hours and training needs. 3. Level of independence: an independent contractor would work principally for remuneration in return for work done, and would not be subject to disciplinary sanctions, as an employer may assess against an employee.

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	4. Type of remuneration: service fees would be paid to an independent contractor on the basis of successful results of the work, perhaps in installments or a lump sum. Supreme Court decisions have held, after applying the analysis described above, that an independent contractor who was performing services within the scope of the hirer's normal business activities was actually an employee.
Corruption, regulation and sanctions	The Thai Penal Code and the Organic Act on Counter corruption (OACC) criminalizes various activities that are regarded as corrupt. Corruption is defined to include an act of giving or promising to give a benefit to a government official on a quid pro quo basis. A purposeful failure to act, such as refraining from pressing criminal charges, also falls within the meaning of corruption. The OACC further sanctions business operators and individuals who pay bribes to foreign government officials and international organization officials. The governing laws do not sanction private commercial bribery (i.e., a bribery given by an employee of a private company to another to win a contract does not fall under the purview of the Penal Code and the OACC). The penalties for individuals include fines or imprisonment of up to five years, or both. The legal entity can be punished with a maximum fine of twice the actual damages or the benefits obtained through the corrupt activity.
Final remarks	Thai labor laws have been well developed and established, with an aim to achieve a balanced and fair position between an employer and employee, while seeking to promote employees' well-being and ensuring that their rights are fully protected. Aggrieved employees may report unfair practices anonymously or even file a formal complaint to the Labor Authority, which would readily instigate an investigative process into the complaint to determine if the employees' rights have been violated. As employees are viewed as a weaker party in an employment relationship, the Authority often finds in favor of the employees. Hence, it is of importance that employers are fully aware of its legal obligations to ensure that their actions would not encroach on the employees' rights, to avoid any unnecessary disputes and disruption to their businesses.

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The International Employment Guide

Turkey

Prepared by Lex Mundi member firm Pekin & Pekin

General remarks	Employment relationships are mainly regulated by the Labour Code and its relevant regulations. Labour Code is the most comprehensive regulation regarding employment law. Setting aside a few exceptions, the Labour Code shall apply to all the establishments, to their employers, employer's representatives and employees, irrespective of the subject matter of their activities.
Employment agreement	An employment agreement is substantially a bilateral agreement between employee and employer in which the employee undertakes to perform certain duties as directed and controlled by an employer in return for the agreed upon wage or salary. An employment agreement is deemed to have been made for an indefinite term where the employment relationship is not based on a definite term. Definite term employment contracts are contracts between the employer and the employee which are made for a specified period or upon objective conditions, such as the completion of a specific task or project. Definite term employment contracts, unless there are justifying grounds, may not be made consecutively. In the event that a probationary period is inserted as a condition into the employment contract, this may only be for a period of maximum two months. The probationary period may be extended to four months in collective bargaining agreements. The employment contract is not subject to a specific form, unless otherwise provided by the Labour Code. However, contracts of employment for a given period of one year and over shall be concluded in writing.
Terms and conditions of employment	As a rule, in accordance with the "freedom of contract", provisions of employment contract can be determined freely by the parties. However as intendment of the employment law prioritize protection of employees from economically stronger employers; provisions of the employment contract cannot be contrary to mandatory provisions of legislation on employment law. Amongst other, some of the material mandatory provisions are explained below. With the object of regulating the economic an d social conditions of all employees working under an employment contract, the minimum limits of wages shall be determined every two years at the latest by the Ministry of Labour and Social Security through the Minimum Wage Fixing Board. The statutory minimum wage for employees is TRY 1.647,00 gross (approximately EUR 498 as of August 14, 2016) and TRY 1.300,99 (approximately EUR 393 as of August 14, 2016) net for 1 January 2016 to 31 December 2016.

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	According to the relevant provisions of the Labour Code, the maximum total working hours per week can be 45 hours. If work exceeds 45 hours in a week within the framework of conditions written in Labour Code, such work shall be evaluated as overtime work. Subject to employees' consents and maximum of 270 hours per calendar year, employees may work overtime based on grounds of national benefit, characteristics of employment or increasing productivity. The length of the employee's annual leave with pay shall not be less than; - **14 days** if his length of service is between 1 and 5 years, (5 included), - **20 days** if it is more than 5 and less than 15 years, - **26 days** if it is 15 and more.
Changing terms and conditions of employment	Material amendments can be made on the working conditions constituted by the employment contracts or the personnel regulation such as internal policies and procedures in the nature of its attachment and similar sources or practices of working place, only by informing the employees in writing of the situation. Any amendments, which are not made in compliance with such form and which are not accepted in writing by the employees within six business days, shall not be binding upon such employees. If the employee does not accept the proposed amendment within this six business day period, the employer may terminate the employment contract, provided that it complies with the notice period and explains in writing that the amendment is based on a justified ground or that there is another justified ground for termination. In the event of such termination, the employee in question shall be entitled to file a lawsuit in accordance with the relevant provisions of the Labour Code.
Trade Unions and the consultation obligation	The influence of trade unions is not significant in Turkish Labour Law. The main functions of trade unions are enactment of collective employment agreements, announcement and management of strikes and lock-outs. There is no consultation obligation to trade unions under Turkish Law. However, employers are obliged to notify trade unions in the events of collective dismissal and establishment of temporary employment relationship. Acquisition of a membership in a trade union is voluntary. No one shall be forced to be a member or not to be a member of a trade union. Moreover, an employee or an employer cannot have a membership in more than one trade union established for the same branch of business at the same time. However, employees who are employed in the same branch of business but at the workplaces of different employers may be a member of more than one trade union. Where an employee or an employer is a member of more than one trade union as a violation to this provision, their subsequent membership shall be deemed void. Furthermore, the employees working for auxiliary works may join the trade union established in the line of activity covering that workplace.
Data privacy and personal integrity	Employers may keep a personal file for each of their employees, in which they shall include, in addition to the identification details of the employee, all the documents and records that the employers are obliged to keep by law and present them to the authorised officials and offices as and when requested.

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	Employers are obliged to use the information they gain access to regarding employees with integrity in line with the law and not to disclose any information, the confidentiality of which would be to the rightful benefit of the employee. Employers may only use the personal data of the employee in the event that such data is related to the predisposition of the employee to the work or is required for the performance of the employment contract. Additionally, Data Protection Law has been entered into force recently, pursuant to Data Protection Law the personal data shall not be processed in case: • There is no situation preventing receive the related person's approval; • There is no express consent; • There is no explicit provision; • Execution or fulfilment of the contract is not necessary; • The data has not become public.
Regulations regarding parental leave or other forms of absence regulated by law	Maternity leave shall be in total sixteen weeks, eight of which must be taken before and eight of which must be taken after giving birth. Where the mother is pregnant with more than one child, a further two weeks shall be added to the eight-week antenatal maternity leave period. However, if the employee so wishes and her health allows her to carry on working, the employee may, with the approval of her doctor, continue to work until three weeks before giving birth. In such cases, the unused portion of the eight-week antenatal maternity leave shall be added to the eight-week post-natal maternity leave period. The period of maternity leave specified above may be increased before and after birth in accordance with the employee's state of health and the characteristics of the employment. Any extension to the period of ante and post-natal maternity leave must be determined in light of a doctor's report. Paid leaves shall be granted to pregnant employees during pregnancy for the purpose of periodical doctor examinations. If a medical report deems it necessary, pregnant employees must be given lighter duties suitable with employees' medical conditions. The employees' pay may not be reduced in these circumstances. If the employee so wishes, she may take unpaid maternity leave of up to six months after the completion of the sixteen-weeks (or eighteen weeks as the case may be) of paid maternity leave. Any period of unpaid maternity leave shall not be taken into consideration in calculation of the annual paid leave. In order for the employees to breastfeed their babies, who are less than one year old, one and a half hours' off time shall be given to such employees. The employee herself shall determine when and in how many parts to use such time off. Such time off shall be considered part of the daily work hours. Additionally, a male employee is also entitled to take up to five days leave in case his wife gives birth. Employees are further entitled to take up to three days leave in the event of the death of a parent, spouse, sibling or child. In addition to annual paid leave, the Labour Code entitles employees to take up to three days leave for marriage.

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	Employees are entitled to take paid sick leave of up to one week upon the production of a medical report. Following such period, if the absence of the employee due to illness is extended, the leave shall be unpaid basis. In such case, the employee should provide the employee with the relevant medical report stating the leave term therein.
Termination of employment	The termination causes and procedures are limited by the Labour Code. The parties cannot agree upon other causes or procedures for termination in the employment contract or limit the scope thereof. The employment contract may be terminated according to the features of the employment contract such as (i) being subject to indefinite or definite term, (ii) the duration of the employment contract, and (iii) whether the employee benefiting from "job security. The definite term employment contracts are automatically terminated upon the expiry date agreed in the definite term employment contract. In addition, in case there exists a cause for immediate termination as explained below, the contract can be terminated prior to the expiry date. As for the indefinite term employment contracts, the employee or the employer is obliged to send notice to the other party before the termination of the indefinite term employment contracts. The rights and liabilities of the parties shall fully remain in force during the course of the notice period. The length of the notice period is; • **2 weeks** if his length of service is less than 6 months, • **4 weeks** if it is more than 6 and less than 18 months, • **6 weeks** if it is more than 18 and less than 36 months, • **8 weeks** if it is more than 3 years. According to the Job Security system, as stipulated under the Labour Code, in order to terminate the employment contracts of the employees benefiting from job security, certain grounds provided by the law shall exist (valid grounds). In case such grounds do not exist or cannot be proven by the employer, the employee shall be returned to work, if possible or, if not, shall be paid a special indemnity. Accordingly, in order for an employee to be able to benefit from the job security, the following conditions must be met: the employee must be working at a work place employing thirty or more employees, the employee must have at least six months of seniority at the work place, the employee must not have the status of an employer representative or employer assistant managing the entire enterprise, and the employee must not have the status of an employer representative managing the entire work place and having the authority of recruiting and dismissing employees. In the case of the existence of certain material reasons that make the continuation of the employment relationship difficult, that are explicitly set out in the Labour Code, the parties may terminate the contract without adhering to the notice periods or before the expiration thereof, irrespective of whether the there is an indefinite or a definite term employment contract. The Labour Code refers to such right as "immediate termination on just grounds".

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Sanctions for wrongful termination	Wrongful termination may be understood as termination by the employer without a valid cause or termination by the employer without a cause for immediate termination. Regarding termination without a valid cause, in case the conditions of benefiting from job security for the employee is met, the employee may file a lawsuit with the Labour Court within 1 (one) month from the receipt of the termination notification. Should the employer fail to provide valid and/or just cause for the termination of the employment contract or should the court rule out the given cause as being invalid and thus disregard the termination, the employer is required to re-employ the employee within one month. If the employer does not re-employ the employee within one month from the application of the employee, the employer shall be liable to pay compensation to the employee, amounting to a minimum of four-month salary and a maximum of eight-month salary. As per the termination by the employer without a cause for immediate termination, the employer shall be required to make severance pay to the employee.
Whistleblower protection	There is no regulation focusing directly on whistleblowing in Turkish Law. However, employees are protected against invalid or unjust dismissal by the certain pieces of the legislation. In this respect following provisions from Turkish law are indirectly related with whistleblower protection: • Employees are protected against invalid or unjust dismissal regarding filing of a complaint or participation in proceedings against an employer involving alleged violations of laws or regulations or recourse to competent administrative or judicial authorities. • No discrimination based on language, race, sex, political opinion, philosophical belief, religion and sex or similar reasons is permissible in the employment relationship. • The authorities and officials shall not reveal the names and identities of employees and other persons from whom they have received information.
Non-Competition Laws	Any post-termination prevention of competition by the employee is regulated by the employment contract, through a non-competition clause or by executing a separate “non-competition agreement", having regard to the general provisions of the Code of Obligations and the established principles of the Turkish Competition Board which is a governmental body that ensures the formation and development of markets for goods and services in a free and sound competitive environment. The Code of Obligations imposes a number of conditions that must be satisfied for a non-competition clause to be valid. First of all, there must be a common understanding between the parties that the employee knows the employer's customers and confidential information and that accordingly there is a risk that the employee may cause considerable loss to the employer by using such information.

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	In addition, non-competition clauses must be reasonable with respect to their term, geographical application and the nature of work to which the prohibition applies. What is considered a reasonable duration for a non-compete provision shall differ according to the practices in the relevant market; however, the common practice of the Turkish Competition Board, is to allow a non-compete provision to be inserted into the employment contracts for a maximum period of two years provided that the market conditions allowed such a period. However, the period may be shorter if the conditions in the relevant market are very changeable and amendable within a very short time frame such as 2 to 6 months as in the banking and finance markets, etc. In addition, as per the Code of Obligations, the term of the non-competition clause cannot exceed two years, unless there are special circumstances justifying a longer term. What constitutes a special circumstance shall be determined on a case by case basis. Moreover, the term of the non-compete clause (even if it is less than two years) may be reduced by the court in case the court determines that the term of the non-compete clause is unreasonably long given the specific circumstances surrounding the case. The Code of Obligations also stipulates that in order to be valid, a prohibition on competition must be in writing. Focusing on the consequences of non-competition clauses inserted to the employment contracts, in the event of breach of the non-competition clause by the employee; such employee shall be liable to compensate the loss of the employer. If a penalty has been envisaged, the employee shall be released from the non-competition clause by paying the penalty fee. However, if the employer proves that that the loss suffered is more than the penalty paid, then the excess amount shall also be compensated by the employee. A court decision may be required in order to enforce the non-compete clause and the penalty to be paid by the employee. Furthermore, the non-competition clause shall terminate upon determination of the non-existence of any interest of the employer worthy of such protection. Besides, if the employment contract has been terminated by the employer on invalid and unjustifiable grounds, no lawsuit can be filed against the employee for breach of the non-competition clause. Moreover, the employee shall always reserve the right to initiate legal proceedings against such provisions.
Discrimination and equal employment opportunity	Any kind of discrimination in employment relations on the basis of language, race, gender, political opinion, religion and sect, or similar reasons is prohibited by Turkish law. Employees working in the same or equivalent jobs may not be discriminated on the basis of gender when being remunerated. Also, no discrimination is allowed among employees working under a definite/indefinite term or part/full time contract. However there are some limitations regarding gender, for example, women are prohibited from employing in some dangerous works such as mining. In addition, there are further provisions in order to encourage employers to recruit and employ disabled employees since it seems more difficult for them to find suitable jobs. In workplaces where there are 50 or more employees, the Labour Code requires private sector employers to ensure that 3% of the workforce is composed of disabled employees in full-time roles that are suitable in respect of their professional qualifications and physical and psychological status.

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Transfer of business and outsourcing	The transfer of the business can be analysed in three categories with respect to (i) the asset sale, (ii) share sale and (iii) transfer of employees. (i) the asset sale, As per Article 6 of the Labour Code, in the event that the workplace is partially or fully transferred to another legal body on the basis of a legal transaction, the employment contracts that exist at the workplace or part thereof at the date of transfer are transferred to the transferee together with all employment rights and obligations. In light of the foregoing provisions, the transferor and the transferee shall be jointly responsible for debts accrued prior to the transfer and which are due on the date of transfer. However, the liability of the transferor is limited to two years following the date of transfer. (ii) share sale, Please be advised that under Turkish Law, changes in the shareholding structure of a company shall not affect the status of the employees so long as the identity (legal personality) of the company remains the same, unless there is a material (adverse) change on the working conditions of the employees. In this respect, neither the issue of share transfer is regulated within the framework of the Labour Code nor are the consequences of a share transfer on the employees of the company subject to such share transfer regulated under the Turkish Labour Legislation. (iii) transfer of employees, In the event of a sole transfer of the employees (transfer of employment contracts as stated under the Code of Obligations), which is a different concept with respect to the transfer of the workplace, consents of the transferring employees are required. In this respect, a three-party agreement may be executed by and between the employee, the current employer and the new employer. In the event of a transfer of an employment contract, there will not be a new employment contract established with the new employer and the current employment contract shall continue to be effective with its all terms and conditions. However, in case there is be any changes in the working conditions of the employees, new employment contracts may be executed since their prior written consents would also be required in order to make any material changes on their working conditions. Please bear in mind that in case of execution of new employment contracts as explained above, the employees' accrued entitlements with the former employer shall be protected.
Global mobility (brief overview of common issues and visa requirements)	Unless otherwise provided in the bilateral or multi-lateral agreements to which Turkey is a party, foreigners are obliged to obtain a work permit before they start to work dependently or independently in Turkey. The work permit applications are evaluated by Ministry of Labour and Social Security with respect to the International Workforce Law, policies determined by the Advisory Board of International Workforce Policy. As per Article 10 of the International Workforce Law, partners of joint stock corporations who are also board members, and partners of limited liability corporations who are also managers, are obliged to obtain a work permit.

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	However, as per article 13 of International Workforce Law, the board members of the joint stock companies and the partners of limited liability companies who do not have managing powers and who are not residing in Turkey are exempted from the obligation to obtain a work permit. According to the International Workforce Law, work permit applications can be made either abroad or in Turkey. In order to apply for a work permit from abroad, an application shall be made by the foreigner or by an intermediary to the Turkish diplomatic representatives of Turkey in the foreigner's country of origin or country of permanent residence. The Turkish diplomatic representatives of Turkey shall forward such applications, including its evaluations which may be related to the work permit application, directly to the Ministry in Turkey. The previous Law, the Law Regarding Work Permits for Foreigners, expressed that only the foreigners, holding a valid residence permit at least for a period of 6 months at the time of the application, or their employers, may make an application for a work permit directly to the Ministry in Turkey, together with the relevant documents. However, the International Workforce Law, do not provide such an article and the application will be reformed regarding the Regulations that the Ministry enacts. Visitors who are not exempt from entry visa must obtain their visas or schedule an appointment with the Turkish Consular offices via Pre-Application System for Turkish Sticker Visa (www.visa.gov.tr). As the countries vary, please visit the Turkish Ministry of Foreign Affair's official website for updated information (http://www.mfa.gov.tr/visa-information-for-foreigners.en.mfa)
Criteria for independent contractor status	According to the Labour Law, a subcontractor may be assigned only for auxiliary tasks for production of goods and services, or regarding a certain section of the main activity due to operational requirements or for reasons of technological expertise. In the event that such conditions are not met, and the agreement between the principal employer and the subcontractor is deemed as a collusive subcontract, such contract shall be invalid and from the beginning of the employment relation, the principal employer shall be accounted as the employer, and shall solely be responsible for the liabilities such as unpaid salaries and social security premiums. In the event that a subcontract agreement is valid regarding the abovementioned criteria, the principal employer shall be jointly liable with the subcontractor for the obligations ensuing from the Labour Law, from employment contracts of subcontractor's employees or from the collective agreement to which the subcontractor has been signatory such as the severance pays and work safety obligations. As for the provided services which are not related to the production of goods and services of the employer, the relationship is not deemed as a subcontract agreement and is not regulated under the Labour Code. Such agreements are governed by the Code of Obligations, regarding their attributes as retainer, service or sales agreements.
Corruption, regulation and sanctions	The acts of corruption such as bribery, malfeasance, embezzlement, fraud and bid-rigging are regulated under the Turkish Criminal Code. The penalties for individuals include fines or imprisonment up to eighteen years. As per Article 20 of the Turkish Criminal Code, criminal sanctions cannot be imposed against

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	legal persons; however, several security measures may be imposed such as seizure of the benefits originated from such criminalized acts, or invalidation of licenses and permits granted by a public authority. However, the criminal code do not define or limit such security measures and ensures judicial discretion.
Final remarks	There is an ongoing process to enact the Draft Code of Labour Courts which will impose an obligation to the litigants to bring the case before intermediators before filing a lawsuit. Pursuant to the draft law, the intermediators may be obliged to solve the case and make a decision in 3 weeks.

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The International Employment Guide

USA, Delaware

Prepared by Lex Mundi member firm Richards, Layton & Finger, P.A.

General remarks	Title 19 of the Delaware Code governs most aspects of the employer-employee relationship. Additionally, if an employment contract exists between the employer and employee that sets forth the terms and conditions of the employee's employment, the contract will dictate the rights and responsibilities of both parties provided such is not prohibited by law. The employer's handbook containing its policies and procedures will also impact the employment relationship between the employer and employee.
Employment agreement	An employer does not have to enter into a written employment agreement with an employee in order for an employment relationship to exist. However, a private employer may choose to enter into a written employment agreement with one or more employees. This is somewhat more common with higher-level employees. If an employer decides to enter into an employment agreement with a particular employee, such agreement sets forth the terms of employment (even if it is "at will" as to the parties' ability to terminate), duties, compensation, and circumstances under which the agreement may be terminated by either party. In addition, such agreements may contain provisions requiring employees to keep information confidential even after they leave employment and barring them from becoming employed by certain competing organizations for a limited period of time following termination. Under Delaware law, an employer is prohibited from prohibiting an employee from discussing or disclosing their wages. 19 Del. C. § 711(i). Thus, any valid employment agreement must not require confidentiality by the employee with regard to his or her wages.
Terms and conditions of employment	Employment is governed by statute and common law. The Delaware Department of Labor enforces employment statutes and investigates discrimination charges and wage and hour violations. Delaware is an at-will state. The employee and the employer are free to terminate the employment relationship at any time, with or without notice and with or without cause, for any lawful reason. Wages must be paid at least once a month, and all wages must be paid within seven (7) days of close of pay period, with limited exceptions. 19 *Del. C.* 1162(d). Additionally, employers must notify employees in writing of the rate of pay and the date, hour and place of payment. 19 *Del. C.* § 1108(1). Severance payment is not required unless the employer voluntarily has such a policy or practice. The minimum wage for most employees in Delaware is $8.25 per hour. 19 *Del. C.* § 902. Delaware has not adopted overtime requirements applicable to private employers. Generally, overtime is regulated pursuant to the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* Delaware has some statutes regulating or relating to aspects of overtime pay applicable in specific limited instances. Delaware has a meal break law applicable to certain employees of at least 30 consecutive minutes if the employee is scheduled to work 7.5 or more hours a day, and must occur after 2 hours of work and before the last 2 hours of work.

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Changing terms and conditions of employment	For "at will" employees who do not have an employment agreement with agreed-upon terms, the employer can unilaterally change most, if not all, of the terms and conditions of the employee's employment without the consent of the employee by making changes to the employer's policies and procedures, which may be set forth in the employment handbook or other written document. With regard to employees who have entered into a written employment agreement, the employee and employer can renegotiate mutually acceptable terms and conditions of employment either during (assuming proper consideration) or at the end of a contract prior to its renewal. Any changes to the terms and conditions of employment must not conflict with Delaware employment laws. If a collective bargaining agreement exists, in most instances the employer will be unable to unilaterally change the material terms and conditions of the employees' employment without the consent of the collective bargaining unit.
Trade Unions and the consultation obligation	A Delaware employer that is bound by a collective bargaining agreement must act in accordance with any obligations to inform, consult with, negotiate and/or obtain the consent of, or formal rendering of advice from, all applicable labor or trade unions and/or any other employee representative bodies.
Data privacy and personal integrity	Delaware employers must notify employees in writing before monitoring employee telephone conversations, email and internet usage. 19 *Del. C.* § 705. In the event that an employer seeks permanently to dispose of records containing employees' personal identifying information (including but not limited to information that contains the employee's first name or first initial and last name in combination with social security number, passport number, driver's license or state identification card number, insurance policy number, financial services account number, bank account number, credit card number, debit card number, tax or payroll information or confidential health care information) within its custody and control, such employer shall take all reasonable steps to destroy or arrange for the destruction of each such record by shredding, erasing, or otherwise destroying or modifying the personal identifying information in those records to make it unreadable or indecipherable. 19 *Del. C.* 736.
Regulations regarding parental leave or other forms of absence regulated by law	Delaware does not have a family medical leave statute that private employers must follow. Delaware follows the federal Family Medical Leave Act (FMLA) 29 *U.S.C.* § 2612. However, Delaware does have rules governing leave for public officers and employees. Delaware law provides that public employees may take up to six weeks of leave for the adoption of a minor child. Additionally, Delaware law provides that a full-time or part-time employee of the state may use accumulated sick leave for child care purposes upon the birth of a child of the employee or the employee's spouse, or upon the adoption by the employee of a pre-kindergarten-age child. All private and public employers, pursuant to Delaware's Pregnant Workers Fairness Act, must make reasonable accommodations for the known limitations of pregnant employees, as long as the accommodation does not constitute an undue hardship for the employer. 19 *Del. C.* § 711(a) (3a). This law also prohibits employers from denying a job to a pregnant applicant based on the need for workplace accommodations, forcing a pregnant employee to take paid or unpaid leave when a reasonable accommodation that would allow her to continue working is available, and making changes to a pregnant employee's work when not necessary. Effective December 30, 2016, it will be an unlawful employment practice for a Delaware employer to discriminate against any individual because of the individual's family responsibilities, except with

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	respect to the employer's attendance and absenteeism standards that are not protected by other applicable law and inasmuch as the employee's performance at work meets satisfactory standards. 19 *Del. C.* 711(k). Further, as of December 30, 2016, it will be an unlawful employment practice for an employer to discriminate against any individual because of a reproductive health decision made by the individual. 19 *Del. C.* § 711(j).
Termination of employment	There is no notice or severance requirement in Delaware, nor are there any rules regarding the manner of termination for at-will employees. The Delaware Wage Payment & Collection Act sets forth the requirements for final pay upon termination. 19 *Del. C.* § 1101 *et. seq.* Notably, a terminated employee's final wages are due on or before the next regularly scheduled payroll date, and employers must pay or provide benefits they are obligated to pay within 30 days. 19 *Del. C.* § 1109. Delaware law provides that an employer must post and maintain printed statements of unemployment regulations in places readily accessible to employees, and further provides that employers must supply an individual with information regarding unemployment regulations at the time the individual becomes unemployed. In order to avoid the payment of unemployment benefits to the terminated employee, Delaware law requires that an employer have just cause for terminating an employee, which in very general terms amounts to willful misconduct, not inability to perform the job adequately.
Sanctions for wrongful termination	At-will employees can sue for wrongful termination if they were fired for illegal reasons, such as an employer's violation of public policy, an employer's breach of an implied contract for continued employment, an employer's violation of the covenant of good faith and fair dealing, as well as discrimination or retaliation by the employer. An employee who is successful in a wrongful termination suit against their employer for discrimination or retaliation is entitled to reinstatement with the employer, back pay, front pay (wages lost from the time of judgment until the employee is reinstated or finds new work), the costs of health insurance and other benefits the employee would have received if still employed, injunctive relief, compensatory damages (out of pocket expenses such as medical bills, pain and suffering or job search costs), and/or punitive damages. However, employees may have a duty to mitigate their damages by looking for a job elsewhere. Also, employees who have an employment contract that specifies the reasons for which they can be terminated can sue their employer for breach of contract if they were fired for other reasons. If an employee is successful, he/she can seek lost wages and benefits under the contract for the remaining period.
Whistleblower protection	Delaware has adopted the Delaware Whistleblowers' Protection Act (WPA). 19 *Del. C.* §§ 1701-1708. Under the WPA, an employee may not be discharged or discriminated against in retaliation for engaging in certain whistleblowing activity. Specifically: • Reporting a violation of either (1) health, safety, and environmental laws; or (2) financial management and accounting standards laws (or potential future violations) to either an appropriate public body or a supervisor. The employee must know or reasonably believe that the violation has occurred. • Participating in a public investigation or hearing concerning a violation of either of these 2 types of laws.

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	• Refusing to commit a violation of either of these 2 types of laws. When reporting violations, an employee may report the violation to an appropriate public body or to a supervisor. Employers are also required under the WPA to inform employees that they will not be retaliated against for whistleblowing. In addition to the whistleblower protection law, Delaware has enacted many anti-retaliation statutes to cover specific instances of retaliation. Employees may not be retaliated against (i.e., discharged or discriminated against) for engaging in protected activities (e.g., reporting violations) concerning the following: Campaign Contributions: An employee may not be discharged or discriminated against in retaliation for reporting a violation of campaign contribution laws to a public body. 19 *Del. C.* § 1703. Child Labor: An employee may not be discharged or discriminated against in retaliation for filing a complaint, providing information to the Delaware Department of Labor, or instituting or testifying in a proceeding related to child labor violations. 19 *Del. C.* § 509(c). Discrimination: An employee may not be discharged or discriminated against in retaliation for participating in the enforcement of Delaware's anti-discrimination laws, nor may an employee be discharged for opposing an employment practice made illegal by state anti-discrimination laws. 19 *Del C.* § 711(f). Handicapped Employee Protection: An employee may not be discharged or discriminated against in retaliation for testifying, assisting or participating in a proceeding to enforce protections for handicapped persons, nor may an employee be discharged in retaliation for opposing an employment practice that violates the Handicapped Persons Employment Protections Act. 19 *Del. C.* § 726. False Claims: An employee may not be discharged or discriminated against in retaliation for advancing a case under the Delaware False Claims Act or for trying to stop a violation from occurring. 6 *Del. C.* 1208.
Non-Competition Laws	A restrictive covenant must (1) meet general contract law requirements, (2) be reasonable geographically and temporally, (3) advance a legitimate economic interest of the party that seeks to enforce the covenant, and (4) survive a balance of the equities test. In general, an offer of employment or a change in the terms and/or conditions of employment is sufficient legal consideration. Reasonableness of the restrictive covenant depends on the circumstances. The courts will look at the legitimate economic interests of the employer. Delaware courts will typically protect the employer's trade secrets, customer good will, customer lists, and other proprietary information in which the employer has a legitimate economic interest. For example, if an employer's client base is international, it may be reasonable for a high-level employee to be restricted from working for any direct competitor anywhere for a certain period of time (e.g., one year is usually reasonable and can be up to two in certain situations). Blue pencil provisions are generally advised, although Delaware courts have rewritten provisions to narrow the scope without specific language in the contract authorizing such.

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Discrimination and equal employment opportunity	In Delaware, the Delaware Discrimination in Employment Act (DDEA) prohibits discrimination based on membership in a protected class. 19 *Del. C.* § 711. The protected classes are race, marital status, genetic information, color, age, religion, sex, sexual orientation, gender identity, national origin, volunteer emergency responder status, surviving sexual assault domestic violence or stalking status. These restrictions apply to public employers and private sector employers with four or more employees in Delaware. In addition, for public employers, an employee's criminal record, criminal history or credit score is also considered a protected class. 19 *Del. C.* §§ 710-719. Pursuant to the Handicapped Persons Employment Protections Act (HPEPA), it is unlawful to discriminate against a handicapped person. 19 *Del. C.* §§ 720-728. The HPEPA applies to public and private employers with four or more employees and requires employers to provide reasonable accommodations for qualified handicapped persons. Effective December 30, 2016, Delaware will also prohibit discrimination with regard to an employee's reproductive health decisions (19 *Del. C.* § 711(k)) and family responsibilities (19 *Del. C.* § 711(i)). The Delaware Department of Labor (DDOL) administers and enforces the DDEA. 19 *Del. C.* § 712. The DDOL's Office of Anti-discrimination handles the intake and investigation of discrimination charges. Employees must file all complaints of discrimination with the DDOL within 300 days after the alleged discriminatory practice or its discovery. 19 *Del. C.* § 712(c). Employees may file a civil action within 90 days of receipt of a right to sue notice with the Superior Court of Delaware after exhausting all administrative remedies before the DDOL and after receiving a Delaware Right to Sue Notice. 19 *Del. C.* § 714(b).
Transfer of business and outsourcing	When there is a transfer of a business (or assets of a business), consideration must be made for how the transfer or termination of employees will be handled. During due diligence the parties will assess risk factors relating to employee liability issues. The asset purchase agreement between the buyer and the seller will generally control which party will be responsible for the liabilities, rights and obligations to employees, including the hiring, transfer and/or termination of employees, and any applicable severance and employment claims. Also, Delaware does not have a state plant closing or mass layoff statute, but follows the federal Worker Adjustment and Retraining Notification (WARN) Act with regard to the notification of employees impacted by a plant closing or mass layoff.
Global mobility (brief overview of common issues and visa requirements)	Foreign employees must have work permits under federal law. There is no supplemental Delaware state law.
Criteria for independent contractor status	There is no single established definition of an independent contractor under Delaware law. Instead, various tests are applied to determine whether an individual or entity is properly classified as an independent contractor for the purposes of common law, unemployment insurance, workers' compensation and other statutory laws. With regard to common law and workers' compensation, Delaware uses the restatement (second) of agency § 220 as an authoritative source in determining whether one who works for another is a servant (employee) or an independent contractor. Second 220 provides a list of nonexclusive factors to be considered. Section 220 provides a list of nonexclusive factors to be considered:

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- The extent of control that, by the agreement, the master may exercise over the details of the work;
- Whether or not the one employed is engaged in a distinct occupation or business;
- The kind of occupation, with reference to whether the work is usually done under the direction of the employer or by a specialist without supervision;
- The skill in the particular occupation;
- Whether the employer or worker supplies the instrumentalities, tools and place of work;
- The length of time for which the person is employed;
- The method of payment, whether by the time or by the job;
- Whether or not the work is part of the regular business of the employer;
- Whether or not the parties believe they are creating the relationship of master and servant; and
- Whether the principal is or is not in business.
  See also *Falconi v. Coombs & Coombs, Inc.,* 902 A.2d 1094 (Del. 2006) (giving material weight to the control factor in workers' compensation cases).

  An individual's status as an independent contractor under Delaware's Unemployment Compensation Law is based on three statutory factors.
  The company must demonstrate that the worker is and will continue to be:

- Free from control and direction by the company in connection with performance of such service;
- Customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed; and
- Such service must be performed either outside the usual course of the business of the company or outside all the places of business of the company. 19 Del. C. § 3302(10)(K).

  Delaware courts have adopted the *Albrecht test* to determine whether a person is an employee or an independent contractor under the WPA. To determine whether an individual is an employee under the WPA, the *Albrecht test* considers:

- The degree of the alleged employer's right to control the manner in which the work is to be performed;
- The alleged employee's opportunity for profit or loss depending upon his managerial skill;
- The alleged employee's investment in equipment or materials required for his task or his employment of helpers;
- Whether the service rendered requires a special skill;
- The degree of performance of the working relationship; and
- Whether the service rendered is an integral part of the employer's business. Tekstrom, Inc. v. Salva, 918 A.2d 1171 (Del. 2007) () (citing Martin v. Albrecht, 802 F. Supp. 1311, 1313 (W.D. Pa. 1992)).

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	The absence or presence of any one factor is not determinative, because courts should "consider, whether, as a matter of economic reality, the independents 'are dependent upon the business to which they render service.'" *Id.* at *5.
Corruption, regulation and sanctions	A person is guilty of bribery when the person offers, confers or agrees to confer a personal benefit upon a public servant: (1) upon an agreement or understanding that the public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced; (2) upon an agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office; or (3) for having violated a duty as a public servant. 11 *Del. C.* § 1201. Bribery is punishable by up to five years in prison. 11 *Del. C.* § 4205. Embezzlement occurs when a person who was entrusted to manage or monitor someone else's money or property steals all or part of that money or property for the individual's personal gain. In addition to fully reimbursing victims for their monetary losses ("restitution"), a person guilty of embezzlement in Delaware will face monetary and/or prison time penalties (which vary according to the value of the property or money embezzled). 11 *Del. C.* § 841.
Final remarks	Almost all places of employment in Delaware are smoke-free pursuant to the Clean Indoor Air Act, 16 *Del. C.* § 2903, and more recently Delaware mandated certain notices that must be provided to pregnant employees pursuant to the Delaware's Pregnant Workers Fairness Act. 19 *Del. C.* § 711(a)(3a). Also, note that Delaware prohibits employers from requiring, requesting, causing or suggesting that an employee or prospective employee take a polygraph, lie detector or similar test or examination as a condition of employment or continuation of employment 19 *Del. C.* § 704.

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The International Employment Guide

USA, Florida

Prepared by Lex Mundi member firm Akerman LLP

General remarks	In comparison to other states within the United States, the State of Florida has a relatively small number of statutory employment laws.
Employment agreement	Absent a collective bargaining agreement or employment agreement for a specified term, the default rule in Florida is that employment is "at-will," meaning that an employer has the right to discharge an employee at any time, for any lawful reason, or for no reason.
Terms and conditions of employment	Effective January 1, 2016, the minimum hourly wage in Florida is $8.05. The Florida minimum wage applies to all employees who are covered by the federal FLSA. The Florida Agency for workforce Innovation is required to calculate a new minimum wage each year and publish it on January 1st. Florida does not have any laws governing the payment of overtime. Employers must grant a meal period of at least 30 minutes to employees under the age of 18 who work for more than four continuous hours. Florida does not have any laws requiring employers to provide meal or rest periods to employees 18 years of age or older. Various local jurisdictions have enacted wage recovery ordinances, whereby employees may seek administrative relief to recover unpaid wages from an employer. Currently the following city and counties have enacted such ordinances: City of St. Petersburg; Alachua County; Broward County; Hillsborough County; Miami-Dade County; Pinellas County; and Osceola County. Employers should review local ordinances to determine whether additional cities or counties have enacted similar ordinances.
Changing terms and conditions of employment	Absent a collective bargaining agreement or employment agreement, an employer may prospectively change the terms and conditions of an employee's employment by providing them with notice of the change, except where the change is prohibited by applicable federal law.
Trade Unions and the consultation obligation	Florida does not have any state laws concerning an employer's obligation to consult with labor unions.
Data privacy and personal integrity	Under Florida law, it is a crime to intercept and disclose wire, oral, or electronic communications. There is an exception for oral communications made where there is no expectation of privacy, and for public oral communications made at a public meeting. As Florida is an all-party consent state, consent must be obtained from all parties prior to the interception or disclosure of the communication.
Regulations regarding parental leave or other forms of	Florida does not have any state laws concerning parental leave.

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absence regulated by law	Under Florida's domestic violence leave law, employers with 50 or more employees are required to provide employees who have worked for the employer for three or more months with up to three days of unpaid leave in any rolling 12-month period if the employee or a family or household member of the employee is the victim of domestic violence. Miami-Dade County has an ordinance similar to the state law, except that eligible employees may be entitled to up to 30 days of unpaid leave for reasons related to domestic violence. Miami-Dade County has enacted a Family Leave Ordinance, which mirrors the FMLA and applies to employers in Miami-Dade County with 50 or more employees. The Family Leave Ordinance goes a step beyond the FMLA and provides leave to care for an employee's grandparent. Employers should check local ordinances to determine whether any additional leave may be required under local law. Various local jurisdictions have enacted paid jury duty leave laws; however, there is no state law requiring employers to provide employees with paid jury duty leave. Employers are mindful to comply with the FLSA, if applicable to the employer, when an employee is on a leave of absence for jury duty. Florida has no law requiring employers to provide employees with vacation benefits or sick leave benefits.
Termination of employment	Employers do not have any legal obligations to provide an employee with specific notice upon terminating an employee, other than any obligations set forth in a collective bargaining agreement or an employment agreement. However, under Florida Health Insurance Coverage Continuation Act, an employer with two to nineteen employees, and thus not covered under the federal COBRA law, must provide employees and their dependents with the opportunity to extend group health insurance coverage through the employer's group health plan.
Sanctions for wrongful termination	Florida law does not delineate specific sanctions for "wrongful termination." Rather, an employee may seek damages under the Florida Civil Rights Act if the employee is terminated by an employer for discriminatory reasons, seek damages under the Florida private or public whistleblower laws if an employee is terminated in violation of the laws, or seek damages under Florida's Workers' Compensation law if the employee is terminated by the employer in retaliation for the employee filing a workers' compensation claim.
Whistleblower protection	A private employer is prohibited from terminating an employee in violation of Florida's private sector whistleblower statute. Under that law, an employer is prohibited from terminating an employee based on the employee's: (1) disclosure or threatened disclosure of a violation of a law, rule, or regulation to a government agency; (2) testifying or providing information to a government agency regarding such violations; or (3) objecting to or refusing to participate in an activity that involves such violations. Under Florida's public sector whistleblower statute, a public sector employer in Florida is prohibited from terminating an employee based on the employee's: (1) disclosure of any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare to a government

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	agency; (2) disclosure of any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or independent contractor; (3) participating in any investigation, hearing or other inquiry conducted by a government agency; (4) refusing to participate in such violations; or (5) initiation of a complaint regarding such violations.
Non-Competition Laws	With limited exceptions, Florida law prohibits restraints on trade. One of the exceptions is a non-compete agreement that meets the requirements of Florida statutory law. Under Florida statutory law, a non-completion agreement is generally enforceable if: it is reasonable in time, area, and line of business; legitimate business interests justify the restrictive covenant; and the restrictive covenant is reasonably necessary to protect the legitimate business interests.
Discrimination and equal employment opportunity	The Florida Civil Rights Act of 1992 protects employees against discrimination in employment based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. Additionally, various local ordinances protect employees from discrimination on the basis of additional protected classifications, such as sexual orientation, gender identity, familial status, and political affiliation. Employers are advised to check local ordinances in relevant jurisdictions to determine whether additional protected classes are included under applicable local law.
Transfer of business and outsourcing	Absent an employment agreement restricting assignment of the employment agreement to a subsequent employer, there is no notice an employer must provide to employees concerning the transfer of the employer's business to another business entity. Florida does not have a mini-WARN act.
Global mobility (brief overview of common issues and visa requirements)	Florida does not have any state-specific requirements concerning authorization to work within the state. All issues concerning visa requirements and authorization to work in the United States are governed by federal immigration laws.
Criteria for independent contractor status	Under Florida's Workers' Compensation Act, a worker (excluding a worker engaged in the construction industry) is an independent contractor if he or she meets at least four of the following criteria: (i) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations; (ii) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations; (iii) The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual; (iv) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation; (v) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own

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	election without the necessity of completing an employment application or process; or (vi) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists. Even if four of the foregoing criteria do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions: (i) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work. (ii) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform. (iii) The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform. (iv) The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis. (v) The independent contractor may realize a profit or suffer a loss in connection with performing work or services. (vi) The independent contractor has continuing or recurring business liabilities or obligations. (vii) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.
Corruption, regulation and sanctions	Florida does not have any employment-related laws concerning corruption.
Final remarks	Under Florida law, an employer may not prohibit an employee from possessing any legally owned firearm when such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in the parking lot. In addition, an employer may not make any verbal or written inquiry regarding the presence of a firearm inside or locked to a private motor vehicle in the parking lot or search the private motor vehicle to ascertain the presence of a firearm in the vehicle. An employer also may not take any action against an employee based on verbal or written statements of any party concerning the possession of a firearm stored inside a private motor vehicle for lawful purposes. Employment may not be conditioned upon the fact that an employee or prospective employee holds or does not hold a license to carry a concealed weapon, or upon an agreement by an employee or prospective employee that prohibits an employee from maintaining a legal firearm locked inside or locked to a private motor vehicle in the parking lot.

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Non-Competition Global Practice Guide

USA, Florida

Prepared by Lex Mundi member firm Akerman LLP

Does your state or country recognize and/or enforce restrictive covenants against employees?

With limited exceptions, Florida law prohibits restraints on trade. One of the exceptions is a restrictive covenant agreement that meets the requirements of Florida statutory law, Florida Statutes section 542.335. Under Florida statutory law, a restrictive covenant agreement is generally enforceable if: it is reasonable in time, area, and line of business; legitimate business interests justify the restrictive covenant; and the restrictive covenant is reasonably necessary to protect the legitimate business interests.

What are enforceable protectable business interests that courts will protect?

Pursuant to Florida statutory law, protectable business interests include, but are not limited to: (1) trade secrets; (2) valuable confidential business or professional information that otherwise does not qualify as trade secrets; (3) substantial relationships with specific prospective or existing customers, patients, or clients; (4) customer, patient, or client goodwill associated with: (a) an ongoing business or professional practice, by way of trade name, trademark, service mark, or “trade dress”; (b) a specific geographic location; or (c) a specific marketing or trade area; and (5) extraordinary or specialized training.

What are considered reasonable restrictions as to geography, duration and scope of activity?

Florida courts will presume a restrictive covenant for six months or less in duration to be reasonable and more than two years in duration to be unreasonable. Florida courts focus on whether the restrictive covenant is reasonably necessary in time and geographic scope in order to protect the employer's legitimate business interests. Florida courts will presume a restrictive covenant governing the use and disclosure of trade secrets for five years or less to be reasonable and more than ten years to be unreasonable.

Can a customer-specific restriction substitute for a geographic restriction?

Florida courts focus on whether the restrictive covenant is reasonable, and therefore, have allowed customer-specific restrictions to complement geographic restrictions when reasonably necessary to protect the employer's legitimate business interests.

Will the court revise, reform, and/or “blue pencil” a restrictive covenant to make it “reasonable?”

Florida statutory law requires the court to modify a restrictive covenant If it is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, and will grant only the relief reasonably necessary to protect such interest or interests.

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Will the court recognize a choice-of-law provision in a restrictive covenant?

Florida courts will apply a choice-of-law provision so long as there is a reasonable relationship between the contract and the state of the law that is selected, and the selected law does not conflict with Florida law or public policy or confer an advantage on a non-resident party which a Florida resident does not have.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

Restrictive covenants cannot be enforced against attorneys and certified and court-appointed mediators.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

In order for a restrictive covenant to be enforceable, mutual promises binding on both the employer and the employee must exist, such as continued employment, salary increase, or an agreement to provide additional compensation.

Does a change in position, salary or responsibilities affect enforceability?

Possibly. Florida courts must consider all pertinent legal and equitable defenses to the enforcement of a restrictive covenant pursuant to Florida Statutes section 542.335. If a change in position, salary or responsibilities constitutes a breach of the employment agreement or causes the employee to resign, the change could affect enforceability of the restrictive covenant.

Is continued employment sufficient consideration to enforce a restrictive covenant?

In an at-will employment relationship, continued employment is sufficient consideration even if the restrictive covenant is entered into after the commencement of the employment relationship.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

In an at-will employment situation, if an employee refuses to sign a restrictive covenant as a condition of continued employment, then the employer may terminate the employee.

Are restrictive covenants assignable?

Yes, provided, however, that in the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person; and in the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.

List any necessary language requirements.

Florida law does not require specific language to be included in a restrictive covenant.

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List any other requirements of importance.

Florida statutory law provides that in determining the enforceability of a restrictive covenant, the court: (1) shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought; (2) may consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of a violation of the restriction; (3) shall consider all other pertinent legal and equitable defenses; and (4) shall consider the effect of enforcement upon the public health, safety, and welfare.
Florida statutory law also provides that a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant.

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The International Employment Guide

USA, Indiana

Prepared by Lex Mundi member firm Faegre Baker Daniels LLP

General remarks	Indiana employment law generally tracks federal employment law principles. There are some Indiana-specific statutes and common law issues of which employers must be aware.
Employment agreement	Generally, in Indiana, an employment is "at-will," subject to certain common law and statutory restrictions on the ability of an employer to separate an employee. Such statutes can be federal statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the National Labor Relations Act, the Family and Medical Leave Act, the Sarbanes-Oxley Act, the Fair Labor Standards Act, and many others. Further, there are Indiana-specific statutes that place restrictions on employers' ability to terminate an employment relationship including: the Indiana Civil Rights Law; the Indiana Age Discrimination Law; the Indiana Military Family Leave Law, and statutes prohibiting discrimination against smokers who engage in tobacco use outside the workplace. Also, an employment relationship that is subject to a contract (such as a written employment agreement for a fixed period of time or a collective bargaining agreement) is not an at-will employment relationship. As noted above, there are common law restrictions on the ability of an employer to discharge an employee. These protections prohibit employers from discharging an employee for exercising a statutorily conferred or protected right, such as seeking benefits under the worker's compensation laws. Another common law exception to the at-will employment doctrine prohibits employers from discharging an employee for refusing to commit an unlawful act. Further, where an employer promises permanent employment or where an employee is hired with the knowledge that the employee gave up job protected status with another employer to take the new employment may not be at-will.
Terms and conditions of employment	Employees who are not exempted under the federal Fair Labor Standards Act (FLSA) must receive a minimum wage of $7.25 per hour. As of January of 2015, the minimum wage of non-exempt employees of federal contractors is $10.10 per hour. In Indiana, for employees who are not covered under the FLSA, there is an Indiana minimum wage which is the same as the general federal minimum wage of $7.25 per hour. Indiana law requires that employees must be paid within ten business days of the close of the pay period in which wages are earned. With respect to meals or rest breaks, most employers must provide one or two documented breaks totaling 30 minutes to employees under the age of 18 who

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	are scheduled to work six or more consecutive hours. Accordingly, employers in Indiana are otherwise required to follow federal law covering such matters. Other than federal law regulation of employee drug testing, Indiana does not prohibit employers from adopting reasonable drug testing policies and procedures. Other than federal law issues with which employers must comply, Indiana law requires criminal history checks of job applicants in the health care and child care fields. Under Indiana's breastfeeding law, employers are asked to provide a private space, other than a toilet stall, for women to express milk, to the extent reasonably possible (and to provide a refrigerator or allow employees to bring coolers for storage of expressed milk). If an employer provides light duty or keeps certain jobs open for employees who require temporary reassignment/accommodation, the employer may not discriminate against worker's compensation claimants by denying them access to such jobs. Under Indiana law, earned and unpaid vacation pay constitutes wages and must be paid with the employee's final paycheck. Indiana law generally permits employers to maintain reasonable written vacation pay policies that provide conditions/restrictions on employee's entitlement to such pay.
Changing terms and conditions of employment	Statutory protections may restrict certain changes in terms or conditions of employment. But, unless there is such a statute or a written employment agreement (including collective bargaining agreements) or a specific employment handbook provision that provides otherwise, an employer is generally permitted to change the terms/conditions of employment.
Trade Unions and the consultation obligation	Consultation obligations with unions arise for employers who are subject to a collective bargaining agreement requiring such consultation or where there is an otherwise legally recognized duty to consult with a union under the National Labor Relations Act. Beyond federal law mandates, there is no separate Indiana law requirement that employers consult with trade unions. Indiana is a right-to-work jurisdiction.
Data privacy and personal integrity	Indiana law regarding security breaches covers employers who own or license data that includes certain personal information. If there is a security breach regarding such data, the employer must disclose such a breach to the affected individual and to the Indiana Attorney General. Employers who own computerized data are obligated to maintain reasonable measures to protect and safeguard personal information from unlawful use or disclosure. In addition to potential security issues, Indiana law also makes it a crime, except in specific circumstances, to disclose a person's Social Security Number . Data disposal is also regulated under Indiana law which prohibits, and in some cases criminalizes, the disposal of data containing certain categories of

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	personal information unless steps are taken to render the data illegible or unusable by third parties. Indiana is a "one-party" jurisdiction in which it is generally lawful to record a conversation as long as one party to the conversation consents to such recording.
Regulations regarding parental leave or other forms of absence regulated by law	Indiana has a military family leave law that affects employers with at least 50 employees for each working day during each of at least 20 calendar weeks. The law provides job-protected leave to certain family members of individuals on active duty in the U.S. Armed Forces or the Indiana Army or Air National Guard. Eligible employees include spouses, parents (including biological, adoptive and foster parents), children, brothers, sisters, grandparents (including biological, adoptive and foster grandparents), and court-appointed guardians and custodians of the person ordered to active duty. Eligible employees may take up to 10 days leave from work for qualifying circumstances during: the 30-day period before active duty orders are in effect; a period of leave provided to the active duty serviceperson while active duty orders are in effect; or the 30-day period after the termination of the active duty orders. Employers are barred from retaliating against or penalizing an employee who elects to take such leave. In order to be eligible for such leave, the employee must have been employed by the employer for at least 12 months and worked at least 1,500 hours during the 12-month period immediately preceding the date on which the leave is to begin. The employer may seek certain notice and documentation from the employee to support the leave request. Upon the employee's return from leave, the employer must return the employee to the same job from which leave was taken or to an equivalent position with equivalent pay, seniority, benefits and other terms/conditions of employment.
Termination of employment	An at-will employment may be terminated at any time by either the employee or employer with or without notice and for any reason (as long as the reason is not unlawful). If the employment is governed by an enforceable contract of employment, the applicable terms of the contract will apply to termination of employment. The federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires employers to provide notice of certain health plan continuation information and rights. In general, Indiana law does not require employers to provide employees with specific notice upon discharge unless there is such an obligation under some form of an employment agreement (including collective bargaining agreements). Where an Indiana employer receives a written request from a former employee for a service letter, the employer must state whether an employee quit or was involuntarily discharged from employment. Employers must pay final wages, upon termination of an employee's employment, no later than the next regular payday for the period within which the employee was separated from employment.

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Sanctions for wrongful termination	If the wrongful termination from employment is considered a tort (such as under one of the common law exceptions to at-will employment), then damages such as economic and noneconomic damages are potentially available to the former employee. If the sanctions are based upon statutory violations, the range of damages can vary according to the particular statute's remedy provisions. For example, violations of the Indiana Civil Rights Law may be remedied by damages including any of the following: injunctive relief, retroactive relief (such as back pay, retroactive seniority, and reinstatement), front pay, interest on damage awards, punitive damages, and attorneys' fees.
Whistleblower protection	Beyond the range of federal laws providing whistleblower protections, Indiana has a statute providing protection to whistleblower employees of private employers that have public contracts. The statute (Ind. Code 22-5-3-3) provides a process by which employees may report a violation of federal or state laws/regulations, a violation of a local ordinance, or the misuse of public resources. The statute includes protection from adverse employment actions (such as discharge from employment, demotion, denial of promotion, reduction in compensation or benefits or job transfer/reassignment) taken in retaliation for such whistleblower activities.
Non-Competition Laws	There is no Indiana statute that governs the enforceability of covenants not to compete, but Indiana common law permits employers to maintain reasonable covenants not to compete if they are part of a valid contract of employment. However, the employer must show a legitimate protectable interest as a basis for the covenant not to compete. Protectable interests can include such things as customer goodwill and confidential/proprietary information. Whether a covenant is reasonable will be reviewed in connection with the scope of the activity, the geographic area and the time period at issue. As to geographic area, courts will generally enforce an otherwise valid covenant if it is limited to the geographic area of the employee's duties. With respect to timeframes, while there is no "bright line" test or rule regarding an acceptable timeframe of restriction, many Indiana cases have upheld a two-year period as reasonable. Indiana follows the "blue pencil" principle which provides that a court will not rewrite an unreasonable covenant to make it reasonable, but if there is an unreasonable part(s) of a covenant that can be clearly severed from other parts, the court may sever the unreasonable portion(s) and enforce the remaining provisions. Beyond continuing employment, Indiana courts have not required new or additional consideration in order to enforce otherwise valid covenants.
Discrimination and equal employment opportunity	The Indiana Civil Rights Law generally prohibits employers with six or more employees from discharging employees because of race, religion, color, sex, disability, national origin or ancestry, or due to the employee's participation in a civil rights investigation. Indiana also maintains an Indiana Age Discrimination Law that prohibits employers (who are not covered under the federal Age Discrimination in Employment Act) from discriminating against employees over the age of 40 on the basis of age.

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	The Indiana Occupational Safety and Health Act provides protection against adverse employment action taken due to an employee's complaint about safety/health issues. There is an Indiana statute protecting employees from employer policies that seek to prohibit or have the effect of prohibiting an employee from possessing a firearm/ammunition that is: locked in the trunk of the employees' vehicle (even if the vehicle is in the employer's parking lot), kept in the glove box of the employee's locked vehicle, or stored out of plain sight in the employee's locked vehicle. There are exceptions to the law that apply to schools, daycare facilities for children, and group homes. Employers cannot inquire as to whether a job applicant or employee owns, possesses, uses or transports firearms. Employers also may not condition terms of employment on the basis of an applicant's or employee's foregoing the right to lawfully own, possess, store, transport or use firearms. Indiana employers may not discriminate on the basis of an employee's use of tobacco outside of the employment. Employers cannot discriminate against an employee who reports suspected employer failure to comply with legal requirements to train on infection control measures intended to prevent transmission of communicable diseases. Indiana also has a minimum wage law that prevents employers (who are not covered under the federal Fair Labor Standards Act) from discharging or discriminating against employees for taking action to recover wages or demanding payment of wages under the law. Indiana Veteran's Affairs Law provides protection against adverse employment action taken due to an employee-reservist's taking protected leave for duty. A similar anti-discrimination law protects employee-volunteer firefighters from employer discrimination due to the employee's service as a firefighter. Employers are prohibited from discharging an employee due to the employer's receipt of a wage garnishment order directed at the employee's wages. Indiana employers may not adversely affect an employee's employment or benefits or threaten the employee due to the employee's receipt of a jury summons, the employee's response to the summons, the employee's reporting to court for prospective service or attendance on a jury.
Transfer of business and outsourcing	While Indiana does not maintain labor and employment statutes about transfers of business and outsourcing, there are cases that suggest that courts may be less strict in review of covenants not to compete when they are provided by business owners in connection with the sale of the business. Indiana does not maintain a state law plant closing act similar to the federal Worker Adjustment and Retraining Notification (WARN) Act.
Global mobility (brief overview of common issues and visa requirements)	Indiana does not have statutes regulating visa or similar requirements as these are regulated under federal law.

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Criteria for independent contractor status	Beyond federal tax and labor principles, there are some guidelines under Indiana worker's compensation and unemployment compensation laws. Under Indiana law, a claimant for benefits can establish a prima facie case if the claimant shows he/she was in the service of another under a contract of hire (which can be express or implied). If the employer wishes to defend on the basis that the worker was an independent contractor and not an employee, the burden is on the employer to come forward with evidence that no employer/employee relationship exists. No specific factor is determinative -- it is the mix of all factors which courts will review in making determinations. In general the following areas are important in making assessments about independent contractor status: • Control -- Indiana cases indicate that it is the right to control the means, method and manner of performing work that is significant. • The right to discharge or quit at anytime. • The ability to employ assistants/helpers. • Investment in equipment and tools. • Manner of payment for the work. • Nature of the work. • The parties' expectations and views of the relationship • Establishment of work boundaries and application of work rules. • Whether the work is performed outside the usual course of the business for which the service is performed. • Whether the worker is customarily engaged in an independently established trade/occupation/profession doing the kind of work at issue. • Whether the worker holds himself/herself out to the general public as performing such work (and does perform such work for others).
Corruption, regulation and sanctions	As noted above, Indiana law prohibits retaliation against an employee of an employer with public contracts where the employee reports (among other things) misuse of public resources. Other general Indiana laws may apply to employment issues which involve claims of bribery, theft, extortion and other unlawful activity.
Final remarks	Most Indiana workplaces are subject to the requirement that smoking is prohibited in the workplace and within eight feet of any public entrance to the facility. Employers must also: • post a sign at any public entrance indicating that state law prohibits smoking within eight feet of the entrance (or with similar language) • clearly advise employees that smoking is prohibited indoors and where it is specifically permitted outdoors • not maintain indoor smoking accessories such as ashtrays. Some local ordinances may impose more strict guidelines on employers with respect to workplace smoking issues.

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Non-Competition Global Practice Guide

USA, Indiana

Prepared by Lex Mundi member firm Faegre Baker Daniels LLP

Does your state or country recognize and/or enforce restrictive covenants against employees?

Yes -- however, the reasonableness of the restrictive covenant will be reviewed to determine its enforceability.

What are enforceable protectable business interests that courts will protect?

Customer information and goodwill, confidential and proprietary information of the business, technical and engineering information, trade secrets and processes, formulae and other types of private information not generally known to the public.

What are considered reasonable restrictions as to geography, duration and scope of activity?

Courts will generally enforce an otherwise valid covenant if it is limited to the geographic area of the employee's duties. With respect to timeframes, while there is no "bright line" test or rule regarding an acceptable timeframe of restriction, many Indiana cases have upheld a two-year period as reasonable.

Can a customer-specific restriction substitute for a geographic restriction?

Yes, but the terms of the restriction must still be reasonable, within the employer's scope of protectable interest, and tailored to the areas of the former employee's duties.

Will the court revise, reform, and/or “blue pencil” a restrictive covenant to make it “reasonable?”

Indiana follows the "blue pencil" principle which provides that a court will not rewrite an unreasonable covenant to make it reasonable, but if there is an unreasonable part(s) of a covenant that can be clearly severed from other parts, the court may sever the unreasonable portion(s) and enforce the remaining provisions.

Will the court recognize a choice-of-law provision in a restrictive covenant?

Generally, yes, but it must have some reasonable relation to the activities and matters at issue; moreover, the court may reject the parties' choice of law if application of such law would be contrary to Indiana's public policy.

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

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What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

Beyond continuing employment, Indiana courts have not required new or additional consideration in order to enforce otherwise valid covenants.

Does a change in position, salary or responsibilities affect enforceability?

Yes -- potentially, depending upon the degree and nature of the changes.

Is continued employment sufficient consideration to enforce a restrictive covenant?

Yes, generally speaking, continued employment may furnish adequate consideration in Indiana in order to enforce an otherwise lawful restrictive covenant.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

Yes, if a restrictive covenant is lawful for the position at issue.

Are restrictive covenants assignable?

Under Indiana law, restrictive covenants constitute personal services contracts and cannot be assigned without the employee's consent; however, such consent may be obtained in advance through a general assignability clause.

List any necessary language requirements.

N/A

List any other requirements of importance.

N/A

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The International Employment Guide

USA, Massachusetts

Prepared by Lex Mundi member firm Foley Hoag LLP

General remarks	Massachusetts employment law generally tracks federal law. However, Massachusetts has a number of employment statutes that offer employees substantially more benefits and protections than they would otherwise have under federal law. Moreover, Massachusetts courts tend to interpret Massachusetts common and statutory law in a manner that is considerably more favorable to employees than do federal courts.
Employment agreement	In Massachusetts, the employment relationship is presumptively at-will. An at-will employee may resign at any time and for any reason, and the employer may terminate the employee at any time and for any lawful reason. However, Massachusetts common law recognizes that a "covenant of good faith and fair dealing" adheres to every at-will employment relationship. If the employee or employer want to agree to an employment relationship other than an at-will relationship, such as for employment for a fixed term, they are generally free to do so.
Terms and conditions of employment	In addition to the federal minimum wage, Massachusetts has its own minimum wage law. It requires that non-exempt employees be paid at least $10.00 per hour. The Massachusetts minimum wage will increase to $11.00 per hour effective January 1, 2017. By law, the Massachusetts minimum wage must be at least $0.50 greater than the federal minimum wage. Retail employees who work in stores with 8 or more employees at one location must be paid time and one-half for hours worked on Sundays, New Year's Day, Memorial Day, Independence Day, Labor Day, Columbus Day and Veterans' Day. Consistent with federal law, Massachusetts employers must pay non-exempt employees overtime at a rate of at least one and one-half times an employee's regular rate of pay for all hours worked in excess of 40 in a week. All employees must be paid within 6 days of the end of the employer's pay period. Generally, employers must pay employees weekly or bi-weekly. However, employers can pay certain employees, including exempt employees and non-exempt employees who are paid on a salary basis for a work week of substantially the same number of hours from week to week, semi-monthly or, at the employee's request, monthly. Employees who work 6 or more hours in a day are entitled to a 30 minute meal break. The break may be unpaid, but if the employee performs any work during the break must be paid. Except in the case of minors, Massachusetts law does not impose a limit on the number of hours that employees can work in a week as long as they receive one full day of rest in each seven-day period.

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	Massachusetts law does not require employers to provide employees with either vacation time off or vacation pay.
Changing terms and conditions of employment	In the absence of an employment agreement or collective bargaining agreement, Massachusetts employers generally can change the terms and conditions of employment at any time and for any lawful reason without employee consent. However, when employers change from weekly to biweekly pay for non-exempt hourly employees, they must provide employees with written notice of the change at least 90 days in advance.
Trade Unions and the consultation obligation	The relationship between unions and employers is governed by federal law and the terms of their negotiated collective bargaining agreements. Massachusetts does not have a "right to work" statute.
Data privacy and personal integrity	The Massachusetts Privacy Act prohibits “substantial or serious interference” with an individual’s privacy. An employer’s inquiry into an employee’s personal affairs is considered violation of the Massachusetts Privacy Act where the intrusion into the employee’s reasonable expectation of legitimate privacy outweighs the employer’s legitimate business interest in the information sought. The Privacy Act may be implicated in cases of employee drug-testing, searches by employers, and employer surveillance. In addition, any individual, company or organization that collects or maintains personal information in connection with employment or the sale of goods or services is subject to Massachusetts' data security law. “Personal information” includes names of Massachusetts residents in combination with their Social Security numbers, state driver’s license numbers, identification card numbers or financial account numbers. Those holding such information are required to adopt a comprehensive, written information security program that adopts reasonable security measures to safeguard this personal information. The plan must contain a number of specific requirements required by applicable regulations, but also must be tailored to the particular business and the type and amount of personal information in its possession.
Regulations regarding parental leave or other forms of absence regulated by law	Parental Leave: Massachusetts requires that employers with 6 or more employees give 8 weeks of parental leave to eligible full-time employees for the purpose of childbirth or for adopting a child under 18 years of age (or under 23 if the child is mentally or physically disabled). Parental leave can be paid at the employer’s discretion. Parental leave runs concurrently with any leave for which the employee may be eligible under the federal Family and Medical Leave Act (FMLA). Small Necessities Leave: Massachusetts employers who are subject to the FMLA are also subject the Massachusetts Small Necessities Leave Act (SNLA). Under this law, employers must permit eligible employees to take up to 24 hours of leave in a 12-month period, in addition to leave under the FMLA, to participate in school activities directly related to the educational advancement of an employee’s child, such as parent-teacher conferences or interviewing for a new school; to accompany the child to routine medical or dental appointments, such as check-ups or vaccinations; and to accompany an elderly relative of the employee to routine medical, dental or other appointments for professional services relating to the elder’s care, such as interviewing at nursing or group homes.

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	Domestic Violence Leave: Massachusetts employers with 50 or more employees also must provide up to 15 days of job-protected leave during a 12-month period to an employee who is or whose covered family member is a victim of abusive behavior. Such leave may be used to address issues directly related to the abusive behavior, including seeking or obtaining medical attention, counseling, victim services or legal assistance; securing housing; obtaining a protective order; appearing in court before a grand jury; meeting with a district attorney or other law enforcement official; or attending child custody proceedings. This leave may be paid or unpaid at the employer's discretion. Earned Sick Time: Massachusetts employers must provide their employees with earned sick time. Massachusetts law requires that all employers allow employees to accrue at least 1 hour of sick time for every 30 hours worked, up to 40 hours per calendar year. For employers with 11 or more employees, the sick time must be paid. Employees may use sick time when required to miss work (1) to care for a physical or mental illness, injury or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse; (2) to attend routine medical appointments of the employee or the employee's child, spouse, parent, or parent of a spouse; (3) to address the effects of domestic violence on the employee or the employee's child; or (4) to travel to and from an appointment, pharmacy or other location related to the purposes listed above. Jury Duty Leave: Massachusetts employers must give employees time off when called for jury duty. Employers must pay employees for their first 3 days of jury duty service. Voting Leave: Certain employers must grant employees a leave of absence to vote during the 2 hours offer polls open when such leave is requested.
Termination of employment	Generally, in the absence of an employment agreement or collective bargaining agreement, an at-will employee may be terminated at any time and for any reason. However, there are exceptions. Employers cannot terminate employees in violation of federal and state anti-discrimination statute. Further, Massachusetts common law prohibits employers from terminating employees in violation of the implied covenant of good faith and fair dealing or a well-defined, clearly established public policy. There are no mandated procedural requirements that must be followed when terminating an at-will employee. Massachusetts employers must pay terminated employees their earned but unpaid wages, including any accrued but unused holiday or vacation pay, at the time of their termination. Where the termination is voluntarily, the employee must be paid his or her final pay on or before the next scheduled pay day. Where the termination is involuntarily, the employee must be paid his or her final pay on the day of the termination. An employer cannot withhold from a former employee's final paycheck amounts it believes are owed to it by the employee, unless there is a definite amount of money at issue and there can be no dispute that the money is owed. Employers must give separated employees a pamphlet on applying for unemployment benefits issued by the Commonwealth's Department of Unemployment Assistance (DUA) as soon as practicable after the termination,

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	but within a period not to exceed 30 days from the last day of compensable work performed. The DUA requires employers to fill in the company's name, address and DUA Employer Account Number (EAN) on the pamphlet. Massachusetts has a mini-COBRA law, which generally extends the right to continue medical coverage under the federal COBRA to employees of employers with between 2 and 19 employees.
Sanctions for wrongful termination	Where an employee is unlawfully terminated, an employee can potentially recover back pay, front pay, emotional distress damages, punitive damages, and attorneys' fees and costs. The employee also may be entitled to injunctive relief, including reinstatement.
Whistleblower protection	Massachusetts does not have a comprehensive whistleblower statute. It has adopted whistleblower protections for employees who work for health care facilities. Massachusetts also has a state False Claims Act that prohibits retaliation against an employee who engages in lawful acts in furtherance of an action under the statute.
Non-Competition Laws	Massachusetts common law recognizes that executives, directors, senior officers and partners have a duty of loyalty that prevents them from competing with their employer during their employment. With limited exceptions, non-competition agreements whereby employees agree not to compete with their employer are enforceable in Massachusetts if they (1) are supported by consideration; (2) are necessary to protect a legitimate business interest; (3) are reasonably limited in scope; and (4) are otherwise consonant with public policy. Legitimate business interests that may be protected by a non-competition agreement include trade secrets, confidential information and customer good will. Protection from ordinary competition is not a legitimate business interest under Massachusetts law. The employer has the burden of establishing enforceability.
Discrimination and equal employment opportunity	The Massachusetts Fair Employment Practices Act (M.G.L. c. 151B) makes it unlawful for an employer to discriminate on the basis of race, color, religion, national origin, sex (including pregnancy), age (40 years and older), disability, sexual orientation, gender identity, ancestry, genetic information, and military service. Employers with 6 or more employees are subject to the law. The FEPA also prohibits retaliation against employees who oppose discrimination, file discrimination complaints with the Massachusetts Commission against Discrimination (MCAD), or testify or assist in MCAD proceedings. Massachusetts law provides for individual liability of co-workers and supervisors who engage in unlawful discrimination. Employees who succeed on their Chapter 151B claims are entitled to damages and/or injunctive relief. Employers with fewer than 6 employees may be held liable for discrimination on the basis of sex, race, color, creed or national original under the Massachusetts Equal Rights Act (M.G.L. c. 93, s. 102).
Transfer of business and outsourcing	Massachusetts has a plant-closing law that applies to employers with 50 or more employees and provides for the continuation of group health insurance coverage — with the same terms as before the closing — for 90 days after employees are terminated.

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Global mobility (brief overview of common issues and visa requirements)	Issues of global mobility are governed by federal law.
Criteria for independent contractor status	Under the Massachusetts Independent Contractor/Misclassification Law (M.G.L. c. 149, s. 148B), an individual performing a service is considered an employee, and not an independent contractor, unless (1) the individual is free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; (2) the service is performed outside the usual course of the business of the employer; and (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. All three elements of this test must be present in order for the individual to be classified as an independent contractor. Accordingly, it is extremely difficult to be properly classified as an independent contractor in Massachusetts.
Corruption, regulation and sanctions	Bribery is a crime punishable by a $100,000 fine, or by imprisonment of up to 10 years in state prison or 2 and 1/2 years in jail or a house of correction, or both.
Final remarks	Massachusetts has noteworthy requirements regarding employment applications. Employment applications must contain a statement that it is unlawful to require a lie detector test as a condition of employment. If an application requests information about prior work experience, it also must state that the applicant may include verifiable volunteer work. Employers generally cannot ask about an applicant's criminal history on a job application Employers with 20 or more employees must retain employees' personnel records for 3 years after termination of employment. Personnel records must include the following: the name, address, and date of birth of the employee, a job title and description, a rate of pay and other compensation, the employee's start date, the employee's job application and other related materials, any written performance evaluations, any written warnings or documents relating to disciplinary action, any waivers signed by the employee, and any termination notices. All employers are required to give notice to an employee within 10 days of placing in the employee's personnel records any information to the extent that the information is, has been used, or may be used to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action. Upon written request, an employee (including a former employee) is entitled to review his or her personnel records during normal business hours and to request a copy of the records within 5 days of the written request. If the employee disagrees with something in his or her records and the employee and the employer cannot agree on removal or correction of the information, the employee can submit a written statement explaining the employee's position that must then become a part of his or her personnel records. Before an employer asks an applicant about his or her criminal record, the employer must before a copy of the record to the applicant. It also must do so before making an adverse employment decision based on the applicant's criminal record. Employers who conduct 5 or more criminal background

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	checks in a year must maintain a written policy that complies with regulations regarding such checks.

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The International Employment Guide

USA, Nebraska

Prepared by Lex Mundi member firm Baird Holm LLP

General remarks	Nebraska employment law typically follows federal law, with notable exceptions outlined below.
Employment agreement	The default rule in Nebraska is that employment is "at-will," meaning that either the employer or employee may terminate the employment relationship at any time, and for any reason. Exceptions to this policy are discrimination, contracts altering the at-will relationship, and public policy (including an exception for workers' compensation retaliation).
Terms and conditions of employment	As of January 1, 2016, the minimum wage in Nebraska is $9.00 per hour. The hourly minimum cash wage for tipped workers is $2.13, based on a maximum tip credit of $6.87. Any Nebraska employer employing student-learners as part of a bona fide vocational training program must pay the student-learners' wages at a rate of at least seventy-five percent of the minimum wage rate which would otherwise be applicable. Nebraska does not have separate overtime rules applicable to private employers. The Fair Labor Standards Act (FLSA) rules will apply to covered employers. Nebraska law does not mandate break or rest periods for most employers. Employees in assembly plants, workshops or mechanical establishments are entitled to a 30-minute lunch period in each eight-hour shift during which they must be free to leave their employers' premises. Likewise, drivers for motor carriers transporting passengers or freight cannot work more than 12 hours in a 24-hour period. Cab drivers are exempt from this rule.
Changing terms and conditions of employment	Nebraska employers generally reserve the right to change the terms and conditions of employment in an Employee Handbook or Manual. Otherwise, terms and conditions of employment--and changes thereto--may be governed by a collective bargaining agreement (CBA), employment contract, or applicable law. There are certain terms that an employer cannot change without employee authorization. For example, other than amounts authorized under federal or state law, Nebraska employers cannot make deductions from wages unless the employee provides written authorization. Other terms cannot be changed at all, even if the employee authorizes the change. For instance, employers cannot ask an employee to waive his/her right to wages once they have been earned. "Wages" include fringe benefits such as sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans

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	and any other employee benefit plans or programs regardless or whether employees participate in such plans or programs. For this reason, private employers cannot maintain a policy stating that earned but unused vacation will not be paid out upon separation. Likewise, recent case law suggests that Paid Time Off (PTO) should be treated like vacation and paid out upon separation.
Trade Unions and the consultation obligation	Nebraska is a "right-to-work" state. Nebraska does not have a labor statute comparable to the federal Labor Management Relations Act. Employees have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees similarly have the right to refrain from any or all of such activities. The Commission of Industrial Relations (CIR) has jurisdiction over state and local government employees including public utilities.
Data privacy and personal integrity	<u>Social Security Numbers</u> Nebraska law prohibits employers from doing the following: a) Publicly posting or publicly displaying in any manner more than the last four digits of an employee's social security number, including intentional communication of more than the last four digits of the social security number or otherwise making more than the last four digits of the social security number available to the general public or to an employee's coworkers; b) Requiring an employee to transmit more than the last four digits of his or her social security number over the Internet unless the connection is secure or the information is encrypted; c) Requiring an employee to use more than the last four digits of his or her social security number to access an Internet web site unless a password, unique personal identification number, or other authentication device is also required to access the Internet web site; or d) Requiring an employee to use more than the last four digits of his or her social security number as an employee number for any type of employment-related activity. e) Employers are only permitted to use more than the last four digits of an employee's social security number for: f) Compliance with state or federal laws, rules, or regulations; g) Internal administrative purposes, including provision of more than the last four digits of social security numbers to third parties for such purposes as administration of personnel benefit provisions for the employer and employment screening and staffing; and h) Commercial transactions freely and voluntarily entered into by the employee with the employer for the purchase of goods or services. i) Social security numbers should not be use as identification numbers. <u>Social Media Privacy</u>

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	Effective July 21, 2016, employers are prohibited from requiring employees to provide them with access to employee social media accounts. An employer cannot: a) request or require an employee or applicant for employment to disclose a user name, password, or other account information in order to access the employee's or applicant's personal internet account using an electronic communication device; b) request or require an employee or applicant to log into a personal internet account using an electronic communication device in the employer's presence in a way that would allow the employer to access or view the contents of his or her personal internet account; c) require an employee or applicant to add anyone, including the employer, to the list of contacts associated with his or her account, or otherwise coerce him or her to change the settings on the account that affect the ability of others to view the account's content; d) take adverse action against, fail to hire, or otherwise penalize an employee or applicant for failure to disclose any information or take any actions specified above; or e) retaliate or discriminate against an employee or applicant because he or she files a complaint under the act, or testifies, assists, or participates in an investigation, proceeding, or action regarding a violation of the act. Exceptions include: a) creating or maintaining reasonable workplace policies regarding the use of the employer's electronic equipment, including policies regarding internet use and personal internet account use; b) requesting or requiring an employee or applicant to disclose access information to the employer to gain access to or operate an electronic communication device supplied by or paid for by the employer, or an account or service that is provided by the employer, obtained by virtue of the employee's employment, or used for the employer's business purposes; c) restricting or prohibiting an employee's access to certain websites while using an electronic communication device supplied by or paid for by the employer, or while using the employer's network or resources, to the extent allowed by law; d) accessing information about an employee or applicant that is publicly available or is otherwise obtained in compliance with the act; e) conducting an investigation or requiring an employee to cooperate in an investigation in specified circumstances; f) taking adverse action against an employee for downloading or transferring private proprietary or financial information to a personal internet account without the employer's authorization; g) complying with requirements to screen employees or applicants before hiring or to monitor or retain employee communications required by state or federal law or by a self-regulatory organization; or h) complying with a law enforcement investigation.
Regulations regarding parental leave or other forms of absence regulated by law	Nebraska law does not specifically mandate parental leave obligations other than as indicated below. <u>Pregnancy Leave</u>

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Nebraska recently revised its discrimination laws relevant to pregnancy discrimination to provide that women affected by pregnancy, childbirth or related medical conditions must be treated the same as other employees for all employment-related purposes, including leave and any other benefits.

Adoption Leave Rights

If an employer permits an employee to take a leave of absence upon the birth of the employee's child, then an adoptive parent, following the commencement of the parent-child relationship, is entitled to the same leave upon the same terms. The law is intended to provide adoptive parents with the same paid leave given to biological parents, whether such leave is sick leave, medical leave or paid vacation.

Family Military Leave

Nebraska has adopted a Family Military Leave Act which requires employers to provide between 15 (employers with 15-50 employees), and 30 (employers with 50+ employees) days of unpaid leave for the spouse or parent of a person called up to military service for more than 179 days. Employees must have worked for the same employer for at least 12 months and a minimum of 1250 hours to be eligible for the leave. Employees who wish to take five or more days of leave must give the employer at least 14 days' notice.

Military Leave

Nebraska employers must grant employees up to 120 hours of leave each year if they work 120 hours or more in three consecutive weeks. Employers must grant employees working less than 120 hours in three consecutive weeks, leave that is equal to the number of hours they work or are scheduled to work, whichever is greater, in three consecutive weeks. Nebraska has adopted many of the provisions of USERRA, including but not limited to, those related to re-employment rights, non-discrimination, and benefits during absence.

Such rules apply to all service members performing duty in service of Nebraska and to any person employed in Nebraska who is a member of the National Guard of another state called into active service by that state's governor.

Emergency Response Leave

No employer with 10 or more employees shall terminate or take any other disciplinary action against any employee who is a volunteer emergency responder if such employee, when acting or actively deployed as a volunteer emergency responder, is absent from or reports late to his or her place of employment in order to respond to an emergency prior to the time such employee is to report to his or her place of employment. An employer may subtract from an employee's earned wages any time such employee, acting as a volunteer emergency responder, is away from his or her place of employment because of such employee's response to an emergency. An employer may ask an employee for written documentation of the need for leave.

Jury Duty Leave

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	Employers cannot discharge from employment, deduct pay, vacation or sick time, or otherwise penalize an employee for absences due to jury duty. An employer may reduce the pay of an employee by an amount equal to any compensation, other than expenses, paid by the court for jury duty. Bone Marrow Donation Leave Employers are encouraged, but not required, to grant paid leaves to employees who donate bone marrow. Voting Leave Employers must provide an employee two hours to participate in an election. Election Duty Leave Upon giving reasonable notice to the employer, an employee cannot be subject to discharge, loss of pay, sick leave, or vacation, or otherwise penalized as a result of his/her absence for election service. Election officials shall be excused upon request from any shift work, without loss of pay, for those hours they are required to serve as an election official, and if required to serve eight hours or more, for eight hours prior to and after those required hours. An employer may reduce the pay of an employee for each hour of work missed by an amount equal to the hourly compensation, other than expenses, paid to the employee by the county for service as an election official.
Termination of employment	At-will employment relationships can be terminated at any time, by either party, for any reason (so long as that reason is not unlawful). No notice obligations are required unless specifically stated in an employment agreement or CBA. Whenever a private sector employer separates an employee from the payroll, the unpaid wages are due and payable on the next regular payday or within two weeks of the date of termination, whichever is sooner. The term "unpaid wages" includes any earned but unused vacation and specifically excludes all other paid leaves unless specifically agreed to by the employer. Recent case law suggests that Paid Time Off (PTO) should be treated like vacation and paid out upon separation. Upon request of an employee, a public service corporation, contractor who works for a public service corporation, or "a contractor doing business in the State of Nebraska" must provide a personalized "service letter" to the employee when the employee is discharged or voluntarily terminates employment with such contractor. The letter must include the nature of the service rendered, the duration and the reason the employee was discharged or voluntarily quit. Employees subject to a CBA or an employment contract must be terminated subject to the terms of those agreements.
Sanctions for wrongful termination	At-will employees who bring claims of discrimination or retaliation under the Nebraska Fair Employment Practice Act (and equivalent rules), must first file an administrative action with the Nebraska Equal Opportunity Commission. They may also then file an action in district court. A successful complainant

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	could be entitled to temporary or permanent injunctive relief, general and special damages, reasonable attorney's fees, and costs. The public policy exception to at-will employment permits at-will employees to bring wrongful-discharge claims for damages when the motivation for discharge contravenes "a very clear mandate of public policy." Examples of situations in which the Nebraska Supreme Court has recognized a public policy exception to the employment at-will doctrine include: • termination of an employee for refusal to submit to a polygraph examination in • where an employee reported, in good faith, suspicions that his employer was violating a criminal law (odometer fraud) • termination of an employee in retaliation for her filing of a workers' compensation claim • termination for reporting abuse of an elderly nursing home resident. The Nebraska Court of Appeals also recognized the public policy exception to find unlawful the termination of an employee who refused an order to drive a truck that had defective brakes. A violation of public policy is a tort claim, and a complainant may be able to seek both economic and noneconomic damages (including damages for mental suffering).
Whistleblower protection	Neb. Rev. Stat. §§ 48-1114 of the Nebraska Fair Employment Practice Act makes it unlawful for an employer to discriminate against its employee on the basis of (1) the employee's opposition to any practice made an unlawful employment practice by the Nebraska Fair Employment Practice Act, (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the act, or (3) has opposed any practice or refused to carry out any action unlawful under federal law or the laws of this state.
Non-Competition Laws	Nebraska law is quite restrictive with regard to its enforcement of non-compete agreements. As a general matter, restrictive covenants must be reasonable in length and limited to the former employer's clients and accounts with whom the former employee actually did business and had personal contact. Nebraska courts will not "blue-pencil" any overly broad provisions of a contract. In fact, if a restrictive covenant is determined to be unenforceable, the *entire* provision is void.
Discrimination and equal employment opportunity	The Nebraska Fair Employment Practice Act (NFEPA), applies to employers with 15 or more employees, and prohibits employment discrimination on the basis of any of race, color, religion, sex, disability, marital status, and national origin. NFEPA was revised in 2015 to provide that women affected by pregnancy, childbirth or related medical conditions must be treated the same as other employees for all employment-related purposes, including leave and any other benefits.

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	The Nebraska Age Discrimination in Employment Act applies to employers with 20 or more employees and protects workers over the age of 40. Other laws protect employees from discrimination on the basis of their genetic information and HIV/AIDS.
Transfer of business and outsourcing	Nebraska does not have specific rules related to the transfer of business or outsourcing.
Global mobility (brief overview of common issues and visa requirements)	Nebraska law does not address visa or similar requirements. Federal law applies.
Criteria for independent contractor status	In Nebraska, courts look at the following factors to determine whether an individual is an employee or an independent contractor: a) the extent of control which, by the agreement, the employer may exercise over the details of the work; b) whether the one employed is engaged in a distinct occupation or business; c) the type of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; d) the skill required in the particular occupation; e) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; f) the length of time for which the one employed is engaged; g) the method of payment, whether by the time or by the job; h) whether the work is part of the regular business of the employer; i) whether the parties believe they are creating an agency relationship; and j) whether the employer is or is not in business. While no one factor is determinative, control is the most important factor to be considered in determining whether someone is an employee or independent contractor. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997).
Corruption, regulation and sanctions	Nebraska's criminal laws related to bribery are not limited to the employment context. For instance, as it relates to public officials, a person commits bribery if: a) He offers, confers, or agrees to confer any benefit upon a public servant or peace officer with the intent to influence that public servant

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	or peace officer to violate his public duty, or oath of office, thereby influencing the public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his official capacity; or b) While a public servant or peace officer, he solicits, accepts, or agrees to accept any benefit upon an agreement or understanding that he will violate his public duty or oath of office by changing or amending his vote, opinion, judgment, exercise of discretion, or other action or inaction as a public servant or peace officer.
Final remarks	The following reflect a few additional miscellaneous rules unique to Nebraska. An employer or a representative of an employer who actively recruits any non-English speaking persons who reside more than 500 miles from the place of employment and whose workforce is more than 10% non-English-speaking employees who speak the same non-English language must file certain documents which provide information regarding the position of employment. All employers subject to the Nebraska Workers' Compensation Act are to establish a safety committee composed of one half employee representatives and one-half employer representatives.

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Non-Competition Global Practice Guide

USA, Nebraska

Prepared by Lex Mundi member firm Baird Holm LLP

Does your state or country recognize and/or enforce restrictive covenants against employees?

Nebraska recognizes restrictive covenants but they must be reasonable in length and limited to the former employer's clients or accounts with whom the former employee actually did business and had personal contact.

What are enforceable protectable business interests that courts will protect?

Nebraska employers have a protectable business interest in the following:
(a) a client base with whom the former employee actually did business and had personal contact.
(b) against improper or unfair competition, but not against "ordinary competition."
(c) customer "good will," which includes data pertinent to the continuation of customers' business.

What are considered reasonable restrictions as to geography, duration and scope of activity?

Nebraska courts will uphold temporal and/or geographic restrictions only if they are no greater than reasonably necessary to protect the employer's legitimate business interest. Courts prefer restrictions that limit the employee from soliciting clients/customers with whom the former employee actually did business and had personal contact.
Nebraska courts generally uphold one-year non-solicitation restrictions.
Given the emphasis on client/customer restrictions, geographic restrictions may no longer be acceptable under Nebraska law. If such restrictions were acceptable, the geographic restriction must be no greater than the area in which the employee actually worked for the employer.

Can a customer-specific restriction substitute for a geographic restriction?

Yes. Nebraska courts prefer restrictions that prohibit soliciting clients/customers with whom the former employee actually did business and had personal contact.

Will the court revise, reform, and/or “blue pencil” a restrictive covenant to make it “reasonable?”

No. Nebraska courts have not "blue penciled" an unenforceable restrictive covenant, although the Nebraska Supreme Court has reserved the right to use the doctrine. A contract provision that specifically provides for revision to an unenforceable covenant will not permit judicial reformation.

Will the court recognize a choice-of-law provision in a restrictive covenant?

Nebraska law allows choice-of-law provisions but not when doing so "would be contrary to a fundamental policy of Nebraska." Rain & Hail Ins. Serv., Inc. v. Casper, 902 F.2d 699, 670 (8th Cir. 1990). In that case, the court applied Nebraska law despite a selection of Iowa law. The court found that Iowa law was more liberal related to blue-penciling, which would result in a different result under Iowa law than under Nebraska law. The court found that such a potential outcome was against Nebraska's fundamental policy against overly broad covenants not to compete.

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Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

The enforcement of restrictive covenants against attorneys may be subject to Nebraska's Professional Responsibility rules.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

Nebraska courts have held that "new employment," "continued employment," and changes to the terms and conditions of employment, are sufficient consideration for restrictive covenants.

Does a change in position, salary or responsibilities affect enforceability?

The effect of a change in position, salary or responsibilities has not been specifically addressed under Nebraska law.

Is continued employment sufficient consideration to enforce a restrictive covenant?

Yes.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

Yes.

Are restrictive covenants assignable?

This issue has not been directly addressed by Nebraska courts.

List any necessary language requirements.

A restrictive covenant is valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.

List any other requirements of importance.

None.

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The International Employment Guide

USA, New Jersey

Prepared by Lex Mundi member firm Day Pitney LLP

General remarks	New Jersey state employment law is governed by a combination of legislative, statutory, judicial, and common law. There are also United States federal employment laws (legislative, judicial, and administrative), which are not addressed herein. Some New Jersey municipalities have their own local laws, some of which are addressed herein.
Employment agreement	New Jersey is an "employment-at-will" state. If there is no contract to restrict termination of employment, an employer has the right to discharge an employee at any time for any reason, so long as it is not an illegal reason (such as discrimination or retaliation as set forth in other responses). An employer may discharge an employee for "no reason" or a reason that might seem arbitrary and unfair. Employment-at-will also protects the employee's right to resign at any time, without the need to explain or defend that decision. Employment agreements are generally governed by contract law.
Terms and conditions of employment	**The New Jersey Equal Pay Act** prohibits discrimination in pay rate or method of payment based on sex. Employers must pay 1½ times the employee's regular base pay for any time worked in excess of forty hours in a week. Employers are not required to pay an hourly premium for additional hours worked in a single day (*e.g.*, more than eight hours in day) or for time worked on weekends or holidays. **The New Jersey wage and hour law** also requires that employers keep accurate wage and hour records for employees, and prohibits retaliation for an employee's complaint, institution of proceedings, or providing of testimony in proceedings related to the law, or for the employee's service on a wage board. **The New Jersey Wage Payment Law** mandates that employees be paid at least twice each calendar month (once per month minimum for executives and supervisory employees) and enumerates specific types of permissible payroll deductions from wages (no others permitted). When an employee leaves employment for whatever reason, employers shall pay the employee all wages due no later than the regular pay period during which the employee left employment; employees compensated by an incentive program are entitled to a reasonable approximation of all wages due until the exact amount due can be computed. **The New Jersey Worker Health and Safety Act** requires employers to provide reasonably safe and healthful workplaces, including protective devices where there is a substantial risk of injury. **The New Jersey Smoke-Free Air Act** prohibits smoking in any indoor public place or workplace (defined as a structurally enclosed location or portion thereof at which a person performs any type of service or labor) and requires employers to post "no smoking" signs at entrances and imposes fines for businesses who fail to enforce the smoking ban.
Changing terms and conditions of employment	If there is no binding employment contract or representation by a union, an employer has the right to change employees' terms and conditions of employment.

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Trade Unions and the consultation obligation	Under federal labor law, employers must bargain in good faith with any union representing their employees regarding changes to terms and conditions of employment.
Data privacy and personal integrity	**The New Jersey Identity Theft Prevention Act** applies to all employers doing business in New Jersey and requires employers to: take steps to prevent the disclosure of Social Security numbers of employees and other personal data; destroy documents and electronic records containing personal information and notify persons affected by any unauthorized access to personal information; and provide certain notification in the event of a security breach. **The New Jersey Genetic Privacy Act** requires the destruction of a DNA sample obtained for employment purposes immediately after the purpose for which it was retained has been accomplished. **The New Jersey Social Media Privacy Law** prohibits employers from requiring or requesting current or prospective employees to provide their username or password or any other means for accessing their personal social media accounts or to require any individual to waive their right under this statute as a condition of applying for or receiving an employment offer. This law also prohibits retaliation against individuals who: refuse to disclose a user name or password to their social media account; report an alleged violation to the Commissioner of Labor and Workforce Development; testify or assist in any investigation concerning this law; or otherwise oppose a violation of the law. This law does not prohibit employers from accessing or using publicly available information about a current or prospective employee or from implementing a policy relating to the use of an employer-issued electronic device or account that the employee uses for business purposes. This law does not prevent employers from conducting an investigation to ensure compliance with applicable laws or prohibitions against work-related employee misconduct; or respond to a receipt of specific information about the unauthorized transfer of the employer's proprietary, confidential, or financial information to an employee's personal account. **The Opportunity to Compete Act**—applies to employers with at least 15 employees over 20 calendar weeks who do business, employ persons, or take applications for employment within New Jersey. Employers are prohibited from: (1) requiring an applicant to complete any employment application that makes any inquiries regarding the applicant's criminal record; or (2) making any oral or written inquiry regarding an applicant's criminal record during the "initial employment application process." The "initial employment application process" begins when an applicant or employer first makes an inquiry to the other party about a prospective position and concludes when the "employer has conducted a first interview, whether in person or by any other means, of an applicant for employment." Employers are also prohibited from publishing any advertisements or solicitations for employment stating that the employer will not consider any applicant who has been arrested or convicted of one or more offenses.
Regulations regarding parental leave or other forms of absence regulated by law	**The New Jersey Family Leave Act** provides employees with up to 12 weeks leave in a 24-month period for the birth or adoption of a child, or the serious health condition of an employee's child (adopted, biological, step-child or any person with a parent child relationship with the employee), parent, spouse or civil union partner. The Act applies to employers with 50 or more employees. In order to qualify, an employee must have worked at least 12 months and at least 1,000 hours during the 12-month period preceding the leave. **The New Jersey Security and Financial Empowerment Act** requires employers with 25 or more employees to provide 20 days of unpaid leave in a calendar year to any employee who is a victim of a domestic violence incident or a sexually violent offense or to any employee whose child, parent, spouse or domestic or

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	civil union partner was the victim of such an incident. At least 13 New Jersey municipalities have laws requiring employers with employees in those municipalities to provide **paid sick leave** (varying provisions).
Termination of employment	If there is no contract to restrict termination of employment, an employer has the right to discharge an employee at any time for any reason, so long as it is not an illegal reason.
Sanctions for wrongful termination	If a dispute arises regarding the validity of a termination of employment, the employee may pursue reinstatement, back pay, front pay, compensatory damages, emotional distress, punitive damages, attorneys' fees and interest.
Whistleblower protection	**The New Jersey Conscientious Employee Protection Act** prohibits an employer from taking adverse employment action against an employee because the employee: (1) disclosed, or threatened to disclose, activities by the employer which the employee reasonably believes to be illegal or against public policy; (2) provided information or testified in connection with an inquiry into the employer's violation of law; or (3) objects, or refuses to participate in, any activities the employee reasonably believes violates law or public policy.
Non-Competition Laws	For a non-compete agreement to be enforceable, New Jersey courts require that the non-compete agreement: (1) protect the legitimate interests of the employer; (2) does not impose an undue hardship on the employee; and (3) is not injurious to the public. (See Non-Compete survey response for more specific information).
Discrimination and equal employment opportunity	**The New Jersey Law Against Discrimination** prohibits discrimination in employment against any person on the basis of race, creed, color, sex, pregnancy and childbirth, national origin, nationality, ancestry, age, atypical hereditary cellular or blood trait, disability, affectional or sexual orientation, gender identity or expression, genetic information, refusal to submit to genetic testing, refusal to provide genetic information, marital status, familial status, liability for service in the Armed Forces. The law also covers person's spouses, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, and customers. Employer must make reasonable accommodation for disabilities and pregnancy and pregnancy-related conditions, provided the accommodation does not result in undue hardship on the business operation; case law has also expanded this requirement to individuals holding sincerely-held religious beliefs. Law also protects harassment based on any of these characteristics. Employer can be liable for acts of its supervisors and non-supervisors in certain circumstances. Individual liability for those "aiding and abetting" in violation of law. Employer may not retaliate against an employee because the employee (1) opposed any practices or acts made unlawful under the law, or (2) has or intends to file a complaint, testify, or assist in any proceeding under the law. A "retaliation" claim, if made in good faith, may prevail even if the underlying claim fails. **The New Jersey Equal Pay Act** prohibits discrimination in pay rate or method of payment based on sex. **The New Jersey Gender Equity Law** requires employers with 50 or more employees (regardless of location) to make employees aware of their right to be free from gender-based discrimination in the workplace, among other obligations. (See also **The New Jersey Opportunity to Compete Act** described in Data privacy section.)

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Transfer of business and outsourcing	The Millville Dallas Airmotive Plant Job Loss Notification Act applies to employers that transfer or terminate operations resulting in termination of 50 or more full-time employees within a 30-day period, or to an employer that conducts a mass layoff. For employers who employ 100 or more full-time employees, requires notification 60 days before first termination or transfer or notification within period of time set forth in the federal Worker Adjustment Retraining Notification Act, whichever is longer. This law specifies content of notification to employees, requires payment of severance to employees not provided proper notice, and permits aggrieved employees to initiate suit for violations of Act.
Global mobility (brief overview of common issues and visa requirements)	Federal law applies.
Criteria for independent contractor status	Independent contractors are: (1) free from control or direction over the performance of such service, both under his contract of service and in fact; and (2) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (3) such individual is customarily engaged in an independently established trade, occupation, profession or business. They are in business for themselves, offering their services to the general public. Signs of independent contractor status include a person who: has an established business, advertises in the electronic and/or print media, buys an ad in the Yellow Pages, uses business cards, stationery and billheads, carries insurance, keeps a place of business and invests in facilities, equipment, and supplies, pays their own expenses, assumes risk for profit or loss, sets their own schedule, sets or negotiates their own pay rate, offers services to other businesses (competitive or non-competitive), is free to refuse work offers, may choose to hire help.
Corruption, regulation and sanctions	White collar criminal law applies.
Final remarks	The above summarizes the law in the State of New Jersey, which is generally more employee-friendly than the applicable federal laws on the listed subjects, including but not limited to Title VII of the Civil Rights Act, the Americans with Disabilities Act, Age Discrimination in Employment Act, the Family Medical Leave Act, the Worker Adjustment and Retraining Notification (WARN) Act, and the Fair Labor Standards Act.

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Non-Competition Global Practice Guide

USA, New Jersey

Prepared by Lex Mundi member firm Day Pitney LLP

Does your state or country recognize and/or enforce restrictive covenants against employees?

Yes, New Jersey courts will assess covenants under a reasonableness standard.

What are enforceable protectable business interests that courts will protect?

Protectable interests in New Jersey include trade secrets, confidential information, goodwill, customer relationships, referrals, training, and disintermediation.

What are considered reasonable restrictions as to geography, duration and scope of activity?

In New Jersey, covenants must be reasonable as to time, geography, and scope of activity. Reasonableness depends on the circumstances. Restrictions should be no broader than are necessary to protect the legitimate interest involved. Covenant lasting one to two years have been enforced. Courts may also consider whether the restraints are greater than the area in which the employee worked.

Can a customer-specific restriction substitute for a geographic restriction?

Yes

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

New Jersey courts may reform a covenant to make it "reasonable".

Will the court recognize a choice-of-law provision in a restrictive covenant?

Yes

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

Yes. Attorneys and licensed psychologists.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

A covenant must be supported by adequate consideration, which can be new employment, continued employment, or other consideration.

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Does a change in position, salary or responsibilities affect enforceability?

No

Is continued employment sufficient consideration to enforce a restrictive covenant?

Yes. Continued employment is sufficient consideration for at-will employees.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

Yes

Are restrictive covenants assignable?

Yes

List any necessary language requirements.

There are no specific language requirements

List any other requirements of importance.

N/A

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The International Employment Guide

USA, New Mexico

Prepared by Lex Mundi member firm Rodey Law Firm

General remarks	Both New Mexico and federal law govern most aspects of the employer and employee relationship. In many areas, New Mexico law is less developed than federal law.
Employment agreement	Both contractual and at-will employment exists in New Mexico. An employment agreement without a definite term is presumed to be at-will. At-will employment can be terminated by any party at any time, without notice, and without liability. This agreement may be modified by a contractual agreement (either express or implied) regarding termination, at which point it is no longer at-will. An employment obligation also may be created through promissory estoppel. If an employer seeks to have an at-will employment relationship, a disclaimer in a handbook is not itself enough to establish one.
Terms and conditions of employment	New Mexico law sets a state-wide minimum wage, and city or county ordinances have set a higher minimum wage in some areas of the state. New Mexico state law requires non-exempt employees be paid one and one-half time their usual wage for overtime hours. Total hours an employee may work is capped at 16 hours in a 24-hour period. Employers are required to pay most employees twice monthly, though some exceptions are allowed and employees may bargain for different pay schedules through collective bargaining agreements. Any employment contract includes a covenant of good faith and fair dealing. Employers may require employees to assign the employer intellectual property rights. Employers may ask employees to sign arbitration agreements, which will be interpreted under contract law.
Changing terms and conditions of employment	Terms and conditions of employment may be modified by express or implied contracts. Implied contracts are created by the parties' behavior and equally enforceable as express contracts.
Trade Unions and the consultation obligation	New Mexico does not have state law on this subject for non-governmental employers.
Data privacy and personal integrity	Personnel files are almost always discoverable in litigation. No New Mexico statute protects sensitive information in files. A confidentiality provision in an employment contract which prevents employees from disclosing information is usually enforceable if the information and limits on disclosure are explicitly described.
Regulations regarding parental leave or other forms of absence regulated by law	New Mexico does not have a state analogue to the Family and Medical Leave Act ("FMLA") and does not have law providing for mandatory meal or break periods, apart from requiring break times to be flexible for nursing mothers.
Termination of employment	An employment contract may impose both substantive and procedural limitations on the employer's right to terminate. An employer must have

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	reasonable grounds to believe that sufficient cause existed to justify the termination. At-will employment can be terminated by any party at any time, without notice, and without liability. An employer cannot terminate in violation of state and federal anti-discrimination laws.
Sanctions for wrongful termination	Compensatory and punitive damages are available for wrongful termination. Other employment law torts available under New Mexico common law are retaliatory discharge, intentional interference with existing or prospective contract, intentional infliction of emotional distress, negligent hiring, supervision, or retention, defamation, invasion of privacy, and prima facie tort.
Whistleblower protection	The New Mexico Whistleblower Protection Act prevents public employers from retaliating against a public employee who communicates information the employee believes in good faith to be an unlawful or improper act; provides information to an inquiry into such an act; or objects or refuses to participate in an activity that constitutes an improper act. An employee who suffers a violation of the act may receive damages, reinstatement to the same seniority, two times the amount of back pay with interest, any special damages suffered, and litigation costs and attorney fees. The Whistleblower Protection Act is not exclusive and the employee may pursue any other remedies available at law. A person who files a false claim under the Act may be liable for civil or criminal sanctions.
Non-Competition Laws	Restrictive covenants in an employment contract, such as a covenant not to compete, are enforceable so long as the restrictions are reasonable. Generally, New Mexico courts enforce non-competition agreements. However, a recent state law prohibits certain non-compete provisions when applied to physicians, osteopathic physicians, dentists, podiatrists, and certified registered nurse anesthetists, unless between shareholders, owners, partners, or directors of a health care practice.
Discrimination and equal employment opportunity	The New Mexico Human Rights Act outlaws discrimination based on race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, serious medical condition, sexual orientation, gender identity, or spousal affiliation. A charge of discrimination must be filed with the New Mexico Human Rights Commission within 300 days of the alleged discriminatory act. The commission investigates and if it finds probable cause, must first try conciliation before holding a hearing.
Transfer of business and outsourcing	New Mexico does not have state law on this subject for non-governmental employers.
Global mobility (brief overview of common issues and visa requirements)	N/A
Criteria for independent contractor status	To determine whether an individual is an employee or independent contractor, New Mexico courts apply a test to measure how much control the principal has over the worker. The following factors are considered: 1) type of occupation and whether it is usually performed without supervision; 2) skill required for the occupation; 3) whether the employer supplies the tools for the persons working; 4) length of time person is employed; 5) method of payment, whether by time or job; 6) whether work is part of the regular business of the

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	employer; 7) whether the parties intend to create an employment relationship; and 8) whether the principal is engaged in business. The court will also evaluate individual circumstances of a case. A contract's designation of an individual as an employee or independent contractor is relevant but does not determine the individual's status.
Corruption, regulation and sanctions	Demanding or receiving a bribe by a public officer or public employee is a third degree felony, and subject to criminal sanctions and forfeiture of the public office held by the employee.
Final remarks	New Mexico does not have a "Right to Work" statute, "take your gun to work" law, or a state analogue to the federal Work Adjustment and Retraining Notification Act. The New Mexico Workers Compensation Act applies to all employers with three or more workers, and requires employers to compensate individuals for accidental injury or death arising out of and in the course of their employment. Most employers must pay unemployment taxes to the state and federal government. New Mexico's state unemployment insurance program pays benefits to eligible individuals who are out of work. Claims for unemployment benefits are handled by the Department of Workforce Solutions.

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The International Employment Guide

USA, New York

Prepared by Lex Mundi member firm Day Pitney LLP

General remarks	New York state employment law is governed by a combination of legislative, statutory, judicial and common law. There are also United States federal employment laws (legislative, judicial, and administrative) which are not addressed here. New York City also has its own local laws, some of which are addressed herein.
Employment agreement	New York is an "employment-at-will" state. If there is no contract to restrict termination of employment, an employer has the right to discharge an employee at any time for any reason, so long as it is not an illegal reason (as set forth below). An employer may discharge an employee for "no reason" or for a reason that might seem arbitrary and unfair. This also protects the employee's right to resign at any time at any time without the need to explain or defend that decision.
Terms and conditions of employment	Employers must pay 1 ½ times the employee's regular base pay for any time worked in excess of forty hours in a week. **The New York Wage and Hour Law** establishes the minimum wage rate and describes the information that must be contained in an employee's payroll records. **The New York Payment of Wages Law** requires that employees be paid no later than seven days after the end of the week when the employee earned the wages and enumerates specific types of permissible payroll deductions from wages. **The New York Public Employee Safety and Health Law** requires that public employers implement and enforce the requires of the federal Occupational Safety and Health Act ("OSHA"). Private employers are bound by OSHA's requirements. **The New York State Clean Indoor Air Act** bans smoking in workplaces. New York City, which includes the five boroughs, also passed the **Smoke Free Air Act** prohibits smoking in all workplaces in the five boroughs.
Changing terms and conditions of employment	If there is no binding contract, an employer has the right to change the terms and conditions of employment.
Trade Unions and the consultation obligation	Under federal labor law, employers must bargain in good faith with any union representing their employees regarding changes in terms and conditions of employment.
Data privacy and personal integrity	**The New York Labor Law §203** requires that employers prevent unlawful disclosures of employee personal identifying information. The personal identifying information may not be posted, displayed, or otherwise communicated to the general public. Personal identifying information under New York law includes but is not limited to the following: (1) social Security numbers; (2) home address or telephone numbers; (3) personal e-mail addresses; (4) internet user IDs and passwords; (5) driver's license numbers; and (6) parents' last names prior to marriage.

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	The Correction Law—applies throughout the State and prohibits an employer from denying employment on the basis of a prior criminal conviction unless the employer can satisfy one of the two exceptions in the law. In order to meet the exceptions, an employer must be able to show: 1) a direct relationship between some or all of the criminal convictions and the job applied for by the individual; or 2) hiring, or continuing the employment of the individual, would present an unreasonable risk to the employer's property, specific individuals or the general public. **The Fair Chance Act** (New York City)—applies to employers in the 5 boroughs only. prohibits an employer from denying employment on the basis of a prior criminal conviction unless the employer can satisfy one of the two exceptions in the law. In order to meet the exceptions, an employer must be able to show: 1) a direct relationship between some or all of the criminal convictions and the job applied for by the individual; or 2) hiring, or continuing the employment of the individual, would present an unreasonable risk to the employer's property, specific individuals or the general public. Prohibits employers to ask about the criminal record of job applicants before making a job offer. This means ads, applications, and interview questions cannot include inquiries into an applicant's criminal record. Employer must first extend a conditional offer of employment to an applicant and then inquire about criminal history and/or obtain authorization to conduct a criminal background check.
Regulations regarding parental leave or other forms of absence regulated by law	There is no state or NYC law equivalent to the federal Family and Medical Leave Act (FMLA), except employees who work more than 20 hours per week may be granted up to 10 days of unpaid leave when their spouse who is a member of the National Guard, Reserves, or Armed Forces and who is deployed during a period of military combat to a combat theater or combat zone of operations is on leave during deployment (N.Y. Lab. Law § 202-i). (see military leave section below). Private NYC employers with 5 or more employees are required to provide their employees five paid sick days per year. Employers with fewer than 5 employees are required to provide their employees five *unpaid* sick days per year. Employees are permitted to use sick time for their own medical care – physical or mental – or for that of a spouse, domestic partner, children, parents, grandparents, grandchildren, and siblings. Notice of rights must be provided to all employees, and a form Notice of Employee Rights has been published by the NYC Department of Consumer Affairs. **New York Employment Protection for Jury Service (N.Y. Jud. Law § 519)** - Employers are prohibited from penalizing employees because of their jury duty attendance. **Military Leave (N.Y. Mil. Law § 317)** - Members of the state military forces called up by governor and members of U.S. uniformed services are entitled to unpaid leave for active service; reserve drills or annual training; service school; initial full-time or active duty training. Returning employee is entitled to reinstatement to previous position, or to one with the same seniority, status, and pay, unless the employer's circumstances have changed and reemployment is impossible or unreasonable.

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	Blood / Bone Marrow Donation (N.Y. Lab. Law §§ 202-a, 202-j) - Employees who work at least 20 hours per week are entitled to unpaid time off of up to three hours for blood donation or 24 hours for bone marrow donation.Employees who request such time off may be required to submit medical documentation of such activity **Time Off for Crime Victims (N.Y. Penal Law § 215.14; N.Y. Executive Law § 296-1(a))** - Employees who are a victim of a crime, whose family member was killed as a result of an offense, or who are subpoenaed as a witness are entitled to take unpaid time off for required attendance at a criminal proceeding, consultation with the district attorney, or other exercise of rights. Employees who request such time off may be required to submit documentation of such activity. Employees who are the victim of domestic violence, stalking or sex offenses are entitled to reasonable accommodation, including an unpaid leave of absence.Employees may be required to submit documentation evidencing their need **Time Off to Vote (N.Y. Election Law § 3-110)** - Employees who do not have sufficient time outside of their working hours to vote may be granted up to two hours of paid time off at the beginning or end of their shift, to vote.Employees must notify their manager at least two days before the election of their need for such time off.
Termination of employment	If there is no contract to restrict termination of employment, an employer has the right to discharge an employee at any time for any reason, so long as it is not an illegal reason.
Sanctions for wrongful termination	If a dispute arises regarding the validity of a discharge, the employee may pursue reinstatement, back pay front pay, compensatory damages, emotional distress, punitive damages, attorneys' fees, and interest.
Whistleblower protection	Under the **Public Health/Safety and Health Care Whistleblowing (N.Y. Lab. § 740(2)–(3)),** an employer shall not take any retaliatory personal action against an employee if the employee: discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud; provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry into any such violation of law, rule, or regulation by such employer; or objects to, or refuses to participate in any such activity, policy, or practice in violation of a law, rule, or regulation. An employee must bring the violation of the law, rule, or regulation to the attention of a supervisor of the employer and afford a reasonable opportunity for the employer to take corrective action.
Non-Competition Laws	Non-compete agreements are disfavored as a matter of public policy and are enforceable only to the extent that they satisfy the overriding requirement of reasonableness. Non-compete agreements will only be subject to specific enforcement to the extent that they are reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public, and not unreasonably burdensome to the employee. (See responses to Non-Compete survey for further information).

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Discrimination and equal employment opportunity	**The New York State Human Rights Law (N.Y. Exec. § 296)** prohibits discrimination in employment against any person on the basis of race, color, creed, age, national origin, alienage or citizenship status, gender (including gender identity and sexual harassment), sexual orientation, disability, marital status, or veteran status. In addition, the law affords protection against discrimination in employment based on arrest or conviction records and status as a victim of domestic violence, stalking, and sex offenses. The law also covers a person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, and customers. An employer must make reasonable accommodations for a recognized disability provided it does not result in undue hardship on the business operation. The law also protects against harassment based on any of these characteristics. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel, or coerce the doing of any discriminatory act (in other words, unlike under federal law, state law provides a theory for individual liability). An employer may not retaliate against an employee because the employee opposed any practices or acts made unlawful under the law or has or intends to file a complaint, testify, or assist in any proceeding under the law. **The New York City Human Rights Law (N.Y.C. Admin. Code § 8-107)** prohibits discrimination in employment against any person on the basis of race, color, creed, age, national origin, alienage or citizenship status, gender (including gender identity and sexual harassment), sexual orientation, disability, marital status, or partnership status. An employer must make reasonable accommodations for a recognized disability provided it does not result in undue hardship on the business operation. This law prohibits employers from: making statements, asking questions during interviews, or circulating job announcements that suggest a preference for or prejudice against individuals based on the protected classes under the law. This law also protects against harassment (less favorable treatment standard) based on any of these characteristics. Religious observance: Under this law, employers are required to make a reasonable accommodation for the religious needs of employees and job applicants, including the observance of the Sabbath and other holy days. Accommodation issues typically arise when an employee's religious practices conflict with their assigned work schedule. If an employee takes time off for religious observance, the employer does not have to pay the employee for the time taken off and may require the employee to make up the time. Retaliation: it is against the law for an employer to retaliate against an employee because she/he opposed an unlawful discriminatory practice or made a charge, or if she/he testified, assisted, or participated in an investigation, proceeding, or hearing. The law protects employees against retaliation as long as she/he has a reasonable good faith belief that the employer's conduct is illegal, even if it turns out that she/he was mistaken. Duty to Accommodate Pregnant Employees: NYC employers now have a duty to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth. Examples of reasonable accommodations include assistance with manual labor, bathroom breaks, disability leave for a reasonable period of time arising from childbirth, breaks to facilitate increased water intake and periodic rest breaks for those who stand for long periods of time. It generally is not reasonable for the

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	employer to place that employee on an unpaid leave of absence. An employer is required to provide such accommodations that would permit the employee to perform the "essential requisites of the job," unless (i) the employer is unaware that the employee is pregnant, has given birth or has a related medical condition; (ii) providing the accommodation will result in an undue hardship for the employer; or (iii) the employee would not be able to perform the essential requisites of the job even with the accommodation. **The New York Labor Law** prohibits discrimination in pay rate based on gender. It also prohibits an employer from firing an employee for: political or recreational activities outside of work, legal use of consumable products outside of work, for membership in a union. The Law also prohibits an employer from penalizing any employee for making a complaint to the employer, to the Commissioner of Labor, or to the Commissioner's representative, about any provision of the Labor Law. (See also Data Privacy section for discrimination regarding criminal records).
Transfer of business and outsourcing	In addition to the federal WARN Act, the New York State Worker Adjustment and Retraining Notification Act requires businesses to give early warning of closing and layoffs. Businesses must give notice to: (1) all affected employees; (2) any employee representative(s); (3) the New York State Department of Labor (DOL); and (4) the Local Workforce Investment Board (LWIB). The New York WARN Act applies to private businesses with 50 or more full time workers in New York State. It covers: (1) closings affecting 25 or more workers; (2) mass layoffs involving 25 or more full-time workers (if the 25 or more workers make up at least 33% of all the workers at the site); (3) mass layoffs involving 250 or more full-time workers; (4) certain other relocations and covered reductions in work hours. A covered businesses must provide all employees with notice 90 days prior to a: (1) plant closing; (2) mass layoff; (3) relocation; or (4) other covered reduction in work hours. If an employer fails to provide notice, it may be required to pay back wages and benefits to workers and/or pay a civil penalty.
Global mobility (brief overview of common issues and visa requirements)	Federal law applies.
Criteria for independent contractor status	Independent contractors are free from: supervision, direction and control in the performance of their duties. They are in business for themselves, offering their services to the general public. Signs of independent contractor status include a person who: has an established business, advertises in the electronic and/or print media, buys an ad in the Yellow Pages, uses business cards, stationery and billheads, carries insurance, keeps a place of business and invests in facilities, equipment, and supplies, pays their own expenses, assumes risk for profit or loss, sets their own schedule, sets or negotiates their own pay rate, offers services to other businesses (competitive or non-competitive), is free to refuse work offers, and may choose to hire help. An employer-employee relationship may exist regardless of how the hiring party describes it. For example, if a worker is given a 1099 Form rather than a W-2 Form, he/she may still be an employee. Workers may qualify as employees under the law, even if, for example, they sign a statement claiming to be an independent contractor or waiving any rights as an employee.

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Corruption, regulation and sanctions	White collar criminal law applies.
Final remarks	The above summarizes the law in the State of New York, which is generally more employee-friendly than the applicable federal laws on the listed subjects, including but not limited to Title VII of the Civil Rights Act, the Americans with Disabilities Act, Age Discrimination in Employment Act, the Family Medical Leave Act, the Worker Adjustment and Retraining Notification (WARN) Act, and the Fair Labor Standards Act.

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Non-Competition Global Practice Guide

USA, New York

Prepared by Lex Mundi member firm Day Pitney LLP

Does your state or country recognize and/or enforce restrictive covenants against employees?

Yes, New York courts will assess covenants under a reasonableness standard.

What are enforceable protectable business interests that courts will protect?

Protectable interests in New York include trade secrets, confidential information, goodwill, customer relationship, and an employee's unique or extraordinary services.

What are considered reasonable restrictions as to geography, duration and scope of activity?

In New York, covenants must be reasonable as to time, geography, and scope of activity. Reasonableness depends on the circumstances. Restrictions should be no greater than are required for the protection of the legitimate interest of the employer. Covenant lasting one to two years have been enforced. Courts may also consider whether the restraints are greater than the area in which the employee worked.

Can a customer-specific restriction substitute for a geographic restriction?

Yes

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

New York courts may reform a covenant to make it "reasonable".

Will the court recognize a choice-of-law provision in a restrictive covenant?

Yes

Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

Yes. Attorneys and broadcasters.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

A covenant must be supported by adequate consideration, which can be new employment, continued employment, or other consideration.

Does a change in position, salary or responsibilities affect enforceability?

Yes. In New York, termination may affect enforcement.

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Is continued employment sufficient consideration to enforce a restrictive covenant?

Yes. Continued employment is sufficient consideration for at-will employees and independent contractors.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

Yes

Are restrictive covenants assignable?

Yes

List any necessary language requirements.

There are no specific language requirements.

List any other requirements of importance.

N/A

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The International Employment Guide

USA, Puerto Rico

Prepared by Lex Mundi member firm McConnell Valdés LLC

General remarks	Puerto Rico is an unincorporated territory of the United States since 1898. In 1917, Puerto Ricans were granted U.S. citizenship and, in 1952, the United States Congress approved a constitution for Puerto Rico conferring a right of internal self-government. The United States retains control of foreign affairs, currency, defense and immigration; moreover, U.S. laws apply in Puerto Rico unless expressly excluded, or are locally inapplicable. As an unincorporated territory of the U.S., Puerto Rico has a dual legal system with coexisting U.S. federal laws and local legal statutory provisions. Although Puerto Rico employment law typically follows U.S. federal law, with some notable exceptions outlined below, Puerto Rico law is generally more protective of employees' rights when compared to other U.S. jurisdictions. In addition to being subject to the U.S. federal labor and employment legislation, Puerto Rico has its own statutory and regulatory labor rules whose implementation falls primarily to the Puerto Rico Department of Labor, supplemented by agencies or bureaus charged with administering unemployment and disability benefits, occupational safety and health, employment standards, arbitration and mediation, anti-discrimination, accident compensation and labor relations.
Employment agreement	In Puerto Rico, an employment contract can be agreed upon and executed through both written and oral negotiations and pacts, whereby an individual agrees to work for an employer in exchange for remuneration. Employment contracts that do not establish a termination date for the employee or the service rendered will be considered as an indefinite-term employment contract, subject to specific statutory rights. Employees are classified as exempt and non-exempt. Exempt employees are salary-based and are not covered by wage and hour statutory provisions and regulations (to wit, administrators, executives, professionals, computer programmers, and outside sales persons, among others). Non-exempt employees are generally those who work and are paid by the hour (and who do not meet the criteria of the aforementioned classifications). Within these categories, employees may also be hired for a fixed term, an indefinite term, or on a temporary basis. Puerto Rico is not an employment-at-will jurisdiction; P.R. Act No. 80 of May 30, 1976 requires that terminations of indefinite-term employees be effected pursuant to "just cause", as defined by the Act. Employees dismissed without cause are entitled to a statutory severance indemnity. Similar principles may apply for the termination of fixed-term employees. In Puerto Rico, a temporary employment contract must comply with certain specific requirements in order to be valid.

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Terms and conditions of employment	Generally, besides the minimum standards established any U.S. federal law and P.R. law, all other terms and conditions of employment are set voluntarily between the employer and the employee. Internal employer policies may also be considered as part of the employment contract. The minimum hourly wage applicable to non-exempt employees of a business covered by the U.S. Fair Labor Standards Act of 1938 ("FLSA") is $7.25. Local law also requires enterprises that are not covered by the FLSA to pay a minimum of 70% of the applicable Federal minimum wage. The FLSA applies to: employers with an annual business volume exceeding $500,000; or, employers who do not meet the stated annual volume but whose employees are engaged directly in interstate commerce or in the production of goods for interstate commerce. P.R. Act No. 379 of May 15, 1948 and the FLSA govern the wage and hour requirements for non-exempt employees in Puerto Rico. Under Puerto Rican law, FLSA-covered non-exempt employees who work in excess of eight regular hours during a twenty four hour period must be compensated at one and a half times (1½) their hourly wage for those overtime hours, unless a Mandatory Decree or Wage Order of the Puerto Rico Minimum Wage Board established a higher overtime rate. This higher rate, however, will only apply to no-exempt employees working continuously with the employer covered by the Decree or Order as of August of 1995. If the worker does not belong to an FLSA-covered industry, the compensation for daily overtime work will be equal to double their regular hourly wage, as long as their work hours do not exceed forty hours. Puerto Rico's weekly overtime pay applicable to non-exempt employees of employers covered by the FLSA is the same as that provided by the Federal statute, that is, time and one half (1½) the regular rate for all hours worked in excess of forty hours during the workweek. Employers not covered by the FLSA must pay their non-exempt employees at two times their regular rate for any hours worked in excess of forty hours during the workweek. Per disposition of Act No. 379, all employers are also required to grant their non-exempt employees a daily one-hour meal break (which can be reduced by meeting certain criteria); employees who are requested or allowed to work during the mandatory meal times are entitled to a remuneration of two times their regular hourly rate. Finally, P.R. law also provides non-exempt employees with a day of rest for every six (6) consecutive days of work; any work performed by a non-exempt employee on the day of rest must be remunerated at twice his/her regular rate of pay.
Changing terms and conditions of employment	In the absence of a collective bargaining agreement, employment agreement or any other specific statute of local regulation, an employer may prospectively change the terms and conditions of an employee's employment by providing them with notice of the change, except where the change is otherwise prohibited by applicable federal or local law. However, employees that resign due to the employer's actions directed to induce or compel them to resign (for example, by imposing more onerous working conditions, reducing their salary, lowering their category or subjecting them to humiliation), may be entitled to the severance indemnity under Act. 80.

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Trade Unions and the consultation obligation	Employees in Puerto Rico have a constitutional right to organize and bargain collectively through representatives. Moreover, the U.S. National Labor Relations Act ("NLRA"), which applies to Puerto Rico, regulates relations between employers and unions, union representation, elections, negotiations of collective bargaining agreements and other related matters. Employees have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Similarly, employees have the right to refrain from any or all of such activities. The Puerto Rico Labor Relations Act of 1945 and the Public Service Labor Relations Act of 1998, also provide rules for union recognition similar to those under the NLRA. These statutes are applicable to limited companies excluding those engaged in interstate commerce, which are covered by the NLRA.
Data privacy and personal integrity	Employees in our jurisdiction enjoy a constitutional right to privacy. The constitutional right to privacy is considered to be a fundamental right, which is enforceable between private individuals and, in particular, within the private employment context to the same extent as within the public sector. The central issue in order to determine whether an individual may claim this right is whether the individual has a reasonable expectation of privacy, considering the particular circumstances of each case. The Puerto Rico Supreme Court has recognized that a violation of a privacy interest is an actionable tort under local law. An employee may recover damages from an employer whose conduct is so callous as to violate the employee's constitutional right to privacy, in addition to any other remedies provided law. An employer may also be liable for disclosure of defamatory communications. Additionally, Act No. 111-2005, known as "Act for Information to the Citizen on the Security of Information Banks" and its regulations require entities having files of personal data to notify the owner, custodian or holder of such information of any security breach of the system which has allowed non-authorized access to such files. The term "files of personal data" includes, among others, the Social Security number, medical information protected under the Health Insurance Portability and Accountability Act ("HIPAA").
Regulations regarding parental leave or other forms of absence regulated by law	Vacation and Sick Leave: P.R. law provides non-exempt employees a statutory right for the accrual and enjoyment of paid vacation and sick leaves. Generally, non-exempt employees who work more than 115 hours per month have the right to accrue vacation leave at a rate of 1 ¼ days per month and sick leave at a rate of 1 day per month. Employees hired as of August 1, 1955, covered by a Mandatory Decree providing higher benefits will continue enjoying those benefits. Employers covered by a Mandatory Decree providing lower benefit may continue to provide those lower benefits to their employees. Non-exempt employees may use up to five (5) accrued sick leave days per year to provide care and attendance due to illness of their sons, daughters, spouse, or parents; or minor children, elderly or disabled persons under their custody, or guardianship. This last benefit does not apply to businesses with 15 employees or less.

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	Maternity, Adoption and Breast-feeding Leaves: Under local Act No. 3 of March 3, 1942, female employees are entitled to an eight-week maternity leave with full pay (including for adoption when the adopted child is 5 years of age or less). The employer is required by law to reserve the job position. Upon return to work, time is allotted during each full-time working day for breastfeeding. Family and Medical Leave: Pursuant to U.S. law, employees have a right to 12 weeks of unpaid leave for certain personal and family situations, including, but not limited to serious personal and family health issues. In case of health or other issues arising from military service, the right for unpaid leave may be for up to 26 weeks. Jury Duty and Witness Leave: Under Puerto Rico Act. No. 281-2003 and Act No. 87 -of June 26, 1964, employees called for jury duty are entitled to up to fifteen days of paid leave for their service, and their reinstatement is protected. Likewise, under Puerto Rico Act No. 122-1986 employees called as witnesses in criminal cases are entitled to paid leave for the duration of their time spent in court; their reinstatement is also protected. Employers are prohibited from deducting such employees' salary, vacation, or sick leave for time spent as jurors or witnesses in criminal cases. Other unpaid leaves include: Military Leave, Workman's Compensation Leave, Non-Occupational Disability Leave; Municipal Assembly Members Leave; and Special Sports Leave.
Termination of employment	Puerto Rico is not an employment-at-will jurisdiction. P.R. Act No. 80 of May 30, -1976 requires that terminations be effected pursuant to "just cause", as defined by the Act. Employees who are terminated without "just cause" are entitled to a severance payment. The amount of severance payment varies depending on the employee's length of employment with the company. "Just cause" is defined by Act No. 80 as: (1) the employee's engaging in a pattern of improper or disorderly conduct; (2) the employee's not working in an efficient manner, or working belatedly and negligently, or in violation of the standards of quality of the product produced or handled by the establishment; (3) the employee's repeated violations of reasonable rules established for the operation of the establishment, provided a written copy of the rules had been given to the employee; (4) full, temporary, or partial closing of the operations of the establishment; (5) technological or reorganizational changes, as well as changes of style, design or the nature of the product made or handled by the establishment and in the services rendered to the public; or (6) reductions in employment made necessary by a reduction in the volume of production, sales or profits, anticipated or prevalent at the time of the discharge. Employees hired for a fixed period of time are not covered by Act No. 80; however, if terminated prematurely for grounds not justified under the contract's terms, he/she may be entitled to contractual and other remedies.
Sanctions for wrongful termination	P.R. Act No. 80 provides that any person employed for an indefinite period of time, who is dismissed without "just cause", is entitled to receive from his employer a compensation that will depend upon the length of service with the employer. In the case of an employee dismissed during the first five (5) years of service, the indemnity will be two (2) month's salary, plus one (1) week's salary for every complete year of service. If the employee has more than five

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	(5) years and up to fifteen (15) years of service, the indemnity payment will be three (3) month's salary, plus two (2) weeks' salary for every complete year of service. After fifteen (15) years of service, the indemnity will be six (6) month's salary, plus three (3) weeks' salary for every complete year of service. Although Act 80 is generally the exclusive remedy for a discharge without cause, it is no bar for an independent cause of action based upon a tort violation of constitutional rights or arising from other legislation protecting employees against discrimination.
Whistleblower protection	Puerto Rico Act No. 80 of May 30, 1976 provides that the collaboration with, or the expressions made by an employee before any administrative, judiciary or legislative forum in Puerto Rico with regard to its employer's business, cannot constitute just cause for its employees' discharge, provided that the expressions are not defamatory and do not constitute a revelation of privileged information. Puerto Rico Act No. 115-1991 also establishes a similar protection against retaliation, and provides for double damages. Act 115-1991 extends its protection to expressions made by an employee using the internal procedures established by the employer or before any employee or employer's representative holding a position of authority. Act No. 17-1988, which prohibits sexual harassment, also has a provision prohibiting retaliation. Specifically, this statute makes an employer liable when it adversely affects the opportunities, terms, and working conditions of any person who has rejected the employer's practices prohibited by the said law, or who has filed a complaint or lawsuit, given testimony, collaborated or participated in an investigation, procedure or hearing that is initiated under Act No. 17. Moreover, Article 20 of Act No. 69-1985 prohibits retaliation for complaining of sex-based discrimination. The above list is not intended to cover all of the Puerto Rico statutes that prohibit retaliation. Together with these statutes, there are various federal laws that prohibit retaliation, including the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII).
Non-Competition Laws	Puerto Rico law is very restrictive with regard to the enforcement of non-compete agreements. As a general matter, restrictive covenants must be reasonable in length and geography, and limited to the former employer's clients and accounts with whom the former employee actually did business and had personal contact. Although there is no specific legislation regarding non-compete agreements, the P.R. Supreme Court has held that non-compete agreements in the labor and employment area are only valid and enforceable when: (i) the employer has a legitimate interest in the agreement; (ii) consideration is provided by the employer to the employee in exchange for agreeing to the same; (iii) the scope of the prohibition must fit the employer's interest, insofar as the object, time, and place of the restriction or clients involved is concerned; (iv) the objective of the restriction must be limited to activities similar to those the employer is engaged in; (v) the term should not exceed twelve months; (vi) with regard to the scope of the prohibition, it specifies the geographic limits or the clients involved; and (vii) the agreement must be in writing.

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	Non-compete agreements are subject to the close scrutiny of the courts to verify that the employees freely and voluntarily entered into the same, and to make sure that they meet the aforementioned conditions. Furthermore, the agreement may not restrict excessively and unjustifiably the employee's freedom of contract and the general public's needs or access to the employee's services. Lastly, these elements are all indispensable, and in the event the non-compete covenant does not meet any of the requirements mentioned above, the courts lack authority to modify its terms, and are obliged to declare the entire agreement null and void.
Discrimination and equal employment opportunity	As a U.S. jurisdiction, Puerto Rico is subject to federal anti-discrimination employment laws, including the following: 1. Title VII of the Civil Rights Act of 1964: Prohibits discrimination on the basis of sex, race, color, religion or national origin. Title VII applies to employers that have fifteen (15) or more employees. 2. Americans with Disabilities Act of 1990 ("ADA"): The ADA makes it unlawful for an employer to discriminate against a qualified individual with a disability. A qualified individual with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. Likewise, the ADA requires employers to reasonably accommodate qualified individuals in the workplace; the employer must work with the employee to determine whether and what accommodation is reasonable. 3. Age Discrimination in Employment Act of 1967 (ADEA): Prohibits discrimination by employers against individuals because of their age. ADEA applies only to workers age forty (40) or over. ADEA applies to employers engaged in interstate commerce who employ more than twenty (20) workers. 4. Equal Pay Act (EPA) of 1963: Protects men and women who perform substantially equal work in the same place of business from sex-based wage discrimination. 5. Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA): Prohibits employment discrimination based on genetic information about an applicant, employee, or former employee. P.R. laws prohibiting discrimination in the workplace include: 1. Act No. 100-1959: Puerto Rico's general anti-discrimination statute bars employers from discriminating against employees and prospective employees on the basis of age, race, color, gender, sexual orientation or identity, social or national origin, social condition, political affiliation, religious belief, marriage or status as a victim of domestic violence or stalking. 2. Act No. 69-1985: Prohibits employers from discriminating against employees and prospective employees because of sex (gender). 3. Act No. 17-1988: Prohibits sexual harassment in the workplace.

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	4. Act No. 3-1942: Prohibits discrimination based on pregnancy in the workplace. 5. Act No. 44-1985: Prohibits disability discrimination in the workplace. It applies to employers having 15 or more employees. 6. Act No. 115-1991: Puerto Rico's general "whistle-blower" protection act, which bars employers from retaliating against employees who take part in a protected activity.
Transfer of business and outsourcing	In the transfer of a business as an ongoing concern, employees who are retained by the buyer maintain the years of service under the former employer. Usually, all other employee rights transfer but this may depend on the scope and nature of the business transaction. From a liability perspective, in Puerto Rico, the successor employer's doctrine applies. As to employees' rights to employment-related claims, the Puerto Rico Supreme Court has assumed the position that a successor in interest, as a cautionary measure (even when it is not the original decision maker or party originally sued), should hold in escrow a sum that may be attributable to potential liability that may result from on-going claims from employees (or potential claims). A successor in interest may otherwise also be held responsible for payments due. Outsourcing is allowed in this jurisdiction. In Puerto Rico there is specific legislation that regulates the relationship between temporary employment agencies and client companies that imposes duties regarding benefits, rights and working conditions of temporary employment agencies' personnel.
Global mobility (brief overview of common issues and visa requirements)	U.S. federal law applies.. All issues concerning visa requirements and authorization to work in the United States are governed by federal immigration laws. A variety of permanent and temporary work visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the U.S. (Puerto Rico) employer and the foreign employee. U.S. permanent residents are authorized to stay and work for indefinite terms in the U.S. where and for whom they wish. Temporary visa holders have authorization to remain in the U.S. for a temporary time and often the employment authorization is limited to a specific employer, job, and even specific work sites. Local Act. No. 480 of May 29, 1972, prohibits employment of aliens without legal residence in the United States. It establishes specific background checks requisites.
Criteria for independent contractor status	Puerto Rico law allows employers to recruit employees for indefinite or definite-term durations. As a third option, employers may hire independent contractors. The independent contractor is not considered an employee as long as certain requirements are met. If in fact an employee is correctly labeled as an independent contractor, his or her relationship with the employer will not be governed by most of the labor and employment legislation of the jurisdiction. Among the factors considered by the courts in determining whether an individual is an independent contractor are: nature, extent and degree of

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	control by the principal; degree of permanence, stability and dependence of the relationship; the amount of the alleged contractor's investment in facilities and equipment; the alleged contractor's opportunities for profit and loss; the degree of independent business organization and operation; form of compensation and withholding of taxes; the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
Corruption, regulation and sanctions	Puerto Rico does not have any employment-related laws concerning corruption in the private sector.
Final remarks	The following reflect a few additional miscellaneous statutory provisions relatively unique to Puerto Rico. The Closing Law of Puerto Rico requires the closing, during certain holidays and on Sundays from 5:00 to 11:00 A.M., of certain retail establishments opened to the general public. Puerto Rico Act No. 217 of September 29, 2006 requires all private employers and local government entities to implement a protocol for the handling of domestic violence situations in the workplace. Puerto Rico Act No. 148 of June 30, 1969, provides for the payment of a Christmas bonus to all employees, which generally will amount to $600. Puerto Rico Act No. 207 of September 27, 2006, prohibits the use of employees' Social Security numbers on identification cards and/or in any other visible place or document of general circulation. The content of this Summary has been prepared for information purposes only, it is not intended as, and does not constitute, either legal advice or solicitation of any prospective client. Readers should not act upon the information contained herein without individual professional counseling. Labor and employment laws, regulations, and case law change constantly, for which reason areas or subjects covered in the Summary may change after its drafting. Separately, attorney-client relationship with McConnell Valdés LLC cannot be formed by reading or receiving this Summary. Such a relationship may be formed only by express agreement with McConnell Valdés LLC.

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Non-Competition Global Practice Guide

Puerto Rico

Prepared by Lex Mundi member firm McConnell Valdés LLC

Does your state or country recognize and/or enforce restrictive covenants against employees?

Yes. However, Puerto Rico Supreme Court decisions have been related to contracts not to compete and agreements for refund for costs and training.

What are enforceable protectable business interests that courts will protect?

Employers should have a legitimate interest in establishing a non-compete agreement. According to the Puerto Rico Supreme Court case law, the protection of the employer's business from competition by its former employees is a legitimate interest, to the extent that in absence of non-compete agreement its business will be substantially affected.

What are considered reasonable restrictions as to geography, duration and scope of activity?

Duration: The time span of the restrictions may not exceed a term of twelve (12) months after the employee's termination date. Any additional term is deemed excessive and unnecessary and will turn the agreement null and void.
Geography: The geographic area covered by the restriction must be strictly limited to that necessary to prevent actual competition between employer and employee.
Scope: When referring to clients, the non-compete clause should refer only to (i) those personally serviced by the employee during a reasonable period before his/her last date of employment; and (ii) which at the time, or for a period immediately before said date, were still the employer's clients.

Can a customer-specific restriction substitute for a geographic restriction?

Yes.

Will the court revise, reform, and/or "blue pencil" a restrictive covenant to make it "reasonable?"

The Puerto Rico Supreme Court has expressly rejected the "blue pencil approach," as well as the partial enforcement method, which allow the parties to modify non-competition agreements to adjust them to reasonable standards. Thus, failure to comply with any of its requirements will cause the entire non-competition agreement to be void and unenforceable.

Will the court recognize a choice-of-law provision in a restrictive covenant?

In Puerto Rico, choice-of-law clauses are generally valid provided the chosen jurisdiction has a substantial connection to the contract, unless such clause is contrary to fundamental public policy considerations. For example, it has been established that a choice-of-law provision in an non-compete agreement adopting Minnesota law on an agreement for services performed in Puerto Rico was valid, considering that the principal was a corporation domiciled and having its headquarters in that state. However, the validity of the covenant not to compete should be assessed under Puerto Rico law.

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Are there any exemptions or classes of employees against whom restrictive covenants may not be enforced?

Yes, although a particular group of employees has not been defined by the Puerto Rico Supreme Court. The general case law requirement is that the employee be in an employment position that allows him/her to effectively compete with his/her employer once he/she has left the company.

What consideration is necessary for a restrictive covenant to be enforceable (e.g. compensation, level of position, industry)?

The employer must provide valid and sufficient consideration in exchange for the employee signing a non-competition agreement. As to newly hired employees, the offer of employment is deemed adequate consideration, provided the employee executes the non-competition agreement as of his/her hire date. As to current employees, additional consideration must be provided in order to secure a valid non-compete. Additional consideration could consist of a promotion, additional employment benefits, or the enjoyment of substantial changes of a similar nature in the employment conditions.

Does a change in position, salary or responsibilities affect enforceability?

The Puerto Rico Supreme Court has not addressed this issue. However, an employee with a contract not to compete may later allege that a change in position or responsibility affected his ability to effectively compete with his/her employer.

Is continued employment sufficient consideration to enforce a restrictive covenant?

Under Puerto Rico Law, continued employment will not be deemed as sufficient and adequate consideration for a non-competition agreement.

Can an employee be terminated if he or she refuses to sign a restrictive covenant?

This issue has not been addressed by the Puerto Rico Supreme Court. However, if an offer of employment has been conditioned to the execution of a covenant not to compete, the employer may have grounds to terminate the employment relationship should the employee fail to execute the agreement. For those individuals currently under an employment relationship, they may allege that, in the absence of a contractual obligation requiring them to execute the agreement, there is no such obligation.

Are restrictive covenants assignable?

Although there is no particular local case law on point, in the absence of a contractual restriction providing otherwise, the answer is probably yes, since in our jurisdiction all rights assigned by virtue of an obligation are transmissible, in the absence of an agreement in the contrary. In such case, it is suggested to notify the employee of the assignment.

List any necessary language requirements.

Although there is no requirement of having a particular contractual language in order for an agreement be effective, the covenant should clearly state that the employer's rights under the agreement may be assigned and prohibit the transfer, assignment, conveyance or encumbrance of the employees' rights by the employee.

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List any other requirements of importance.

The employer must have a legitimate interest to protect and the non-competition agreement must be drafted so as to not impose any limitations beyond those needed to protect the interest. The existence of the employer's interest needs to be directly related to and will depend on whether the employee's position in the company enables him/her to effectively compete with his/her employer in the future.
The restrictions on the employee must be circumscribed to activities similar to those the employee is engaged in.
The time span of the restrictions may not exceed a term of twelve (12) months after the employee's termination date.
The geographic area covered by the restriction must be strictly limited to that necessary to prevent actual competition between employer and employee.
When referring to clients, the non-compete clause should refer only to (i) those personally serviced by the employee during a reasonable period before his/her last date of employment; and (ii) which at the time, or for a period immediately before said date, were still the employer's clients.
The employer must provide valid and sufficient consideration in exchange for the employee signing a non-competition agreement.
The non-competition agreement must be in writing.

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