Labour & Employment

Contributing editors
Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek

2017

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2006
Twelfth edition
ISSN 1750-9920

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Labour & Employment*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Monaco and Thailand.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek of Morgan Lewis & Bockius LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
April 2017

Global overview

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Morgan, Lewis & Bockius LLP

US companies have gone increasingly global in recent years. Many US firms now have far-flung operations (as well as customers) spread around the world. US-based multinationals often learn the hard way that they cannot deal with overseas employees in the same manner they do with their US counterparts because of the dramatic differences between the United States and the rest of the world's labour and employment laws. This overview highlights and summarises the principal distinctions and discusses recent reforms in some foreign countries to narrow that gap.

Employment-at-will versus job stability

The United States regulates its labour market significantly less than other countries do. Unlike much of the rest of the world, there is no comprehensive statutory labour law governing individual employment relationships or constitutional recognition of labour rights in the United States. The terms of employment relationships are determined largely by employers and accepted or rejected by workers rather than imposed by the government. This is generally designed to encourage business development, job creation and the movement of workers from declining sectors of the economy to expanding sectors. The result is that the United States has a historically lower unemployment rate than that of most other nations.

The basic principle of individual labour law in the United States is the employment-at-will doctrine. Under employment-at-will, US private-sector employers can dismiss their non-unionised employees at any time for any reason or even no reason at all. Thus, non-union US private employers do not have to demonstrate 'just cause' to terminate an employee without paying severance or providing notice. They just have to make sure that the termination is not for discriminatory (eg, based on sex, age, race, national origin, religion or disability) or retaliatory reasons, which are outlawed by federal, state and, sometimes, local statutes.

On the other hand, in most other countries, both developed and developing, employees are presumed to have a basic right to keep their jobs indefinitely. Put simply, unlike in the United States, it is generally difficult to discharge employees without incurring substantial liability. Their employment can only be terminated without consequence if the employer has 'just cause'. What constitutes 'just cause' is often specifically defined in the law and nothing less than serious misconduct qualifies. Establishing 'just cause' is typically analogous to meeting the very high burden of demonstrating wilful misconduct by an employee in an unemployment compensation hearing in the United States. And if the employer cannot prove 'just cause', it must either provide a lengthy pre-termination notice period or pay a very generous severance based on seniority. For high-level, long-term employees, these severance payments can run into six or even seven figures. In addition, back wages often accrue until a ruling is made.

Importance of discrimination laws

One consequence of the fact that all employees in most countries outside the United States have 'just cause' protection is that, although there are often anti-discrimination provisions on the books as in the United States, they are invoked far less frequently. There is no need for foreign employees who believe that they were unfairly treated to attempt to 'shoehorn' their claims to fit within anti-discrimination protections to obtain relief. Aggrieved employees simply file claims that their terminations were without 'cause'.

Employment contracts

In the United States, employees rarely have written employment contracts. Employment contracts are generally reserved only for high-level executives, and, in the absence of a written employment contract for a fixed term, US workers' employment is at-will.

By contrast, in most of the rest of the world employment contracts are either statutorily required for all employees or highly recommended as best practice. Moreover, the minimum terms that employment contracts must contain are often outlined in statutes. In the absence of a written employment contract, it is very difficult for employers to win if disputes with foreign employees arise.

Managing termination exposure risk

Although discharged employees in most parts of the world are entitled by law to generous severance payments, the potential exposure can be quantified and can be budgeted and saved. Typically, the severance formula is set out in a statute and includes a base payment plus a multiple based on seniority of final pay for a specified period. Unlike in the United States, compensatory and punitive damages, jury trials, and class and collective actions are also generally unavailable for employment claims. This greatly reduces the risk of an unexpected or runaway result.

Unionisation

Only 6.7 per cent of the US private-sector workforce is unionised and it is doubtful that number will increase any time soon. Although the proposed Employee Free Choice Act, which would allow workers to elect union representation simply by signing a support card, was a big issue in the 2008 elections, support dwindled in the wake of the economic crisis and the Act was scarcely mentioned in the 2012 elections. In 2013, Michigan became the 24th 'right-to-work' state in which employees do not have to pay dues to unions to contribute to the cost of negotiating and administering union contracts. US unions claim that this weakens unions. It is particularly notable that Michigan adopted a 'right-to-work' law, as it was the second manufacturing state (after Indiana) with a powerful union presence in the United States to do so.

In the rest of the world, union and other employee representation penetration is much higher. Depending on the jurisdiction, employee representation outside the United States can take a variety of forms, including trade, industry, national, regional or local unions, works councils, and health and safety and other committees with employee members.

Employee benefits

Another fundamental difference between the United States' and other countries' employment laws is in the area of employee benefits. In the United States, whether to provide fringe benefits and the scope of those benefits is at the discretion of the employer. For example, there are no statutory requirements for paid or unpaid vacations or holidays, paid leaves of absence, medical insurance or pension plans. A US employer can even require employees to work over Christmas with no extra pay, something that would be unheard of in many parts of the world. Of

course, most US employers do provide generous fringe benefits of their own volition, to attract and retain qualified workers and remain competitive, but they are not obliged to do so by law.

In most other countries, however, the labour laws require that employers provide a whole host of benefits to their employees. These benefits include mandatory vacations and holidays, and premium pay for those vacations and holidays, sick and maternity leave and leave pay, health insurance, caps on hours worked, year-end bonuses and even profit-sharing.

The gap begins to narrow

There is growing recognition worldwide that overly employee-protective labour and employment laws discourage employers from hiring new staff and thus have contributed to high unemployment, particularly among young people. To address this issue, a number of countries have, in recent years, adopted changes that will bring their laws more in line with the more flexible US model. These efforts are beginning to bear fruit.

For example, on 26 January 2017, Puerto Rico's Labor Transformation and Flexibility Act became effective. The new law consists of sweeping pro-employer reforms designed to stimulate Puerto Rico's economy by attracting new businesses and making it easier for existing businesses to operate.

Similarly, on 31 January 2017, Kazakhstan lowered the rate employers have to pay as mandatory social health insurance for employees from 2 per cent to 1 per cent. This change is intended to encourage entrepreneurs to create more jobs and continues the employer-friendly trend that began with the enactment of Kazakhstan's new Labour Code in 2015.

Even France, with its iconic 35-hour maximum workweek, is considering labour law reform, which would eliminate obstacles to employers adding staff. In fact, all of the first-round presidential candidates for the May 2017 election have platforms proposing to reform the French Labour Code.

On the other hand, the US labour market is becoming slightly less flexible. For example, social media and information technology make it easier for US employers to 'weed out' potential employees and increasingly protective anti-discrimination and retaliation laws make it more difficult to sack workers and thus hire new ones. In addition, the proliferation of licensing requirements for many jobs in the United States has added barriers to entry where none previously existed.

Conclusion

Outside the United States there is a strikingly different, more rigid and employee-protective approach to employment relationships that labour and employment practitioners need to recognise in our increasingly global economy. Nevertheless, we anticipate continued loosening in other countries' labour and employment laws to make them more business-friendly and incentivise job creation as economic conditions improve.

Global gender pay equity – an achievable aim?

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The first country to give women the vote was New Zealand in 1893. The first country to elect a woman as its head of government was Sri Lanka in 1960. The first country to establish gender pay equity is still to be decided. Ensuring pay equity between men and women is undoubtedly a laudable objective in a genuinely meritocratic society. Moreover, as Kofi Annan once remarked, 'gender equality is more than a goal in itself'. People and their talents are among the core drivers of sustainable long-term economic growth. If half of those talents are underdeveloped or underutilised, growth and sustainability will be compromised. It is perhaps for these reasons that many countries and organisations are redoubling their efforts to eradicate pay inequality.

A challenge in drawing overall comparisons between countries is the difficulty in finding good and reliable data sets. A useful starting point is the global gender gap report produced on an annual basis by the World Economic Forum. A number of factors are looked at when assessing pay equity, including the participation gap between men and women in the workforce, the gap between the advancement of men and women in their careers, and the remuneration gap. The last indicator is measured by looking at the ratio of estimated female-to-male income.

Although no country has eliminated pay inequity to date, the Scandinavian countries are clearly leading the way. In its 2015 global gender gap report, the World Economic Forum found that three of the top five countries in the global rankings are in Scandinavia. By contrast, the bottom five countries are all in the Middle East.

For large multinational employers, such regional differences are important to appreciate when trying to formulate a global pay equity strategy. While many organisations would prefer to adopt the same strategy across all countries in which they operate, there is a whole host of complex social, political, and cultural factors that cannot be discounted. A 'one size fits all' approach is rarely the answer, but neither is the sacrifice of an organisation's core values. Instead, many organisations adopt a principled but pragmatic approach to pay equity issues, taking into account regional differences, their industries, and other wider risk factors.

Some employers choose to voluntarily publish gender pay disparities even where there is no legal obligation to do so, except perhaps in more litigious countries such as the United States. This can be good for business by allowing them to recruit the best and the brightest or to align themselves more closely with the values of their customers.

What follows is a broad summary of the key issues globally.

Europe

The law of most European countries prohibits unlawful sex discrimination and establishes the principle of equal pay for equal work between men and women. Some countries go further and require employers to produce internal or external reports on gender pay disparities.

For example, earlier this year the UK government introduced a requirement for employers with 250 or more employees to publish on their websites an annual report on pay disparities between men and women focusing on:

- the mean and median pay gaps between men and women (focusing on the hourly rate of pay);
- the mean and median bonus pay gaps between men and women;
- the proportion of male and female employees who have received a bonus; and
- the proportion of men and women who fall within each of the four pay band quartiles of an employer's workforce (starting from the lowest-paid, up to the highest-paid employees).

UK employers must report on these pay disparities with reference to a snapshot of data taken as at 5 April each year. The first such report is due by no later than 4 April 2018. As there is no requirement to submit the data to a regulator or independent third party for verification, employers may suspect that their competitors have taken a less robust approach to the collection and reporting of data if it is convenient to do so. There is some flexibility for an employer in that they do not need to include data if they do not have that data and it is not reasonably practicable for the employer to provide such data.

Such data quality concerns should not be overstated. As employers are required to produce updates on their gender pay disparities on a year-on-year basis, the manipulation of such data may not serve their long-term interests. This is because of the risk that their data will create a credibility gap among staff within the organisation or that it will be difficult to show progress made.

With that said, some European countries have sidestepped such concerns. For example, Denmark imposes certain information gathering obligations on employers with 35 or more employees and at least 10 employees of each gender with the same work function. Such employers are required to provide information regarding pay to a central government body. Statistics are then compiled and published showing the differences in pay between men and women for each employer.

In other European countries, employers are not only required to publish gender pay reports but to also engage with employee representatives in closing such gaps. For example, in France the obligation to report on gender pay differences applies to employers with at least 50 employees. There is an obligation for an employer to produce an annual report on pay disparities between men and women and inform and consult with the works council on closing gender pay gaps.

Belgium requires employers to implement a detailed action plan where such gender pay gaps exist, setting out defined objectives and timescales for addressing the issues. A failure to implement a plan can in and of itself amount to unlawful sex discrimination and result in litigation from the affected employees. In theory, employers may also be subject to fines and even criminal liabilities.

The main sanction for failing to comply with gender pay reporting requirements is administrative fines, but in Austria a works council may issue legal proceedings against the employer in question. In countries such as the UK, however, the only sanction is reputational risk and the government has suggested that league tables may be produced listing non-compliant employers and providing comparative rankings in certain industry sectors.

Some European countries, including the Netherlands, Poland and Romania, do not presently have any legal requirement for gender pay gap reporting.

United States

In the United States, there is no requirement for employers to publish internal or external reports on pay disparity between men and women.

However, the laws of many states such as California, New York and Massachusetts require employees to be given equal pay for equal work.

In addition, many state and local laws now prohibit employers from asking questions about a job candidate's prior pay during the recruitment process.

At a federal level, employers with more than 100 employees must submit certain pay data to the Equal Employment Opportunity Commission (the EEOC). Such data includes statistics regarding the earnings and hours worked by male and female employees. The EEOC uses such data for assessment of charges of unlawful discrimination involving a particular employer. The EEOC performs statistical analysis of data to determine if there are pay disparities across pay bands in connection with gender and other protected characteristics.

The potential implications resulting out of the submission of such data are most obviously enforcement actions against a particular employer. There is also the risk that affected employees might bring expensive class actions based on unlawful sex discrimination.

To mitigate such risks, many US employers are conducting their own detailed pay equity analyses (ideally with a labour economist or statistician) on a legally privileged basis to assess whether similar employees receive comparable pay. It can be helpful for an employer to replicate what the data would show if it was subject to a full regulatory audit. Other steps that US employers may wish to take include reviewing existing pay policies to determine whether revisions are needed (such as starting pay or merit increases) as well as auditing pay decisions and making real-time adjustments when possible.

Asia Pacific

As a region, Asia has been relatively slow to address the gender pay gap between men and women and this is estimated to have cost the region approximately $50 billion a year in lost economic opportunities.

There are laws prohibiting unlawful sex discrimination and establishing the principle of equal pay for equal work in countries such as India, Pakistan and Singapore, but not China or Hong Kong. None of the Asian countries have implemented gender pay reporting requirements.

By contrast, Australia has been a world leader in taking steps to tackle gender pay equity issues. All non-public-sector employers with more than 100 employees must submit an annual report to a government agency against a set of standardised gender equality indicators.

Latin America

Generally, Latin American countries have not implemented specific measures aimed at establishing gender pay equity between men and women. In particular, there are no requirements for employers to publish gender pay reports in any Latin American countries.

Most Latin American countries have sought to address gender pay equity issues by focusing on enhancing educational levels and increasing minimum hourly pay rates as a way of improving pay equity between men and women.

Brazilian law prohibits unlawful sex discrimination and mandates equal pay between men and women. While an employer is not required to report on gender pay differences, it can avoid equal pay claims by implementing a formal career plan. Such a career plan is a document which sets out an organisational structure of the roles, duties and salaries of employees within an organisation, usually with details of different levels of seniority and milestones to be achieved by employees during their careers.

Middle East and North Africa

Despite the fact that the Middle East continues to be the worst-performing region for addressing gender pay inequalities, significant progress has been made by some Middle Eastern countries in closing the gender pay gap over recent years.

Algeria has gone further than most countries in the region by enshrining the requirement for men and women to be provided with equal pay for equal work. The United Arab Emirates also has a requirement that where a woman is performing the same work as a male counterpart she should receive the same remuneration. This has reportedly led to a significant narrowing of the gender pay gap.

By contrast, there has apparently been a significant deterioration in gender pay inequality in countries such as Turkey, Iran and Saudi Arabia.

In many Middle Eastern countries there are legal restrictions on women participating in the workplace. For example, certain jobs are designated as hazardous and morally damaging for women. There is a concern that such laws are hindering women from competing with men for highly paid job roles.

Other problems said to affect pay equity between men and women include the low levels of statutory maternity leave available to women. For example, in Tunisia there is a concern that maternity leave of 30 days is woefully inadequate and below international standards. There is a concern that such policies disengage women from the workforce at the point when they decide to start a family.

Obviously, there are no gender pay gap reporting requirements in the Middle East and North Africa region.

Conclusion

The solution to achieving gender pay equality appears fiendishly complex. This goes beyond conscious or unconscious bias in pay practices in the workplace. Rather, the underlying root cause lies with gender and cultural stereotypes for men and women.

While some governments have introduced laws requiring employers to report on gender pay gap differences, this is unlikely to eliminate the gender pay gap on its own. For example, there is a recognition that men and women often gravitate towards different career paths: statistically, a smaller proportion of women accept university places in engineering, mathematics and computer science compared to men. This may be due to certain stereotypes formed about 'men's work' and 'women's work' from a child's earliest days in school.

A connected issue relates to the fact that family-caring responsibilities tend to fall disproportionately more heavily on women compared to men. Some countries have taken steps to counterbalance such cultural bias. For instance, in Sweden the relatively low gender pay disparity is attributed to the generous 'use it or lose it' form of shared parental leave system. Both the mother and the father are required to take three months' shared parental leave.

It is not necessarily the case that gender pay differences will slowly but surely be eradicated over time. For example, with the rise of machine learning and artificial intelligence, many traditional process-driven jobs and industries will be destroyed or radically transformed through the creation of the gig economy. As many of these types of jobs have generally been dominated by women, there is a concern that such changes may widen rather than narrow pay disparities between men and women.

Against this backdrop, some employers are self-regulating their approaches to gender pay issues regardless of the laws in the countries in which they operate. They are for example publishing reports on gender pay disparities and devising and implementing action plans to try to address such differences.

Depending on the type of industry, other employers are only publishing gender pay differences where this is required by law. Where such an obligation exists, an employer must also consider whether it should provide any commentary to give context to such data, and, if so, how much detail should be given.

In all circumstances, great care must be taken by employers when reporting on gender pay disparities. Most employers adopt this type of approach as part of their overall equality and diversity strategies. Employers should ensure that internal and external communications are consistent and carefully managed through HR and public relations teams. Furthermore, managers need to receive appropriate training and understand that gender pay disparity does not automatically equate to evidence of unlawful sex discrimination.

Equally, where problems are identified, an employer will need a plan for resolving them. Is it better to address unexplained pay disparities as part of an employer's normal pay review cycle or to make on-the-spot pay adjustments? How can this be done in a way that minimises the risk of employment claims? If the pay disparities can be traced back to the initial recruiting decision, does the employer need to provide additional training for its recruiting managers to ensure that men do not receive higher pay than women simply because they are statistically better at negotiating starting salaries? These and many questions like them need to be addressed by employers seeking to eliminate gender pay disparities.

Afghanistan

Ghazi Khan and Muhammad Ismail

Legal Oracles

Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Legislation regulating employment includes:

- the Labour Law, 2008;
- the Labour Regulations, Official Gazette No. 791, 2000;
- the Regulation on Foreign Employment in Afghanistan, 2005;
- the Regulation on Financial Responsibility of Employees, 2000;
- the Regulation on Part-Time Work, 2011;
- the Kindergarten Regulation, 2014; and
- the Regulation on Overtime, 2011.

Moreover, Afghanistan is a signatory to several international conventions on employment. The Parliament of Afghanistan has ratified the following international conventions:

- the Discrimination (Employment and Occupation) Convention, 1958;
- the Weekly Rest (Commerce and Offices) Convention, 1957;
- the Equal Remuneration Convention, 1951;
- the Minimum Age Convention, 1973; and
- the International Labour Standards Convention, 1976.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes. Article 9 of the Labour Law prohibits all forms of discrimination pertaining to recruitment, wages and entitlements, profession, field or speciality, including the right to education.

Furthermore, article 1 of the Discrimination (Employment and Occupation) Convention defines discrimination in employment as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Labour, Social Affairs, Martyrs and Disabled (Ministry of Labour) is responsible for the enforcement of employment and labour-related laws and regulations. Moreover, the High Council of Labour is the highest decision-making body for labour-related issues and is established under the Ministry of Labour.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Yes. Article 147 of the Labour Law provides for the establishment of employees' and labour unions. The Labour Law further provides that an employees' or labour union is a social organisation that is established through voluntary participation of the employees. Certain provisions of the Social Organisations Law also govern these unions.

5 What are their powers?

Labour laws and regulations do not provide for or specify the powers for employees' representatives or unions. However, some provisions of the Labour Law remotely provide for the participation of labour or employee representations. Article 131.2 of the Labour Law provides that the employees' union participates in the Dispute Resolution Commission for labour/employees. Furthermore, article 89 of the Labour Law states that employees' representatives or unions participate in dispute resolution for determination of standards and regulation of work between the employees and employer.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

No, there are no legal restrictions or prohibitions on running background checks on applicants.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

No. Article 13 of the Labour Law establishes that one of the preconditions of securing employment in an organisation is the provision of a health certificate issued by a medical hospital or clinic approved by the Ministry of Public Health if he or she does not provide a medical examination certificate.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

No. An employer can refuse to hire an applicant who does not submit to a test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

No. All forms of discrimination are strictly prohibited as discussed in question 2.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes. Article 14 of the Labour Law specifically provides for the need for a written contract. Furthermore, article 15 of the Labour Law lays down the requisite terms to be evidenced in writing, which include:

- legitimacy;
- specified subject matter or specified job description;
- absence of legal obstacles against work;
- type of work or occupation that the employee will perform;
- wages, rights and privileges of the employee;
- timing and hours of work in conformity with the Labour Law;
- leave in conformity with the Labour Law;
- workplace or unit where the employee will be engaged in work;
- date of execution of the contract; and
- the term period of the contract.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible under the Labour Law. In accordance with article 14 of the Labour Law, the maximum duration of a fixed-term employment contract shall be one year, which can be extended for the same term with the mutual consent of the parties.

12 What is the maximum probationary period permitted by law?

Pursuant to article 17 of the Labour Law, the maximum permitted probationary period is three months. The employer has no discretion whatsoever in any given circumstance to extend this probationary period.

13 What are the primary factors that distinguish an independent contractor from an employee?

There appear to be no distinguishing factors between an independent contractor and an employee in the Labour Law and regulations.

14 Is there any legislation governing temporary staffing through recruitment agencies?

No. There is no legislation governing temporary staffing through recruitment agencies. However, in accordance with article 151 of the Labour Law, private employment agencies may be established after acquiring the requisite approvals from the Ministry of Labour. The Ministry of Labour has special procedures in place for registration and establishment of recruitment agencies.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Under the Regulation on Foreign Employment in Afghanistan, 2005 (the Foreign Employment Regulation), a work visa backed by a work permit is granted for a period of 180 days, but can be renewed. There appears to be no provision or practice of visa availability for employees upon transfer from one corporate entity, in one jurisdiction, to a related entity in another jurisdiction.

16 Are spouses of authorised workers entitled to work?

No. Spouses are not entitled to work; they follow the procedure for being recruited as approved workers in Afghanistan before being authorised to work. Spouses are only entitled to a resident visa when an expatriate employee is working in Afghanistan.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The Foreign Employment Regulation governs the employment of foreign citizens. The Labour Law applies to both local Afghan citizens and foreigners in its entirety. The rules for employing foreign workers are stated in article 5 of the Foreign Employment Regulation:

- Foreign citizens over the age of 18 and who have not reached the age of retirement (set out in the Labour Law) who hold a health certificate from the country of their citizenship and the Ministry of Public Health of Afghanistan may be employed in Afghanistan through the following two methods:
  - On the basis of an agreement based on the request of governmental organisations and the countries involved. The employment documents for the issuance of a work visa are accordingly processed through the Ministry of Foreign Affairs or the Ministry of Labour.
  - On the basis of an individual request of a foreign citizen who has obtained a visa for Afghanistan and whose employer provides them with a formal appointment or request letter for the issuance of work visa by the Ministry of Foreign Affairs or the Ministry of Labour.
- Employment of foreign citizens outside their field of specialisation is not allowed.

Furthermore, article 6 of the Foreign Employment Regulation provides for sanctions and restrictions on the employment and recruitment of foreign citizens; it states that, in the case of availability of both local Afghan citizens and foreign citizens for a specialised job, priority shall be given to local Afghan citizens over foreign citizens. The same restriction has also been provided in article 15 of the Procedures of Invitation adopted by the Afghanistan Investment Support Agency (AISA).

18 Is a labour market test required as a precursor to a short or long-term visa?

Yes. Article 7 of the Procedures for Invitation adopted by AISA provides that a visa application shall be reviewed by AISA to ascertain that there are no local workers who are qualified to fill the position being offered to foreign citizens. Further, a Presidential Decree has been issued to the effect that, if local workers are available in a specific sector, priority shall be given to them instead of foreign citizens.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Yes. Article 30.2 of the Labour Law provides for the normal working hours, which on average during the course of the year shall not exceed 40 hours per week. Furthermore, as per article 30.4, upon approval from the Ministry of Labour and given the nature of the work, working hours may be increased or decreased during any day of the week, provided that the total working hours do not exceed the maximum threshold of 40 hours.

20 What categories of workers are entitled to overtime pay and how is it calculated?

In accordance with article 38 of the Labour Law, a worker performing any work over and above the legally allowed working hours (ie, 40 hours per week) is entitled to overtime pay. The Labour Law has further categorised the circumstances in which work over and above the legally allowed working hours is considered as overtime:

- in cases where performance of work may not be delayed and is required for public services;
- in cases where performance of work is required for prevention or removal of industrial or social accidents or waste;
- in cases where performance of work is required to repair or restore damaged machines if the malfunctioning leads to stoppage of work for a large number of employees;
- in cases where performance of work is required to remove unforeseen circumstances that prevent the normal functioning of social services (eg, water supply, heating, lighting, sewerage, transportation, communications, health and other allied social services);
- in cases where performance of work is required to complete work that was started previously and whose non-completion would lead to material damage;
- in cases where performance of work is required to continue work due to absence of a shift worker and the interruption of work would lead to material delay in the delivery of work; and
- in cases where performance of work is required by the employee or organisation as determined by the relevant person in charge.

The Regulation on Overtime, 2011 (the Overtime Regulation) governs the method of calculating the payments to be made in lieu of overtime work performed. Article 6 of the Overtime Regulation provides for the method for calculation of payment for overtime work performed as follows:

- Overtime pay for normal working days – one hour of overtime payment is equal to a 25 per cent increase of the monthly wage or salary of an employee divided by the average number of working hours in a month.
- Overtime pay for holidays – one hour of overtime payment is equal to a 50 per cent increase of the monthly wage or salary of an employee divided by the average number of working hours in a month.

Furthermore, article 7 of the Overtime Regulation states that allowances and fringe benefits are also considered as part of the base wage

or salary for the purposes of calculating overtime payment. In a non-governmental organisation, overtime work payments can be made to an employee with the consent of the employer and the employee, in accordance with Overtime Regulation.

21 Can employees contractually waive the right to overtime pay?

There are no specific provisions in the Labour Law and regulations wherein the employee can waive the right to overtime pay. However, according to article 14.2 of the Labour Law, a contract of employment is entered into with the consent of the parties, so an employee can contractually undertake to waive the right to overtime pay.

22 Is there any legislation establishing the right to annual vacation and holidays?

Yes. The Labour Law establishes the right to annual vacation and holidays. Articles 39 and 41 of the Labour Law provide that annual leave includes recreational, sick and urgent leave. An employee is entitled to 20 days' paid annual leave. An employee below the age of 18 is entitled to 25 days' annual leave, and an employee involved in underground and arduous work or work that is injurious to health is entitled to 30 days' annual leave.

Annual leave is taken at the convenience of both the employee and the employer; an employee can take the allowed 20 days of annual leave consecutively, and if the employer cannot grant the employee annual leave due to an urgent matter, any annual leave not taken may be carried forward with the consent of the employee. Furthermore, if the employer has an urgent need, annual leave can be divided into 10 days for every six months. Moreover, in accordance with article 49, a newly employed employee can take annual leave only upon completion of 11 months of work with an employer. An employee whose employment contract is less than a year but not less than three months may take annual leave proportionate to the term of the contract.

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes. In accordance with article 52 of the Labour Law, an employee is entitled to 20 days of sick leave annually with payment of wages and allowances as per the employment contract. Moreover, the Labour Law does not provide for sick pay.

An employee can take sick leave of up to five days by providing a written notification to the employer. If the sick leave period extends for longer than five days, the employee shall provide the employer with a sickness certificate issued by a medical practitioner certified to practise by the Ministry of Public Health. Where the employee is covered by medical insurance, certification by a doctor from the insurance company is valid. If the permitted sick leave exceeds a period of 20 days, an adjustment is made to the annual leave to be taken.

In addition to the above, a female employee is entitled to maternity leave of 90 days with full payment of wages and allowances as per the employment contract; one-third of the maternity leave can be taken before delivery and the remaining leave can be taken after delivery. In the case of an abnormal delivery or multiple births, an additional 15 days of maternity leave can be granted.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

An employee may take a leave of absence or urgency in circumstances provided for under article 51 of the Labour Law, which include: urgent leave for marriage; death of father, mother, brother, sister, spouse, child, father in-law, mother in-law, uncle or aunt; and birth of a child.

The maximum duration of a leave of absence or urgency is 10 days and the employee is entitled to full wages and allowances as per the employment contract during this period.

25 What employee benefits are prescribed by law?

Chapter 13 of the Labour Law extensively covers benefits that are available to employees. In accordance with article 134 of the Labour Law, an employee and, in certain cases, his or her immediate family members, are entitled to the following benefits:

- food allowance;
- transportation;
- housing allowance;
- medical allowance;
- financial aid of 10 months' wages or salary with all allowances and entitlements, based on the last monthly salary, to be paid: at the age of retirement; at the completion of the service term; and following work-related disability or illness;
- assistance after childbirth;
- financial aid for the family of a deceased employee for the burial ceremony, equal to 10 months' wage along with its allowances and entitlements, based on the last monthly salary; and
- pension for old age, completion of service term, illness and disability.

Furthermore, an employee is entitled to financial assistance on account of his or her inability to work because of illness or temporary disability. The financial assistance shall be equivalent to the last wage or salary of the employee, along with allowances and entitlements.

26 Are there any special rules relating to part-time or fixed-term employees?

The Labour Law primarily regulates both part-time and fixed-term employees. In addition to the Labour Law, the Regulation on Part-Time Work, 2011 has been enacted as a special legislative document to specifically regulate part-time employees.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The Labour Law does not provide for the validity and enforceability of post-employment restrictive covenants. The employment contract can be incorporated with post-employment restrictive covenants and a breach of contract can be enforced under the Civil Code of Afghanistan.

No limitation period for post-employment restrictive covenants has been provided in the Labour Law and regulations.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Not applicable.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

There are no specific provisions in the Labour Law, nor are there regulations that provide for circumstances in which the employer can be held liable for acts of employees. However, the general principle of vicarious liability may apply in tort.

Taxation of employees

30 What employment-related taxes are prescribed by law?

The employer shall withhold tax from salary or wages of employees, as provided in article 46 of the Income Tax Law. The scheme of withholding tax on salary or wage payments by an employer is as follows:

- zero per cent (exempt) for salary or wage of up to 12,500 afghanis per month;
- 10 per cent for salary or wage of between 12,501 and 100,000 afghanis per month; and
- 20 per cent for salary or wage of over 100,000 afghanis per month.

Furthermore, rewards, bonuses and *bakhshishi* (gratitude payments) paid to employees shall be subject to a 20 per cent withholding tax.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

There is no legislative document with regard to employee inventions. However, the general provisions of the Law on the Support of Rights of Inventors and Discoverers would be applicable.

32 Is there any legislation protecting trade secrets and other confidential business information?

There is no specific legislation with regard to protection of trade secrets or other confidential business information. However, article 92 of the Labour Law provides for the obligations of an employee, among other obligations, that an employee shall be obliged to protect job and trade secrets. Furthermore, trade secrets and other confidential business information may be protected through contractual obligations between the employer and employee.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There is no legislation with regard to protecting employee privacy or personnel data.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

In accordance with article 18 of the Labour Law, in cases of sale, merger, acquisition, death of an employer, change of product or service rendered, or destruction of property, the related rights and privileges of employees shall be regulated by the relevant legislative document. No such legislative document for the protection of employees has been enacted to this effect thus far.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer can dismiss or terminate the employee with or without a cause by serving the employee with one month's notice of the termination of the employment contract. Article 23 of the Labour Law provides for the circumstances wherein an employment contract can be terminated:

- agreement of parties;
- completion of term in a fixed-term contract;
- retirement;
- death;
- disability that hinders the performance of work;
- cessation of work for more than six months;
- dissolution of the organisation or reduction in the number of staff;
- final conviction that prevents an employee from working;
- repeated breach of work regulations after application of disciplinary punishments;
- refusal by the employee to work after being reassigned to previous duty; and
- an unsatisfactory probationary period.

Furthermore, article 95 of the Labour Law provides for the procedure to be followed if an employee violates labour discipline. The employer shall apply disciplinary penalties based on the following steps:

- upon the first instance of a violation, the employee may advise the employee of the violation;
- upon a second disciplinary violation, the employer may give a warning to the employee;
- upon a severe violation, the employer may deduct an amount from the salary of the employee;
- for further violations, the employer may transfer the employee; and
- finally, the employer may terminate the employee's contract.

Furthermore, article 101 of the Labour Law provides for instances wherein the employer shall have the right to terminate the employment contract in line with article 95:

- absence for 20 consecutive days from work without good cause; and
- in the event that a warning, deduction of salary or transfer of employee is applied more than once during a year.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Pursuant to article 23.4 of the Labour Law, the employer is under an obligation to give one month's notice prior to dismissal, as discussed in question 35. However, the employer can terminate the contract with immediate effect, provided such term is included in the employment contract. Further, the employer has to provide payments in lieu of notice.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

The Labour Law does not provide for circumstances in which an employer can dismiss an employee without notice.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Severance payments are calculated in accordance with the scheme set out in article 25.2 of the Labour Law. The right to severance pay accrues upon termination of the employment contract in the following circumstances:

- cessation of work for more than six months;
- dissolution of the organisation or reduction in the number of staff;
- final conviction that prevents the employee from working; and
- refusal by the employee to work after being reassigned to his or her previous duty.

The employer is under an obligation to make a payment of final gross salary or wage to the employee if the employment contract has been terminated in the above-mentioned circumstances. Severance payments are calculated based on the following scheme:

- if the duration of work is one year, one month's gross salary or wage shall be paid as severance pay;
- if the duration of work is from one year to five years, two months' gross salary or wage shall be paid as severance pay;
- if the duration of work is from five to 10 years, four months' gross salary or wage shall be paid as severance pay; and
- if the duration of work is more than 10 years, six months' gross salary or wages shall be paid as severance pay.

39 Are there any procedural requirements for dismissing an employee?

Requirements for dismissal in the case of disciplinary termination are provided in article 95 of the Labour Law and discussed in question 35. No prior approval from a government agency is required by law to dismiss an employee.

40 In what circumstances are employees protected from dismissal?

Under the Labour Law, an employee is protected from dismissal during paid leave provided by law or during service on missions as envisaged in article 28. Furthermore, there are no special provisions in the Labour Law that provide for circumstances where employees are protected from dismissal.

41 Are there special rules for mass terminations or collective dismissals?

Article 149 of the Labour Law governs mass terminations and group dismissals. The employer shall seek the approval of the Ministry of Labour before doing the same. In the case of a contemplated long-term work stoppage or the closing down of the entity or organisation, this shall be notified to the Ministry of Labour three months prior to mass terminations or group dismissals.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

No rules or regulations are in place for class or collective action claims. An employee can only assert labour and employment claims on an individual basis.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The mandatory and maximum age of retirement pursuant to article 168 of the Labour Law is 65. An employer may extend the working period of an employee for a further five years with the consent of the employee. An employer is allowed to impose any mandatory retirement age, which may not exceed 70.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Yes. The employer and employee can agree to private arbitration of employment disputes. Pursuant to article 131 of the Labour Law, any labour dispute between an employer and employee may be settled through mutual understanding and obligations undertaken in the employment contract. If the parties fail to resolve a labour dispute, it can be referred to:

- the dispute resolution commission established by the employer within the organisation;
- the High Commission on Labour Dispute Resolution; or
- the court that has jurisdiction.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

Yes. An employee can agree to waive statutory and contractual rights to potential employment claims. The Labour Law does not provide any necessary requirements for a valid waiver.

46 What are the limitation periods for bringing employment claims?

No such limitation period applies.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The Fair Work Act 2009 (Cth) (the FW Act), is the principal statute governing the employment of the majority of Australian employees, although some public-sector workers sit outside this coverage. The FW Act deals with the National Employment Standards (NES), modern awards, enterprise agreements, minimum wages and other terms and conditions of employment, and processes for challenging terminations of employment. The FW Act operates in conjunction with other federal, state and territory legislative schemes relating to areas such as work health and safety and non-discrimination.

An individual's employment is also regulated by applicable industrial instruments, such as a relevant modern award or enterprise agreement. Modern awards are determined and reviewed by the Fair Work Commission (the Commission) and provide a safety net of minimum pay rates and employment conditions. They are also used in the approval process conducted by the Commission for assessing whether employees are 'better off overall' under a proposed enterprise agreement. In the absence of coverage by a modern award or enterprise agreement, contractual terms agreed to in the contract of employment and common law principles may determine the terms and conditions of employment.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

There is a range of federal state, and territory legislation prohibiting discrimination and harassment in employment in Australia. There is no unified equality act operating at the federal level in Australia, with attributes such as sex, race, age and disability each covered by a separate piece of legislation. Coverage of discrimination on the basis of sexual orientation, gender identity and intersex status is included in the federal Sex Discrimination Act 1984 (Cth). State and territory anti-discrimination legislation tends to have a more unified coverage of numerous attributes in the one piece of legislation, but each varies as to the attributes covered, the conduct proscribed and the context in which they operate. Specific prohibitions on sexual harassment and disability harassment operate under federal anti-discrimination legislation, as well as under some state and territory anti-discrimination legislation.

Outside the equality arena, employees are further protected by the 'general protections' provisions in the FW Act that prohibit an employer taking adverse action against an employee or prospective employee because of an attribute of the employee that is protected by discrimination laws.

This complex matrix of coverage can present challenges in practice in identifying the appropriate legislative regime under which to pursue a claim of employment-based discrimination or harassment.

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

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Commission is one of the principal agencies involved in the enforcement of minimum employment standards for the majority of Australian workers. As the national workplace relations tribunal, it has a range of functions that include responsibility for setting minimum wages for employees, determining the conditions under modern awards, facilitating good faith bargaining and the making and approval of enterprise agreements. In addition, it has jurisdiction to grant remedies for unfair dismissals and in limited circumstances some breaches of the general protections provisions, has oversight of the taking of industrial action and is involved in attempting to resolve a range of collective and individual workplace disputes through conciliation and arbitration. Finally it has specific functions with respect to workplace determinations, equal remuneration, transfers of businesses, bullying, rights of entry and the standing-down of employees.

The other key federal agency is the Fair Work Ombudsman. It is an independent statutory office that is tasked with ensuring compliance with Australian workplace laws. It provides information and advice to employers and employees about workplace rights and obligations, as well as assessing complaints and alleged breaches of workplace laws or of statutory instruments, such as awards or agreements. In certain circumstances the Fair Work Ombudsman itself will initiate litigation to enforce workplace laws.

Finally, the Federal Court of Australia and the Federal Circuit Court of Australia have jurisdiction regarding civil and criminal matters brought under the FW Act. The Federal Circuit Court also has a small claims jurisdiction.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

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

In more general terms the regulation of trade unions, employer associations and enterprise associations is dealt with through registration under the Fair Work (Registered Organisations) Act 2009. Amendments to this legislative scheme were passed in November 2016, but are not yet in force. Once they come into effect, oversight in this area will be split between the Fair Work Commission and a new body, the Registered Organisations Commission. New obligations regarding auditing arrangements and financial disclosures by officers and related persons will also apply.

5 What are their powers?

One of the most significant powers that trade union representatives have is the power to enter workplaces to engage in discussions with their members and to investigate alleged breaches in order to enforce compliance with awards, agreements and other workplace obligations. Officials of registered organisations who hold entry permits are entitled to enter premises for the purpose of fulfilling their representative role under the Fair Work Act and under state or territory work, health and safety laws. Permit holders can also enter premises to investigate suspected contraventions of the Act and fair work instruments, and to inspect documents for these purposes.

Registered trade unions are entitled to represent their members in bargaining over enterprise agreements and can become a party to such agreements. Employer associations and trade unions can initiate proceedings with respect to breaches of modern awards, and trade unions can also initiate proceedings with respect to breaches of the NES, national minimum wage orders and enterprise agreements.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Background checks are generally permissible in the Australian employment law context to the extent that such checks are necessary to ascertain a candidate's ability to fulfil the role. Police records and working with children checks are generally mandated for roles that involve working with vulnerable individuals. Other justifiable circumstances include checks regarding honesty and integrity, for example where an employer is seeking to engage an individual in a role that involves responsibility for significant financial transactions. Some legislative schemes in Australia specify the circumstances in which convictions are no longer taken into account, commonly referred to as 'spent convictions' regimes. In addition, some roles in particular organisations require specific security clearances.

Background checks that do not carry some form of justification run the risk that they will be considered discriminatory or an infringement of the individual's privacy, irrespective of whether they are conducted directly by the employer or by a third party as the employer's agent.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Pre-employment medical testing can be justified where it relates to a specific industry legislative requirement (eg, working in the mining industry), the ability to perform the inherent requirements of the job, or to compliance with work health and safety obligations. A mandatory pre-employment medical examination or satisfactory answers to questions about an applicant's medical history may be justified on the basis of the nature of the work involved and the framing of such requirements is designed to enable the employer to determine an individual's capacity to perform the inherent requirements of the job, or to identify any reasonable accommodations that can be made.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Employers may have a designated drug and alcohol policy or a general work health and safety policy that deals with drug and alcohol testing at work. Alternatively the terms of an enterprise agreement may specify the manner in which drug and alcohol testing can be implemented in the workplace. Where the health and safety concerns of a particular work environment warrant a strict testing regime, an employer may be justified in refusing to hire a prospective employee who will not submit to a test. There has been ongoing debate in Australia about the efficacy of urine testing compared with saliva testing and the circumstances in which each of these types of testing may be used or relied on.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

There is no legislative scheme specifically requiring preference in hiring. However employers can actively encourage applications from members of disadvantaged groups in an effort to enhance diversity. If an employer sought to restrict recruitment to a designated group, for example, based on age or gender, this would need to constitute a special measure or positive discrimination under anti-discrimination legislation. An employer could also seek an exemption from the application of specific anti-discrimination legislation in order to have a targeted hiring preference.

Federal state and territory anti-discrimination laws and the FW Act prohibit discrimination based on specified attributes in recruitment, although the attributes differ under different legislative schemes. By way of example, the FW Act prohibits an employer from taking adverse action against a prospective employee because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Employment contracts may be formed by verbal agreement, written agreement, or a combination of both. The fact that the parties have reached an agreement may be inferred from their conduct, such as the commencement of work and the payment of wages. The extent of any documentation that is created may vary, particularly for managerial appointments that are often regulated largely by the contract of employment and can involve very detailed terms.

The terms of the employment contract must provide sufficient certainty to enable the contract to be performed. Therefore the contract needs to have clear terms on the essence of the bargain between the employer and employee, that is, the work to be undertaken and the remuneration for the work undertaken. Even where there is some uncertainty on these points, the courts are unlikely to find the contract to be unenforceable as terms may be implied to reflect the intentions of the parties. Terms that are implied as a matter of law in all employment contracts include the obligation to act in good faith and with fidelity, to work with skill and diligence, and to obey lawful and reasonable directions.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible under Australian law and there is no legal maximum duration for such contracts.

However, a true fixed-term contract (which is a contract that does not allow for termination with notice prior to its end date) may have a term of reasonable notice implied into it if either party attempts to bring the contract to an end prior to the expiry of the term (particularly if the term of the contract is so long as to be unreasonable). Alternatively, bringing a fixed-term contract to an end prior to its end date may constitute a breach for which the party not in breach may recover damages.

To mitigate these risks, employers often utilise maximum-term contracts, which may be terminated with notice prior to their end date.

12 What is the maximum probationary period permitted by law?

Probationary periods are a matter of contract and may therefore be of any length agreed between an employer and employee. An employer may increase an employee's probationary period by obtaining the employee's agreement to vary the employee's employment contract (however, employers may not contract out of the notice periods required under the FW Act by extending a probation period).

The duration of a probation period will often reflect the duration of the relevant 'minimum employment period' for the purposes of the unfair dismissal jurisdiction under the FW Act (12 months for small business employers and six months for all other employers). This is because an employee whose employment is terminated within the minimum employment period is not eligible to bring a claim for unfair dismissal.

13 What are the primary factors that distinguish an independent contractor from an employee?

A distinction is drawn between work done pursuant to a contract of service (an employee) and work undertaken pursuant to a contract for services (independent contractor). At common law this distinction between employees and independent contractors is determined

by applying a multi-indicia test, which looks at the totality of the employment relationship and the reality of the work arrangements. This dichotomy may be altered by specific legislative schemes, such as in the context of work health and safety legislation, which uses an expanded definition of 'worker' that imposes obligations in respect of both employees and independent contractors, or the FW Act, which provides some protections for independent contractors.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Recruitment agencies that are the employers of workers placed in organisations on a temporary basis are required to comply with labour law and employment legislation with respect to those employees. For example, such recruitment agencies must comply with obligations imposed under anti-discrimination legislation and the unfair dismissal and general protections regimes of the FW Act.

Further, certain Australian states and territories (including South Australia, Western Australia and the Australian Capital Territory) have legislation in place governing licensing regimes for recruitment agencies (although there is no such legislation at the Commonwealth level).

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Prior to 14 February 2014, businesses that were registered to sponsor foreign workers under the Temporary Work (Skilled) (Subclass 457) Visa programme were required to nominate a ceiling, that is, a cap on the number of foreign workers that could be sponsored during the period of the approved Standard Business Sponsor (SBS). Businesses that had SBS approval prior to this date are still required to comply with the numerical limitations set by their ceilings, or apply to vary the ceiling if necessary. Businesses that applied to acquire SBS status after this date are still required to provide an estimate number of foreign employees the business expects to sponsor during their sponsorship period (currently a five-year period). However, this estimate is not enforced as a set ceiling.

Other short-term work visas are not limited numerically and are granted to an organisation on a needs basis. For example, the Temporary Work (Short Stay Specialist) visa (Subclass 400) is an option for Australian employers who wish to invite foreign nationals to undertake specialised, non-ongoing work in their Australian offices. This visa is used to support one-off, non-ongoing projects that have a need for highly specialised labour or professional skills that cannot be sourced locally.

In terms of visas available to employees transferring from a corporate entity in one jurisdiction to a related entity in another, the migration regulations and supporting policy classify this category of applicant as an 'intra-company transfer'. Visa applicants with 'intra-company transfer' status are treated with a flexible and facilitative approach by way of certain exemptions, as well as by the added 'discretion' given to case officers when assessing their applications. For example, Department of Immigration and Border Protection case officers have the discretion to not require intra-company transferees applying for a Temporary Work (Skilled) Subclass 457 Visa to provide skills assessments to justify their skills, where they would otherwise be required to do so. Similarly, in the context of a Temporary Work (Short Stay Specialist) (Subclass 400) Visa, the policy guidelines instruct case officers to adopt a flexible approach towards applicants with intra-company transferee status, as opposed to new recruits.

16 Are spouses of authorised workers entitled to work?

This depends on the visa subclass being considered. In terms of the working visas, spouses of 457 Visa holders are provided with full working rights given that this visa has up to a four-year validity period and has the prospect of renewal. The spouse of a 400 Visa holder does not have working rights. This is related to the short and one-off purpose of this visa. The policy confirms that this approach is adopted so as to not undermine employment opportunities for Australian citizens and permanent residents.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Australian employers have the onus of reviewing the visa status of any prospective employee before they can commence work. For migration purposes, 'work' is defined broadly and covers 'any arrangement included in a series of arrangements' for the performance of work by a person.

Where this is not complied with, the Migration Act 1958 (Cth) (Migration Act) renders any employer that 'knowingly or recklessly allows or refers an illegal worker to work', to have committed a criminal offence. The legislation has also introduced aggravated offences where an illegal worker is found to have been subject to exploitation.

Further, the Migration Amendment (Reform of Employer Sanctions) Act 2013 was introduced to strengthen provisions relating to employer obligations regarding checking their employees' visa status, and increased the penalties applicable. The new civil penalties regime takes a 'no fault' approach, meaning the offence is established regardless of the state of mind of the employer. However, a penalty may be avoided if an employer can demonstrate that they took 'reasonable steps to verify' their employees working rights. Such 'reasonable steps' refer to the processing of an employee's visa status check via the visa entitlement verification online (VEVO) portal. A VEVO verification allows an employer to check a prospective foreign national employee's visa status and visa conditions associated with their visa, including any working limitations. Employers found to have employed, referred or contracted a foreign national who does not have permission to work or is in breach of their visa conditions may face penalties of between A$3,240 and A$108,000 per illegal worker.

18 Is a labour market test required as a precursor to a short or long-term visa?

At present, labour market testing is a precursor to certain temporary work visas, namely within the 457 Visa scheme. However, this is only in respect of certain occupations and there are a number of exemptions available to circumvent such labour market testing requirements.

Where an occupation is identified as requiring labour market testing, employers are required to provide evidence that such efforts were made to test the market in respect of the nominated position in the business in the 12 months prior to the application being made. This is normally done by way of a paid job advertisement, or other evidence of attempted recruitment.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The NES prevents employers from requesting or requiring an employee to work more than 38 hours per week unless those additional hours are reasonable. When determining what is 'reasonable', a court must consider the following:

- any risk to the employee's health and safety from working the additional hours;
- the employee's personal circumstances (including family responsibilities);
- the needs of the business;
- whether the employee is entitled to receive overtime payments or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;
- any notice given by the employer of the additional hours;
- the usual patterns of work in the industry;
- the nature of the employee's role; and
- whether the additional hours are capable of being averaged under a modern award and have been averaged in accordance with the award.

Employment contracts for employees receiving a salary often stipulate that any reasonable additional hours are compensated for through an employee's total remuneration.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Employees who are covered by a modern award or enterprise agreement will be entitled to overtime pay in accordance with the relevant industrial instrument. Overtime is in reference to work performed outside the ordinary hours set out in the modern award or enterprise agreement (for example, 7am–7pm, Monday to Friday). The rate of pay for overtime will vary depending on the terms of the industrial instrument, but is usually paid at a rate of time and a half for the first several hours and double time thereafter.

Employees who are not covered by a modern award or an enterprise agreement do not receive overtime unless their contract of employment provides for such payments. These employees may be required to work reasonable additional hours (as discussed above) above 38 hours per week, and their remuneration is typically expressed to incorporate payments for any 'overtime' performed.

21 Can employees contractually waive the right to overtime pay?

Every modern award contains a flexibility provision which allows an employer and individual employees to agree to vary the application of various terms of the award to that employee, including, among others, overtime rates. Such an agreement is only valid if it is genuine (ie, without coercion or duress).

Any agreement that is entered into must result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been made. For example, an employee may wish to start and finish an hour early in order to attend to family commitments. Without the flexibility agreement, the employer may be liable for an hour of overtime pay and therefore unlikely to allow such an arrangement. As a result of the agreement the employee is able to attend to family responsibilities and is therefore subjectively better off.

22 Is there any legislation establishing the right to annual vacation and holidays?

Under the NES, full-time employees are entitled to four weeks' paid annual leave per year of service. If an employee is a shift worker as that term is defined in the legislation, they are entitled to five weeks' paid annual leave per year of service. The Commission has set the threshold of an employee working at least 34 Sundays and six public holidays over the course of a year to qualify for the additional week of annual leave.

Part-time employees are entitled to paid annual leave on a pro rata basis. Casual employees are not entitled to paid annual leave. An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

23 Is there any legislation establishing the right to sick leave or sick pay?

Under the NES, full-time employees are entitled to 10 days' paid personal or carer's leave per year of service. Part-time employees are entitled to paid personal or carer's leave on a pro-rata basis and casual employees are not entitled to paid personal or carer's leave. An employee's entitlement to paid personal or carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year. The NES also provides for unpaid personal or carer's leave in certain circumstances.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Leave of absence is not a prescribed entitlement under Australian workplace legislation or industrial instruments. A period of leave of absence is usually granted at the discretion of the employer and is generally unpaid.

There is no maximum duration of such leave; however, a period of unpaid leave of absence typically does not count as 'continuous service' for the purposes of calculating entitlements such as annual leave, personal or carer's leave and redundancy pay. While it does not count as 'continuous service' for the purposes of calculating entitlements, a period of unpaid leave of absence does not break an employee's continuity of service with the employer. Therefore service with the employer both before and after the period of unpaid leave of absence will count when determining the accrual of these entitlements.

25 What employee benefits are prescribed by law?

The NES sets minimum standards of employment across 10 areas:

- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave and related entitlements;
- annual leave;
- personal carers' leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- Fair Work Information Statement.

The entitlements provided under the NES may be supplemented by the terms of a modern award or an enterprise agreement, and these benefits are also regarded as prescribed by law.

26 Are there any special rules relating to part-time or fixed-term employees?

Part-time employment in Australia is usually defined in modern awards or enterprise agreements as applying to the situation where an employee is engaged to work for fewer than 38 hours per week. The award or enterprise agreement may also set out the 'rules' that apply to ensure that a part-time working arrangement is effectively implemented. Part-time employees are entitled to the same benefits as full-time employees, calculated on a pro rata basis. Under the NES employees have a right to request flexible work arrangements in designated circumstances, such as return from parental leave or for other care responsibilities, including the right to request part-time work.

A fixed-term employment contract comes to an end when the specified period expires and does not involve a termination of employment. Where an employee continues to work beyond the expiry date of the contract this may be seen as impliedly agreeing to an ongoing employment relationship. If the contract is a genuine fixed-term contract with no provision for notice, and an employer seeks to bring the arrangement to an end before the expiry of the period, it may be liable for payment of salary and other benefits for the full period. Some awards and agreements limit the use of fixed-term contracts.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

While restrictive covenants are generally regarded as unenforceable on the grounds of being contrary to public policy, they are enforceable where the employer is able to show that it has a legitimate business interest to protect, and that the geographic reach and time frame of the restraint is reasonable in light of this interest. The interest may include preventing the employee from pursuing or dealing with clients, customers or suppliers they had contact with during the course of their employment, but can also extend to prohibiting a former employee from working for a competitor or establishing their own business in competition with their former employer in the geographic area and for the time period of the restraint clause. In enforcing restraint clauses, courts in Australia have adopted the practice of reading down the geographic scope and time frame of clauses that would otherwise be unenforceable to what is regarded as a reasonable restraint.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Unless the contract of employment makes provision to the contrary, an employer is not obliged to continue to pay the former employee who is subject to a valid restraint clause.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

At common law an employer will be vicariously liable for the acts or omissions of its employees that occur in the course of the performance

of their employment duties. This is replicated in a statutory form in many legislative schemes. For example, under the Sex Discrimination Act 1984 (Cth), where an employee engages in unlawful discrimination or harassment in connection with their employment, the employer will also be liable for the conduct, unless it can establish that it took all reasonable steps to prevent the employee from engaging in such conduct.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employers are required by law to deduct income tax directly from their employees' salaries each pay period in accordance with tiered income tax rates. Employers must also meet their obligations under state and territory laws with respect to payroll tax. Payroll tax is assessed on the total wages bill of an employer, and arises where the total wages bill exceeds a threshold amount.

Under the Superannuation Guarantee (Administration) Act 1992 and the Superannuation Guarantee Charge Act 1992 employers must direct a percentage of an employee's wages into a specified superannuation fund to enable the employee to accumulate retirement savings. Failure to do so will lead to the imposition of a tax or charge on the employer.

A fringe benefits tax is payable for certain benefits provided by the employer to its employees beyond their wages or salary, such as allowing private use of a work vehicle, certain entertainment expenses, or reimbursement of private expenses such as school fees.

Concessional tax treatment applies to employee share schemes (ESS) where employees have the opportunity to obtain shares in the company they work for at a discounted price or the option to buy shares in the company in the future. Changes to the taxation treatment of ESS came into effect on 1 July 2015 that defer the taxing point for ESS interests and allow a tax refund where an employee acquires rights but does not exercise them.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

There is no Australian legislation dealing with ownership of employee inventions, although it is dealt with at common law. It is an implied contractual term that an employer is entitled to the benefit of any employee inventions made in the course of employment. This implied term is consistent with the common law duty of fidelity and good faith, which assumes an employee will devote their full attention to their duties so that the employer will solely benefit from their service.

The question of whether an invention is developed in the course of employment is answered through careful consideration of many factors, such as the position and duties the employee is paid to perform, whether the invention was made during the employee's own time and whether it was developed using their own resources. To simplify matters, an employer will typically draft express provisions in the employment contract addressing intellectual property and the circumstances under which ownership will be assigned to it.

32 Is there any legislation protecting trade secrets and other confidential business information?

There is only a very limited range of legislative provisions that specifically protect trade secrets and other confidential business information. Employees owe a common law duty to their employers that prevents them from misusing information. This duty has been codified in the Corporations Act 2001 (Cth), which specifically prohibits a director (or a past director) from improperly using information to gain an advantage for themselves or someone else at the expense of the corporation they serve (or served).

The Copyright Act 1968 (Cth) provides that the creators of copyright material, such as employees, can maintain their 'moral rights' to be recognised as the author of such works, even where the employer or a third party has ownership in the copyright of the work.

Employers commonly protect themselves against misuse of information by employees by including post-employment obligations in the contract of employment. This enables the employer to sue for breach of contract if an employee were to compromise trade secrets or confidential information. In some circumstances, an employer may rely on these contractual terms to seek an injunction to prevent a potential or further breach of confidentiality occurring.

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

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

While there is no common law right to privacy in Australia, the collection, use and disclosure of personal information is regulated by the Privacy Act 1988 (Cth) (the Privacy Act). However, the Privacy Act contains an 'employee records' exemption that relieves employers from compliance obligations regarding the collection, use or disclosure of information that forms part of an employee record, that is, where the record pertains to the employment relationship. The exemption does not apply to records relating to unsuccessful job applicants and contractors. Hence these are subject to the compliance obligations imposed by the Act.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

The FW Act contains a range of provisions that protect employees in the event of a transfer of business. For example, under the FW Act certain business transfers operate in such a way that an employee's period of service with their first employer counts as service, and the employee retains his or her entitlements, such as accrued annual leave (unless paid out on termination of employment with the first employer). The transfer of business provisions may also operate to transfer across the terms of an industrial instrument that applied to the employment of the employees in their previous employment.

For these protections to apply, the transferring employee must commence work within three months of the termination from the old employer, the work performed must be substantially the same, and one of the following connections must be established between the old employment and the new employer:

- they are associated entities;
- there is an outsourcing or insourcing of business between them; or
- there is an arrangement concerning the ownership or the assets to which the transferring work relates.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

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

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Minimum statutory notice periods apply under the FW Act, based on length of service, as follows:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	Period
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

An additional one week's notice applies where the employee is over 45 years old and has completed at least two years of continuous service with the employer.

To end employment an employer must give the employee written notice of the last date of employment, or payment in lieu of notice. Longer notice requirements may apply under an industrial instrument, contract or policy. In the absence of an express provision, a longer term may be implied requiring the provision of reasonable notice.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Serious misconduct can warrant summary dismissal without notice or payment, such as in the case of dishonesty, fraud or other serious conduct that impacts significantly on the employer's interests, operations or reputation so as to amount to a repudiatory breach of contract. Summary termination in such circumstances arises as a matter of common law, although many employment contracts also specify the circumstances where summary dismissal may arise. The FW Act also sets out examples of conduct that may constitute serious misconduct.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The FW Act sets out a scale of severance pay based on years of service as the minimum entitlement for all employees, including senior management. The amount of severance pay is based on the base rate of pay for ordinary hours of work, and excludes bonuses and other discretionary entitlements. For service prior to the commencement of this regime in 2010 to be taken into account in calculating an employee's severance pay entitlements, the employee must have had an existing entitlement to severance pay either under an industrial instrument, contract or policy.

39 Are there any procedural requirements for dismissing an employee?

Procedural factors are relevant in determining whether a dismissal is unfair, including whether the employee was notified of the reason for termination and given an opportunity to respond, and in the case of unsatisfactory performance, whether the employee was made aware of performance concerns and given an opportunity to improve. Where an employee's employment is being terminated on the ground of redundancy, and the employee is eligible to make an unfair dismissal claim, the redundancy must be 'genuine'. For a redundancy to be considered genuine, an employer must follow the consultation requirements and have considered reasonable redeployment opportunities.

40 In what circumstances are employees protected from dismissal?

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

Update and trends

The Fair Work Commission is currently undertaking its four-yearly review of modern awards, and has identified several common issues that it will amend or modify in most modern awards. These issues include annual leave, award flexibility, casual employment, family and domestic violence provisions, family-friendly work arrangements, part-time employment and public holiday arrangements.

The Australian Building and Construction Commission (ABCC) has recently been re-established, and its operations commenced on 2 December 2016. This re-instituted a separate workplace relations regulatory framework for the building industry and creates new civil penalty offences for unlawful industrial action. New powers are vested in the ABCC and its inspectors with regard to obtaining information for an investigation of a suspected contravention of the Building and Construction Industry (Improving Productivity) Act 2016.

In the migration sphere, legislation has been proposed to introduce a new sponsorship framework, with more stringent requirements for Australians applying to sponsor family members under the family visa scheme. In addition, the introduction of new Temporary Activity Visa Framework in November 2016 has resulted in the consolidation of sponsored temporary activity visa subclasses, as well as the introduction of two new visa subclasses to cater for temporary, short stay activities.

41 Are there special rules for mass terminations or collective dismissals?

Where a decision to terminate on the basis of economic, technological or structural factors will affect 15 or more employees, an employer must notify the relevant trade union representatives and give notice to the government employment agency (Centrelink). Specific consultation obligations also apply when a decision has been made by an employer to implement major changes in a workplace.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

In general, employment claims in relation to unfair dismissal, discriminatory treatment, harassment or breach of contract are pursued as individual rather than collective actions. However, some aspects relating indirectly to the termination of an individual's employment, such as the failure to consult regarding redundancies, may be pursued as collective actions. The negotiation of terms and conditions at work under a new or varied enterprise agreement is also pursued collectively.

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43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The general rule is that specifying a mandatory retirement age is not permitted in Australia under anti-discrimination laws, although there are some legislative schemes that still make allowance for some forms of mandatory retirement. Specific exemptions also apply in relation to certain professions, such as judges and defence force personnel.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

In general, parties are free to agree to any dispute resolution process to resolve the dispute that has arisen between them. Whether the parties agree to be bound by the outcome of that process, depends on the nature of the agreement reached between the parties and the wording of any applicable dispute resolution clause in an enterprise agreement or employment contract. Private arbitration is not commonly utilised in Australia as the Commission is regarded as providing an appropriate arbitration service. However, the use of private arbitration could be designated as the dispute resolution method in the relevant clause of an enterprise agreement, if the bargaining parties agreed on this process.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee can waive their rights with respect to an employment claim. The settlement of claims is generally formalised in the form of a deed of release, with undertakings given by both parties as the consideration for bringing such claims to an end.

46 What are the limitation periods for bringing employment claims?

The most common types of employment claims made by employees are general protections and unfair dismissal claims. An employee must make their unfair dismissal application to the Commission within 21 days of the termination of employment occurring. It is at the discretion of the Commission as to whether a claim may be accepted following the lapsing of this time period. In the case of general protections dismissal claims, the 21-day time frame also applies. If a general protections dismissal claim fails to settle at the conciliation stage and all reasonable attempts have been made to resolve the dispute, a certificate will be issued confirming this, and the employee will have 14 days to apply for the matter to be heard by the court, unless the parties agree to the Commission arbitrating the claim.

Other employment claims, such as claims in relation to entitlements or general protections claims not involving dismissal, may be made within six years of the claim or entitlement arising.

Austria

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Austrian law on employment is regulated by a large number of statutes and regulations. The main statute setting out general rules for the relationship between employer and employee, collective employment law, etc, is the Labour Constitutional Act. The legal basis for employment contracts as well as provisions generally applicable to all employment contracts may be found in the Austrian General Civil Code (ABGB). The Salaried Employees Act contains special provisions with respect to white-collar workers. In addition, protection rules are set out, inter alia, in the Workers Protection Act, the Working Hours Act and the Austrian Act on Rest Periods. Provisions relating to the individual relations between employer and employee are also regulated in the Employment Contract Law Adaptation Act. The employment of foreign employees in Austria is regulated in the Act on the Employment of Foreign Workers, and the employees' liability towards the employer can be found in the Act on the Liability of Workers. As of 2017 a new version of the Salary and Social Dumping Prevention Act was introduced, which contains provisions that regulate the formal prerequisites of the transfer of employees from abroad to Austria, among others.

Furthermore, Austrian labour law is to a large extent regulated by legally binding collective bargaining agreements concluded between employer and employee organisations for certain services or industry sectors.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Austrian Equal Treatment Act prohibits any direct or indirect form of discrimination in connection with employment (and since 2011 also in connection with other legal relationships) due to gender, age, racial or ethnic origin, religion or belief, or sexual orientation. Discrimination based on these grounds is explicitly prohibited with respect to hiring, working conditions, compensation, fringe benefits, promotion, education and training, as well as termination. The Equal Treatment Act also prohibits sexual harassment by employers and third parties and regulates the consequences of such behaviour (including consequences upon failure of the employer to prevent sexual harassment by third parties).

In addition, the Act on the Employment of Persons with Disabilities provides for regulations protecting persons with disabilities against discrimination, which apply to both private-sector and federal institutions. Apprentices, foreign employees and persons completing a trial period in an enterprise also enjoy protection under the Equal Treatment Act.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Labour Inspectorate is the largest authority for the monitoring of employment conditions in Austria. It consists of 19 regional inspectorates and one separate inspectorate for construction works, all under the authority of the Ministry of Labour, Social Affairs and Consumer Protection. The inspectorates monitor the protection of the health of employees, compliance with the provisions on working hours and rest periods, the employment of children and young people, the protection of pregnant women and nursing mothers, and control the enforcement of the Act on Foreign Workers.

The main judicial bodies for the enforcement of employment statutes and regulations, including employment contracts, collective bargaining agreements, illegal employment or wage and social dumping, are the labour and social courts.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Employee representation in Austria is done through the works council. The Labour Constitutional Act requires a mandatory works council for all businesses having at least five permanent employees over 18 years of age. The works council is not directly a trade union body. The establishment of the works council is the exclusive obligation of the employees; an employer only has the duty to tolerate, but not to actively participate in, the establishment of such council. If there are more than 50 employees, one of them can be an external trade union representative, who is not employed at the workplace, but in practice this is very rare. Austrian law does not provide for any sanctions or penalties if no works council is established by employees.

5 What are their powers?

The primary role of the works council is to represent the employees with regard to the employer. The Labour Relations Act, in certain cases, provides the works council with the effective right to veto – the employer cannot act without the works council's agreement. The main rights of the works council in economic and financial issues are to be informed and consulted at least every three months as well as obtaining a copy of the annual report and accounts. In addition, the works council must be informed about any planned termination of an employee and moreover where major economic changes, that could damage the interests of the employees, are planned. Further, the works council can request that the employer negotiate termination and, in certain cases, can also challenge a termination before the court on behalf of the employee. In the area of employment rules – such as the prohibition of alcohol and smoking, the normal start and end of the working day, sickness report, among others – the employer needs the agreement of the works council, or failing that a decision of the specially constituted conciliation body, to act.

In employment and social issues the works council has a general right to oversee the actions of the employer, to ensure that the law and the collective agreements are properly observed. It can make suggestions for improving working conditions, including training arrangements and health and safety. It must be informed and consulted about the business's employment plans, including the recruitment of new staff, and individual transfers and promotions.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Under Austrian employment law, pre-employment checks must comply with the Austrian Data Protection Act and other applicable legislation. As a general rule, background checks are permissible provided the employer does not violate employees' rights to privacy and personal freedom. Moreover, it is common practice to use web pages or public profiles from social media networks for insight into an applicant's background, but only the publicly available information or information obtained with the consent of the employee. Sensitive or personal information that is not publicly available and which therefore is considered private cannot be used. The Austrian labour court has constantly held that during job interviews, any questions concerning pregnancy, family planning, political views (which are also considered as discriminatory under the Austrian Equal Treatment Act), previous convictions (if already deleted from the record) and financial standing, except in certain occupations (eg, cashiers in banks), are not permissible. Furthermore, an employer may contact a candidate's previous employers for references.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Certain occupations require the employer to request medical examination of the employee (eg, workers exposed to noise or certain chemicals). Apart from such statutory medical checks, an employer may only require a medical check if it is justified by the scope of work in question and in relation to diseases which may be detrimental to other employees, otherwise a request for a medical check by the potential employer as to the physical condition of an applicant constitutes an inappropriate intrusion into the employee's privacy. The employer may only refuse to hire an applicant who does not submit a requested examination if such request is justified by the scope of the work.

An explicit restriction with respect to medical examinations is set out in the Genetic Engineering Act, which prevents the employer from requesting a genetic analysis.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no explicit restrictions or prohibitions against drug and alcohol testing. Nevertheless, drug and alcohol testing during the application process can, in general, infringe the applicant's privacy if the employer does not obtain the employee's prior consent. An employer may require such tests in special cases and if it is justified by the scope of work to be rendered by the applicant. In certain occupations, alcohol and drug testing is mandatory (eg, pilots and professional drivers).

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Certain statutes provide for mandatory preferential hiring of female applicants, such as in state and municipal services, and universities. According to the Act on Employment of Disabled Persons, businesses with more than 25 employees are obliged to employ at least one disabled person (with a reduction of the ability to work of at least 50 per cent) per 25 employees. Furthermore, if the employer does not comply with this obligation, a fine is due (in 2016 the payments ranged – depending on the number of employees being employed in the business – between €251 and €374 per month). Other than disabled persons, there are no other legal requirements to give preference to any particular people or groups of people when hiring or not discriminating against.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

In general, there are no formal statutory requirements for employment contracts; they may be concluded in writing, orally or through conclusive action (eg, rendering of services by employee and employer's acceptance of such). Under the Employment Law Harmonisation Act, however, the employer is obliged to issue a written service notice containing all relevant information in connection with the employment, in particular:

- name and address of employer;
- name and address of employee;
- start date of employment;
- end date of employment (for fixed-term employments);
- length of notice period, termination date;
- ordinary place of work;
- possible classification;
- intended responsibilities;
- starting salary (basic remuneration plus special payments);
- extent of annual holidays;
- stipulated daily and weekly normal working hours;
- collective bargaining agreement; and
- severance payment fund.

Service of notice is not required if the duration of employment does not exceed one month. Employers must serve employees with notice without undue delay after the beginning of the employment relationship.

11 To what extent are fixed-term employment contracts permissible?

As a general rule, the initial conclusion of fixed-term employment contracts is permissible without any restrictions under Austrian law; in particular, there is no limitation with respect to the maximum duration of such fixed-term contract. For the termination rights of employees whose fixed-term contract exceeds five years, see question 26.

However, the consecutive conclusion of fixed-term contracts with the same employee is legal only if it is justified by economic or social reasons. Failing such grounds, a chain of two or more subsequent fixed-term contracts is deemed to constitute a permanent contract of unspecified duration dating back to the start of the conclusion of the first contract. In practice, justifying economic or social reasons for consecutive fixed-term contracts are only very rarely acknowledged by the Austrian courts, for example in seasonal businesses or for the duration of a vocational training (doctors, etc). Fixed-term contracts can be terminated before the expiry of the contract or without cause only by mutual agreement between the parties, or for important reasons.

12 What is the maximum probationary period permitted by law?

The maximum probationary period permitted by law is one month, during which time both parties can terminate the contract immediately without notice. The probationary period can only be established at the beginning of employment; an extension of the probationary period is not permitted and may result in the contract being deemed a contract for an indefinite term. Collective bargaining agreements may provide for a shorter, but not a longer, probationary period. A probationary period of three months applies for contracts with apprentices.

As a general rule, the probationary period has to be explicitly agreed upon in the employment contract to be valid; however, some collective bargaining agreements provide for an automatic probationary period.

In practice, employment contracts often provide for a limitation of the contract for three or six months with the first month being a 'probationary month' (ie, probationary period), before turning into a permanent contract.

13 What are the primary factors that distinguish an independent contractor from an employee?

The ABGB requires the following characteristics for a contract to be considered an employment contract:

- contractual obligation of the employee to work for a certain time; and
- personal dependency of the employee (decisional power of the employer).

For the 'personal dependency' criteria such as incorporation in the employer's organisation, duty to carry out the work oneself, and regulation of the work by the employer, in particular with respect to work time, workplace and procedure have to be considered.

Further criteria suggesting the existence of an employment contract are:

- economic dependency (ie, use of employer's equipment, remuneration);
- success benefits the employer; and
- the employer takes the risk (eg, if product is not sold or is incorrect).

Not all of the conditions stated above must be fulfilled in each case. The decisive factor for the existence of an employment contract is whether these characteristics prevail over characteristics of other types of contract.

In contrast with an employment contract, a freelance contract (independent contractor) is characterised by the lack of (or limited) personal dependency. As a general rule, an independent contractor is not (entirely) integrated into the organisation of the ordering party, does not use the tools of the ordering party and – unlike a contract for work and services – does guarantee a certain outcome of the work. As independent contractors enjoy limited protection under labour legislation, in the absence of a specific agreement, they have no claim to statutory benefits such as periods of notice, holiday pay, etc.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Temporary staffing through recruitment agencies is, in principle, regulated by the Austrian Personnel Leasing Act. The lessor and lessee typically enter into a personnel leasing contract by which the former undertakes to let a certain amount of his or her own employees to the latter for a definite or indefinite period of time. In order to legally conduct the business of personnel leasing the lessor must also obtain a trade registration in accordance with the rules set out in the Austrian Trade Act. Only a few exceptions apply.

In terms of personnel leasing contracts the lessor remains the employer of hired-out personnel. His or her duties in this context particularly encompass the payment of salaries to the hired-out employees. Moreover, the lessor will also be regarded as the employer in light of social insurance law and thus responsible for the payment of the corresponding social security contributions. The lessee, on the other hand, may exercise the employer's right to give orders and instructions to the hired personnel, incurs a general duty of care towards such personnel – for example, the protection of workplace safety – and also, by operation of the law, stands surety for the payment of salaries as well as social insurance contributions.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Short-term visas entitle foreign nationals to stay, but not to work, in Austria for a certain time. There are no numerical limitations for such visas. Foreign nationals who wish to live and work in Austria require – apart from numerous exemptions – a residence permit and a permit to work (see question 17).

As of 2014, Austrian law no longer provides for a numerical limitation on foreign nationals' access to the Austrian labour market.

Employers with a place of business in a European Economic Area (EEA) state may post employees who are EEA nationals without the requirement for a work permit; the employer only has to notify the central coordination office of the Ministry of Finance about the employee's transfer. Under certain circumstances, non-EEA nationals do not require a work permit when transferred to Austria for a temporary provision of services, but an EU posting confirmation is required. Further, certain exemptions apply for posting of employees by foreign employers not having a place of business in Austria. Such employers may post an employee in Austria for a maximum of four months without obtaining a work permit; only a posting permit is required in such case. Moreover, with the new change in employment law as of January 2017, the employees of foreign group companies may be sent to a group company in Austria if the posting does not exceed the duration of a total of two months per calendar year, and they are only used for certain activities within the group. For other transfers the general rules for employing foreign nations apply (see question 17).

16 Are spouses of authorised workers entitled to work?

Subject to several additional requirements, spouses of authorised workers are entitled to a residence permit (in particular for the purpose of reunification of family members) and – depending on the type of residence permit – simultaneously to limited or unlimited access to the labour market. It should be noted that spouses of authorised workers are not automatically permitted to work in Austria, they are basically subject to the Act on the Employment of Foreign Workers (see question 17) if they do not hold a residence permit.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The requirements to be fulfilled for a lawful employment of foreigners depend on the nationality of the foreign employee. There are no work restrictions for citizens of the EU, Switzerland, Iceland, Norway and Liechtenstein. If not already included in their residence permit, nationals of other countries must obtain a work permit in order to legally work in Austria. The Act on the Employment of Foreign Workers provides for several different permits, each allowing foreign employees to work to a different extent. The following permits may, inter alia, be issued.

Work permit

The work permit allows the employee to engage in a particular occupation for one year at the most (an extension is possible). A work permit may only be issued after a labour market test has been performed by the Public Employment Service.

Work authorisation and certificate of exemption

Due to an amendment of the Act on the Employment of Foreign Workers, work authorisations and certificates of exemption were abolished as of 1 January 2014 and will no longer be issued. However, work authorisations and certificates of exemption issued before 31 December 2013 will be valid until their expiry (extensions are not possible).

EU Blue Card

The EU Blue Card may be issued to third-country nationals if they have completed a tertiary education (eg, university degree) of at least three years, present a binding job offer for highly qualified employment and their gross annual salary is not less than 1.5 times the average gross annual salary as published by the Federal Agency for Statistics (Statistics Austria). Further, some of the requirements for work permits apply analogously. The EU Blue Card is limited to two years, unless the working contract is subject to a shorter limitation period. In this case the EU Blue Card is issued for a period of three months exceeding the limitation period of the working contract.

Red-white-red card and red-white-red card plus

The red-white-red card may be issued for key employees from third countries (highly skilled key employees, persons with job titles and skills included on the government-approved shortage occupation list, self-employed key employees, other employed key employees and graduates of Austrian universities). The red-white-red card is issued for one year and entitles the foreign national to engage in a particular occupation (ie, work for one specific employer). Foreign nationals with a red-white-red card who have been employed for at least 10 of the past 12 months, family members of red-white-red card holders, holders of EU Blue Cards who have been employed for at least 21 of the past 24 months, and family members of foreign citizens permanently settled in Austria may apply for the red-white-red card plus, providing them with unrestricted access to the Austrian labour market.

Certificate of exemption

Turkish nationals, who have been legally employed in Austria for a period of four years, are entitled to receive a certificate of exemption allowing them to work without restriction in Austria. The certificate of exemption is issued for five years, and an extension is possible.

The sanctions for employing foreign workers without permission depend on the extent of the violation (in particular, the number of workers). The sanctions range between €150 and €50,000. The illegal

concurrent employment of a large number of employees represents a criminal offence with a penalty of up to six months' imprisonment.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test is required in connection with every application for a work permit (see question 17).

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

As a general rule, normal working hours amount to eight hours per day, or 40 hours per week, but numerous collective bargaining agreements provide for shorter working hours (eg, 38.5 hours per week). The Working Hours Act and many collective bargaining agreements provide for many exceptions with respect to the maximum working hours and the allocation of the working time on the respective working days (eg, the employer and employee may agree on a daily work time of nine hours, and as compensation, a 'shorter' Friday). Unless explicitly provided for in the law, the rules regarding the maximum working hours are mandatory and neither the employee nor the employer may opt out of them.

20 What categories of workers are entitled to overtime pay and how is it calculated?

In general, all employees working overtime are entitled to overtime payment or – if agreed upon – to compensatory time off (however, all-in contracts may be validly agreed upon in certain circumstances). Any overtime work exceeding the statutory normal working hours (ie, eight hours a day or 40 hours a week) is compensated with a 50 per cent surcharge. In the case of compensatory time off, any overtime hour is compensated with 1.5 hours off. Many collective bargaining agreements provide for a higher surcharge for overtime performed on Sundays or public holidays or between midnight and 7am (eg, 100 per cent). With effect from 1 January 2016, the maximum daily permitted working time can be increased from 10 to 12 hours in the case of actual travel time (eg, driving a car). Employees may be subject to working overtime only if this does not conflict with their own considerable interests (such as childcare or an urgent doctor's appointment).

21 Can employees contractually waive the right to overtime pay?

Generally, an employee is entitled to receive overtime pay for working beyond normal working hours. However, it is possible to agree that the employee receives compensatory time instead. Collective bargaining or works agreements may also provide for such choice despite a different agreement with the employee. According to a recent decision of the Austrian Supreme Court, agreements between an employer and an employee which provide that the employee waives the right to receive overtime pay for working beyond normal working hours are invalid as long as the employee is economically dependent on the employer. Equally, it is invalid to stipulate in the employment contract that the employee shall waive his or her right to be paid for overtime. Nevertheless, it is valid and not unusual to conclude 'all-in-contracts' or allowances. Such contracts provide that all or a fixed extent of overtime shall be compensated by a certain lump sum, usually contained in the regular salary. As of 2016, it is no longer sufficient to only display the lump sum in employment contracts or service notices for newly hired employees. The contract or notice must now, in any event, also show the base salary. If, however, retrospectively the salary, including the allowance for overtime, does not meet the minimum payment provided for in collective bargaining agreements considering the total working hours, the employee is entitled to respective further compensation.

22 Is there any legislation establishing the right to annual vacation and holidays?

The Austrian Vacation Act mandates that every employee is entitled to paid annual holidays of five weeks (ie, 25 work days); after the completion of 25 years of service the annual vacation increases to six weeks (ie, 30 work days). This statutory vacation entitlement may not be restricted; only a provision more favourable for the employee may be validly agreed upon.

During the first six months of employment, holiday accrues in a proportional share of the annual statutory holiday (approximately two days per month). After the first six months of the first year of service, the employee is entitled to the entire amount. From the start of the second (and any subsequent) year, the entire annual holiday entitlement is due with the beginning of the new year of service.

23 Is there any legislation establishing the right to sick leave or sick pay?

According to the Salaried Employees Act (for white-collar employees) and the Continued Remuneration Act (for blue-collar workers) employees are entitled to a time-limited continued remuneration, if an illness or accident results in the inability to work, provided the illness or working accident were not caused by gross negligence or intentionally by the employee (sick pay). The employee has to immediately notify the employer of his or her inability to work, and upon request of the employer, provide the employer with a medical certificate demonstrating the beginning of the inability to work, its likely duration and its (general) cause.

The length of the sick pay is determined by the duration of that particular employment. Employees are entitled to sick pay of up to at least six weeks' full remuneration and four weeks' half remuneration. Depending on the duration of the employment the sick pay will increase as follows:

- after five years of service: eight weeks' full remuneration plus four weeks' half remuneration;
- after 15 years of service: 10 weeks' full remuneration plus four weeks' half remuneration; and
- after 25 years of service: 12 weeks' full remuneration plus four weeks' half remuneration.

After the period of sick pay by the employer, the employee is entitled to sick pay from the Health Insurance System in the amount of one half of the last salary, up to a maximum of one additional year.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

In addition to holidays and sick leave, Austrian law provides for many circumstances entitling an employee to take a leave of absence.

Most importantly, employees are entitled to maternity or parental leave until a child reaches two years of age. Employees may take a further educational leave of up to one year provided the employment has lasted for more than six months. In both cases, the employee is not entitled to receive pay during the absence of leave.

Employees also have the right to take a leave of absence due to important reasons concerning the employee, and carer's leave while receiving full pay.

Important reasons concerning the employee include family responsibilities (funerals of family members, weddings of close relatives and public responsibilities, such as summons by a public authority), as well as natural and force majeure events.

Carer's leave is limited to the following reasons:

- taking care of a close family member living in the same household as the employee (ie, spouses, registered partners, parents, grandparents, great-grandparents, children, grandchildren, etc) or taking care of a child when the person normally caring for the child is unable to do so due to death, severe illness, etc (up to one week per working year); and
- an additional week off due to the necessary care of a child under 12 years old in the event of the recurrent illness of the child.

The Labour Law Amendment Act 2013 introduced a new form of carer's leave to Austrian law. Upon written consent by the employer, employees who have been employed for more than three months (with the same employer) may take carer's leave for a period of up to three months in order to take care of close relatives who have been granted federal care allowance at level 3, according to the Federal Care Allowance Act. In the event a minor is the subject of care, the grant of federal care allowance at level 1 suffices.

In general, this form of carer's leave may only be taken once for the same person. However, in the event of a significant increase in the

need for long-term care, another period of carer's leave may be taken. The employee is not entitled to receive salary during carer's leave. However, he or she may claim a governmental carer's leave allowance.

25 What employee benefits are prescribed by law?

In addition to the agreed salary, the employer is statutorily obliged to make contributions to the social insurance fund. In general, an employer contributes to pension, medical, unemployment insurance, corporate pension insurance funds as well as to insurance against non-payment in the case of insolvency.

The majority of collective bargaining agreements further provide for an obligation of the employer to pay bonus payments (ie, holiday pay, due in May or June, and Christmas bonus, due in November or December, each generally amounting to a month's salary). For employees, whose employment relationship begins or ends during a calendar year, those remunerations shall be paid on a pro rata basis.

Furthermore, statutory benefits on the part of the employee include paid holiday leave (see question 22), severance pay (see question 38), medical examinations (under certain circumstances), etc.

26 Are there any special rules relating to part-time or fixed-term employees?

With respect to part-time work, the Austrian Working Hours Act provides an explicit principle of non-discrimination (ie, part-time employees cannot be discriminated against compared with full-time employees due to the fact that they work part-time, unless a different treatment is justified by objective grounds). However, in contrast with full-time employees, the employer may unilaterally change the agreed working hours of a part-time employee, provided:

- this is justified by objective grounds;
- the employee is given notice of at least two weeks prior to such change;
- there are no conflicting (extenuating) circumstances on the part of the employee; and
- nothing to the contrary has been agreed by the parties.

A change of the agreed working hours requires a written form. Furthermore, as of 2016 the employer is obliged to notify his part-time employees of all full-time positions that are becoming vacant. For overtime work exceeding the agreed part-time working hours (but below the maximum statutory of eight hours per day and 40 hours per week) a surcharge of 25 per cent is due.

As a general rule, fixed-term contracts cannot be subject to a premature termination by the employer or employee as they end with the final date of employment agreed upon by the parties. The employment contract may, however, provide for a provision explicitly stipulating the right to terminate the contract; with respect to termination deadlines and notice periods, the same rules apply as for permanent contracts. Furthermore, where the duration of a fixed-term contract exceeds five years, the employee has the right to terminate the contract once five years have elapsed, upon six months' prior notice. A provision stipulating a termination right in a very short employment contract (eg, a nine-week internship) is deemed invalid.

Alongside the introduction of the aforementioned new form of carer's leave, the Labour Law Amendment Act 2013 also introduced a new carer's part-time employment to Austrian Law. With respect to eligibility, both essentially follow the same rules. Hence, upon written consent by the employer, employees who have been employed for more than three months may change to part-time employment for a period of up to three months in order to take care of close relatives who have been granted a federal care allowance (see question 24). During the period of part-time employment, the employee is also entitled to claim a governmental carer's leave allowance.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Non-compete clauses are in general permitted by Austrian law; an employment contract can include a term stating that after leaving the company, the employee cannot engage in any activity that represents competition for the previous employer. However, they are to a large extent subject to restrictions. Non-compete clauses are only permissible provided the employee was older than 18 years at the date of the conclusion of the contract and that in the last months of employment, the employee was entitled to a gross remuneration exceeding a certain threshold fixed yearly by the Ministry of Labour, Social Affairs and Consumer Protection (€3,320 in 2017). The final requirement does not apply to employment contracts of white-collar employees concluded prior to 17 March 2006 and for employment contracts of blue-collar employees concluded prior to 18 March 2006.

Furthermore, a non-compete clause can generally only be validly agreed upon for a maximum period of one year after the termination of the employment contract, and the clause must be fair and reasonable considering the subject, time and geographical scope; be reasonably required for the protection of the employer's business; and not place any undue hardship on the employee with respect to his or her professional advancement, otherwise it may not be enforceable.

Further, non-compete clauses are not enforceable if the employee terminates the employment contract due to a breach of contract by the employer or if the employer unilaterally terminates the employment contract (but not in the case of a summary dismissal). In a case of unilateral termination of the contract by the employer, however, the employer may still enforce the non-compete clause by offering to pay a full salary to the employee during the restrictive period.

The parties may also agree on a penalty for a breach of the non-compete clause. In such case, the employee may only be obliged to pay a penalty (which may be reduced by the court), but need no longer comply with the clause. Furthermore, the level of such penalties may not exceed an amount equal to six net salaries (excluding holiday pay and Christmas remuneration) of the specific employee.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No; provided that a post-employment restrictive covenant (ie, non-compete clause) has been validly agreed upon and is enforceable under Austrian law (see question 27), the employer is not obliged to continue to pay the former employee. As stated above, however, where a non-compete clause in not enforceable due to unilateral termination on part of the employer, the employer may offer to pay the employee full salary for the period of the restriction, thus rendering the non-compete clause enforceable.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

In Austria, generally every individual is liable for his or her own behaviour. Relevant cases in connection with an employment relationship concern vicarious liability, in particular the auxiliary person pursuant to section 1313a of the ABGB. The employer is just as liable for any fault or negligence of an auxiliary person acting within the framework of carrying out his or her contractual duties stemming from an employment contract. In turn, the employer is entitled to take recourse against the employee. The employer is generally not responsible for any intentional or negligent conduct not related to the employment relationship on the part of an employee; however, due to the dependency created by an employment relationship, the Employee Liability Act contains special provisions partly amending the general Austrian tort law. It applies if an employee inflicts damage on an employer or on a third party in the course of carrying out the duties stipulated in the employment contract. The specificity lies in the fact that liability of the employee is reduced or even excluded depending on the gravity of the error. The employee may not be held liable for a genuine excusable error of performance or judgement; in the case of slight negligence the liability of the employee may be mitigated (by court) up to the total exclusion of any liability; in the case of gross negligence, liability may also be subject to mitigation, but a total exclusion of the liability is not possible. In the case of intentional conduct, however, the employee is liable without any limitation.

Taxation of employees

30 What employment-related taxes are prescribed by law?

An employee has to pay income tax, which is withheld by the employer and paid to the tax authorities. Mandatory contributions to the social security fund are borne by both the employer and employee.

Update and trends

As of January 2017, the provisions regarding the Salary and Social Dumping Prevention Act are accumulated and systemised in a separate act, the LSD-BG. Only minor material changes regarding the construction sector and the enforceability are made to the existing provisions, and penalties were increased.

The expert programme scholarship, which was suspended in 2016, is being reintroduced and is expected to allow the entry of a total of 6,500 people in 2017/2018. The training is extended for persons with a maximum compulsory education. Moreover, under the general prerequisites, the preparatory courses for the final examination will be open to all teaching professions.

Annual tax assessment, income tax declaration and the payment of other taxes are tied to particular deadlines.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Austrian Patent Act contains provisions regarding inventions made by the employee in the course of the performance of his or her work obligations. Such inventions are called 'business inventions'. In general, the inventor's legal right is given priority, but the business interests can be secured within the framework of an agreement. The agreement's validity is subject to written form, but it is also sufficient to stipulate this fact in the collective bargaining agreement. Any corresponding agreements on an individual or collective basis regarding other inventions than business inventions are not effective. According to the provisions of the Patent Act, the employee is entitled to receive adequate remuneration for the licensing or the granting of a usage right. Further to that, the Austrian Utility Models Act, the Austrian Industrial Designs Act and the Austrian Plant Breeders' Rights Act contain very similar provisions on employee-created IP.

32 Is there any legislation protecting trade secrets and other confidential business information?

Under Austrian law the protection of trade secrets and confidential information is, in principle, regulated by the Austrian Act Against Unfair Competition and the Austrian Criminal Code. As defined in section 20 of the Austrian Data Protection Act, confidentiality agreements could relate to certain confidential information (as agreed by the employer and the employee) gained by the employee during the course of employment. Such information may be broader than the information that would otherwise be protected under an implied term or in equity. Depending on the particular circumstances of each case, the owners of trade secrets and confidential information may therefore avail themselves of the various remedies provided for by civil law (such as compensation, rendering of accounts; injunctive relief, etc) as well as press criminal charges against a person who unjustifiably disclosed such information. However, it is important to note that the disclosure of trade secrets or confidential information does not amount to a criminal offence if such disclosure was justified by public or compelling private interests. It is therefore advisable to include non-disclosure clauses with regard to trade secrets and other confidential business information into any employment agreement or service notice.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The constitutionally guaranteed basic right of data protection must also be observed with regard to an employment relationship. The registration and processing of personal data of employees by the employer is regulated by the Austrian Data Protection Act. The basic principles and the admissibility of data use as stipulated in the Austrian Data Protection Act must be adhered to with respect to labour law; beyond that, statutory privacy rights apply at the workplace. The employer can, however, resort to and apply certain control measures and technical systems necessary for the fulfilment of the employer's duties (eg, withholding of tax and social security contributions). Whatever the event, employees have a statutory right to be informed about the personal data collected by their employer. According to the Labour Relations Act, any measures affecting human dignity are subject to the works council's consent with respect to their legal effectiveness. This consent can only be given based on a works agreement. In a company without an existing works council, these measures require the explicit consent of the concerned employee. Private life and any spare-time activities do not fall under this regulation and thus cannot be controlled.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

The Employment Contract Law Adaptation Act regulates the rights and obligations in connection with a business transfer (ie, the transfer of an undertaking, business or part of an undertaking to another proprietor). Pursuant to section 3, all existing employment contracts are automatically transferred to the new proprietor without a change of the rights and obligations arising from those contracts. If the transfer causes an essential deterioration of the applicable collective bargaining agreement or company-level agreements, employees may terminate the contracts, as they are entitled to the same treatment as if the employer terminated the contract within one month of such transfer. Furthermore, the employee may, in some cases, object to the transfer of the employment contract, resulting in the employment contract with the former employer remaining valid. This is the case, for example, if the new proprietor neither grants protection against dismissal as specified in the relevant Collective Bargaining Agreements nor undertakes to comply with the former company pension schemes.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Austrian law distinguishes between dismissal with notice and dismissal without notice (summary notice – see question 37). A dismissal with notice does not require any grounds, but the employer (as well as the employee) must observe either the contractual notice terms or, in the absence of agreed notice terms, the minimum statutory notice terms. Under certain circumstances, employees may challenge a dismissal before the courts. Under the Austrian Trade Regulation, the employer has the possibility to terminate the employment relationship effective immediately in special cases (eg, disloyalty to the employer, persistent neglect of duties, incompetence with regard to work and falsified qualification, among others).

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

A dismissal with due notice (ie, regular termination) requires a prior notice of termination, which has to be received by the other party. Unless otherwise agreed upon, the notice does not require written form; oral or conclusive acts are deemed sufficient. With respect to white-collar employees, the minimum notice terms for a dismissal by the employer range from six weeks to five months depending on the number of years of service. With respect to blue-collar employees, the minimum statutory (but not mandatory) notice term amounts to 14 days. Pay in lieu of notice is only valid if agreed upon by both parties. While continuing payments, however, employers may release employees from their duties to work during the notice term.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

A dismissal without notice requires substantiated grounds. A demonstrative enumeration of the causes for summary dismissal exists in the Salaried Employees Act. Among these are embezzlement and untrustworthiness, inability to perform promised services or reasonable services with respect to the circumstances, persistent breach of the obligation to work and non-compliance with the employer's orders. With respect to blue-collar employees, the Austrian Trade Regulation provides an exhaustive enumeration of circumstances entailing summary dismissal, which includes showing false or falsified qualifications,

incompetence with regard to work, indecent assault and defamation of the employer, and drunkenness at work.

If an employee gives rise to a cause of dismissal, the employer must immediately dismiss the employee, otherwise the cause of the dismissal becomes inapplicable.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

With respect to severance pay, Austrian law provides for two different schemes depending on the date of the conclusion of the employment contract. For employment contracts concluded since 31 December 2002, the employer has to make contributions amounting to 1.53 per cent of the monthly remuneration into the corporate provision fund. The severance pay entitlement of an employee equals the sum of the accumulated capital and investment returns (minus administrative costs). The employee is entitled to disbursement of the severance pay provided the employment was not terminated by the employee handing in his or her notice, unless due to retirement by justified summary dismissal or by unjustified immediate resignation of the employee and payments to the corporate provision fund were made for at least three years.

Employees with contracts signed prior to 1 January 2002 are entitled to severance pay provided the employment lasted at least three years and was terminated due to, inter alia, dismissal by the employer, illegitimate summary dismissal, justified immediate resignation, expiry of a fixed-term employment contract or termination by mutual agreement or retirement. Depending on the duration of the contract, the severance pay may range between two monthly salaries (for three years of service) and 12 monthly salaries (for 25 years of service).

39 Are there any procedural requirements for dismissing an employee?

The works council, if established, must be informed a week prior to a dismissal.

Special procedures have to be observed when dismissing 'protected' employees (see question 40). Dismissal of a protected parent or member of the workforce, for example, requires prior consent from the labour court or the local authorities

The dismissal of a registered disabled person is only valid provided the employer obtains a prior consent from the Disability Committee chaired by the Federal Office for Social Affairs and Disabled Persons.

For the procedural requirements in connection with mass terminations see question 41.

40 In what circumstances are employees protected from dismissal?

Certain groups of employees are granted protection against a dismissal. Among these are members of the works council, certain types of parent, employees carrying their compulsory military or alternative community service, apprentices, and members of the workforce who are registered disabled (with a reduction of the ability to work of at least 50 per cent). Mothers are protected from the start of the pregnancy until four weeks after the end of the maternity leave (if the mother does not take maternity leave, the protection is effective for at least four months after the delivery); fathers are protected when taking parental leave instead of the mother. The dismissal protection – in addition to special procedural requirements (see question 39) – statutorily restricts the circumstances entailing dismissal (eg, inability of the employee to render the work). In all these cases, the employer must obtain the prior consent of the labour court or local/governmental authority.

Further, employees may under certain circumstances contest a dismissal as being taboo or socially unfair.

41 Are there special rules for mass terminations or collective dismissals?

Yes; special rules apply for mass terminations or collective dismissals. The employer has the obligation to inform and consult the works council when such dismissals are planned, and regarding changes affecting the business. Mass terminations as defined in section 45a of the Labour Market Promotion Act require prior notification of the local Employment Market Service in order to be valid. Following such notification, the employer must observe a 30-day waiting period. Dismissals declared within such period are void.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Austrian law does not provide an explicit regulation regarding class actions. In general, class actions are deemed permissible provided the legal bases of the claims, as well as the factual or legal issue to be addressed in the proceeding, are essentially of the same kind. In addition, with respect to labour and employment claims, the works council may file a declaratory complaint as to whether certain employee rights exist. Such complaint requires that the asserted right concerns at least three employees. Unions have similar rights.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

A mandatory retirement age leading to an end of the employment relationship requires the mutual agreement of the parties. As stated above, however, the employer may dismiss employees without cause; in general, this applies with respect to all employees, even elderly employees. Nevertheless, an employee may contest a dismissal as being taboo or socially unfair.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Pursuant to the Labour and Social Court Law, arbitration clauses with respect to employment disputes are not valid. An exception is made for

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managing directors and board members of companies. In addition, the parties may agree to private arbitration for already-existing disputes.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

Austrian law does not provide for explicit regulation with respect to an employee's waiver of employment claims. However, pursuant to Austrian case law, a waiver regarding claims arising from statutory legal regulations is not permissible during an existing employment relationship. This is even the case with respect to claims already incurred, provided the claims were waived due to economic pressure (ie, in order to keep the job – the existence of economic pressure is refutably presumed by Austrian courts). With respect to non-mandatory claims (eg, voluntary benefits provided by the employer) the employee may, without restriction, validly waive future claims; claims already incurred may be only waived if there is no economic pressure on the part of the employee involved (eg, in order to avert an impending insolvency of the employer).

A waiver of claims after the end of the employment relationship is generally valid. However, if – despite the end of the employment – the employee is still under economic pressure, a waiver is deemed invalid. This may be the case if, for example, due to the influential position of the employer the employee fears that he or she will not be able find another job in the same industry sector.

46 What are the limitation periods for bringing employment claims?

As a general rule, claims in connection with employment (eg, salary claims) are subject to a three-year statute of limitation. The limitation period starts with the date of knowledge of the wrongdoer and of the damage (ie, maturity of the claim). The employer and employee may agree upon a shorter limitation period, but an extension of the limitation period is not permissible.

However, Austrian law provides for numerous exemptions to the general three-year limitation period. For instance, holiday entitlement becomes time-barred within two years of the end of the respective leave year. For claims in connection with unjustified early termination by the employee or an unfair termination by the employer, a limitation period of six months applies. In addition, many collective bargaining agreements provide for 'sunset' clauses stipulating that claims on the part of an employee have to be asserted within six months, otherwise they become time-barred. If a dismissal is contested for being 'socially unfair;' the respective action must be filed within two weeks after the dismissal.

Belgium

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes and regulations are:

- the Employment Contracts Act (3 July 1978);
- the Labour Act (16 March 1971); and
- the Collective Bargaining Agreement (CBA) No. 109 regarding the statement of reasons for dismissal.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes, mainly:

- the Anti-Discrimination Acts of 2007 and the Act regarding workers' well-being (4 August 1996);
- age, sexual inclination, civil status, birth, wealth, religion, political conviction, language, actual or future health status, handicap, physical or genetic characteristics, social origin;
- sex;
- nationality, race, colour, origin, national or ethnic origin; and
- part-time employees (compared with full-time employees).

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

These are social inspection units and the Labour Courts.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Yes, the Work Organisation Act (20 September 1948) and the Act regarding the Workers' Well-Being (4 August 1996). The establishment of a works council is obliged as soon as the company (technical business unit) employs usually and on average 100 employees. The establishment of a committee for prevention and protection at work is obliged as soon as the company (technical business unit) employs usually and on average 50 employees.

In addition, most major companies also have a trade union delegation (National CBA No. 5 and sectoral rules). A trade union delegation is installed upon the request of one or more employees' organisations.

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

5 What are their powers?

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

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

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

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Yes, background checks can only be conducted if relevant for the vacant position and after approval of the employee (CBA No. 38 regarding recruitment of employees and the Privacy Act (8 December 1992)).

By way of example, it would be acceptable to verify whether a candidate has been previously sentenced for driving under alcoholic intoxication if the applicant is applying for a job in the transport sector.

It does not make a difference whether the employer conducts its own checks or hires a third party.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

In principle, requiring such a medical examination is prohibited. In some sectors, however, a medical examination is in fact required by law (for instance: for employees in direct contact with food).

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Yes, such tests are only authorised under specific conditions but only for employees and thus not for applicants (CBA No. 100).

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

No (at least not in the private sector).

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No, except in certain cases (eg, student contract, part-time contract, fixed-term employment contract, interim contract). Also, some specific clauses, such as a non-compete clause, should be in writing. Oral employment agreements are, however, uncommon.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible under Belgian law but, in general, employment contracts are deemed to be of indefinite duration.

The law does not foresee a maximum duration for a fixed-term contract. However, if parties continue the execution of the contract beyond the duration of the fixed-term contract and under the same terms and conditions, the contract will be considered to be a contract of indefinite duration.

Successive fixed-term employment contracts are in principle prohibited and will be considered as one contract of indefinite duration. However, the law provides for several exceptions. The most frequently occurring of these are:

- four successive fixed-term contracts each with a duration of at least three months, with a maximum duration of two years; and
- successive fixed-term contracts each with a duration of at least six months, with a maximum duration of three years subject to approval of the competent social inspection unit.

12 What is the maximum probationary period permitted by law?

The probationary period no longer exists (since 1 January 2014), except in relation to student contracts (three days, not extendable) and interim contracts (three days, not extendable).

13 What are the primary factors that distinguish an independent contractor from an employee?

Whether or not there is a subordinate relationship between the actors involved is the key element in distinguishing between independent contractors and employees. By way of example, the following criteria could be used to demonstrate the level of independence or dependence: responsibility or decision-making power, way of organising work and working time, liberty to hire personnel, etc.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Yes, the Interim Workers Act (24 July 1987).

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Citizens of the European Economic Area or Switzerland do not need a visa to reside in Belgium for business purposes. Citizens of all other countries are considered to be 'foreigners'.

If a foreign employee transferring from one corporate entity to a related entity in Belgium is to work in Belgium for more than three months, a long-term visa is required (D visa).

A short-term visa can only be used for business trips of less than three months.

There is no restriction on the number of short-term visas (for less than three months) that the Belgian state may award.

16 Are spouses of authorised workers entitled to work?

Spouses of foreign authorised workers (ie, authorised workers from outside the European Economic Area or Switzerland) are not automatically authorised to work in Belgium. A work permit for the spouse should be obtained as well. The work permit will be granted on the basis of the authorised employment of the spouse already in employment (it being understood that all other conditions are also complied with (for instance, the spouse of the authorised worker should have an employment contract with an employer)).

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Companies that want to hire a foreign worker (ie, from outside the European Economic Area or Switzerland) should obtain a work permit (issued by the Belgian state (regional)). Different types of work permit exist. The most common type is the work permit B for specific categories of workers (highly qualified workers, posted highly qualified workers, trainees, etc).

Hiring foreign employees who have not obtained a work permit or helping foreigners to enter Belgium to work illegally can be sanctioned with administrative and criminal fines (€48,000 maximum) and imprisonment (three years maximum).

18 Is a labour market test required as a precursor to a short or long-term visa?

In principle, a labour law test is required to obtain a work permit. In practice, however, most foreign workers can invoke a particular statute or circumstance (highly qualified worker, posted highly qualified worker, trainee, etc) so that the labour market test can be avoided.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

In Belgium, before 1 February 2017, working time (ie, the time during which the worker is at the disposal of his or her employer) could in principle not exceed nine hours per day or 38 hours per week. It was, however, possible to derogate from the principle of nine hours per day and 38 hours per week provided that the work did not exceed either 11 hours per day or 50 hours per week. The employer had to ask for this authorisation.

The new Act on Workable and Flexible Work has abolished the strict 38 hours' week. It is now – by law – possible to increase or reduce the working time by a maximum of two hours per day and five hours per week during certain periods (high or low workload), so long as, on an annual basis, the total number of hours performed is not exceeded (1,976 hours per year in companies applying the 38 hours' working week). Derogations with authorisation still remain possible.

Employees may not opt out of these restrictions unless this is required by the employer and only in the circumstances regulated by law.

In principle, it is forbidden to work more than the legal working hours, outside the applicable schedules, on Sundays, bank holidays and at night (from 8pm till 6am), but there are certain exceptions.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Employees working beyond the statutory working hours are entitled to compensatory time off and overtime pay as long as the extra hours of work have been requested by the employer. The rules for overtime work are stricter for workers under the age of 18.

However, it should be noted that the rules relating to working hours and overtime pay do not apply to certain categories of workers, for example, sales representatives, homeworkers and – to some extent – employees in a managerial role or a position of trust within the company.

Overtime is paid at 50 per cent above the normal compensation, or 100 per cent in the case of work on Sundays or public holidays.

21 Can employees contractually waive the right to overtime pay?

No, this is in principle not possible. However, if a CBA has been agreed within a particular sector or within the company, employees may convert overtime pay to additional compensatory time off.

22 Is there any legislation establishing the right to annual vacation and holidays?

The right to annual vacation is established by the Royal Decree of 30 March 1967 and is accrued on the work done by the employee during the calendar year ('service year') immediately preceding the year during which the holidays are taken (ie, the 'holiday year'). The minimum annual vacation is 20 working days based on a five-day working week and 24 days on the basis of a six-day working week. Besides this, employees are entitled to 10 official public holidays.

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes, the Act on Employment Contracts establishes the right to sick leave and sick pay. Both white-collar workers and blue-collar workers

are entitled to 30 days 'guaranteed' salary in case of sickness to be paid by the employer. However, only white-collar employees (with an employment agreement of indefinite duration or of a fixed duration of at least three months) are entitled to be paid 100 per cent of their salary by the employer. For blue-collar employees (and white-collar employees with an employment agreement of a fixed duration of less than three months), the employer is only obliged to pay 100 per cent of the salary during the first seven days of the sick leave. From the eighth day, this percentage is reduced (unless there is a deviating CBA to the employee's benefit at sectoral level). If the period of sick leave lasts longer than the guaranteed salary period (ie, more than 30 days), the salary will be paid by the mutual insurance company. The allowance paid by the mutual insurance company is calculated in accordance with the duration of the sick leave.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees are entitled to paid leave of absence for family events, to comply with civic obligations and civil duties and to appear in court. The maximum duration depends on the reason for the leave of absence and on the industry sector.

Employees may also take leave of absence in relation to unforeseeable events that require urgent and indispensable intervention, provided that the employment contract makes this intervention impossible (eg, an accident suffered by a cohabitee, fire damage to the employee's home, etc). The maximum duration is 10 working days per calendar year. This leave is not paid, unless otherwise agreed between the parties.

25 What employee benefits are prescribed by law?

These are:
- monthly salary for white-collar workers;
- hourly salary for blue-collar workers;
- holiday pay and holiday pay upon departure (in case of termination of the employment contract); and
- reimbursement of commuting costs (public transport).

Most sectors and companies do, however, foresee some additional benefits, such as meal vouchers, eco vouchers, end of year premium, company car, group insurance or hospitalisation insurance.

26 Are there any special rules relating to part-time or fixed-term employees?

Fixed-term employment contracts should be in writing (for the duration, see question 11).

Part-time employment contracts should also be in writing and should be signed before the start of the employment. The duration should in principle be at least one-third of the working time of a full-time worker in the company and may in no case be shorter than three successive hours.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

A non-compete clause is a clause by which the employee is bound, after leaving the company, not to perform similar activities (either by developing their own business or by joining an employer who is a competitor) that would enable them to cause harm to the company that they have left by using (either for themselves or for a competitor) the particular know-how, in industrial or commercial matters, that has been acquired.

In order to be valid, the ordinary non-compete clause must meet the following requirements (for sales representatives, the conditions are less severe):
- the clause must be writing;
- the employee's annual salary must exceed €66,944 (amount for 2017 – this amount is modified each year) at the moment the employment agreement is terminated. If the annual salary is between €33,472 and €66,944 (amounts for 2017), a non-compete clause will nevertheless be valid for those types of functions that have been set forth in a CBA of the Joint Industrial Committee, or, in the absence thereof, at company level;
- the prohibition must be restricted to 'similar activities';
- the prohibition is territorially limited to places where the employee can actually compete with the employer, and may in no case extend outside the Belgian territory;
- the prohibition may only apply for up to 12 months after termination of the employment; and
- the clause must provide for the payment of a specific non-compete indemnity, equal to at least 50 per cent of the employee's salary for a period equal to the non-competition period, unless the employer notifies the employee within 15 days of termination of the contract that it waives the clause's application.

The non-compete clause will only be effective (enforceable by the employer) if the employee resigns (with a notice period or with a payment in lieu of notice); is dismissed for serious cause after the first six months of the employment agreement; or if the employment contract is terminated by mutual consent.

Under certain circumstances (for instance, in an international context) a special non-compete clause can be inserted in employment agreements. The conditions for the special non-compete clause are less restrictive, in the sense that the clause may deviate from the following conditions:
- the territorial restriction to the national (Belgian) territory; and
- the maximum period of 12 months (although it may not be for an unlimited period; a duration of two or three years maximum seems reasonable).

Contrary to the ordinary non-compete clause, the special non-compete clause may also be applicable even if the employment contract is terminated by the employer without serious cause after the first six months of the employment agreement. It can also be applicable if the contract is terminated during the first six months, in which case it will only have effect during a period equal to the duration of the activities performed during the first six months of the employment agreement.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

A one-time non-compete indemnity is due unless the employer has waived the application of the non-compete clause within 15 days of termination of the employment contract.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer is, in principle, liable for damage caused by employees when carrying out their duties under the employment contract (article 1384, paragraph 3, Civil Code). However, the employer can in its turn hold the employee concerned accountable and claim back the compensation it has been ordered to pay on behalf of the employee if the damage was caused by a frequently occurring minor fault, a serious fault or fraud (article 18, Employment Contracts Act).

Taxation of employees

30 What employment-related taxes are prescribed by law?

The employer is obliged to deduct withholding tax directly from the employee's salary.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes. Most legislation relating to the various intellectual property rights specifically addresses this issue and provides for some specific rules.

In this regard, a distinction must be made between non-protectable creations and protectable inventions or creations.

Non-protectable creations

In general, the ownership relating to non-protectable creations of employees developed while carrying out their job is automatically

acquired by the employer. The creation is considered to result from the execution of the employee's duties for which he or she is paid.

In this regard the general rules on unfair competition or the performance of agreements may be applied.

In accordance with article 17(3) of the Law on Employment Contracts, an employee can moreover not disclose the trade secrets of his or her employer, or enter into unfair competition with the employer. Also the general principle of good faith (article 1134, Civil Code) and even the Criminal Code (article 309, Criminal Code) provide protection against possible unfair use of creations by the employee.

Protectable creations

Copyright

The author of a work is the person who has actually created the protected work. The employee-creator is therefore the automatic owner of the copyright, without having to complete any administrative formalities. Moreover, an undertaking can never be the original owner of copyright, but can only obtain copyright by an assignment of rights from the original author. Under Belgian copyright law there is no automatic transfer of copyrights to the employer.

Very often, the employment agreement stipulates the assignment of the patrimonial rights to the employer. The Belgian copyright legislation provides for specific rules in this regard. Only creations developed while the employee is carrying out his or her job can be assigned. The transfer of rights must moreover be in writing, restrictively interpreted, and must contain both an exhaustive list of all possible exploitations and details of the compensation for the author.

However, with respect to copyrights on software and databases, the applicable rules explicitly provide that these rights are automatically assigned to the employer (even if nothing has been stipulated in the agreement and unless agreed otherwise).

The moral rights (ie, the right of the employee to be named as the author) will always remain with the employee and cannot be transferred.

Design right

Article 3.8 of the Benelux Convention on Intellectual Property rights as well as article 14 of the Community Design Regulation provide that if a design has been developed by an employee during the execution of his or her job, the employer shall, unless otherwise agreed, be deemed to be the designer. This is the case, even if the design would also be protected by copyright.

Patent rights

The Belgian patent legislation has no specific rules relating to employee inventions. Case law has however provided some guidance. As such it is generally accepted that the rights on patentable inventions belong to the employee-inventor. The employer can obtain the patrimonial rights to an invention by a transfer of rights or according to a legal presumption if the invention has been created during the performance of the employment agreement. In other words, if the employee has specifically been allocated the job of creating inventions, the employee is presumed to have accepted the transfer of rights by accepting that job.

Patent rights relating to inventions made by the employee, which are totally outside the scope of the employment agreement, remain with the employee.

The situation with regard to 'mixed inventions', ie, inventions made by the employee partially within the scope of the employment agreement, remains unclear and are decided on a case-by-case basis.

Also in relation to patent rights, the moral rights (ie, the right of the employee to be named as the inventor) cannot be transferred.

Sui generis database rights

The sui generis database right is automatically transferred to the producer of the database, ie, the individual or undertaking taking the initiative and the risk to invest in the database.

Plant variety rights (or breeder's rights)

With respect to plant varieties, article XI.111 of the Belgian Economic Code provides that the right to a plant variety is granted to the person who has bred or discovered the variety. If the breeding or discovery has been made by an employee in the framework of his or her employee agreement, the right to the variety is conferred on the employer, unless agreed otherwise. For community plant variety rights, article 11.4 of the Regulation 2100/94 on community plant variety rights refers to the national law applicable to the employment relationship.

Topographies of semiconductor products

Article XI.322 of the Belgian Economic Code provides that, if the topography of a semiconductor product is made by an employee in the framework of his or her employee agreement, the right to protection shall apply in favour of the creator's employer, unless agreed otherwise.

32 Is there any legislation protecting trade secrets and other confidential business information?

Yes, article 17, 3 of the Act on Employment Contracts. Employees are legally (and often contractually) obliged to not disclose, either during the employment contract or after its termination, trade secrets and other confidential information acquired by the performance or during the performance of the employment contract.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Yes, article 22 of the Belgian Constitution and the Privacy Act of 8 December 1992.

Any employer processing personal data should in principle notify the Privacy Commission prior to processing the personal data. However, the majority of the data collected in the context of the employment contract are exempted from such notification.

As of 25 May 2018, the EU Regulation of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the General Data Protection Regulation) will be applicable in Belgium. It is expected that the Belgian Privacy Act of 8 December 1992 will be modified accordingly.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Yes, CBA 32-bis regarding the transfer of undertaking.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

The employment contract can be terminated for any reason, whether economical or technical (eg, restructuring of a company department) or personal (eg, underperformance). Since 1 April 2014, employees can oblige their former employer to communicate the reasons for termination in writing (if the employer does not do so it may be subject to a fine of two weeks' salary).

Termination 'for cause' is possible (ie, where there are serious facts that make the collaboration between the employer and the employee immediately and definitively impossible, such as theft of employer property by the employee, fraud, etc). In case of termination 'for cause', no notice period or indemnity in lieu of notice need be given or paid.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Under Belgian law, an employment contract can in principle be terminated by the employer at any time provided proper notice is given (notice period to be served) or an indemnity in lieu of notice is paid (termination with immediate effect). It is the employer's sole decision whether to terminate the contract with a notice period or with an indemnity in lieu of notice.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

In case of termination 'for cause' (see question 35).

Update and trends

On 1 February 2017 most of the provisions of the Act on Workable and Flexible Work entered into force. This act aims to modernise Belgian labour law so as to improve the competitiveness of the Belgian labour market. The act contains measures offering employers possibilities to make employment more flexible, and employees a better way to find a good balance between work and family life ('workable work').

The following new rules may have a significant impact on companies in Belgium (some measures still need activation at sector level):

- the strict 38-hour week has been abolished. Instead, it is – by law – possible to increase or reduce the working time by a maximum of two hours per day and five hours per week during certain periods (high or low workload), so long as, on an annual basis, the total number of hours performed is not exceeded (1,976 hours per year in companies applying the 38-hour working week);
- an employee can voluntarily agree to perform overtime up to 100 hours per calendar year without obligation to take compensatory rest (only overtime payment is due). Of course, overtime can only be performed upon request of the employer;
- a legal framework for 'flexible working hours' implies that an employee can decide, within certain limits, when the working day starts and ends and when a break is taken (eg, employees can start working between 8am and 10am, take a break between 12pm and 2pm and finish work between 4pm and 7pm);
- telework (ie, working from home or at any other place chosen by the employee) is possible on an occasional basis, for instance for personal reasons (before, telework was only possible in a structural framework (eg, one day per week));
- the practical arrangements for part-time work have become simpler (eg, with respect to the notification of variable work rosters);
- a regime of 'selling of holidays' can be set up, whereby an employee can waive his or her right to conventional holidays (if any) for the benefit of other employees who will use the holidays to take care of a child (under 21 years old) who is ill, disabled or has had a serious accident and requires continued assistance;
- employees can 'save up' time (eg, overtime, conventional holidays) to take a break, without loss of salary, at a certain point in their career (not yet in force); and
- the possible duration of palliative leave and of the time credit regime (for reasons of care) has been extended.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes, the Act on Employment Contracts (article 39). If no proper notice period is given, the employer must pay an indemnity in lieu of notice that is equal to the remuneration, including benefits in kind (employer's contribution to meal vouchers, group and hospitalisation insurance, variable remuneration such as a bonus or commission, etc), that would have been paid to the employee during the notice period if the contract had been terminated with a notice period.

39 Are there any procedural requirements for dismissing an employee?

If a notice period is given, the employee should be notified by registered mail (or by bailiff writ, but this is uncommon). The notification should mention the starting date and the duration of the notice period.

Where there is an immediate termination upon payment of an indemnity in lieu of notice, no formalities need be complied with (the termination can even be done orally), but it is usual to inform the employee of the termination by registered mail as well, so that there is proof of both the termination and the date of the termination.

No prior approval from a government agency is required. In specific cases, for instance, in a case of termination 'for cause', the employer needs the prior approval of the labour court to dismiss an employees' representative in the works council (protected employee).

40 In what circumstances are employees protected from dismissal?

In general, one can distinguish between four types of protected employees:

- employees' representatives in the works council and committee for prevention and protection at work (highest level of protection);
- trade union delegates;
- prevention adviser; and
- 'thematic' protected employees (pregnant employees, employees benefiting from the time-credit regime (career interruption), employees on parental leave, employees having filed a claim for harassment, etc).

41 Are there special rules for mass terminations or collective dismissals?

Yes, with respect to collective dismissals, there are:

- Procedural rules ('Renault legislation'). Once a company has the intention to proceed with a collective dismissal, the employees' representatives should be informed and consulted well in advance of any actual decision. Also certain public authorities should be informed. In a subsequent phase, although this is not a legal obligation, a 'social plan' may be negotiated. In practice, it is unrealistic for a company to proceed with a collective dismissal without granting the dismissed employees some extra-legal indemnities or advantages via a social plan. Once the information and consultation phase has been closed and the company takes the decision to proceed with the collective dismissal, the actual dismissal of the employees can only take place after a 30 or 60-day waiting period (specific provisions may apply for protected workers and workers benefiting from pre-retirement).
- Rules regarding the collective dismissal indemnity due to employees affected by a collective dismissal. This indemnity, aiming to ease the consequences of the collective dismissal, equals 50 per cent of the difference between the net reference salary and the unemployment benefits. If the employees receive a closure indemnity (collective dismissal is often combined with the closure of the undertaking), the collective dismissal indemnity is not due.
- Rules on reconversion or outplacement. Any employer that considers proceeding with a collective dismissal will formally qualify as a 'company in reorganisation' from the date of the announcement of the company's intention to proceed with a collective dismissal until a maximum of two years following the date the collective dismissal decision is announced. This status will trigger the obligation to set up a specific structure (reconversion cell) composed of representatives of the employer, at least one trade union, the regional employment office and the sectoral education fund, if this exists.

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

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

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

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

No, class actions are not allowed.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Currently, the legal retirement age is fixed at 65. As of 2025, the legal retirement age will be 66 and as of 2030 it will be 67. As soon as an employee turns 65 (or 66 or 67 in the future), he or she can take retirement, but he or she is not obliged to do so. The employer cannot force a 65-year-old employee to take retirement but a specific notice period applies.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

The employer and the employee cannot already agree to private arbitration within the employment agreement. An arbitration clause will only be valid if it is entered into after a dispute has arisen.

There is, however, one exception: white-collar workers with an annual salary above €66,944 and in charge of the daily management of the company, or having a managerial function within a (large) company that can be compared to the management of an entire (small) company, can agree to private arbitration before a dispute has arisen.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An agreement regarding the conditions for termination in which an employee waives statutory and contractual rights to potential employment claims can be entered into only after the termination of the employment agreement.

46 What are the limitation periods for bringing employment claims?

Claims based on the employment contract should be brought before the court within five years of the fact at the origin of the claim and at least within one year of the termination of the employment contract. Claims based on offences (such as the non-payment of salary) can be brought before the court irrespective of the time of the offence, provided they are bought at least within one year of the termination of the employment contract.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The Federal Constitution and the Consolidation of Labour Laws are the main statutes and regulations regarding labour and employment in Brazil. In addition, other mandatory labour and employment rules may be also established by collective bargaining conventions (between employees' unions and employers' unions) and collective bargaining agreements (between an employer and the employees' unions). Moreover, Laws 8,212/1991 and 8,213/1991, and Federal Decree 3,048/1999 cover the main regulations regarding social security obligations relating to employment. Visas and work permits are governed by normative resolutions issued by the Ministry of Labour.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Federal Constitution ensures human dignity and welfare for every citizen, regardless of nationality, race, gender, colour or age and prohibits any other kind of discrimination, establishing that federal laws shall regulate the enforcement of such constitutional guarantees and the relevant penalties in cases of violation.

In this sense, Law 7,716/1989 states that it is a crime to deny or prevent employment in a private company due to race, colour, ethnicity or religion. This law also defines as a crime the practice of certain conducts due to racial or colour discrimination or prejudice related to origin, nationality or ethnicity such as:

- not supplying work tools or equipment to an employee in the same condition as to other workers;
- preventing an employee from enjoying a job promotion or a professional benefit; or
- treating an employee differently in the workplace and in terms of the salary amount.

In addition, Law 10,741/2013 prohibits discrimination and age limitation of elderly people on the admission to any job, defining the following conducts as crime:

- denying employment or work; or
- taking ownership of or diverting assets, earnings, pension or any other income of the elderly.

Law 12,984/2014 defines as a crime the following discriminatory conduct against HIV-positive people because of their condition:

- denying them employment or work;
- removing or dismissing them from work and employment;
- segregating them in the workplace; and
- disclosing the condition of the patient carrying HIV to offend his or her dignity.

Laws 7,853/1989 and 13,146/2015 guarantee to persons with disabilities the right to the work of their own free choice, and acceptance, in an accessible and inclusive environment, in equal opportunities with other persons, including equal remuneration for the same type of work. Further, they are guaranteed the participation and access to courses, training, continuing education, career plans, promotions, bonuses and professional incentives offered by the employer. Any restriction or discrimination on grounds of disability, including during recruitment, selection, admission, periodic medical examinations, permanence on the job, professional growth and rehabilitation, as well as requirement of full capacity is forbidden. These laws also define as crimes the practice, inducement or incitement of discrimination of persons because of their disability; and taking ownership of or diverting assets, earnings, pension or any other income of the persons with disability.

The use of advertisement or any other means to recruit employees requiring specific race, ethnic appearance profiles, or any kind of discrimination not related to professional experience is also forbidden.

The Criminal Code states that sexual harassment is a crime, characterised when someone holding a hierarchically superior status harasses another person to gain advantage or sexual favours because of their work, position or role.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Labour is the primary government agency responsible for the enforcement of labour and employment statutes and regulations.

The Labour Prosecution Office, in turn, is an independent entity responsible for supervising compliance with labour laws and respect for social and collective and/or homogeneous individual rights. This entity has jurisdiction to start and develop investigations into the breach of labour rights, and where violation is verified, it notifies the offender to execute an out-of-court settlement by means of which the offender undertakes to cease the practice of labour and employment irregularity. If the offender fails to comply, settlement can be executed before the labour courts. If the offender refuses to execute the out-of-court settlement, the Labour Prosecution Office may file a civil class action requesting the labour courts to ensure the enforcement of employment statutes and regulations.

Further, the Federal Revenue Service is the primary government agency responsible for the enforcement of social security statutes and regulations regarding taxes on compensation for work, while the National Institute of Social Security oversees social security benefits.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Federal Constitution states that the election of an employee representative council or committee is allowed in companies with more than 200 employees. The House of Representatives ratified the Workers' Representatives Convention 135, of the International Labour Organization, which also grants protection to employee representatives elected or appointed by employees' unions or elected by workers in a company, who are commonly called plant committees. The Consolidation of Labour Laws obliges employers to set up internal committees for accident prevention, formed by representatives of both employees and employer, aimed at the prevention of work-related accidents and sickness. Employees elected as union officers can also be considered as employees' representatives in the workplace.

The establishment of workers' committees stimulates permanent negotiation between employees and employers in the workplace, but it does not exclude negotiations between the relevant unions representing the employees. Regarding unions in Brazil, in each territorial base, which corresponds to at least one city, there may be a single union representing the employees in each specific work category, which comprises employees under the same work conditions while developing their tasks in the same or similar economic activities and a single employers' union, which represents companies with economic interests in common that result from the development of identical or similar activities.

The state is prevented from intervening in the unions' organisation. The negotiation between employees' unions and employers' unions generally results in conventions that establish specific labour rights pertaining to the relevant category.

Employees' unions and companies may also directly negotiate specific rules and work conditions by executing a collective bargaining agreement.

5 What are their powers?

Employees appointed to councils or committees and those employees elected as union officers are entitled to freely conduct their mandates and meetings. They may also inform employees about the agendas, programs, list of claims, and all related labour subjects; additionally, employers can neither prevent them from convening meetings during working hours nor from distributing union advertisements in the workplace.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

There are no specific restrictions on background checking of applicants, provided that the privacy, private life, honour and image of people are respected. Inspections by authorities or labour claims may be filed by applicants for indemnification due to alleged moral or material damages, regardless of whether the background check is conducted by the future employer or by a third party, mainly when such background check leads to dismissal or to prevention of the hiring of an applicant.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

The Consolidation of Labour Laws prohibits the requirement of certificates or medical examinations to prove infertility or pregnancy as a condition for hiring an applicant.

Nonetheless, it is mandatory that all employees submit to a medical examination prior to their admission to confirm that the professional is sufficiently healthy to perform the required job duties. The applicant cannot refuse to submit to such prior examination. Regular examinations and examinations upon termination to ensure the employee is sufficiently healthy to work are also mandatory.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no specific legislation restricting or prohibiting the submission of applicants to drug and alcohol tests. However, case law interprets such practice as illegal because it interferes with the applicant's intimate and private life. Thus, the understanding is that employers are not allowed to refuse to hire an applicant who does not submit to such test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Discrimination against any people or group is prohibited. Nevertheless, companies with 100 or more employees are obliged to hire disabled workers or those submitted to professional rehabilitation after work-related accidents, as follows:

Employees in the company	Minimum percentage of disabled workers or those submitted to professional rehabilitation
100 to 200	2
201 to 500	3
501 to 1,000	4
Over 1,000	5

Different treatment also applies to the hiring of apprentices. The apprenticeship is a hiring regime that, in addition to the theory taught in courses, grants professional and technical training to people between 14 and 24 years old. Companies are also obliged to hire a certain number of apprentices, the quota varying from 5 to 15 per cent of the number of workers who perform roles that demand professional training.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The employment contract must be recorded in the relevant employee's record book, including information on the hiring date, compensation and special conditions to which the employment contract is subject. Written employment contracts are mandatory for temporary, fixed-term and part-time employments only. Nonetheless, the parties usually execute an additional written employment contract detailing other work terms and conditions not established by law or by collective bargaining conventions and collective bargaining agreements.

11 To what extent are fixed-term employment contracts permissible?

The maximum period of duration for fixed-term employment contracts is two years. If the employment contract is fixed for a period of less than two years it can be renewed only once (except those executed for two years with foreign employees, which are non-renewable – see question 15), provided that both periods together do not exceed two years, otherwise the employment contract is converted into an indefinite-term one. Fixed-term employment contracts are allowed in the case of essential services owing to a temporary demand for activities in the company or in the case of temporary services or if their nature justifies the fixed term.

12 What is the maximum probationary period permitted by law?

The maximum length of a probationary period is 90 days according to the law. Should this period be shorter than 90 days, the employer may extend it once if both periods together do not exceed 90 days. If the employment contract continues after the probationary period, including due to job tenure, it is automatically converted into an indefinite-term contract.

13 What are the primary factors that distinguish an independent contractor from an employee?

According to the Consolidation of Labour Laws, the employee is a specific individual who is paid for the habitual rendering of services developed under subordination to the employer; for example, the employer has the power to direct the business and the employment relationship, and thus control, inspect and penalise the employee. Independent contractors, in turn, are solely responsible for their business and do not render services under such subordination to the engaging party, as the latter just aims at the result of the contract. Independent contractors may also allocate other professionals, including their own employees and other independent contractors, to comply with their contract, which does not apply to employees.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Law 6,019/1974 governs the temporary work performed by individuals to urban companies, and is allowed in two situations: to meet the temporary need to replace regular and permanent employees in the company (for example, in the case of vacation and sick leave) or to deal with the extraordinary increase of activities (for example, at certain times of the year, such as during the holiday season).

The temporary employment contract is necessarily written and can be executed for three months, extendable for a further three months in case of replacement resulting from extraordinary increase in activities (totalling six months of contract), and for a further six months in case of replacement of regular and permanent staff (totalling a nine-month contract). In both cases, companies must ask for grounded authorisation from the Ministry of Labour for hiring for more than three months, at least five days before the beginning of the contract. In the case of an extension, the request must be made five days before the end originally intended in the contract.

Temporary employment agencies are responsible for paying and assisting the temporary workers hired by them with respect to their rights and obligations, as established by Law 6,019/1974.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

For each foreign employee the employer must hire two Brazilian employees. This is the 'two-thirds rule' established by the Consolidation of Labour Laws, which is also required in relation to the proportionality of compensation to be paid to foreign and Brazilian employees.

Among the many types of visas and work permits, the most applied-for visa is the temporary visa for foreign employees sponsored by a Brazilian company, the length of which is up to two years (non-renewable, but the foreigner can apply for a permanent visa after the temporary visa) upon the execution of an employment contract between the Brazilian company and the foreign professional, which shall be submitted to the Ministry of Labour's analysis. The compensation paid to the foreign employee cannot be lower than the higher compensation paid in Brazil for holders of the same position in the company, and vice versa. This visa is available for employees who are transferred from one corporate entity in another jurisdiction to a related entity in Brazil.

Officers and administrators who do not qualify as employees may apply for permanent visas, which are approved when the company evidences an investment, duly registered with the Central Bank of Brazil, in an amount of at least 600,000 reais for each professional; or an investment of at least 150,000 reais per professional provided that the Brazilian company undertakes to create at least 10 new jobs within two years following its incorporation in Brazil or the concession of the permanent visa to the foreign administrators or officers.

Another possibility is the granting of a permanent visa to foreign individuals investing in Brazilian companies. In such case, each foreign investor must provide evidence that he or she has already made capital contributions, duly registered with the Central Bank of Brazil, to a new or an existing Brazilian company, in an amount not lower than 500,000 reais. Exceptionally, the Immigration Council can authorise, at its sole discretion, the granting of a permanent visa even if the capital contribution is lower than 500,000 reais but higher than 150,000 reais, provided that the investment is in innovation, basic and applied research or for scientific and technological purpose.

16 Are spouses of authorised workers entitled to work?

Spouses and other family members of foreign employees with temporary visas must apply for their own visas and work permit to be able to legally work in Brazil. Foreign family members of foreign workers with permanent visas are entitled to work in Brazil.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

To employ foreign workers, the employer must obtain a visa and work permit and not exceed the limit of foreign workers in the company (see question 15). The visa and work permit application is analysed by the National Immigration Council, which is formed by personnel from the Ministry of Labour and the Ministry of Justice and verifies the compliance with the legal requirements for each kind of visa and work permit.

The hiring of foreign workers that does not fulfil the legal requirements subjects the company to fines imposed by the Brazilian immigration authorities, and the illegal foreign worker may be deported by the federal police.

18 Is a labour market test required as a precursor to a short or long-term visa?

There is no labour market test required for employers to demonstrate that local workers are not willing to take on, or not qualified for, the job position offered to the foreign worker. However, if the company applies for a visa to hire a foreign worker based on an employment contract, it shall demonstrate that this professional has special qualifications and work experience to develop his or her activities in Brazil by presenting degrees, certificates and declarations, as required by the National Immigration Council.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The working hour limits defined by law are mandatory. The maximum working hours are 44 hours per week and eight hours per day. Some worker categories have a lower limit of working hours per day (eg, bank workers, workers in hazardous activities).

Breaks for rest during the working hours should be according to the following parameters: a 15-minute break if the working hours exceed four hours, but do not exceed six hours; and a break of at least one hour if the working hours exceed six hours. Employees are also entitled to a rest of at least 11 hours between two work shifts.

Specific rules regarding working hours may be also established by collective bargaining conventions or collective bargaining agreements.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All categories of employees are entitled to overtime pay, except for part-time workers (see question 26), employees who perform external activities that are incompatible with the employer's control of working hours and holders of trust positions, because they are not subject to the control of their working hours by their employers.

The minimum overtime pay is an additional allowance of 50 per cent over the normal compensation, but this percentage may be higher due to rules established by collective bargaining conventions and collective bargaining agreements, mainly in the case of work on Sundays and holidays.

21 Can employees contractually waive the right to overtime pay?

Employees cannot waive the right to overtime pay and waivers regarding any type of payment, including overtime, may be interpreted as invalid by courts in the case of a lawsuit filed by the employees or by the union representing them. Employers, however, may negotiate with the union representing the employees for the establishment of time banks to credit the employees' overtime hours for days off instead of paying them.

22 Is there any legislation establishing the right to annual vacation and holidays?

Employees are entitled to a 30-day vacation, which must be compensated with the payment of the normal monthly salary (including the average of variable salaries, such as commission), plus a bonus corresponding to one-third of such payment. The vacation payment must be made up to the second day preceding the beginning of the vacation period.

A vacation must be granted by the employer within a year after 12 months of work; otherwise, besides the vacation, the relevant compensation shall be doubled as a penalty for the employer.

Employees are entitled to convert 10 days of their vacation into working days, and for such period, the employee is entitled to receive the compensation related to the working days plus the vacation payment (including the one-third bonus).

Regarding holidays, the law establishes the national holidays on which employees shall not work. State and municipal laws may also establish other holidays.

23 Is there any legislation establishing the right to sick leave or sick pay?

The legislation ensures the right to sick leave to the employee under medical recommendation, in which case the employment contract is suspended and cannot be terminated. The employer pays the first 15 days of sick leave and the National Institute of Social Security pays the remaining days as a social security benefit. There is no limit for sick leave.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The employee is entitled to a paid leave of absence in the following circumstances:

- maternity leave: 120 days, which can start up to 28 days before the delivery (the employee's compensation is paid by the National Institute of Social Security); companies may extend the maternity leave to 180 days if specific tax requirements are met;
- legal abortion: two weeks;
- paternity leave: five days after the birth; companies may extend the leave to 20 days if specific tax requirements are met;
- adoption leave: 120 days for female employees, five days for male employees;
- death of certain specific relatives: two days;
- marriage: three days;
- accompanying pregnant wife or partner on medical appointments or exams: two days;
- accompanying son or daughter under six on medical appointments: one day per year;
- voluntary blood donation: one day per year;
- university access tests: on the dates of tests;
- leave to perform military or public service, where the employer continues to pay the salary during the initial 90 days of the leave;
- participation in court proceedings, when required by the authorities; and
- union officers: whenever it is necessary to meet the duties related to their mandate.

Collective bargaining conventions or collective bargaining agreements may also provide for other paid leave.

25 What employee benefits are prescribed by law?

The main rights prescribed by law are the following:

- national minimum wage (currently 937 reais per month);
- overtime payment of at least 50 per cent on the normal compensation;
- reduced night shift hours that are also paid with an additional compensation of 20 per cent on the normal hourly salary;
- a weekly rest day, preferably on Sunday;
- Christmas bonus, also called thirteenth salary, which is equivalent to one-twelfth of the salary multiplied by the months of work during the year, paid in two instalments, one up to 30 November and the other up to 20 December;
- 30 vacation days per year of work, paid with a bonus equivalent to one-third of the salary in addition to the salary of the relevant period;
- profit or results-sharing programmes if negotiated with the relevant labour union;
- justified work absences;
- additional compensation of 30 per cent over the base salary in the case of work under certain activities that involve risk, such as contact with flammable or explosive substances under a strong risk condition; contact with radioactive substances or ionising radiation; in the electric power segment; and subject to risk conditions in a permanent and intermittent manner;
- additional compensation in the case of unhealthy working conditions equal to 10, 20 or 40 per cent of the national minimum wage;
- unemployment severance fund equivalent to 8 per cent of the monthly compensation, which is deposited in an official individual bank account for each employee, who can withdraw the accrued funds in certain circumstances established by law, such as in the case of retirement or dismissal without cause;
- minimum notice period for termination by the employer of at least 30 days plus three days per year of work, limited to a maximum of 90 days, or the employer may provide pay in lieu of notice;
- fine paid by the employer of 50 per cent on the balance of the unemployment severance fund deposited during the employment contract in the case of dismissal without cause (40 per cent fine reverting to the employee and 10 per cent fine paid as an extraordinary social contribution);
- family bonus, per child under 14 years old, of 44.09 reais (for employees with a monthly salary of up to 859.88 reais), and of 31.07 reais (for employees with a monthly salary of from 859.89 to 1,292.43 reais); the payment is made by the employer, which is then reimbursed by the National Institute of Social Security; and
- public transportation vouchers for the employee's journey to and from work paid by the employer, which has the right to discount up to 6 per cent of the relevant cost from the employee's monthly salary.

Other benefits may be mandatory by the application of collective bargaining conventions or collective bargaining agreements.

26 Are there any special rules relating to part-time or fixed-term employees?

The work shift of part-time jobs is limited to 25 hours per week and the relevant salary must be proportional to the full-time job salary. No overtime is allowed for part-time employees.

Part-time employees' vacation varies according to the number of working hours from eight to 18 days accrued after 12 months of work. No vacation is granted in the case of more than seven unjustified absences during the accrual period.

Fixed-term contracts are only allowed in a few cases (see question 11) and the maximum length for them is two years. They may be renewed only once if the maximum period of two years is respected, otherwise, they are converted into indefinite-term contracts. The main specific rule relating to fixed-term contracts is that in the case of earlier termination by the employer, the employee is entitled to receive an indemnification corresponding to 50 per cent of the compensation that would be due up to the end of the term, and no prior notice period is applicable. If the earlier termination is caused by the employee, the employer is entitled to be indemnified for the relevant losses, but the amount is limited to that which would be due to the employee if applicable.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

There is no specific legislation regulating these covenants. Case law interprets that non-compete clauses are considered valid and enforceable when employees are reasonably indemnified for the non-compete period, which is usually up to 24 months and may only refer to the roles and territory established in the employment contract that was terminated. Post-termination non-solicitation and non-dealing covenants are accepted as valid and enforceable if they are reasonable.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes, employers must indemnify former employees in cases of post-termination covenants not to compete. At least 50 per cent of the employee's last monthly salary per month of non-competition has been accepted in case law as reasonable indemnification for such work restrictions.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The Civil Code states that the employer is liable for all acts of its employees during work, regardless of their guilt. Nonetheless, the

employer is allowed to sue the employee for an indemnification corresponding to the damages.

The Consolidation of Labour Laws also allows the employer to discount from the employee's salary the amounts corresponding to damages caused by the employee due to malice or if this condition is established by the employment contract.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Generally, the employer is liable for the following employment-related taxes:

- social security contribution at the rate of 20 per cent on the monthly salary paid to professionals (individuals, employees or independent contractors) or up to 4.5 per cent levied on the company's gross revenue for some specific sectors;
- social security contribution at a variable rate of 1 per cent to 3 per cent to fund work-related accident benefits and special retirement over the monthly salary, according to the activities performed by the company, that can be reduced by half or doubled according to the quantity, frequency and cost of social security benefits due to work-related accidents;
- social security contribution at a variable rate of 6 per cent, 9 per cent or 12 per cent over the monthly salary received by employees entitled to special retirement benefits due to the performance of activities under harmful conditions;
- contributions levied at variable rates of up to 5.8 per cent for social services provided by rural, industrial, services and trade associations; and
- unemployment severance fund at the rate of 8 per cent over the monthly salary.

The employee, in turn, is liable for the following employment-related taxes (withholding by the employer):

- income tax at progressive rates over the monthly salary higher than 1,903.98 reais, varying from 7.5 per cent to 27.5 per cent (applicable for withholding income tax and annual income tax, the first being a prepayment of the second); and
- 8 to 11 per cent social security contributions over the monthly salary according to the following progressive taxable basis:

Taxable basis – remuneration	Rate (percentage)
Up to 1,659.38 reais	8
1,659.39 to 2,765.66 reais	9
2,765.67 to 5,531.31 reais (maximum of taxable basis for social security contributions)	11

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Employee inventions are the employer's property if they are developed due to an employment contract related to research or invention activities, or if these activities result from the nature of the services rendered. The compensation for the invention developed is limited to the employee's salary, unless other compensation is agreed by the parties.

32 Is there any legislation protecting trade secrets and other confidential business information?

In general, the protection of trade secrets and other confidential business information is provided for in the Federal Constitution, which ensures the free initiative and exercise of economic activity, and Law 9,279/1996, which fights unfair competition, states that the following conduct committed by an employee, partner or administrator of the company impaired is a crime:

- publishing, by any means, false statements to the detriment of competition, in order to take advantage;
- providing or disclosing false information about a competitor, in order to take advantage;
- using fraudulent means to divert, to its own advantage or of a third party, the clients of others;
- using an advertising slogan or a sign of a third party, or imitating them so as to cause confusion between products or establishments;
- unduly using the trade name, establishment title, or emblem of third parties, or selling, displaying or offering for sale or having in stock a product with such references;
- replacing with its own name or company name products of third parties, of their name or business name, without their consent;
- using a reward or distinction not obtained by it as a means of propaganda;
- selling or displaying, or offering for sale, in the container or packaging of third parties, an adulterated or counterfeit product, or using it to negotiate with a product of the same type, even if not adulterated or counterfeit, if the fact does not constitute a more serious crime;
- giving or promising money or another product to a competitor's employee, so that such employee, violating his or her employment duty, is providing an advantage;
- receiving money or another product, or accepting the promise of pay or reward, to, in violating of the employment's duty, provide advantage to the employer's competitor;
- disclosing, exploiting or using, without authorisation, confidential knowledge, information or data that may be used in the industry, trade or service provision, excluding those that are publicly known or that are obvious for an expert in the matter, to which it had access upon a contractual or employment relationship, even after the termination of the agreement;
- disclosing, exploiting or using, without authorisation, trade knowledge or information obtained by illegal means or to which it had access by means of fraud;
- selling, displaying or offering a product for sale, declaring it to be the subject of a deposited or granted patent, or registered industrial design, when it is not, or mentioning, in advertising or commercial paper, as filed or patented, or registered, without it so being; and
- disclosing, exploiting or using, without authorisation, test results or other data not disclosed, the preparation of which involved considerable effort and that have been presented to government entities as a condition for approving the marketing of products.

Thus, the legislation guarantees the confidentiality and secrecy of all documents, memoranda, drawings, diagrams, lists, computer programs and other items that may contain business secrets.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Although there is no specific law related to the protection of employee privacy and personal data, the Federal Constitution ensures the inviolability of intimacy, private life, honour and image of all citizens. In this sense, employers shall keep employees' personal data confidential, and they may be disclosed only upon a judicial decision.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

The Consolidation of Labour Laws establishes that no modification on the company's structure shall affect the employee's rights. Therefore, employment contracts remain effective in the case of sale or acquisition of shares or quotas. The same principle is extended where the sale of assets represents a business transfer.

Outsourcing is considered licit by the labour courts only with regard to activities not related to the core business of the company. In this case, the employment contracts are terminated with the company and the outsourcing company is free to hire (or not to hire) the dismissed employees.

Update and trends

The worsening political and economic crisis of recent years culminated in the opening of an impeachment process against President Dilma Rousseff, who was definitively removed from the Presidential Office in the second half of 2016. This brought uncertainties about the country's ability to resume economic growth and circumvent the recession process triggered from 2012 to 2013. In this context, the current interim government has been struggling to pass economic and social agendas that enable the resumption of the country's growth. In this sense, there are bills of law under way in the National Congress aimed at reforming the labour and social security laws to boost the country's economic activity and limit public spending with pensions and social benefits.

In the labour scenario, the government's bet is to increase the power of negotiation between employees and employers, and between employees' unions and employers for more flexible working conditions, such as daily working hours (which could be extended from the current eight hours to up to 12 hours per day); division of vacation time into more periods (from two to three annual periods) and payment proportionate to the days enjoyed; individual negotiation of profit participation agreements; greater flexibility to define meal and rest breaks (30 minutes minimum instead of one hour as provided by law); individualised negotiation and greater flexibility of the bank of hours for overtime payment; establishment of compensation for productivity in collective work agreements, among other measures.

The National Congress has just approved a bill to state that any activity of an employer, including its core businesses, can be outsourced. This new law, however, has not been sanctioned by the President yet and there is another bill under discussion by the National Congress also comprising rules regarding outsourcing, which may cause conflicts with the recently approved bill. This situation causes uncertainty among employers and may trigger litigations as workers and unions allege that labour rights are being indirectly reduced with the new outsourcing rules.

In the social security area, the points of reform brought to vote in the National Congress aim at stanching the system's loss-making process and include measures that aim at hindering and delaying the payment of social benefits to workers such as establishing a unified minimum retirement age for men and women (65 years) and increasing the contribution time (from 15 to 25 years) to grant the retirement; extinguishing special retirement schemes for teachers and police officers; reducing the amounts paid by way of death pensions; and increasing the contribution rates of federal civil servants, among other measures.

The federal government's expectation is to approve the bills for labour and social security reform in the National Congress by the end of 2017 to prevent the agenda from being blocked in 2018 when there will be elections for senior positions in the Executive and Legislative branches.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Employees may be dismissed with or without cause. The first case does not trigger the obligation to pay the fine over the unemployment severance fund and no prior notice is required (see question 25). The causes are expressly defined by the Consolidation of Labour Laws as:

- acts of dishonesty;
- intemperance of conduct (related to inappropriate sexual behaviour) or misconduct;
- habitual trading without the employer's permission (during working hours) or when it is considered an act of competition with the employer or it is harmful to the business;
- final criminal condemnation (if the execution of the penalty is not suspended);
- negligent performance on duty;
- drunkenness in the workplace;
- breach of the company's secrets;
- lack of discipline or insubordination;
- job abandonment;
- physical violence or acts against someone's honour or name during work, except in the case of self-defence or defence of third parties; and
- habitual gambling in the workplace.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Yes, if the termination is without cause. The notice period must be proportional to the length of the employment contract, provided that the minimum period for the notice to be given prior to the effective date of termination is 30 days plus three days for each year of service rendered to the same employer, limited to a maximum of 90 days. The employer may provide pay in lieu of notice.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Dismissal without notice is acceptable, but the employer shall provide payment in lieu of notice (see questions 25, 26, 35 and 36).

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes, in cases of dismissal without cause the employee is entitled to receive an indemnification corresponding to 40 per cent of the balance of deposits made by the employer on the employee's unemployment severance fund account (an additional 10 per cent fine is paid by the employer to the government as tax). This indemnification is not due in the case of dismissal with cause.

Upon any kind of termination, the employee is entitled to receive the balance of the monthly salary and accrued vacation.

39 Are there any procedural requirements for dismissing an employee?

Termination payments must be made within 10 days after the termination if the employer fails to give notice. If notice is given, such payment must be made on the first day after the last day of work. After the termination, the employer must submit an official termination form detailing the severance to be reviewed by the labour union. Such review does not apply in the case of employment contracts that last up to one year.

40 In what circumstances are employees protected from dismissal?

Employees are protected from dismissal without cause during the following periods:

- 12 months after sick leave due to work-related accidents;
- pregnancy up to five months after the birth;
- from the candidature up to one year after the mandate for members of internal committees for accident prevention, union officers and members of conciliation commissions representing employees; and
- other cases established by collective bargaining agreements, which usually prevent dismissals in the case of employees that are about to retire or have just returned from vacation.

41 Are there special rules for mass terminations or collective dismissals?

Although there is no specific legislation in this regard, there are precedents under labour lawsuits filed by labour unions indicating that it is recommendable that employers consider negotiating the terms of a mass termination or collective dismissal with the relevant trade union; otherwise, they may be considered null by the labour courts.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class or collective actions in defence of workers are allowed by the legislation and the employees are generally represented by labour unions or by the Labour Prosecution Office.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

No, employees are free to retire whenever they have complied with the requirements established by the social security legislation. The earning of retirement pensions does not prevent the retired from continuing to work as employees. Law 13,183/2015 states that, up to 30 December 2018, male employees are entitled to retire when the total sum of their years of work and age corresponds to 95 (eg, 35 years of work plus 60 years of age). For female employees, the sum required is 85 (eg, 30 years of work plus 55 years of age).

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

According to the case law, private arbitration is not valid to settle individual employment disputes. The Consolidation of Labour Laws, however, provides the possibility of the establishment of conciliation commissions by trade unions and companies to settle private employment disputes. For the resolution of disputes arising from collective bargaining between employees' and employers' unions, the Federal Constitution allows them to use arbitration.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

Owing to the principle that the employee's rights cannot be waived, waivers may be always challenged before the labour courts.

46 What are the limitation periods for bringing employment claims?

The statute of limitations for labour claims is two years from the termination of the employment relationship, provided that the labour claims comprise rights related to the past five years counted from the filing date.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The Labour Code is the basic source of law that regulates employment relations in Bulgaria. In addition, there are various legislative and sub-legislative acts focused on specific topics. The Health and Safety at Work Act contains detailed requirements with respect to health and safety conditions at work. The Settlement of Collective Labour Disputes Act encompasses the provisions related to collective employment disputes. The Labour Migration and Labour Mobility Act lays down the rules for access of foreign workers to the local labour market. The Ordinance on the structure and organisation of the employment salary, the Ordinance for the working time, breaks and leave, the Ordinance on business travel inside the country, the Ordinance on business travel and specialisation abroad, and the Ordinance on the terms and conditions of posting and sending of workers for providing of services are also worth mentioning.

Furthermore, the legally binding collective agreements are an integral part of Bulgarian labour legislation. Such agreements regulate labour and social security relations with employees in certain industry sectors.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Bulgarian Labour Code prohibits direct or indirect discrimination on the grounds of ethnicity, origin, gender, sexual orientation, race, skin colour, age, political and religious convictions, affiliation to trade union and other public organisations and movements, family and property status, existence of mental or physical disabilities, as well as differences in the contract term and the duration of working time.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The General Labour Inspectorate Executive Agency exercises overall control over compliance with labour legislation. The aim of the measures for control and prevention is not only to protect the rights of employees, but also to ensure free and fair competition between employers. The agency controls the compliance of employment relationships with legal requirements.

Judicial control for the enforcement of employment legislation is executed by the general civil courts.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

There are several main categories of employees' representatives, such as trade unions representatives, representatives of the general meeting of the employees, information and consultation representatives, health and safety representatives, etc.

Employees are entitled on a voluntary basis to establish, join or leave trade union organisations.

Further, employees may form a general meeting or (in cases when this is not practically achievable) nominate proxies of the employees. The general meeting of employees may elect representatives who shall represent its common interests on issues of industrial and social security relations before the employer or before the state bodies.

5 What are their powers?

Generally, workers' representatives have the right to be informed by their employer and to participate in consultation procedures with the employer and to express their opinion on the measures envisaged by the competent authorities, which shall be taken into account during decision-making.

In addition, trade union organisations typically represent and protect employees' interests before state bodies and employers as regards the issues of industrial and social security relations and living standards through collective bargaining, participation in tripartite cooperation, organisation of strikes and other actions within the extent of the law. Trade union organisations shall be entitled, upon the request of the workers, to represent them as authorised representatives before the court.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Bulgarian law does not provide for any explicit regulations regarding background checks by the employer. Generally, background checks are acceptable as far as the employer does not violate employees' rights to privacy and personal freedom (ie, only publicly available information or information obtained with the consent of the employee).

Further, the applicants are required to present to the employer a number of documents before concluding the employment agreement. They include medical examination, passport data, documents evidencing qualification, capacity, length or work (the last are only required for specific jobs). For particular jobs, the employee may request a clear criminal record or financial standing, as well as other documents if required by law.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Each employee shall present to the employer a medical examination document at his or her initial 'entrance into office' and after suspension of work under employment agreement for more than three months. The employer may refuse to hire applicants who do not submit the medical examination document.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no explicit restrictions or prohibitions against drug and alcohol testing, provided the employer obtains the applicant's prior consent. An employer may require such tests if it is justified by the scope of work to be rendered by the applicant. In certain occupations, alcohol and drug testing is mandatory (eg, pilots, miners, professional drivers).

Further, the Labour Code prescribes that the employee shall report for work in a condition enabling him or her to fulfil the tasks assigned

and not to consume alcohol or another intoxicating substance during working time. The employer may suspend from work an employee who reports for work in a state that prevents him or her from performing the respective labour duties, or consumes alcohol or other strong intoxicating substances during working time.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

There are several categories of employees, who the employer would be required to hire or keep at work on a proper position. The employer, together with the health authorities, is obliged to determine on an annual basis positions and places for work for pregnant women, breastfeeding mothers and women in advanced stages of in vitro treatment. Further, businesses with more than 50 employees are obliged to annually define positions for disabled employees, which shall be from 4 per cent to 10 per cent out of the total number of employees in the enterprise, depending on the industry sector. Businesses with more than 300 employees shall establish specific units for persons with permanently reduced working capacity.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The employment contract shall be in writing (as per the Labour Code).

The employment contract shall contain the following mandatory terms:

- place of work;
- position;
- date of its conclusion and starting date of its performance;
- duration of the employment contract;
- amount of annual leave;
- notice period in case of termination;
- basic and supplementary labour remunerations, payment period; and
- duration of the working day or week.

11 To what extent are fixed-term employment contracts permissible?

An employment contract shall, in principle, be entered into for an indefinite period. A fixed-term contract may be concluded in the following cases:

- contracts with new employees in enterprises, which are bankrupt in liquidation, as well as contracts for temporary, seasonal or short-term activities, wherein the contract may not exceed three years, unless otherwise stated by law. As an exception, a fixed-term employment contract may be concluded for work that is of no temporary, seasonal or short-term nature for a period of not less than one year. The employee may also conclude such an employment contract for a shorter period upon his or her voluntary written request. In such cases, the fixed-term employment contract may be re-concluded with the same employee for the same type of work only once for a period of at least one year;
- replacement of employee, who is absent from work;
- for work in a position which is to be occupied through a competitive examination – for the time until the position is occupied on the basis of a competitive examination; and
- mandate positions.

12 What is the maximum probationary period permitted by law?

The maximum probationary period is six months in favour of either the employer or the employee, or both of them. The probationary period shall not include the time during which the employee has been on statutory leave, or has not performed the work for other valid reasons.

An employment contract for a probationary period may be concluded with the same employee for the same type of work at the same enterprise only once.

13 What are the primary factors that distinguish an independent contractor from an employee?

Employees shall perform certain typse of daily work as defined in their job description. The employment contract is regulated by the Labour Code and it shall contain minimum mandatory provisions. The employee shall observe the rules for work time, work place, breaks, annual paid leave, labour discipline, termination rules, etc. Typically, employment contracts are concluded for an unlimited term, apart from exceptional cases. The employee may terminate the employment contract at any time with written notice. The employee enjoys general protection under the Labour Code (ie, the employer may terminate the employment agreement only based on exhaustively listed grounds in the Labour Code; mandatory compensations exist in various cases).

The independent contractor shall provide services and individual tasks for a specific matter. The contract is regulated by the provisions of the Contacts and Obligations Act. The parties are free to negotiate the content of the contract. The independent contractor bears the risk and is free to determine how and when the work will be performed, as long as he or she fulfils the assignment. The parties are free to negotiate the options for termination of the contract. No mandatory compensations apply in case of termination. The independent contractors are not treated as employees in the sense of employment law and they are not subject to special protection under the Labour Code.

14 Is there any legislation governing temporary staffing through recruitment agencies?

An employee may be hired by a recruitment agency, the 'temporary work agency', and sent to a client undertaking only to execute a specific work or temporarily replace an employee.

The employment relation arises between the employee and the temporary work agency. Additionally, the agency and the client shall conclude a general agreement for the leased personnel. Agency workers enjoy the same rights and benefits as permanent employees.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Short-term visas, which enable their holders to reside (but not to work) in the territory of Bulgaria for up to 180 days, are not subject to any numerical limitations. Visas are available for employees who are subject to intra-company transfers.

Employees who are citizens of an EU or EEA member state or Switzerland, posted to Bulgaria, do not require a work permit for employment in Bulgaria. Employees who are third-state citizens and who have been posted to Bulgaria (except for numerous exemptions) do need a valid work permit.

16 Are spouses of authorised workers entitled to work?

Family members of citizens of EU or EEA member states or Switzerland, who are themselves third-country citizens, have access to the labour market if they possess a valid permit for temporary residence for a family member or a long-stay visa, unless an international treaty binding Bulgaria provides otherwise. Family members of third-country citizens require a valid working permit to be employed in Bulgaria.

The spouses of employees transferred on the grounds of an intra-company transfer may work upon issuance of a long-term residence permit with a decision of the Employment Agency Director.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

There are no work restrictions for citizens of the EU/EEA member states or Switzerland. Generally, non-EU/EEA or non-Swiss citizens have the right to work in Bulgaria only after a work permit or blue card is issued. Those provisions do not apply, among others, to managerial personnel.

Work permits or blue cards should be requested by the employer from the employment agency.

Work permits shall be issued for a maximum duration of one year. If the terms and conditions for its issuance are still valid, the work permit may be renewed for an additional one-year term.

If the employer employs a foreign national who does not have the right to work, the following sanctions shall apply to the employer: from approximately €1,020 to approximately €10,215, and to the foreign worker: from approximately €255 to around €2,555. The range of the fines is doubled for a repeated violation.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test shall be performed before granting certain work permits and long-term visas. A labour market test is not required for particular jobs (currently only positions in the IT sector) that are included in a special, annually updated, list.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The standard working time is eight hours per day over a 40-hour (five-day) week. Further, there are several working time models:

- extended working time up to 48 hours per week, but not more than 60 working days annually, 20 of which should not be successive;
- reduced working time for minors or employees working in specific conditions and under unavoidable health exposures;
- open-ended working time for some job positions;
- shift work;
- overtime (generally forbidden and acceptable only in exceptional cases);
- part-time work; and
- flexible working.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime work is generally prohibited and could be permitted only in exceptional cases:

- performance of work related to national defence;
- the prevention, management and mitigation of the effects of disasters;
- performance of urgent, publicly necessary work to restore water and electricity supply, heating, sewerage, transport and communication links, provision of medical care;
- performance of emergency repair on working premises, of machinery or of other equipment; or
- performance of intensive seasonal work.

Performance of overtime shall not be permitted for:

- employees who have not attained the age of 18;
- pregnant women or women in an advanced stage of in vitro treatment;
- mothers of children who have not attained six years of age, mothers taking care of children with disabilities irrespective of the age thereof, except with their written consent;
- occupational-rehabilited employees, except with their consent; or
- employees pursuing studies without interruption of employment, except with their consent.

Overtime work cannot be more than three hours in two consecutive working days and cannot be more than six hours in one working week, respectively 150 working hours per year.

The overtime shall be compensated with a higher remuneration of 75 per cent for work on weekends and 100 per cent for work on public holidays.

21 Can employees contractually waive the right to overtime pay?

Employees may not waive their right to overtime pay.

22 Is there any legislation establishing the right to annual vacation and holidays?

Employees are entitled to a minimum 20 working days' paid vacation per year on the basis of a five-day working week. In the case of first employment, the employees are entitled to vacation after eight months of service. Compensation in cash for non-used paid annual leave is not allowed, except upon termination of the employment.

Employees working under specific conditions or risks for life and health and at open-ended working time are entitled to five days' additional paid vacation per year. Employees who have not reached 18 and employees with a permanently reduced working capacity of 50 per cent and more than 50 per cent are entitled to paid annual leave of not less than 26 working days.

Paid annual leave does not depend on the accumulation of length of service. Longer annual leave may be agreed in individual employment agreements and collective bargaining agreements.

Vacation is in addition to public holidays, which are also paid.

23 Is there any legislation establishing the right to sick leave or sick pay?

According to Bulgarian law, the employees are entitled to sick leave and sick pay, if an illness or accident results in the inability to work. Employees shall have the right to cash benefits instead of remuneration for the duration of the sick leave, provided that they have at least six months of insured length of service. The requirement for six months of insured length of service shall not apply to those under the age of 18.

In case of illness (inability to work), the employee is obliged to submit to the employer a medical certificate within two days as of its issuance. Sick leave of more than 14 days without interruption may be allowed only by the medical consulting commission. Medical consulting commissions allow continuous sick leave for temporary disability up to 180 calendar days, but not for more than 30 days at once. After the expiry of 180 days continuous leave for temporary disability, additional sick leave may be allowed only by the Labour Expert Medical Commission, which decides on a case-by-case basis.

Sick pay is determined by the duration of the illness. The first three days of sick leave shall be paid by the employer at 70 per cent of the average daily remuneration. The rest shall be paid by social security at 80 per cent of the average daily remuneration, or 90 per cent in case of a workplace accident or occupational sickness.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

In addition to holidays and sick leave, employees are entitled to maternity or parental leave, which commences 45 days prior to expected childbirth and ends when the child reaches two years of age. For 45 days prior to childbirth and the first year after childbirth the employee shall receive from social security 90 per cent of the social secured income. After the first year until the end of the maternity leave, the employee shall receive from social security a salary equivalent to the national minimum wage.

Furthermore, employees are entitled to educational leave (25 working days for each educational year), leave for family responsibilities (funerals of family members, wedding, blood donation) and public responsibilities (summons by a public authority, witness in court case, etc), which are paid by the employer.

Carer's leave shall be paid by social security and limited to the following reasons:

- taking care of a close family member living in the same household as the employee or taking care of a child under two years of age when the person normally caring for the child is unable to do so due to death, illness, etc (up to 10 calendar days per year for family member over the age of 18 and up to 60 calendar days per year for family member under the age of 18); or
- unpaid leave of up to six months for taking care of a child under the age of eight years. This leave may be used in parts.

Each employee is entitled to unpaid annual leave, irrespective of whether the paid annual leave has been already used or not.

25 What employee benefits are prescribed by law?

The employer is obliged to make contributions to the social security system, which comprises statutory pension (retirement pension, disability pension), health social security (healthcare and nursing care, pregnancy and maternity, sickness and disability), unemployment and occupational accidents insurance. Contributions to the social security system are borne in shares by the employer (60 per cent) and the employee (40 per cent).

Furthermore, statutory benefits on the part of the employee include paid holiday leave (see question 22) and severance pay (see question 38).

The employer may also make bonus payments, but he or she is not statutory obliged to do so.

26 Are there any special rules relating to part-time or fixed-term employees?

The law does not provide for sufficient regulation of part-time work, especially with regard to the duration of breaks. The Labour Code, however, provides an explicit principle of non-discrimination: part-time employees cannot be discriminated solely due to the part-time duration of the working time thereof compared to regular employees who perform the same or similar work at the enterprise. The part-time employees shall have the same rights and obligations as the regular employees, except for particular cases where the law makes the enjoyment of certain rights contingent on the duration of the work time of the part-time employees, the length of employment service, the qualifications possessed (ie, the annual leave of part-time employees shall be determined proportionally to the work time). As to conclusion, amendment and termination of the employment contract, the same rules apply as for full-time contracts.

For fixed-term employment, see question 11.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Non-compete clauses are in general prohibited by Bulgarian law and therefore not valid and enforceable. However, many employers implement non-compete clauses in the employment contracts for psychological effect. In some cases, the employer enforces the non-compete clause by offering to pay compensation (post-termination covenant) to the employee during the restrictive period.

In several cases, the Bulgarian courts have accepted particular non-compete clauses in employment agreements as valid and enforceable, but only in favour of the employee, when post-termination covenants have been agreed between the employer and the employee and the employee claimed their payment, except in the case of waiver: prior to or upon termination of the employment, the employer may waive the covenant not to compete in writing.

Post-termination covenants not to solicit or not to deal with customers are essentially subject to the same rules.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

See question 27.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The general rules in the Obligations and Contracts Act and the specific rules in the Labour Code provide for liability for acts or conduct of third persons (including employees).

According to the Obligations and Contracts Act, a person who has commissioned another to perform certain work (including an employer) shall be liable for the damage caused by the latter in, or in connection with, the performance of such work. The compensation shall include material and immaterial damages. The person liable for deliberate damage caused by third parties shall have a regress claim against the latter.

According to the Labour Code, the employer shall incur financial liability for damages resulting from employment injury or occupational disease, which have caused temporary disability, permanently reduced working capacity of 50 per cent or more or death of an employee, regardless of whether an employee was at fault. The employer shall be liable for compensation for the difference between the damage caused (including the lost profit) and the social security benefit or pension or both. However, the employer shall not be liable if the injured employee has acted wilfully. In case of gross negligence of the employee, the liability of the employer shall be reduced. The employer shall have a regress claim against the employee who caused the damage for the compensation paid to the injured employee.

Upon unlawful non-admission to work of an employee, the employer and the responsible employees shall be jointly liable for payment to the employee of the gross employment remuneration from the day when the said employee reported to begin work until the actual admission. The same applies when an employee has been unlawfully suspended from work by the employer or the immediate supervisor – such employee shall be entitled to compensation from the employer or the responsible employee (jointly liable) amounting to the gross employment remuneration for the time of suspension.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employees pay income tax in the amount of 10 per cent, which is withheld by the employer and paid to the tax authorities. The employer must also withhold the employee's share of social security contributions. Mandatory contributions to the social security funds are borne by both the employer and employee (see question 25).

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Bulgarian Patent Act contains provisions regarding inventions made by the employee in the course of the performance of his or her work obligations. Such inventions are called 'business inventions', except where the employment contract provides otherwise. According to the law, the inventor shall notify his or her employer in writing of the invention within three months of making it and shall be entitled to be identified and to a fair remuneration.

32 Is there any legislation protecting trade secrets and other confidential business information?

Trade secrets and business information are generally regulated in the Bulgarian Commercial Act and Competition Protection Act and do not specifically relate to the employment relationship. The Labour Code obliges the employee to be loyal to the employer and not to abuse the employer's trust, respectively not to disclose any confidential data for the employer, as well as to protect the reputation of the enterprise.

Violating the confidentiality obligation shall constitute a breach of work discipline and shall represent legal grounds for employment termination. Besides the employment termination, the employee could be financially liable for damages caused to the employer to the amount set by the general civil rules.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The basic principles and the admissibility of data use, as stipulated in the Bulgarian Data Protection Act, must be observed in an employment relationship. The employer may collect, process or use personal data for the purposes of the employment relationship after having registered as a personal data administrator with the Bulgarian Data Protection Commission. Third parties receiving personal data from the employer, particularly affiliated companies and payrolls, may process or use such data only for the purposes for which they were transmitted and in accordance with the law.

Transmission of personal data to countries other than member states of the EU and the EEA and other countries with adequate level of data protection is subject to further requirements. In the case of transmission of personal data, the employees shall first be informed about the persons to whom the data are transmitted, the volume and

the kind of the personal data to be transmitted, as well as the purpose of the transmission.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

According to the Labour Code, in case of business transfer (share/asset deal, transformation of enterprise) all existing employment contracts shall be automatically transferred to the new proprietor without a change of the rights and obligations arising from those contracts. The employer shall meet the following information and consultation requirements:

Before the transfer, the 'old' and the 'new' employer have to notify the trade union members and the employees' representative of the date of the transfer, the reasons for the transfer, the possible legal, economic and social implications of the transfer for the employees and any measures envisaged in relation to the employees. The notification shall be performed at least two months before the transfer. The transfer does not itself constitute ground for termination of the employment relationship; terminations for other reasons, however, shall remain unaffected.

No explicit provisions are provided for in the Labour Code with regard to keeping the employment agreements in case of outsourcing. However, in particular cases of outsourcing, the existing employment agreements can be transferred to the new employer, especially when the outsourcing of the activity is accompanied by the transfer of material assets (in these cases, the existing employment relations will be transferred to the new employer because they have been established for the work related to those material assets).

In view of the above, the question of whether to keep the employment agreements when outsourcing shall be decided on a case-by-case basis.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

The employment contract may be terminated by the employer only on grounds provided for in the Labour Code (ie, by mutual consent; against compensation in a minimum amount of four gross monthly salaries; due to business reasons – partial closure of the enterprise; reduction of work volume; in case the employee lacks the professional qualification required for the work; statutory retirement or disciplinary liability).

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

In the case of regular termination (see question 35), written notice to terminate must be given prior to dismissal. For unlimited employment contracts, the statutory minimum notice period is 30 days, the statutory maximum – three months. For limited employment contracts, the statutory minimum notice period is three months, but the notice period may not be longer than the unexpired term of the contract. Pay in lieu of notice shall be possible, in which case the compensation shall amount to the remuneration due for the non-kept notice period.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Dismissal without notice is possible in the event of a serious breach of duty (persistent breach of the obligation to work, non-compliance with the employer's order) or for reasons related to the individual (eg, deprivation of the right to exercise the job based on a court sentence or an administrative act). Under certain circumstances, employees may challenge a dismissal before the labour courts.

If an employee gives rise to a cause of dismissal, the employer shall perform a special disciplinary procedure.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

A statutory right to severance exists only in particular cases. Generally, the employees may claim, depending on the respective termination ground, the following severance payments:

- non-kept notice period;
- unused annual leave. The amount of this compensation depends on the number of days of unused annual leave;
- unemployment (only in case of termination due to business reasons): the unemployment benefit amounts to one gross monthly salary or to the difference between the employee's salary and the lower salary with the next job;
- retirement (age pension) upon employment termination (irrespective of the grounds for the termination) – the severance payment shall amount to two gross monthly salaries. If the employee has worked for the same employer for the past 10 years, the compensation shall amount to six gross monthly salaries; or
- employment termination by reason of illness: the employee shall be entitled to compensation amounting to two gross monthly salaries, if the employee has a length of employment service of at least five years and has not received compensation on the same grounds during the past five years of work.

39 Are there any procedural requirements for dismissing an employee?

In case of termination of employment due to business reasons or the employee's lack of professional qualification, required for the work, certain groups of employees are granted protection against a dismissal, such as: mothers of children under the age of three and pregnant women; an occupational-rehabilited employee; employees suffering from certain diseases; employees taking their leave; elected workers' representatives. The employment contracts in these cases may only be terminated with the prior approval of the Labour Inspectorate or the Medical Labour Expert Commission or both. Otherwise, the employer may not terminate the employment contract.

40 In what circumstances are employees protected from dismissal?

Some groups of employees may be dismissed only after prior approval by the authorities:

The dismissal of female employees during statutory pregnancy leave, mothers of children under the age of three, employees on statutory leave (annual leave, illness, unpaid leave, etc) is possible only after the prior consent of the Labour Inspectorate. The dismissal of disabled employees or employees suffering from certain diseases is possible only after the prior statement of the Medical Labour Expert Commission and the prior approval of the Labour Inspectorate. The termination of employment of works council members and employees responsible for the work safety conditions also requires the prior consent of the Labour Inspectorate. Trade union members may be dismissed during their membership only after the prior approval of the management of the respective trade union.

41 Are there special rules for mass terminations or collective dismissals?

Mass terminations are terminations by the employer, for reasons not related to the employees themselves, when the number of employment agreements to be terminated within 30 days are:

- at least 10 in an enterprise where usually more than 20 and less than 100 employees are engaged; or
- at least 10 per cent of the employees in an enterprise where usually more than 100 and less than 300 employees are engaged.

Before implementing a collective dismissal, the employer is obliged to notify in writing the Bulgarian Employment Agency and the employee's staff representatives about the mass termination, at least 30 days before the termination takes place.

Update and trends

As of 30 December 2016, the Bulgarian legislator gave force to the Posting of Workers Directive 2014/67/EU through amendments to the Bulgarian Labour Code. The changes, which relate to the basic employment and working conditions for posted and temporary agency workers, can be summarised as follows:

- improvement of the process for implementing and enforcing the stronger protections for posted workers and preventing their abuse;
- refinement of the provisions of the Labour Code regarding the provision of services by posted workers;
- separation of the legal provisions on posting workers and sending workers by a temporary agency, in order to bring clarity and legal certainty to the implementation of both procedures;
- establishment of the procedures for posting workers and sending workers by a temporary agency from Bulgaria to other EU member states, EEA countries and the Swiss Confederation, as well as posting workers and sending workers by a cross-border temporary agency from these countries to Bulgaria;
- requirement for the parties to employment agreements for posting or sending workers to satisfy the minimum job terms and employment conditions which are established for workers exercising the same or identical job in the host country;
- creation of provisions allowing workers, posted or sent to Bulgaria, to bring an action against their employer in Bulgaria in cases where the minimal work conditions were not observed;
- administrative coordination between the General Labour Inspectorate Agency and the competent authorities of other countries; and
- establishment of the General Labour Inspectorate Agency as the body responsible for the supervision and collection of fines imposed for violations of legislation related to the posting of workers and sending of workers by a temporary agency.

It should be noted that the new national posting provisions do not determine which state (the home or the host one) will tax labour income. Taxation of posted workers is still subject to bilateral tax agreements, which stipulate the general principle that income tax is paid in the country where the income is earned when the worker works for more than 183 days within a period of 12 months in the host state.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Bulgarian Law does not permit class or collective actions to be brought by employees. Employees may only assert labour and employment claims on an individual basis.

Collective labour disputes may be settled through direct negotiations between the employees and the employers or between their representatives, pursuant to a procedure freely determined by them.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

A mandatory retirement age is a legal ground for the employer to terminate the employment. The employer may dismiss the employee who has already reached the mandatory retirement age by giving him or her prior written notice and a severance (see question 38).

Currently, the mandatory retirement age for female employees is 61 years and for male employees it is 64 years.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Pursuant to the Bulgarian Labour Code and the Civil Procedure Code, arbitration clauses with respect to employment disputes are not valid.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

Bulgarian labour law does not provide for explicit regulation with respect to an employee's waiver of employment claims. However, according to a basic principle in Bulgarian law, a prior waiver of statutory rights under individual employment agreements or collective bargaining agreements, respectively, regarding claims arising from statutory legal regulations, is not permissible. With respect to non-mandatory claims (eg, voluntary benefits provided by the employer), the employee may validly waive future claims.

46 What are the limitation periods for bringing employment claims?

As a general rule, claims in connection with employment (eg, salary claims, severance claims, etc) are subject to a three-year statute of limitation starting with the date when the respective right has arisen (eg, with the maturity date in case of monetary claims).

However, Bulgarian law provides for several exemptions to the general three-year limitation period. Holiday entitlement becomes time-barred within two years of the end of the respective leave year. For claims in connection with an unfair termination by the employer, including disciplinary termination and reinstatement to the previous work, a limitation period of two months applies as of the date of termination, respectively as of the date of delivery of the employer's order for termination. Claims for compensation for financial damages caused by the employees must be filed within one month as of the date the right became exercisable.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Employment relationships are ruled by the Labour Code. Its text was established by Decree with Force of Law (DFL) No. 1 (Official Gazette, January 2003). The Labour Code regulates the main aspects of employment, including individual and collective matters. It also considers the labour procedures and labour court regulations. Other relevant labour laws to be considered are:

- Law No. 16,744 regarding labour accidents and professional illnesses;
- Decree Law (DL) No. 3,500 and its modifications, which regulate the private pension system; and
- DFL No. 2, which establishes the Labour Directorate.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Article 19(2) of the Constitution establishes that all people are equal before the law. It expressly insists on this principle of equality between men and women.

The Labour Code (article 2) states that the working relationship must always respect the dignity of persons, stating specifically that sexual harassment behaviour is not compatible with this stipulation. The Code also prohibits any distinction, exclusion or preference made based on race, colour, sex, age, marital status, unionising, religion, political opinion, nationality, national extraction or social origin that could have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof, shall not be deemed to be discrimination. Potential employers must not discriminate for economic reasons or because of the existence of debts, except for those employees empowered to represent the employer as managers, sub-managers, agents or other company representatives, or those in charge of collecting, administrating or taking care of funds or values of any nature.

The final paragraph of article 194 of the Labour Code prohibits any kind of discrimination on the grounds of pregnancy.

Article 7 of Law No. 19,779 prohibits the establishment of a condition regarding test results to detect the presence of human immunodeficiency virus (HIV) for the hiring of employees, the renewal of their contracts or promotion. It also prohibits requiring the completion of that test for such purposes.

Article 62-bis to the Labour Code was incorporated on 19 June 2009 and states that the employer must comply with the principle of equal remuneration for men and women who provide the same work, not considering arbitrary objective differences in wages that are based on the abilities, skills, suitability, responsibility or productivity.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Labour Directorate, a public entity under the Labour Ministry, is in charge of interpreting and enforcing employment statutes. Additionally, any individual may seek the enforcement of labour laws before the labour courts and, when they are due, seek the payment of wages, social security payments, severance payments, compensations, etc. Employers may file lawsuits before the labour courts against fines imposed on them by Labour Directorate officers.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

There are only two committees that are mandatory. One is a joint health and safety committee, which is required whenever there are more than 25 employees in a particular workplace. The second is a bipartite training committee, which is required whenever there are more than 15 employees in the company. Both committees are formed by three members elected by employees and three appointed by the company. There are no other mandatory workers' committees or works councils.

On the other hand, employees have the constitutional and statutory right to unionise and form labour unions. There are different types of labour unions recognised by the law, including company labour unions, intercompany labour unions, temporary workers labour unions and independent workers labour unions. Likewise, federations are formed when three or more unions come together, and confederations arise by the jointure of three or more federations or 20 or more labour unions.

5 What are their powers?

The joint health and safety committee is the technical body of participation between employers and current employees, whose main function is to identify and assess the risks of accidents and occupational diseases. It has to instruct on the proper use of personal protection equipment, ensure compliance of preventive hygiene and safety, investigate causes of accidents and occupational diseases in the company, decide inexcusable negligence and adopt measures of hygiene and safety for the prevention of occupational risks.

The bipartite training committee promotes the training of employees inside the company.

The unions, in general terms, represent the employees before the company. They also act on behalf of their mutual interests in collective bargaining and the fulfilment of the labour and social security laws of their associates.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

In general, the law does not consider restrictions or prohibitions against background checks. Information regarding applicants could be obtained from applicants without statutory restrictions. Notwithstanding, companies should avoid questions, tests or searches that could be considered discriminatory.

It is expressly prohibited to require certificates or declarations regarding an applicant's credit and financial background.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Pre-employment examinations are permitted under Chilean law, with the exception of HIV testing (Law No. 19,779, article 7), pregnancy testing (Labour Code, article 194) and genetic diagnosis (Law No. 20,120, article 4). Knowledge of the results of the testing by the employer would require express written consent by the candidate.

Articles 185 and 186 of the Labour Code state that a medical certification of aptitude must be required prior to working in dangerous or hazardous activities or industries.

Although there are no specific provisions in the law, an employer has the option of not hiring an applicant who does not submit to an examination when compatible health conditions are required for performing a particular job.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Drug, alcohol and tobacco tests are not prohibited under Chilean legislation. However, the consumption of illegal drugs cannot be the sole reason for refusing to hire an applicant. The decision to not hire someone must be based exclusively on the fact that the consumption affects his or her employment capacity or personal fitness. Also, a fundamental consideration would be whether such consumption increases the risk of accidents in certain work activities. In addition, past drug consumption cannot be taken as the basis to discriminate against a rehabilitated person. Any information obtained must be treated in a strictly confidential manner.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

There are no statutory requirements regarding this matter.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The employment contract must be in writing and executed within 15 days from the initiation of services. This term is reduced to five days when the contract duration is less than 30 days or if it is not specifically mentioned in the contract and it is exclusively determined by the specific work for which the employee was hired (typically in construction). Article 9 of the Labour Code states that if the labour contract is not put in writing within the aforementioned 15-day period, the terms and conditions thereof shall be those indicated by the employee. Additionally, the employer shall bear the burden of proof of the real conditions and terms agreed on.

The labour contract must contain the following clauses:

- place and date of contract;
- individualisation of the parties, indicating nationality, birth date and the date the worker begins employment;
- nature of services to be provided and place or city where they are to be rendered. The contract may indicate two or more specific services that may be alternate or complementary;
- amount, form and payment period of the remuneration agreed to;
- duration and distribution of work schedule, except if the company has a work system based on shifts, in which case internal regulations must be observed; and
- term of the contract.

The parties may include in the labour contract other clauses they may agree upon, for example, voluntary benefits.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term contracts could be made for a maximum duration of one year. In the case of managers or individuals that have obtained a professional or technical degree granted by a state-recognised institution, the maximum duration is two years. The continued performance of services after this period turns the contract into one of indefinite duration. A second extension of a fixed-term employment contract produces the same effect.

12 What is the maximum probationary period permitted by law?

In general, the Labour Code does not consider a probationary period. The only exception is a two-week term provided for domestic workers. During this time, the employment contract may terminate at the will of either party, with a notice of three days in advance, paying the employer the time served. Regarding other employees, Chilean companies usually use fixed-term agreements as a de facto probationary period (first employment contract term is set for a couple of months), and if the employee fits in the position the labour agreement is renewed, or the employee can sign an indefinite (permanent) contract, otherwise the employee is dismissed at the initial term's completion. This 'probationary period' could be extended at the discretion of the employer, for the maximum periods indicated in question 11.

13 What are the primary factors that distinguish an independent contractor from an employee?

This distinction is made based on the characteristics of the services rendered. The employer–employee relationship exists when it qualifies as subordination or dependency between the parties. On the other hand, when the services are performed without such subordination or dependency, the individual is considered an independent contractor.

14 Is there any legislation governing temporary staffing through recruitment agencies?

As a general rule under Chilean labour law, employees should be directly hired by the employer to which they render services. Therefore, the scheme of employees provided by an external company is exceptional and needs to be duly justified based exclusively on legal causes, and for limited periods of time. Temporary personnel may be supplied by specialised companies called transitory services companie (ESTs) when the user company is under one of the following circumstances, indicated in article 183-Ñ of the Labour Code:

- Suspension of the labour contract or suspension of the rendered services, as a consequence of sick leave, maternity leave or holidays.
- Extraordinary events, such as the organisation of congresses, conferences, fairs, expositions or others of similar nature.
- New and specific projects of the user company, such as the construction of new facilities, expansion of the facilities or expansion to new markets.
- Initial period of activities at new companies.
- Occasional or extraordinary increase, either regular or not, of the activity on a determined section or establishment of the user company.
- Urgent and specific works, which require an immediate execution, such as facility repairs of the user company.

These ESTs must appear enrolled in a special registry of the Labour Authority, and have to pay a monetary deposit as guarantee. There are certain cases where the provisory supply of personnel is not allowed: to fill managerial, sub-managerial, agent or representative job positions; and to replace regular employees during a strike.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There are no numerical limitations on short-term visas. The applicable statutes – DL No. 1,094 of 19 July 1975 and Supreme Decree No. 597 of 14 June 1984 – do not consider specific visas for transferred employees. However, having an employment contract with a Chilean company or with a foreign company to render services in Chile shall be sufficient to request a visa to render services in Chile.

16 Are spouses of authorised workers entitled to work?

Family members of a foreign employee in possession of a visa may be granted visas as dependants of the holder of the visa. Note that a visa granted to a dependant of a visa holder does not authorise the dependant to carry out remunerated activities in the country (article 49 of Supreme Decree No. 597 of 1984, which approves the Foreigners'

Regulations). Therefore, if dependants expect to carry out any remunerated activity in Chile, they must request, as may be pertinent, a temporary visa or an employment-contract visa as main holders.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

With regard to foreign workers and those foreigners who are seeking to study or develop their business in Chile, whether they are professionals, employees, students or investors, the Constitution establishes in article 19, No. 16 that every person has the right to free undertaking and free selection of work, with just compensation, prohibiting any discrimination that is not based on personal capacity. In fact, article 2 of the Labour Code establishes that acts of discrimination are contrary to the principles of the labour laws, indicating any distinctions, exclusions or preferences based on nationality.

Any foreign worker must apply for a visa or permit in order to carry out any activity in Chile. An employment-contract visa or a temporary visa authorise foreign workers to render services in Chile. The Department of Foreign Affairs of the Ministry of the Interior may authorise foreign workers, in their capacity as tourists, to provide services or develop some type of labour activity. The permits that allow foreign workers to perform a labour activity in Chile are the following: permission to work under a tourist visa, permission to work with a visa under proceeding, an employment-contract visa, a temporary visa and a permanent residence.

The granting of a visa is at the discretion of the immigration authorities: The Ministry of Foreign Affairs, through its consuls in different countries and the Ministry of the Interior, through the Foreigners' Department in the city of Santiago or in the provincial governments in the regions. Before granting a visa, they should consider how convenient or useful it would be for the country and also consider international reciprocity.

Article 19 of the Labour Code states that at least 85 per cent of employees who serve the same employer must be of Chilean nationality. Article 20 of the same Code establishes that to calculate the above proportion, the following rules must be applied:

- the total number of employees that an employer occupies within the national territory and not of the different branches separately will be considered;
- the specialist technician personnel will be excluded;
- foreigners whose spouse or children are Chilean will be considered as Chilean, or if he or she is a widower or widow of a Chilean spouse; and
- foreigners who have resided for over five years in the country, without taking into account accidental absences, will also be considered as Chilean.

The Immigration Authority or the Labour Inspectorate can apply fines to those companies that have foreign workers rendering services without an authorisation to do so.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test is not required at any instance.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Article 22 of the Labour Code provides a maximum permissible working schedule of 45 hours a week distributed in no more than six and no fewer than five days. Managers, employees with powers to manage, as well as those who work without direct supervision, at home or in another location than the workplace are excluded from the application of such limit. An employee cannot choose to be excluded from such restrictions or limitations.

In July 2008, Law No. 20,281 limited the exceptions to the maximum working hours regulations, stating three cases wherein it is assumed that employees are under the work hour system: employees whose entrance and exit from the company is formally registered; employees whose wages are withheld in cases of lateness; and employees who are functionally and directly controlled by a supervisor, regarding the way and opportunity their work is performed. There is no such control if employees report from time to time and work in different cities to the address of the employer.

Ordinary work per day cannot exceed 10 hours. Additionally, only two hours of overtime are allowed per day. The labour authority may authorise a special distribution of the work period, whenever the nature of the activity performed requires an ad hoc regime.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employees who are not excluded from the application of work hours' limitations, as expressed above, are entitled to overtime pay. It is calculated at a rate of one-and-a-half times the ordinary hourly salary.

21 Can employees contractually waive the right to overtime pay?

No, overtime pay cannot be waived by the agreement of the parties.

22 Is there any legislation establishing the right to annual vacation and holidays?

Article 67 of the Labour Code establishes an annual holiday of 15 working days. After the first 10 years of work for one or different employers, it is increased by one day for every three years in employment with the current employer.

Workers in the 11th and 12th regions and the province of Palena in the 10th region are entitled to 20 days, as increased by Law No. 20,058.

Public holidays are only those stipulated by law and, in general, employees cannot work on those days or on Sundays, with certain exceptions, such as:

- employees who work in retail and provide direct attention or service to the public;
- those who work on ports or in ships;
- those who provide services that require continuity due to the nature of the services, technical reasons or to avoid damage to the public interest or to the industry; and
- those who work to repair damage caused by force majeure if works cannot be delayed, etc.

23 Is there any legislation establishing the right to sick leave or sick pay?

Supreme Decree No. 3 of 1984 recognises the right of the employee to sick leave following a doctor's orders. During this absence, the employee will receive an amount equivalent to his or her salary paid by the respective health institution. Regarding absences due to work-related accidents, such leave of absence will be paid by a special entity in charge of overseeing these types of accidents. There is no annual limit on the number of days of sick leave that an employee can take, this will depend on the medical licence extended by the doctor.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The Labour Code sets out specific circumstances under which an employee may take a paid leave of absence, such as:

- marriage – five working days of paid leave;
- female employees over 40 years and male employees over 50 years – half working day once in a year of paid leave to have a mammography and prostate examination;
- during the period of time in which an employee is engaged in military service, the employer must reserve the employee's position, but without pay;
- death of a son, daughter or spouse – seven working days of paid leave;
- death of unborn child or a parent – three working days of paid leave;
- birth of a child – the male worker has paid leave of five days, which he may use as he requests after the baby is born or during the month following the birth; this leave is also granted in the case of adoption of a child; and
- female workers are entitled to a paid maternity leave starting six weeks prior to the birth of the child (prenatal maternity leave) and continuing 12 weeks thereafter (postnatal maternity leave).

There is an additional permit – introduced by Law No. 20,545 (effective 17 October 2011) – of 12 weeks (during which female employees will receive the same subsidy of the pre- and postnatal maternity leave) that starts immediately after the termination of the postnatal maternity leave. Female employees may choose between this new permit or working half of their ordinary working hours for 18 weeks (part-time). In the latter case, they are entitled to receive 50 per cent of their salary and all their variable remunerations (eg, commission). A female employee can also decide to transfer this new permit – with the same option she has chosen – to the father of the child, starting on the seventh week (Labour Code, article 197-bis).

25 What employee benefits are prescribed by law?

In general terms the Labour Code does not consider employee benefits. Benefits may be stipulated in the individual or collective employment contracts or otherwise granted by the employers' policies or handbooks.

26 Are there any special rules relating to part-time or fixed-term employees?

Fixed-term employee conditions are explained in question 11.

The Labour Code considers a part-time employee to be anyone who works no more than 30 hours per week. Part-time employees are entitled to the same rights and benefits as full-time employees, proportionally to the number of hours effectively worked. Although there are no special rules related to part-time employees, according to article 40-bis(C) of the Labour Code, they are allowed to agree different workday distributions.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

In Chile, there are neither labour rules nor civil rules expressly regulating non compete covenants. Nevertheless, they are regarded similarly to clauses forbidding the transfer of goods in civil law, where there is a conflict with property rights and some principles such as free movement of goods. Considering the above, non-compete clauses after the employment relationship has ended are accepted provided they are not absolute, that is, they do not impose a perpetual or long-lasting prohibition and they are justified by a lawful interest. Non-compete clauses made after termination of the employment contract are only accepted to a limited extent as they are deemed to conflict with the constitutional rights established in article 19, Nos. 16 and 21 of the Chilean Constitution; freedom to contract in labour matters and the right to develop any economic activity. In connection with the latter, the Constitution provides that unless it is contrary to morality, public security or health, or unless it is so demanded by public interest or the law so declares it, no activity may be forbidden.

The following requirements have been established for the non-competition clauses to be valid:

- they must be made in writing;
- there must be pecuniary indemnification or compensation for the employee;
- their duration must be reasonable;
- they must be agreed only for certain category of employees (not for all the personnel, just for those related to the competitive interests of the company); and
- they must be exclusively related to the company´s activities of a commercial or industrial interest.

Pursuant to the abovementioned, notwithstanding non-compete covenants are difficult to enforce under Chilean labour law, some companies include them in the employment contracts in order to ensure that the employee undertakes not to compete with his or her employer and develop activities within its business for personal gain or for the benefit of another organisation. Employers aim to reduce the risk posed by certain employees competing directly with them, or the risk of employees' being tempted by competitors to provide services to them. They are generally included in the employment agreements of employees holding managerial or strategic positions, or in the contracts of employees who deal with confidential information on behalf of the employer, or in the contracts of some senior employees. These clauses exist where, because of the circumstances and knowledge of the employee, there is a risk of serious harm to the employer in case of infringement. The non-compete covenant remains in force during the course of the labour relationship. During such period, the infringement of this employment obligation would constitute justifiable cause for termination of the employment agreement without severance payment. Upon the termination of the labour relationship, the non-compete clauses in labour contracts are included mainly to obtain a dissuasive effect and are very difficult to enforce. In order to prevent the ex-employees from competing once the labour agreement has finished, the labour courts have stated that it is required to have a non-compete covenant in the labour agreement release or in another document issued after the termination of the labour contract. This document must fulfil all the requirements previously mentioned.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

If the employer and the employee agree post-employment restrictive covenants subject to a pecuniary indemnification or compensation for the employee, the former employee will be entitled to request such payment from the employer. For the employer to enforce these covenants and, consequently, for the former employee to request the payment of this compensation, they must be stipulated in the relevant labour agreement release or a post-termination non-compete or non-solicitation agreement.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

In general, employers may be liable for the acts or conduct of their employees when executed while performing their services. The above is unless the employer is able to prove that the employee acted improperly and the employer had no means of preventing such conduct or the employer proves it has exercised due care.

Taxation of employees

30 What employment-related taxes are prescribed by law?

The law prescribes a second-category tax that applies to income from dependent employment. This is a progressive tax, with rates ranging from zero to 40 per cent. This second-category tax is calculated on the total salary and remuneration of the employee. The employer must withhold the monthly tax and, subsequently, pay it to the tax authority.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Article 68 of Law No. 19,039 on Industrial Property provides that in the employment and service agreements, whose nature is the fulfilment of an inventive or creative activity, the power to request registration as well as the eventual industrial property rights will exclusively belong to the employer or to whomever the service was assigned, unless there is an express stipulation to the contrary.

The second and third paragraphs of article 8 of Law No. 17,336 on Intellectual Property, state that in the case of computer programs, the individual or entities whose dependants, in the performance of their labour duties, have produced them, will be the title holders of the respective copyright, unless there is a written stipulation to the contrary.

With respect to computer programs produced by assignment of a third party to be commercialised for its account and risk, the copyright will be understood to have been assigned to it, unless there is a written stipulation to the contrary.

32 Is there any legislation protecting trade secrets and other confidential business information?

The primary protection for employers against theft of trade secrets is article 284 of the Chilean Criminal Code. It provides that anyone who, in a fraudulent manner, communicates industrial secrets of his or her employer may be condemned to imprisonment and be subject to fines.

The referred rule of the Criminal Code is the principal protection for employers, as Chilean law does not include a general confidentiality

provision for employment relationships. As a result, in order to terminate an employment contract for breach of confidentiality, such obligation should be expressly included in the respective labour agreement release.

Also, it is important to bear in mind that Chilean labour law allows exit searches, under certain rules. Labour Code article 154, No. 5, establishes that the obligations and prohibitions of the employees, including the employee control measures, must be included in a handbook known as 'Internal Rules of Order, Hygiene and Safety'. In this regard, the Labour Code states that any control measure adopted by the employer, including exit searches, must be of a general nature, impersonal, and preventive, and the employee's dignity must always be respected.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The most important legislation on this matter is Law No. 19,628, regarding the Protection of Private Life or Protection of Personal Information, as well as the Labour Code.

Law No. 19,628, article 4, states that the processing of personal data may only take place when determined by law or if the owner of the data gives written consent. However, there are exceptions to this provision: such authorisation is not required when private entities process the personal data for their own exclusive use or that of their agents and affiliates, and it is for their benefit.

In labour regulation, article 154-bis of the Labour Code sets forth the employer's obligation not to reveal the information and private data related to its employees to which it has access because of its employment relationship.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Article 4(2) of the Labour Code establishes that total and partial modifications to the ownership, possession or mere tenancy of the company will not affect the rights and obligations of the employees, arising from their individual employment contracts or their collective bargain contracts, which shall remain effective under the new management or employer. The new entity or transferee assumes all the labour and social security obligations undertaken by the previous employer.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

The employer cannot dismiss an employee for any reason, but on the contrary, he or she must substantiate the decision. According to article 161 of the Labour Code, labour agreements may be terminated by the employer on the grounds of 'company needs', such as those resulting from rationalisation or modernisation, low production, changes in market conditions or in the economy, or any other reasonable business reason.

Only in the case of employees who have the power to represent their employer, such as managers, assistant managers, agents or attorneys-at-law who have been granted general powers of management, their employment contract may be terminated without invoking any cause.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

If the employment relationship ended on the grounds of 'company needs' as stipulated in article 161 of the Labour Code, the employer must send a written communication to the employee informing him or her of the termination of the labour contract, one month in advance, unless the employer agrees to pay the employee a compensation equivalent to 30 days of work, which is referred to as 'compensation in lieu of notice'. It is important to mention that according to article 172 of the Labour Code (final paragraph), this compensation has a legal cap: the amount of the remuneration for this purpose may not exceed 90 inflation-indexed units (UFs).

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

The employer may dismiss an employee without notice or compensation in lieu of notice, if he or she invokes one of the circumstances set forth in article 160 of the Labour Code, which include gross misbehaviour or dishonesty as well as other material breaches of the contract as described below:

- any undue conduct of a serious nature, duly evidenced as indicated below:
  - dishonesty of the employee in the performance of his or her duties;
  - sexual harassment or labour harassment;
  - employment harassment;
  - physical assault by an employee of the employer or any co-worker;
  - insults by the employee to the employer; or
  - immoral conduct of the employee that affects the company for which he or she works;
- negotiations made by the worker within the company's business activity that were prohibited in writing in the labour contract by the employer;
- the employee's absence from his or her duties without justification for two consecutive days, two Mondays within a month or a total of three days during an equal period of time, as well as unjustified absences or absences without previous notice by a worker in charge of an activity, task or machine whose abandonment or stoppage constitutes a serious disturbance in the advancement of the work;
- desertion of work on the part of the employee – the employee abruptly and unjustifiably leaves the workplace during working hours without the permission of the employer or whoever represents him or her; or the refusal to work without justifiable cause in the workplace agreed upon in the employment contract;
- acts, omissions or gross negligence that affect the safety or the operation of the facilities, the safety or the activity of the workers or the health of these;
- material harm intentionally caused to the facilities, machinery, tools, work accessories, products or goods; and
- serious non-compliance of the obligations undertaken in the employment contract.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

If the labour relationship is terminated based on the company's needs or on those circumstances in which no cause is required (article 161 of the Labour Code), the employer must pay severance payments.

The general rule in Chile is the payment of severance pay that was contractually agreed upon. If there is no agreement on this matter or if the agreed amount is lower than the legal severance pay, the legal severance must be paid.

The legal severance pay is an amount equal to one month of salary for each year worked, with the following limitations: it may not exceed 11 months, that is, 11 years of rendered services; and the amount of the remuneration for this purpose may not exceed 90 UFs. The first limitation is not applicable in the case of employees hired before 14 August 1981.

The aforementioned rule is applicable in the case of contracts with an indefinite duration.

For the purposes of compensation payment for termination of contract, the employer must consider whatever sum the worker may be receiving on the date of termination of the labour, including social security contributions, bonuses or any items valued in money, excluding benefits the employee may receive occasionally.

Notwithstanding the foregoing, the two limitations that apply to the calculation based on the compensation for years worked, may be voluntarily waived by the parties, either in the labour contract or in any other documents, such as in a contract or collective agreement.

39 Are there any procedural requirements for dismissing an employee?

The employer must prepare a termination letter and then deliver it personally or by certified mail sent to the employee's domicile (the domicile indicated in the employment agreement). The employer must

Update and trends

The Works Councils or Employee Representatives Law No. 20,940 on Modernization of Labour Relations is effective from 1 April 2017. The aim of this law is to develop modern, fair and balanced labour relations between the company and the unions. In general terms, the law increases the bargaining power of unions and introduces amendments in collective bargaining regulations to improve employees' position in collective bargaining processes.

The main amendments of the Chilean law reform regarding collective negotiation are the following:

- Unions as the 'principal subject' of collective negotiation: before the new law, the existence of a union at a company does not prevent groups of employees, united for the purposes of negotiation, from bargaining collectively with the company. Nevertheless, it was finally determinated that the group of employees can also negotiate inside the company.
- Extension of benefits agreed to in a collective contract: the law prohibits the employer from completely or partially applying or extending the benefits of a collective instrument to employees who did not take part in the collective negotiation process, including those without union affiliation. According to the law, the extension of benefits to non-affiliated employees by the employer, without the consent of the respective union, is considered an anti-union practice. The law provides that union membership gives all new members of the union the benefits of the collective agreement signed by the trade union, as soon as they have communicated their affiliation to their employer. Benefits can only be extended to new union members with the approval of the employer and the union.
- Extension of the union's information rights: the employer must deliver the following information to unions:
  - detailed compensation data of each unionised employee;
  - compensation by position or function (only when there are five or more employees in the relevant position);
  - balance sheet and financial results of the year; and
  - the investment plans of the company.
- Right of information for companies that have less than 50 employees: annually they must inform the unions about their income and expenses per the applicable tax regime (in a 30-day term after the tax income declaration). In addition, the unions have the right to require information regarding the payroll, the benefits of the current collective contract and the cost of the labour of the last 2 years, within 90 days prior to the termination of the current collective contract. The company will have 30 days to provide this information required by the union.
- Minimum services and constitution of emergency teams: during a strike the union's negotiating committee must enable personnel to carry out the minimum level of service necessary in order to: protect the assets and operations of the company; prevent accidents; ensure the provision of public utility services and the basic needs of the public (including those relating to public health and safety); and ensure the prevention of damage to the environment or to general public health. The definition of 'minimum level of service' should be agreed upon by the parties in a preliminary negotiation. The absence of an agreement should be resolved by the labour authority, and the decision will be appealable before a labour court. Notwithstanding the above, it should be kept in mind that neither the labour inspectorate nor the labour courts are competent to assess whether an emergency team is qualified to maintain the specific functions of the company, considering the complexity and diversity of each company's processes.
- Non-replacement during the strike: the new law eliminates the possibility of replacing employees who are not working in the company due to the strike.
- Basic minimum for the collective negotiation: the law establishes that an employer's response to the collective negotiation must include, at least, a basic minimum for negotiation. If a collective agreement is in force, the basic minimum for negotiation constitutes an offer with identical stipulations to those established in the current collective agreement, excluding adjustments as per inflation, real increases, pacts over special work conditions and benefits granted only as a consequence of the subscription of the collective agreement. If there is no collective agreement in force, the employer's response may not be less than the benefits which, in a regular and periodic form, have been granted to the employees represented by the union. If the employer's response does not comply with this basic minimum standard, it will be understood as incorporated for all legal purposes.

indicate in such notice the grounds invoked and the facts it is founded upon. The employer is also required to enclose with the termination letter the relevant social security contributions receipts.

The communication must be delivered or sent within three working days following the effective termination. A copy of such communication must be sent to the labour inspectorate within the same term.

Prior approval by the government agency is not required by law.

40 In what circumstances are employees protected from dismissal?

Employees who have immunity from dismissal are employees who enjoy some privileges and may be dismissed only by a court order based on specific enumerated legal grounds. The following employees enjoy immunity from dismissal:

- female employees who are pregnant are protected under the relevant privileges against dismissal for the length of their pregnancy and for one full year following the expiry of maternity leave (article 174 of Labour Code). Maternity leave starts six weeks prior to the birth of the child and continues 12 weeks thereafter;
- labour union members are protected from dismissal under 'immunity privilege' in the following cases:
  - employees joining to constitute a union – from 10 days prior to constitution of the union to 30 days after constitution;
  - candidates for a union director position – from the time the election date is set until the election is completed with a maximum period of 15 days;
  - union directors and directors of federations, confederations and workers' centres – during their term of office and for six months thereafter; and
  - employees involved in collective bargaining – for a period starting 10 days before bargaining and ending 30 days after bargaining;
- staff delegates – during the term of office and for six months thereafter;
- one of the employee members of the health and safety paritary committee – until the end of his or her duties as the employees' representative on this committee;
- any employee whose child or spouse dies is protected against dismissal under the relevant privileges for one month after the death;
- any employee whose wife dies in childbirth or during her maternity leave is entitled to the same privileges applicable to pregnant female employees; and
- those in military service – employees performing duties in the military, including those who are part of mobilised national reserve forces and employees who have been called for combat duty, are protected against dismissal without cause while performing their military service and for one month thereafter (or for up to four months if they become ill or disabled during military service).

41 Are there special rules for mass terminations or collective dismissals?

There are no special rules for mass terminations or collective dismissals.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class or collective actions are not specifically regulated under the Chilean labour law. Notwithstanding the above, a group of employees claiming together against the same employer can file any action provided under the labour law to request the same labour entitlements. In addition, a union representing affiliated employees may file labour claims on their behalf against the employer.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Chilean law does not allow employers to impose a mandatory retirement age. Notwithstanding the above, according to Law Decree No. 3500, men can retire at the age of 65, and women at the age of 60.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

In general, it is not possible to agree to private arbitration of employment disputes. The authorities for resolving disputes between employees and employers are the Labour Inspection Board and Labour Courts. However, parties may agree during a collective bargaining process on arbitration of disputes.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee cannot waive statutory employment rights (article 5(2) of the Labour Code).

On the other hand, the employment contract, individual or collective, could be amended by a new agreement executed by both parties. At the termination of the labour contract the employee may agree to waive some payments owed by the employer, such as remuneration or severance, in the labour agreement release. No economic considerations are required. Nonetheless, social security obligations cannot be waived.

46 What are the limitation periods for bringing employment claims?

In general, judicial actions regarding labour rights are limited to six months after the date of termination of the employment contract. During the employment contract, employees may claim their rights during the two years following the time the rights were accrued, with the only exception being overtime payment, which may be claimed up to six months after the date the overtime should have been paid. Social security obligations expire five years after the date of the termination.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes and regulations relating to labour and employment at the national level are as follows:

- Joint Implementation Pilot Scheme of Maternity Insurance and Medical Insurance (19 January 2017);
- Measures Announcing Significant Violations of Labour and Social Security Laws (1 January 2017);
- Interim Provisions on Labour Dispatch (1 March 2014);
- Amendment to the Labour Contract Law (effective as of 1 July 2013);
- Interpretation of the Supreme People's Court on Several Issues on the Application of Law of Employment Disputes (1 February 2013);
- Interpretation of the Supreme People's Court on Several Issues on the Criminal Cases of Refusing to Pay Labour Remunerations (23 January 2013);
- Special Rules for Labour Protection of Female Employees (28 April 2012);
- Social Insurance Law of the People's Republic of China (1 July 2011);
- Amendment (VIII) to the Criminal Law of the People's Republic of China (1 May 2011);
- Interpretation (III) of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Labour Dispute Cases (14 September 2010);
- Tort Liability Law (1 July 2010);
- Implementing Regulations of Labour Contract Law (18 September 2008);
- Labour Disputes Mediation and Arbitration Law (1 May 2008);
- Labour Contract Law (1 January 2008);
- Employment Promotion Law (1 January 2008, and the amendment effective as of 24 April 2015);
- Employment Service and Employment Management Regulations (1 January 2008, and two amendments effective as of 23 December 2014 and 30 April 2015);
- Interpretation (II) of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Labour Dispute Cases (1 October 2006);
- Labour and Social Security Supervision Regulations (1 December 2004);
- Collective Contract Regulations (1 May 2004);
- Regulations on Minimum Wages (1 March 2004);
- Regulations on Work-Related Injury Insurances (1 January 2004, and the amendment effective as of 1 January 2011);
- Occupational Disease Prevention Law (1 May 2002, and two amendments effective as of 31 December 2011 and 2 July 2016);
- Trade Union Law (27 October 2001);
- Interpretation of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Labour Dispute Cases (16 April 2001);
- Interim Administrative Rules on Registration of Social Insurance (19 March 1999);
- Interim Regulations on Collection and Payment of Social Insurance (22 January 1999);
- Regulations on Labour Working Hours (1 May 1995);
- Regulations on Medical Care Period for Enterprises' Employees for Illness or Non-work Related Injury (1 January 1995);
- Labour Law (1 January 1995); and
- Interim Rules on Salary Payment (1 January 1995).

The Labour Law is the fundamental legislation governing employment matters, which was written into law around 22 years ago. There has been no substantial amendment since 1995 when it was first enacted. Another significant piece of legislation in the labour sector is the Labour Contract Law, effective 1 January 2008; the implementing regulations of the Labour Contract Law were introduced later in 2008. Many of the provisions in the Labour Law are restated or supplemented in the Labour Contract Law and its implementing regulations to make them easy to implement and reduce ambiguities. These two laws set out the basic principles for employment, but their implementation and enforcement rely on various regulations or rulings by the governmental agencies in charge of labour matters. Given such regulations are not always crystal clear or consistent with one another, the relevant governmental agencies in charge of labour administration usually have broad discretion to interpret such regulations in practice.

In addition to national legislation, governments at provincial and municipal levels are authorised to make rules to regulate labour and employment matters according to the local situation. Such local legislation constitutes an integral part of the Chinese labour and employment laws.

Finally, the judicial interpretations of the national laws by the Supreme People's Court provide practical and clearer guidelines to local courts in trying labour or employment cases.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Any type of discriminative activities or sexual harassment is generally prohibited by law and an affected employee may file a lawsuit to ask for damages if an employer violates such principles in the relevant legislation. Non-discrimination principles are adopted by the Employment Promotion Law, which requires employers to offer equal employment opportunities, terms and conditions to their employees regardless of their gender, nationality, physical condition or religious belief. The Trade Union Law also provides that blue and white-collar workers whose main source of livelihood is their wages are entitled to take part in and organise a trade union regardless of ethnicity, race, gender, occupation, religious belief or level of education. In addition, the Employment Service and Employment Management Regulations prohibit employers from incorporating any discriminatory content in their recruitment materials.

There are also specific laws and regulations that provide protection against certain categories of discrimination:

- the Law on Protection of Women's Rights and Interests stipulates that women enjoy equal rights to work as men and equal pay for identical work;
- the Law on Protection of Disabled Persons prohibits any discrimination against disabled persons in recruitment, employment, promotion, remuneration, welfare, social security, etc; and

- the Employment Promotion Law and the Employment Service and Employment Management Regulations stipulate that an employer cannot refuse to employ an applicant because such applicant is a carrier of any infectious pathogens.

The Law on Protection of Women's Rights and Interests and Special Rules for Labour Protection of Female Employees forbids sexual harassment against women. Victims are entitled to file complaints with the competent governmental agencies and to bring civil suits against the harassers.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary governmental agency in charge of labour law enforcement is the Ministry of Human Resources and Social Security, including its counterparts at provincial, municipal and district levels. Those government agencies are authorised to order non-compliant employers to take corrective measures or impose administrative penalties on such employers under some circumstances. However, in practice, the enforcement relies more on the local courts only if a party files a lawsuit.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

According to the Trade Union Law, employees may establish trade unions voluntarily and no one can prohibit or restrict such rights of workers. Provincial and municipal governments also promulgated local regulations to implement the principles set out in the Trade Union Law. An employer is periodically required to contribute a minimum percentage of gross salaries to the trade union. It seems that an employer with fewer than 25 employees is not mandated to set up a trade union. In practice, most employers with more than 25 employees have established employer-friendly unions.

5 What are their powers?

According to the Trade Union Law, the basic goal of a trade union is to safeguard the legitimate rights and interests of the employees. The Trade Union Law and the Labour Contract Law give a trade union the power to:

- request that an employer rectify its violations of regulations related to the employees' representative congress system and other democratic management systems;
- assist and provide guidance to employees when executing employment contracts with the employer;
- represent employees as they conclude a collective bargaining agreement with their employer;
- require that an employer bear liability pursuant to the law when an employer violates a collective bargaining agreement; a trade union also has the right to file for arbitration if the labour dispute cannot be resolved through friendly negotiations; a trade union may presumably file a lawsuit if filing for arbitration is rejected or if the trade union is not satisfied with the arbitral award;
- raise objections to improper disciplinary actions imposed by an employer;
- be consulted before an employer unilaterally terminates an employee; and if the trade union's opinion favours the employee, the employer must take the trade union's opinion and report into consideration in its final decision;
- investigate an employer's violation of an employee's legitimate rights, and the employer must provide assistance during the investigation;
- provide support and assistance pursuant to the law when an employee applies for arbitration or files a lawsuit;
- negotiate with an employer as it drafts company policies related to employee benefits like salary, working hours, annual leave, work safety, social insurance and benefits, training, etc. The trade union also has the right to request that an employer revise improper company policies; and
- express its opinion in the event of economic layoffs; the employer must also give 30 days' prior notice to the trade union.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

No, there are no prohibitions or restrictions under the current law or regulations for a potential employer to conduct reasonable background checks on applicants. Disclosure of certain personal or sensitive information will usually require consent by the relevant individual, especially information related to his or her health status or other personal matters. In practice, employers may engage professional firms to do such checks, but such third parties should hold the proper qualifications and act within the boundaries of the applicable laws and regulations.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Generally, employers may require their candidates to have medical examinations to determine whether their health conditions meet the requirements of the positions. In practice, the employers may determine the items of such examination based on specific job duties and require the candidates to submit their examination report. An employer must not, however, request that a candidate have a hepatitis B test, request a report of such test or enquire whether the candidate is a hepatitis B carrier. Except for those special occupations approved and announced by the Ministry of Health, such medical examination may not include a hepatitis B test unless requested by the candidate.

Current laws and regulations in China do not provide whether an employer may refuse to hire an applicant who does not submit to such medical examination. In practice, it is analysed on a case-by-case basis.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions under the current laws and regulations in China regarding drug and alcohol testing from a job recruitment perspective. In practice, however, some employers may request that their candidates go through drug or alcohol abuse testing in consideration of specific job duties and requirements.

Similarly, because the current laws and regulations in China do not indicate whether an employer may refuse to hire an applicant who does not submit to such a test, in practice, it is analysed on a case-by-case basis.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Yes. According to the Labour Law, the Employment Promotion Law and other labour rules and regulations, employers may not discriminate against women, disabled persons, ethnic minorities, candidates who are carriers of infectious diseases during the recruitment process or secondees if dispatched to employers by any staffing firm.

Under the labour laws of China, if an employee is laid off due to a bankruptcy reorganisation, difficulties in production and business operations, enterprise operation mode adjustment, material changes in the economic conditions, etc, this employee will take priority if the employer intends to recruit new staff within six months.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes, an employer should execute a written employment contract with an employee within one month of such employee commencing his or her work. If an employer fails to sign an employment contract within one month, for the period commencing from the first day of the second month and ending on the last day of the twelfth month, it must pay twice the monthly salary of the employee for each month services were provided without a written employment agreement. The employment will be deemed 'open ended' if an employer fails to enter into a written employment agreement with an employee within one year of such

employee commencing his or her work; such open-ended employment cannot be terminated unless otherwise explicitly authorised by law. The essential terms of an employment contract are:

- the employer's name and address, and the name of its legal representative or chief person;
- the employee's name, address and ID number;
- the term of the employment contract;
- the nature of the employee's job duties, work requirements and workplace;
- the employee's working hours, leave and holiday;
- the employee's remuneration;
- social insurance;
- labour protection, working conditions and professional hazard protection; and
- other information as may be necessary for specific employment contracts.

11 To what extent are fixed-term employment contracts permissible?

There are three types of employment contracts under Chinese law: fixed-term employment contracts, open-ended employment contracts and employment contracts with a period to complete the prescribed work. In practice, most employment contracts are fixed-term contracts, and there is no maximum duration for such contracts. An employer will be obliged to enter into an open-ended employment contract if requested by an employee if:

- the employment contract has been renewed twice after expiry of the original term;
- the employee has successively worked for the employer for more than 10 years; or
- the employer has not signed any written employment contract with the employee for more than a year.

12 What is the maximum probationary period permitted by law?

The probationary period varies depending on the nature and term of the relevant employment agreement as stated below:

Term of labour contract	Maximum term of probation
Less than three months or a contract with a term to expire upon completion of certain work	No probation allowed
Three months or more but less than one year	Up to one month
One year or more but less than three years	Up to two months
Three years or more or open-ended employment	Up to six months

There will be only one probationary period throughout the term of employment, and an extension of the probationary period is not allowed under Chinese law.

13 What are the primary factors that distinguish an independent contractor from an employee?

In practice, labour arbitration tribunals or courts tend to recognise the establishment of an employment relationship if the following main conditions are satisfied:

- the employer and the individual are both legally qualified in accordance with applicable laws and regulations;
- employment-related rules and policies of the employer apply to the individual, and the individual works for remuneration under the management and supervision of the employer; and
- the work carried out by the individual is an integral part of the employer's business

14 Is there any legislation governing temporary staffing through recruitment agencies?

Yes. According to the Labour Contract Law and the Interim Provisions on Labour Dispatch, recruitment agencies shall apply for and obtain labour dispatch Operation Permits from competent human resources authorities to engage in staffing businesses. Employers should engage staffing firms with valid permits. Temporary staff will enter into fixed-term labour contracts for at least two years with qualified recruitment agencies and be dispatched to the employer. However, the roles of such dispatched employees are limited to those of a temporary, auxiliary or substitute nature. There are some additional restrictions or requirements for an employer's use of staffing services. For instance, if a dispatched employee works for more than six consecutive months, this role shall not qualify as temporary and, as a result, the arrangement arguably breaches the regulatory restrictions. In addition, if an employer plans to engage dispatched employees to work in auxiliary positions, it should consult the trade union or employees' representative and make an announcement to all employees. What is more, the regulations require that the number of dispatched employees shall not in any event exceed 10 per cent of the total number of employees, which is designed to prevent any abuse of staffing business to bypass legal obligations otherwise owed to non-dispatched employees. Dispatched employees, as a matter of law, are entitled to 'equal pay' treatment as other employees at the same positions and discrimination is not permitted. Significantly, the Interim Provisions of Labour Dispatch have a general anti-abuse provision that prohibits employers from using staffing services in the name of outsourcing when the substance of the arrangement is labour dispatch. Unfortunately, neither the regulations nor the courts set up any standard to differentiate good-faith outsourcing from labour dispatch. Therefore, the risks to employers shall be analysed based on the totality of the facts and circumstances and planning may be desirable.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

A foreign employee may apply for a work visa on condition that he or she meets all of the requirements and submits all of the documents to the governmental entities as required by the applicable regulations. Before a foreign employee applies for a work visa, the employer must first obtain an employment authorisation certificate from the governmental entities for such foreign employee, as this is required for such application.

16 Are spouses of authorised workers entitled to work?

The spouses of authorised foreign workers are not allowed to work in China. The spouse of an authorised foreign worker may only work in China after his or her employer obtains an employment authorisation certificate from the governmental authorities for him or her, and then obtains a work permit from the relevant governmental entities.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

An employer may only employ a foreign national with a valid work permit and residence permit issued by the governmental entities. An employer who hires a foreigner without a proper visa and work permit will pay a fine of 10,000 yuan for each foreign employee illegally employed, which is capped at 100,000 yuan, and any income (if any) generated by those illegal employees shall be confiscated.

18 Is a labour market test required as a precursor to a short or long-term visa?

No labour market test is required as a precursor to a short-term or long-term visa. It is a basic principle under Chinese law and regulations that an employer may recruit foreign workers for positions with special requirements when no domestic candidates are available for such positions. However, a labour market test need not be conducted prior to the recruitment of foreign workers.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The general principle is that the daily working hours must not exceed eight hours, and the average weekly working hours must not exceed 40 hours. If an employer cannot guarantee the foregoing working hours

system for any particular reason, the employer may apply an alternative working hours system with the approval of the government entities in charge of labour administration. If the employer needs an employee to work overtime, the employer may consult the employee's trade union and the employee, and the overtime working hours generally will not exceed one hour per day; if longer overtime working hours are needed for some special reason, they may not exceed three hours per day, and the monthly overtime working hours may not exceed 36 hours, given that the employee's health must be guaranteed. However, there are exceptions to the aforementioned limitations on overtime working hours: natural disaster, accident or other events that endanger the health, life and property and thus require emergency handling; malfunction of manufacturing equipment, traffic line or public facilities that influences operations and public interest, and thus require urgent repair; and other circumstances prescribed by laws and regulations. In addition, employees are entitled to at least one rest day every week.

Employees may not opt out of the above restrictions or limitations.

20 What categories of workers are entitled to overtime pay and how is it calculated?

An employee is entitled to overtime pay calculated as follows:

- overtime on a regular working day: at least 1.5 times the regular salary;
- overtime on an off-work or rest day: at least twice the regular salary; and
- overtime on a statutory holiday: at least three times the regular salary.

However, the above calculations do not apply to employees who work under an alternative working hours system. The calculation of overtime pay for employees who work under an alternative working hours system is subject to special rules.

21 Can employees contractually waive the right to overtime pay?

No. It is mandatory for an employer to pay an employee for his or her overtime work. In practice, any waiver of the right to overtime pay or a similar agreement will most likely be deemed unenforceable against employees.

22 Is there any legislation establishing the right to annual vacation and holidays?

Yes. According to the Regulations on Paid Annual Leave of Employees, employees of authorities, organisations, enterprises, public institutions, private non-enterprises or individual private businesses (with hired staff) who have continuously worked for more than one year will be entitled to paid annual leave.

Annual leave entitlement is worked out as follows:

- for employees who have cumulatively worked for more than one year but less than 10 years – five days;
- for employees who have cumulatively worked for more than 10 years but fewer than 20 years – 10 days; and
- for employees who have cumulatively worked for more than 20 years – 15 days.

Statutory holidays, rest days and other leaves stipulated by law, such as marriage leave, bereavement leave and maternity leave, are not calculated as annual leave.

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes. In accordance with the Regulations on Medical Period for Employees who are Sick or have a Non-Work-Related Injury, such employees are entitled to between three and 24 months of medical leave, depending on the employees' total working life and the time working for the current employers.

For certain employees who suffer from certain diseases (such as cancer, mental illness or paralysis), if such employees are unable to recover within 24 months, the medical leave can be extended appropriately subject to the employer's approval and that of the local labour authority.

Employers should pay sick leave wages in terms of the labour contracts entered into with employees. Such sick leave pay will be no lower than 80 per cent of the local standard minimum salary, which can vary depending on local regulations. For example, the minimum wage in Beijing in 2016 was 1,890 yuan per month, so sick pay must be no less than 1,512 yuan per month.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees are entitled to receive pay during the following periods of leave according to relevant laws and regulations.

Maternity leave

According to the Special Provisions on Labour Protection of Female Employees, pregnant employees are generally given maternity leave of 98 days, including 15 days of antenatal leave. An extra 15 days of leave may be granted if the employee experiences a difficult childbirth. Employees who give birth to more than one baby in a single birth will be granted extra maternity leave of 15 days for each additional baby. If an employee suffers a miscarriage when she has been pregnant for fewer than four months, 15 days of leave will be granted. If an employee has a miscarriage after the fourth month of the pregnancy, 42 days of maternity leave will be granted. Local legislation may provide additional maternity leave and paternal leave according to the PRC Population and Family Planning Law. For example, maternity leave is extended by 30 days in Beijing, and male employees are entitled to 15 days of paid paternal leave.

Marriage leave and bereavement leave

One to three days, subject to specific circumstances and approval of the employer. Marriage leave may be extended by local government. For example, local rules in Beijing extend marriage leave for all employees by 7 days.

25 What employee benefits are prescribed by law?

Pursuant to national and local labour laws and regulations, employees are entitled to receive basic social benefits, including endowment insurance, medical insurance, maternity insurance, work-related injury insurance, unemployment insurance and housing accumulation funds. In addition, employees have the right to enjoy statutory holidays, paid annual leave, marriage leave, maternity leave, etc.

26 Are there any special rules relating to part-time or fixed-term employees?

The principal rules regulating part-time employment are set out in the Labour Contract Law. Generally, an employee working on a part-time basis for one employer may not work in excess of four hours per day or 24 hours per week. The employer and the part-time employee may have a verbal contract. A part-time employee may enter into a labour contract with more than one employer, given that the contract entered into during the term of an existing contract may not influence the performance of an existing contract. No probation period may be stipulated in a part-time labour contract, and either party may terminate the employment by notice at any time. In addition, the part-time employee is not entitled to any severance upon termination. The hourly salary may not be lower than the minimum hourly salary published by the local government in the municipality in which the employer is located.

The rules regulating fixed-term employment are set out in the Labour Contract Law and its implementation rules.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

According to the Labour Contract Law, employees subject to non-compete covenants are limited to an employer's senior management, senior technicians and other personnel with a confidentiality obligation. The scope, territory and term of such restrictions will be agreed to between the employer and the employee, and such agreement may not violate laws and regulations. Any non-compete covenants lasting longer than two years after the termination of the employment contract are not enforceable. Non-solicitation clauses are not specifically addressed by the current employment-related laws and regulations.

It is common practice for the parties to be reasonable regarding non-solicitation covenants.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Reasonable compensation is widely seen as a precondition to the enforceability of the competition restrictions. Generally, the compensation may not be less than 30 per cent of the employee's average salary in the 12-month period immediately preceding the termination of the employment contract. If this amount is lower than the minimum salary periodically announced by the local government, the employer must pay an amount no less than the minimum local salary. The minimum compensation for non-compete restrictions can be raised by local regulations. For instance, in Shenzhen, the compensation may not be lower than 50 per cent of the employee's average salary in the past 12 months. There is no specific requirement on the compensation for non-solicitation covenants.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

It is a well-established legal principle that an employer will be held liable for damages caused by its employees in the course of the employees performing their employment duties.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employees are subject to individual income tax on wages, salaries, bonuses and other employment-related income. An employer, as a withholding agent under the tax law, is liable to withhold applicable taxes and pay the same to the competent tax authorities upon payment to its employees. In practice, an employer will file tax returns on behalf of its employees.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes. According to the Patent Law, as amended, an employee invention is an invention completed by an employee in the course of performing duties for the employer or completed by substantially using the material and technical conditions of the employer. The employer will have the right to apply for a patent for an employee invention and shall become the patentee upon approval. The employer and the employee inventor are allowed to enter into an agreement with regard to the ownership of such invention.

When the employer has been granted patent rights for an employee invention, it may reward the employee inventor, and when the patent is implemented, the employee inventor should be given reasonable remuneration according to the scope of implementation and the economic benefits subsequently received. The Implementation Regulations of the Patent Law, as amended, provide further detailed rules on what constitutes an employee invention and how much remuneration shall be paid to the employee inventor.

On 26 November 2012, the State Intellectual Property Office and other governmental agencies jointly issued Several Opinions on Strengthening the Protection of the Lawful Rights and Interests of Employee Inventors and Promoting the Implementation of the Intellectual Property Rights, which provides further rules increasing the economic compensation to the employee inventor.

The Copyright Law, as amended, provides that a work created in the course of fulfilment of the work assignment is an employee work. The author of the work will be entitled to the copyright to such work and the employer will have priority in using such work within its scope of business. However, for the following works, the author will solely enjoy the right of authorship, and the employer will enjoy other rights pertaining to the copyright, and may reward the author at its discretion:

- drawings of engineering designs, product designs, maps, computer software and other author works that are created mainly by using the materials and technical conditions of the employer and for which the employer bears responsibility; or
- author works whose copyright belongs to the employer according to the law or contract requirement.

The Copyright Law, as amended, further provides that for a period of two years after the completion of the employee work, without the employer's consent, the author may not allow a third party to use the work in the same way as his or her employer does. The Implementation Regulations of the Copyright Law, as amended, offer explanations as to the meaning of the terms 'work assignment' and 'materials and technical conditions'.

32 Is there any legislation protecting trade secrets and other confidential business information?

Yes. According to the Labour Law, the Labour Contract Law and the Contract Law, employers and employees may agree upon the protection of trade secrets and other proprietary confidential information in labour contracts or by signing separate confidentiality and non-competition agreements. Employees in breach of such confidentiality obligations shall be liable for compensation to employers for any loss caused. There could also be criminal liabilities under the Criminal Law depending on the circumstances, which could result in serious consequences and up to seven years' imprisonment for blatant violation. The Law of the PRC against Unfair Competition also prohibits any and all unauthorised obtaining, disclosure, use or permission of others' use of trade secrets which is in violation of any confidentiality or similar obligations. The Law of the PRC on Promoting the Transformation of Scientific and Technological Achievements further provides for the protection of technical know-how and forbids any disclosure of, transfer of, or competition based on such technical know-how by employees without employers' authorisation.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Yes. According to the Employment Service and Employment Management Regulations, employers are required to keep their employees' personal data confidential. Employers must obtain their employees' written consent before disclosing their personal information. It is an established civil law principle that a party that breaches another party's civil rights (including the right to privacy) may be liable for damages in respect of monetary losses and, where applicable, damages for mental distress. Thus, if an employer discloses its employees' personal data without authorisation, the affected employees may file a civil lawsuit against the employer.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Yes. If an employer intends to lay off any of its employees, it must go through the statutory procedures as specified by the Labour Contract Law by giving prior notice to the affected employees, carrying out consultation with the affected employees and reporting the layoffs to the local labour administrative authorities. If an employer intends to terminate employment contracts with certain employees who are not part of the layoff, it must first negotiate with such employees; the employer is also obligated to pay severance payments in such cases. The Implementing Regulations of the Labour Contract Law and a recent judicial interpretation by the Supreme People's Court further clarify that, in the case of the transfer of an employee to a new employer for reasons not attributable to the employee, the years of service with both the former and new employers will be cumulative, unless the former employer has paid a severance payment for its ex-employee's years of service. As a result, if the former employer has not made sufficient severance payment, the employee may ask the continuing employer to pay such amount accrued (as a result of his or her service with the former employer) by the time the former employer has transferred such employee to the continuing employer.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer may terminate an employee only for 'cause'. The Labour Contract Law provides that employers may dismiss employees without prior notice if the employees:

- fail to meet the conditions set out for the probationary period;
- severely violate the employer's internal rules and policies;
- are corrupt or neglectful in performing their duties, causing severe damage to the employer's interests;
- fraudulently induced the employer to employ them;
- are simultaneously employed by another employer, severely affecting the performance of their duties, or the employee refuses to rectify the situation after receiving the employer's request; or
- are prosecuted for a crime.

An employer may also dismiss an employee under the following circumstances, but 30 days' prior notice or one month's salary in lieu of such notice is required:

- if, after the completion of the medical treatment for an illness or non-work-related injury, employees are unable to perform their original jobs or any other work position arranged for them by the employer;
- if employees are incompetent in their jobs and fail to make any improvement after training or adjustment of their positions; or
- if material changes of the objective circumstances have made the employment contract no longer executable, and the employer and employees cannot reach agreement on a change to the employment contract.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Under some circumstances, prior notice or one month's salary in lieu of such notice will be required – see question 35.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

See question 35.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes. According to the Labour Contract Law, an employer must make a severance payment upon termination of employment if:

- the employee terminates the employment contract due to the employer's fault;
- a severance payment has been provided for in an agreement between the employer and the employee for termination of the employment contract;
- the employer terminates an employment contract with 30 days' notice or payment of one month's salary in lieu of notice;
- the employer carries out collective dismissals owing to the need to restructure the enterprise in accordance with the applicable laws and regulations;
- a fixed-term labour contract expires, except that the employee refuses to renew the employment contract while the employer offers the same or more favourable terms;
- the employer is declared bankrupt in accordance with the law, has its business licence revoked, is subject to a lawful order to shut down, or is closed down or decides to go into liquidation; or
- any other circumstances prescribed by law and administrative regulations.

The aggregate amount of a severance payment is calculated primarily based on the employee's monthly salary for each completed year of service with the employer. A period longer than six months but less than one year will be rounded up to a full year of service, and a period of less than six months gives rise to an entitlement to half a month's salary. In calculating the severance payment, the monthly salary used is the employee's average per month salary in the 12-month period immediately preceding the termination. If the monthly salary of an employee is three times higher than the average monthly salary for the relevant year as announced by the Central People's Government at the municipal level directly under the central government or at the level of district where the employer is situated, the monthly salary used to calculate the severance payment must be capped at three times the average monthly salary announced by the government. In such a scenario, the number of service years for calculating the severance amount of the concerned employee may not, in any case, exceed 12 years. However, if an employee was hired before 1 January 2008 (the effective date of the Labour Contract Law) and terminated thereafter, the calculation may vary significantly depending on the reason for the termination and the circumstances involved.

39 Are there any procedural requirements for dismissing an employee?

Yes. The Labour Contract Law prescribes certain procedures to dismiss employees. If an employer plans to terminate an employment contract unilaterally, it must notify the affected employee's trade union in advance. If the employer violates any laws, regulations or the employment contract, the union may ask the employer to take corrective measures. The employer must consider the union's opinions and notify the union in writing of the outcome. Usually, no prior government approval is required to terminate an employee's contract, but such approval will be necessary in practice in the event of mass layoffs.

40 In what circumstances are employees protected from dismissal?

Certain employees are protected from dismissal with prior notice and collective dismissal (but not summary dismissal) of their employment contracts under the following circumstances:

- employees engaged in positions with the risk of occupational disease who have not undergone proper health examinations before leaving the position, or employees who are suspected of having occupational diseases, are being diagnosed for such diseases, or are under medical observation;
- employees who have lost or partially lost the ability to work due to a work-related injury or disease;
- employees within the statutory period for medical treatment due to illness or non-work-related injuries;
- employees who are pregnant, in confinement or in a nursing period;
- employees who have worked for 15 consecutive years with the same employer and are within five years of the statutory retirement age; and
- employees otherwise protected by the relevant laws and administrative regulations.

41 Are there special rules for mass terminations or collective dismissals?

Yes. If an employer is to dismiss 20 persons or more, or fewer than 20 persons who represent 10 per cent or more of the total number of its employees, such dismissal must be based on statutory reasons including restructuring according to the Enterprise Bankruptcy Law or serious difficulties in production or business operations. In addition, the employer should give a 30-day advance notice of the background of and reasons for the dismissals to the affected employees' trade union, or to all of its employees. The employer should consider the opinions of the union or the employees, and file the collective dismissals plan with the labour administrative authorities.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

In theory, class actions are allowed in China. According to the Civil Procedure Law, where the subject matter of an action is of the same category and one of the parties has numerous litigants but the exact number of the litigants is uncertain when the lawsuit is filed, the people's court may issue a public notice to explain the nature of the case and the claims, as well as notify interested persons who are also entitled to claims to register their claims with the people's court within a specified time period. In practice, however, no such class actions have been brought; in most cases, an employee will file a claim on an individual basis. When there is a breach of a collective bargaining agreement, as authorised by the Labour Contract Law, a labour union may apply

for arbitration or bring a lawsuit against the employer. However, labour disputes filed in the name of labour unions are not common.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Yes. Under the current law, the mandatory retirement age is 60 for males, 55 for females who hold management positions, and 50 for other female workers. When this law was promulgated several decades ago, it applied only to employees of state-owned enterprises; however, now it also applies to other businesses, private and foreign-owned. Employees who work underground, at high altitudes or in extreme temperatures, or whose work is especially physically taxing or otherwise harmful to their health, are entitled to an early retirement age (ie, 55 for males and 45 for females). Employers, however, are allowed to hire retirees using a labour service contract. Retired employees hired under labour service contracts are not entitled to termination protections and some other benefits provided under PRC Employment Contract Law.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

No. Private arbitration over employment matters is not allowed under Chinese law. The law encourages the parties to resolve their disputes by way of friendly negotiation. Furthermore, the law specifically mandates arbitration at government-controlled labour arbitration organisations if there is any dispute between the employer and employee. If a party disagrees with the arbitration award granted by the labour arbitration organisation, such party may challenge such award within a certain period of time by filing a lawsuit with the competent people's court.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

No. As a general principle, Chinese labour laws do not allow waiver of potential employment claims to be made by employees. According to the Labour Contract Law, if any employer evades its mandatory legal liability or denies an employee's rights in an employment contract, such employment contract will become invalid or partially invalid.

46 What are the limitation periods for bringing employment claims?

Any claim for arbitration must be made within one year from the day when 'the employee knows or should have known of the infringement of rights' according to the Law on Labour Dispute Mediation and Arbitration. Regarding disputes over salary payment with current employees, the one-year limitation starts running only after the termination of the employment contract.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

In Denmark, there is no general employment act covering all employees on the labour market. The employer–employee relationship is therefore governed by a mixture of statutes, collective agreements and individual employment contracts between the parties.

Danish employment regulation can be divided into two main categories: collective agreements and legislation on salaried employees (white-collar employees).

A large part of the Danish workforce is covered by a collective agreement. The collective agreements, which are concluded by trade unions and employer organisations, lay down terms of employment and pay, typically governing hours of work, minimum pay, notice periods, etc. As a result, employment conditions are to a wide extent regulated by collective agreement.

The Danish Salaried Employees Act covers a large number of employees in the private and public sectors, but only employees who are salaried employees within the meaning of the Act (white-collar employees). The Act provides salaried employees with certain minimum rights, including notice periods, termination pay, compensation for unfair dismissal, sickness absence and compensation for any post-termination covenants.

In addition to the collective agreements and the Danish Salaried Employees Act, certain labour market conditions are regulated by specific acts as well, which set out a number of minimum requirements. Examples of such acts are the Danish Holiday Act, the Danish Statement of Employment Particulars Act, the Danish Anti-Discrimination Act and the Danish Act on Equal Treatment of Men and Women.

Also, a number of public servants are protected by the Danish Public Servants Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

There are a number of acts prohibiting discrimination in the labour market on grounds of gender, race, colour, religion or belief, political opinions, sexual orientation, age, disability or national, social or ethnic origin.

Further, there are a number of acts regulating and prohibiting discrimination on grounds of specific types of employment contracts such as fixed-term employment (question 11), part-time employment (question 26) and temporary work (question 14).

In the event of breach, the employee may be awarded a substantial compensation payment.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

In Denmark, there is no specific government agency responsible for enforcing employment legislation in general. The Danish Ministry of Employment can introduce bills, issue executive orders, etc, concerning employment, and is also responsible for framing and wording the legislation.

However, there are a number of government agencies that enforce specific areas of employment law. Examples of such agencies are the Danish Working Environment Authority, which may fine employers for non-compliance with working environment rules and regulations, and the National Board of Industrial Injuries, which processes employees' compensation claims.

If the parties to an employment-related dispute are unable to solve the dispute amicably, they can bring the dispute to the courts or special employment tribunals that can decide certain employment-related claims for employees covered by a collective agreement.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Danish Information and Consultation of Employees Act requires undertakings with 35 employees or more to lay down a procedure ensuring that the employees receive adequate information about the undertaking in relation to their employment. If the employees enjoy the same or better rights under a collective agreement, the above-mentioned Act does not apply.

Most collective agreements contain provisions concerning union representatives and works councils.

Usually, blue-collar employees and government or municipal employees are covered by a collective agreement allowing the employees to choose a representative. White-collar employees in the private sector are typically not covered by collective agreements to the same extent.

According to the Danish Working Environment Act, if the company has 10 or more employees they are entitled to elect one or more (depending on the size and organisation of the company) health and safety representatives. Health and safety representatives are protected against unfair dismissal in the same way as union representatives in the same or a similar sector.

5 What are their powers?

Under the Danish Information and Consultation of Employees Act, the employees are entitled to discuss changes with the employer and the employer must consult with the employee representative (or representatives), but the employer is not required to accommodate the employees' wishes. As a general rule, deciding how to run the undertaking is the employer's prerogative.

Most collective agreements contain provisions concerning the cooperation between the employer and the employee representatives. If a collective agreement is applicable, those rules must be observed.

Health and safety representatives are entitled and obliged to participate in the safety organisation's work in accordance with the rules set out in the Danish Working Environment Act.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

By virtue of the Danish Data Protection Act, employers are in some situations restricted in their use of personal data, and personal data include data about employees and applicants. Employers are therefore only to a certain extent allowed to carry out background checks on applicants, whether by themselves or through a third party.

See also question 32.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Under the Danish Act on Use of Health Data in the Labour Market, employers are only entitled to request health data from an applicant to determine whether the applicant suffers from or has suffered from a disease if this will adversely affect the applicant's capacity to perform the job in question.

Some jobs require special knowledge of the employee's health, and employers are allowed to ask the necessary questions in those cases. Requiring a general medical examination is only allowed in very limited circumstances, for example, for health and safety reasons, in order to find out if the applicant can perform the job in question. In those cases, the employer is entitled to reject an applicant who refuses to undergo a medical examination.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Under the Danish Data Protection Act, information about drug and alcohol use constitutes sensitive data and may therefore only be collected for good reasons.

Asking employees to submit to a drug or alcohol test (or both) is an employer's prerogative. The tests must be requested for legal and reasonable grounds, for example, for health and safety reasons, and the testing must affect the employees as little as possible.

Employers are therefore generally not prohibited from requiring a drug or alcohol test (or both) as a condition of employment, but it depends on the job in question.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

In general, affirmative action on specific grounds is not allowed because there are a number of Danish acts prohibiting discrimination in the labour market on grounds of gender, race, colour, religion or belief, political opinion, sexual orientation, age, disability, or national, social or ethnic origin.

However, in some cases affirmative action may be allowed for objective and legitimate reasons, for example, raising the employment rate of non-ethnic Danes. In the public sector, there are some situations where affirmative action may even be required. For example, an equally qualified disabled candidate must be given priority over other applicants for vacancies at public employers.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

As a general rule, employers must provide their employees with a written statement of particulars outlining the terms of employment. Under the Danish Statement of Employment Particulars Act, the statement of particulars (which will often be a contract) must at least include:

- name and address of employer and employee;
- work address;
- a job description, job title or job category;
- commencement date;
- expected duration of employment (if not indefinite);
- holiday and holiday pay;
- notice periods (employee's and employer's);
- applicable or agreed pay;
- hours of work; and
- specification of any collective agreements affecting the employment.

Also, any other 'material terms' must be mentioned.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible in Denmark and there are no rules for the duration of such contracts.

Employers are not allowed to treat temporary or fixed-term employees less favourably than their permanent employees, unless the differential treatment is based on objective grounds and is not exclusively based on the temporary status of the employment relationship.

With regard to part-time employment, see question 26.

12 What is the maximum probationary period permitted by law?

In Denmark, there is no general legislation regarding probationary periods. However, for salaried employees (white-collar employees), only a probationary period of up to three months may be agreed. This period cannot be extended. During the probationary period, both parties are entitled to terminate the employment contract by giving two weeks' notice.

For manual employees (blue-collar employees), there is no legislation on the maximum duration of probationary periods. Such provisions may, however, follow from an applicable collective agreement.

13 What are the primary factors that distinguish an independent contractor from an employee?

As mentioned in question 1, in Denmark there is no general employment act covering all employees on the labour market. Therefore, there is no general rule distinguishing an independent contractor from an employee. However, there are a number of criteria that will normally be used to test whether the person in question is an employee or an independent contractor. The following factors will typically indicate if a person is in an employment relationship and therefore to be considered an employee:

- the person has an obligation to execute agreed work;
- the employer is entitled to control and direct the person's work;
- the work is performed in the employer's name;
- there are fixed hours of work;
- holiday entitlement is accrued; and
- there are agreed notice periods.

Further, an employee will normally not be liable for any acts or omissions committed or not committed in the course of the employment.

On the other hand, an independent contractor:

- does not have an obligation to work;
- organises his or her own work and working hours;
- the work is performed on his or her own premises;
- payment is only for the 'goods or services supplied'; and
- the work is performed in his or her own name and at his or her own risk.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Temporary staffing is governed by the Danish Temporary Agency Workers Act which is based on Directive 2008/104/EC. The Act applies to workers employed by a temp agency who are assigned to user undertakings to work temporarily under the user undertakings' supervision and direction.

The temp agency must ensure that temporary workers' basic working and employment conditions such as pay, working hours, holiday are at least the same as those that would apply had the temporary workers been recruited directly by the user undertaking to perform the same job. According to case law, a comparison of the working conditions must be made for each working condition.

The user undertaking must inform the temporary workers of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment.

A temporary worker whose rights under the Danish Temporary Agency Workers Act are violated can be awarded a compensation. Further, the temp agency in question may be fined.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Danish law contains no limitations on the number of short-term visas that a foreign worker may be granted, but a separate application must be submitted for each stay requiring a short-term visa.

Danish business can be certified under the Fast Track Scheme that will enable highly qualified employees to apply for a residence and work permit very quickly for the purpose of taking up employment in Denmark for a fixed period of time. Further, the Fast Track Scheme enables employees to work alternately inside and outside of Denmark.

16 Are spouses of authorised workers entitled to work?

Foreign nationals with close relatives in Denmark can apply for a residence permit on the basis of family reunification. Provided that certain conditions are met, family reunification can be granted to spouses and partners.

If the spouse or partner is granted a residence permit, it will be a temporary one. The spouse or partner can apply for an extension of the residence permit, and after a certain period of time, the spouse or partner can apply for a permanent residence permit.

A person who is granted a residence permit on the basis of family reunification will usually be entitled to work in Denmark.

Special rules apply to Nordic, EU, EEA and Swiss nationals residing in Denmark. Additional special rules apply if the person residing in Denmark (the spouse or partner) is a student.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The Danish legal framework for employment of foreign nationals is quite extensive and based in part on national law, EU law and international conventions. Specific provisions governing employment of foreign nationals can be found in national law, for example, the Danish Integration Act, the Danish Aliens Act and a number of executive orders.

Some foreign nationals are required to hold a residence and work permit. The specific requirements in connection with living and working in Denmark depend, first and foremost, on the person's nationality and qualifications (see question 18).

It is the employee's own responsibility to obtain a work permit if such a permit is required. Employees working illegally in Denmark risk deportation and either a fine or imprisonment. The employer risks a fine or imprisonment.

18 Is a labour market test required as a precursor to a short or long-term visa?

In most cases, foreign nationals need to have a residence and work permit (long-term visa) before they can begin working. In certain cases, however, foreign nationals can perform work-related activities while in Denmark on a visa (short-term visa) without holding a residence and work permit.

Foreign nationals staying less than three months are allowed to perform certain types of work-related activity even without a residence and work permit. Such activities include teaching or attending a course, or participating in meetings, negotiations, briefings and training.

As for foreign nationals who wish to live and work in Denmark, some are required to hold a residence and work permit (long-term visa). The specific requirements in this connection depend first and foremost on the person's nationality and qualifications. Regarding nationality, Nordic nationals are as a general rule free to live and work in Denmark. Special rules apply to EU, EEA and Swiss nationals.

Normally, a long-term visa must be warranted by occupational or labour market considerations. A number of schemes apply providing relatively easy access to obtain a long-term visa if there is currently a shortage of qualified labour in Denmark in the relevant area. For example, a special 'positive list' provides for a fast-track procedure in terms of obtaining a long-term visa for workers whose professions are on the positive list. For research scientists, it is particularly easy to obtain a long-term visa provided that the foreign national is able to prove why the job should be carried out by him or her.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

In the European Union, the number of working hours is limited by Directive 93/104/EC, as amended by Directive 2000/34/EC, also known as the Working Time Directive. In Denmark, the Directive is implemented in Danish law by the Danish Act on Implementation of Parts of the Working Time Directive and the Danish Working Environment Act.

Under the Danish Act on Implementation of Parts of the Working Time Directive, employees working more than six hours a day are entitled to a break. Similarly, the average working hours during a seven-day period may not exceed 48 hours, including overtime, calculated over a period of four months. More protective rules apply for those working evenings and nights, and employees working in the transport sector are protected by special rules.

It is possible to opt out of the Danish Act on Implementation of Parts of the Working Time Directive by collective agreement, but only if the collective agreement complies with the Working Time Directive.

Under the Danish Working Environment Act, employees are, as a starting point, entitled to 11 consecutive hours of time off during each 24-hour period. Similarly, all employees must have one 24-hour period of time off for every seven-day period. Special rules apply for shift workers, agricultural workers, managers, etc. In special circumstances, employers and employees may agree to opt out of the Danish Working Environment Act.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Employees are not entitled to overtime pay under Danish law as such. This is a question that is regulated in the individual employment contract or collective agreement. Collective agreements may vary quite a lot on this question and it is therefore difficult to say anything specific about how overtime pay is calculated. Manual employees (blue-collar employees) are usually entitled to overtime pay under the applicable collective agreement. For salaried employees (white-collar employees), the situation is less simple – among other things, because many salaried employees are not covered by a collective agreement.

21 Can employees contractually waive the right to overtime pay?

For employees who are not covered by a collective agreement, any agreement can be made with regard to overtime pay. It is not unusual for salaried employees (white-collar employees) to be obliged to carry out any overtime necessary without overtime pay, because any overtime is considered to be included in the remuneration.

As regards employees who are covered by a collective agreement, individual agreements that waive employees' entitlement to overtime pay under the collective agreement cannot – as a general rule – be made.

22 Is there any legislation establishing the right to annual vacation and holidays?

Under the Danish Holiday Act, employees are entitled to 25 days' holiday every year, and to take 15 of the 25 days consecutively between 1 May and 30 September.

Employees are not required by law to actually use their holiday entitlement because they are not entitled to paid holiday from the commencement date. Employers are required to pay their employees

2.08 days' extra pay every month and set this amount aside for their holiday the following year, which means that employees accrue 25 days of paid holiday after being employed for 12 consecutive months. Upon leaving the employment, the employees will be able to have any untaken holiday paid out to the holiday scheme, FerieKonto, enabling the employees to take holiday with allowances paid from this scheme even though they have not yet accrued paid holiday from the new employer.

A proposal for a new Danish Holiday Act is expected to be presented during 2017. See 'Update and trends'.

23 Is there any legislation establishing the right to sick leave or sick pay?

The rules vary depending on whether the employee is a salaried employee (white-collar employee) or a manual employee (blue-collar employee).

Salaried employees are entitled to receive their usual remuneration during sickness absence. If the employee is absent for more than 30 days, the employer is entitled to an amount corresponding to the sickness benefits from the local municipality.

Other employees are entitled to sickness benefits during sickness absence. During the first 30 days of absence, the employer will pay the sickness benefits to the employee. After that, the local municipality will pay the sickness benefits to the employee.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The answer to this question varies, and collective agreements and individual contracts may grant employees special rights.

Employees are always entitled to a leave of absence if a family member is suddenly severely injured or falls seriously ill and requires the employee's presence. Employees are not entitled to receive pay during such leave by law, but they may be under a collective agreement or their individual employment contract.

The Danish Act on Entitlement to Leave and Benefits in the Event of Childbirth governs women's and men's entitlement to pregnancy, maternity, paternity, parental and adoption leave. The Act is quite complicated, but in outline the Act entitles women to start their pregnancy leave four weeks before the expected date of birth and to have 14 weeks' maternity leave after the birth. Men or spouses are entitled to 14 days' paternity leave after the birth. On top of this, each of the parents is entitled to 32 weeks' parental leave, which can be extended to 46 weeks. Whether the parents are entitled to pay during the leave varies and must be determined on a case-by-case basis, but they will usually be entitled to benefits for a total of 32 weeks which can be split among the parents in various ways.

Salaried employees covered by the Danish Salaried Employees Act are entitled to at least 50 per cent pay while on pregnancy and maternity leave (until 14 weeks after the birth).

25 What employee benefits are prescribed by law?

Employee benefits are regulated not by law, but by the individual employment contract or collective agreement or by verbal agreement.

26 Are there any special rules relating to part-time or fixed-term employees?

Part-time employment is governed by collective agreements and legislation. The Danish Part-Time Employment Act, which implements Directive 97/81/EC on part-time work, carries on the Danish tradition of respecting the collective bargaining system in that it allows the social partners to implement the provisions of the Directive through collective agreements. The Danish Part-Time Employment Act only applies as a supplement where no collective agreement applies.

Part-time employees working at least eight hours a week on average will also be protected by the Danish Salaried Employees Act provided that they qualify as a salaried employee (white-collar employee).

Under the Danish Part-Time Employment Act, employers are prohibited from discriminating directly or indirectly against part-time employees because of their employment status as part-time employees. Also, the employee is entitled to compensation if he or she is dismissed for refusing to work part-time or for requesting to work part-time.

Similarly, fixed-term employment is regulated by collective agreements as well as by legislation. See also question 11.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

In Denmark, the following post-termination covenants may be valid and enforceable:

- non-competition clauses (to prevent an employee from taking up employment with a competing business or engaging in competitive conduct in general);
- non-solicitation of customers clauses (to prevent the employee from approaching customers and having any dealings with former customers); and
- combined non-solicitation and non-compete clauses.

As of 1 January 2016, a new act on post-termination restrictions entered into effect, setting out uniform rules for all employees and restricting the use of no-hire clauses (which are entered into by two or more employers to prevent each from hiring the other's employees).

The Danish Act on Post-Termination Restrictions regulates all agreements between an employer and an employee entered into from 1 January 2016 and forward. The Act imposes strict limits on the use of non-competition clauses and non-solicitation clauses.

A non-competition clause is only enforceable if the employee holds a very special position of trust, is informed why it is necessary to enter into a non-competition clause, has been employed for more than six months and is informed in writing of all the terms and conditions relating to the non-competition clause.

A non-solicitation clause is only enforceable if the clause concerns customers that have had business relations with the employee within the last 12 months before the date of notice, the employee has been employed for more than six months and is informed in writing of all the terms and conditions relating to the non-competition clause.

A 12-month limit applies to non-solicitation and non-competition clauses, while a six-month limit applies if the employee is asked to accept both clauses.

Non-competition clauses are not enforceable in case of unfair dismissal or redundancy. Managing directors and CEOs are not covered by the Danish Act on Post-Termination Restrictions.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

The compensation must amount to at least 16 to 60 per cent of the employee's remuneration at the effective date of termination (including benefits) depending on the duration of the restriction and whether the employee has obtained other employment. The first two months' compensation must always be paid as a lump sum upon termination.

If the employee is bound by a non-competition or non-solicitation clause with a duration of up to six months, the employee is entitled to a compensation of at least 40 per cent of the employee's remuneration. If the employee finds other appropriate employment during the notice period, the compensation is reduced to 16 per cent of the employee's remuneration.

If the employee is bound by a non-competition or non-solicitation clause with a duration up to 12 months or a combined clause with a duration of up to six months, the employee is entitled to a compensation of at least 60 per cent of the employee's remuneration. If the employee finds other appropriate employment during the notice period, the compensation is reduced to 24 per cent of the employee's remuneration.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

As a general rule, employers may be held liable for their employees' acts or conduct if the acts or conduct are carried out as a result of or relating to the employees' duties.

Update and trends

An entirely new and more simple holiday system is expected to be adopted in the near future. The current Danish Holiday Act is very complex and is primarily based on early to mid twentieth century labour market conditions. In 2016, a committee was set up to rewrite the Danish Holiday Act making it easier for employers to administrate holiday and making the holiday system more transparent to employees.

Following the adoption of the European General Data Protection Regulation (GDPR), the administration is working on adapting Danish legislation in order to comply with the rules of the GDPR. There is no overview of the consequences of the GDPR yet, and currently the Danish Ministry of Justice is preparing a report on the required amendments to the current legislation. It is expected that the incorporation of the GDPR will require changes in legislation and this area will be the focus in the coming years.

Employers continue to experience a large number of cases based on the claim that employees who have been dismissed due to excessive sickness absence or employees who have been made redundant are suffering from a disability and are, thus, entitled to a compensation under the Danish anti-discrimination legislation. The main themes of such cases are often whether the employee is actually disabled within the meaning of Council Directive 2000/78/EC or whether the employer has taken appropriate measures to enable the employee to carry out his or her job despite suffering from a disability.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employees are liable to pay tax in Denmark on income earned from a Danish employer.

All employees in employment must pay 8 per cent of their pay in labour market contributions. The amount is deducted by the employer.

Employers are also required to pay two-thirds of the ATP (the Danish labour market supplementary pension scheme) contribution per month, and deduct the remaining one-third from the employee's pay. The total ATP contribution for all full-time employees who are paid on a monthly basis is 284 Danish kroner per month.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

For patentable inventions, the rights of employees are governed by the Danish Employee Inventions Act. Most of its provisions are not mandatory, and the employer and employee can thus opt out of them by agreement.

For non-patentable inventions, the general rule is that such inventions belong to the employer because they are seen as a result of the work performed by the employee in the course of his or her employment.

32 Is there any legislation protecting trade secrets and other confidential business information?

Under the Danish Marketing Practices Act, an individual who is under a contract of service or work in cooperation with a business or carries out an assignment on its behalf must not obtain or try to obtain knowledge of or access to the trade secrets of the business in an improper manner.

If the individual concerned has obtained knowledge of or access to the trade secrets of the business in a lawful manner, he must not (unless authorised) pass on or make use of such secrets. This prohibition is valid for three years after the end of the contract of service, cooperation or assignment. Traders may not make use of a trade secret if knowledge of or access to it has been obtained in conflict with the rules above.

Breach of the rules may result in a claim for damages and a fine or imprisonment for up to 18 months, unless a more severe penalty is prescribed under the Danish Penal Code. Prosecution will take place only at the request of the injured party.

It should be noted that the amended Danish Marketing Practices Act is expected to enter into effect on 1 July 2017. With regard to the relationship between employers and employees, no essential changes are expected but sections 1 and 19 – which are often directly referred to in employment contracts – will be renumbered.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Under the Danish Data Protection Act, employers are subject to certain restrictions in connection with retrieving and disclosing employee data.

Data processing must take place in accordance with good data processing practice. Personal data must be collected only for specified, explicit and legitimate purposes, and any subsequent processing must not be incompatible with those purposes. The data must always be complete and correct. Also, a requirement of proportionality applies to both the amount of data processed and the registration period.

The Danish Data Protection Act distinguishes between sensitive and non-sensitive data, sensitive data (eg, employee health data) requiring greater protection.

The Danish Data Protection Agency monitors compliance. In practice, this includes handling complaints, processing notifications submitted, granting authorisations (needed before processing sensitive employee data) and inspections.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Under the Danish Act on Employees' Rights on Transfer of Undertakings, employers must inform and to some extent consult their employees if they are planning a business transfer covered by the Act.

With effect from the transfer date, the transferee will become a party to the transferor's employment contracts and will thus assume all rights and obligations under the contracts. If the transferor is a party to one or more collective agreements, the collective agreement(s) may also transfer. Therefore, if the transferee does not wish to become a party to the transferor's collective agreement or agreements, the transferee must notify the relevant trade unions within certain time limits.

A business transfer is not in itself a valid reason for dismissing employees, but the affected employees can be dismissed if necessary for economic, technical or organisational reasons entailing changes in the workforce.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

In Denmark, no general fairness or 'cause' requirement applies to individual dismissals. However, if the employee is a salaried employee (white-collar employee) and therefore protected by the Danish Salaried Employees Act, the dismissal must be reasonably justified by the conduct of the employee or the circumstances of the employer. Similar provisions are found in most collective agreements.

'Cause' is not a defined concept. 'Circumstances of the employer' often means economic reasons. If, for example, the employer is able to prove a need for cutbacks, the dismissals will usually be considered reasonably justified. But when carrying out the dismissals, the employer must ensure that the selection criteria are not arbitrary and not based on age, gender, religious beliefs or any of the other protected characteristics. Similarly, 'conduct of the employee' means that dismissals based on sickness absence, underperformance, etc, will usually be considered reasonably justified. In most cases, however, it will be a requirement that one or more written warnings have been given before the dismissal to allow the employee to remedy the situation and thus avoid dismissal.

Salaried employees (white-collar employees) are entitled to compensation for unfair dismissal if they have been continuously employed by the same employer for at least one year before the date of notice. For other employees (blue-collar employees), collective agreements will usually – directly or indirectly – impose a fairness test with respect to dismissals if the employee in question has been continuously employed for a specified period of time.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Employees are usually entitled to notice of termination unless dismissed for gross misconduct. Employers are normally entitled to pay out the employee's pay during the notice period as a lump sum and it is up to the employer to decide whether to require the employee to work during the notice period. If the employee is entitled to holiday pay, this amount must be paid into the holiday administration scheme (FerieKonto) at the end of the notice period.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Employers are entitled to dismiss employees with immediate effect for gross misconduct such as unexplained absence, theft, engaging in competitive actions, disloyalty, inappropriate behaviour, insubordination, etc.

If dismissing a salaried employee (white-collar employee) for gross misconduct, the employer will be entitled to damages for any loss incurred. However, such damages are not very common as the burden of proof is on the employer. In the event of unexplained absence or desertion, the employer is as a minimum entitled to damages equalling half a month's pay in the absence of special circumstances.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

There is no such general legislation in Denmark. However, salaried employees (white-collar employees) are entitled to redundancy pay if they have been continuously employed with the same employer for at least 12 years. In such case, the severance pay – which is payable in addition to the salary during the notice period – will amount to one month's pay. After 17 years of service, the amount is three months' pay.

For other employees (blue-collar employees), a number of collective agreements contain somewhat similar provisions.

39 Are there any procedural requirements for dismissing an employee?

Such procedural requirements apply only to public employers or if provided in a collective agreement. See also question 41 on collective redundancies.

No prior approval from a government agency is required by law.

40 In what circumstances are employees protected from dismissal?

Some categories of employees enjoy special dismissal protection. These employee categories include union representatives (under most collective agreements), health and safety representatives (under the Danish Working Environment Act) and employee directors (under the Danish Companies Act).

In addition, dismissal protection is given under various anti-discrimination acts. These include the Danish Act on Equal Treatment of Men and Women, the Danish Equal Pay Act, the Danish Act on Leave for National Service, the Danish Anti-Discrimination Act, the Danish Freedom of Association Act, the Danish Part-Time Employment Act and the Danish Act on Employees' Rights on Transfer of Undertakings. Further, some collective agreements may provide for dismissal protection in cases of sickness. See also question 35.

41 Are there special rules for mass terminations or collective dismissals?

The Danish Collective Redundancies Act applies if an undertaking plans to dismiss a certain number of employees, depending on the size of the undertaking. Under the Act or similar collective agreements, or both, employers must consult with employee representatives before actually deciding to carry out collective dismissals.

The employees must be given all relevant information and the employer must notify the relevant regional employment council.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Under the Danish Administration of Justice Act, common claims, including labour and employment claims, are allowed to be submitted as class actions under certain conditions. The aim of these rules is to collect similar claims on behalf of a number of individuals in order to make the process quicker and more efficient and economical for the plaintiffs.

A class action will only be allowed by a court if it is deemed the best way to try the claims. Thus, in practice, a class action involves an assessment on a case-by-case basis and greater discretion for the court. It is important to stress that an employee can always choose to assert a claim on an individual basis as well.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Employers are not allowed to impose a mandatory retirement age. Nevertheless, a mandatory retirement age set in collective agreements concluded before 28 December 2004 will still be valid if the retirement age is reasonably justified by a legitimate aim and is an appropriate and necessary means of achieving that aim.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Employers and employees are generally free to agree to submit to private arbitration in the event of a dispute, subject to the requirements of the Danish Arbitration Act. One such requirement is that the agreement between the parties must be clear and unambiguous, that the parties must have equal representation on the arbitration tribunal and that the arbitrator must be independent.

However, there have been examples in case law where the courts have allowed salaried employees (white-collar employees) to bring

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disputes before the ordinary courts about whether the employer could set aside certain parts of the Danish Salaried Employees Act, even though the parties had agreed to submit any disputes to private arbitration.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

As a general rule, statutory rights cannot be waived.

Even if the employer offers the employee higher pay in return, employees cannot waive their statutory rights during the employment relationship.

On termination, however, an employee will sometimes be allowed to waive certain rights in return for compensation. For example, the employer and the employee may enter into a severance agreement specifying that the agreement is a full and final discharge of any and all claims arising out of the employee's employment and dismissal. However, if the severance agreement is unfair, it may be set aside or changed by the courts.

46 What are the limitation periods for bringing employment claims?

The Danish Limitations Act sets out the limitation periods for employment claims. As a general rule, employment claims cannot be pursued after five years, although in special circumstances the five-year limitation period may be suspended or extended up to a total of 10 years.

Ecuador

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main regulations are:

- the political Constitution of Ecuador;
- international conventions, among others, those of the International Labour Organization (ILO), duly ratified by Ecuador;
- the Labour Code; and
- the Social Security Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes. Different laws, including the Political Constitution, ILO Conventions, Labour Code and specific laws for the disabled, prohibit the harassment of, and discrimination against, women or the disabled, as well as harassment or discrimination because of race, gender, political and sexual preferences, catastrophic or specific diseases, such as HIV, and so on.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Labour Ministry and the Ecuadorian Social Security Institute (IESS).

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

In general, the Constitution and applicable labour legislation recognise the workers' right to freely form a workers' organisation without any authorisation required in advance. This right consists of the freedom to form labour unions, associations, and other kinds of organisations, as well as to become affiliated with the organisations of their choice and to freely disaffiliate from them. Furthermore, the state has the obligation to encourage the creation of both workers' and employers' organisations.

5 What are their powers?

The purpose of these organisations is to:

- have better conditions stated in workers' individual employment agreements as a result of the negotiation and execution of collective bargaining contracts;
- receive professional training and cultural education;
- receive mutual support through the creation of cooperatives or savings banks; and
- receive benefits for workers' economic or social improvement and defence of workers' interests.

Although workers have the right to strike, the Constitution prohibits the stoppage of public health services and environmental remediation, education, justice, firefighters, social security, electrical power, potable water and sewage system, hydrocarbon production, fuel processing, transportation and distribution, public transportation, mail service, and telecommunications.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

No. Background checks are confidential and the results cannot be published or delivered to third parties.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

The law requires at least one medical examination prior to employment and one when the employment relationship is over. Based on certain regulatory requirements, and depending on the type of job, medical examinations will be required from time to time.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

This kind of examination cannot be directly requested, but may be included in the medical examination at the commencement of a job. Alcoholics and drug addicts cannot be barred from employment, although drinking alcohol or taking drugs on the job can be prohibited as the law prohibits bringing drugs and alcohol into the workplace and taking or drinking them there.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

In the public sector the law is aimed at procuring a balance between the number of men and women hired. For minority sectors, a specific number of points is assigned to the score needed to fill a public position.

The law states that when an employer from either the public or the private sector has more than 25 employees, at least 4 per cent of personnel must be disabled people or individuals who take care of disabled persons.

A new type of employment agreement has been created for young adult workers, between 18 and 26, to enter into a relationship of employment. The minimum percentage for this kind of agreement will be set in a regulation and is mandatory for employers. One year of social security taxes normally paid by employers will be covered by the state, if the salary is less than or equal to two times the unified base salary for workers in general. In addition, the number of employment agreements for young adults cannot exceed 20 per cent of the total payroll of stable workers in each company.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes, employment agreements have to be in writing and must fulfil the minimum requirements that are stated on the forms drawn up by the

Ministry of Labour. These requirements are not included in the law. The essential terms are:

- agreement between the parties;
- the worker's provision of lawful and personal services (meaning the worker him or herself, as opposed to through another person, has to provide the service);
- relationship of dependence or subordination, which means that the worker is required to be subject to the employer's orders and instructions (the employer establishes the schedule, place of work, manner in which the job has to be done and so on); and
- payment of a salary.

After the employment agreement is signed, it has to be uploaded on the Labour Ministry's web page.

11 To what extent are fixed-term employment contracts permissible?

In general, fixed-term employment contracts are prohibited. Nevertheless, there are certain forms of employment similar to fixed-term employment:

- piecework contracts: when the worker takes under his or her charge the execution of a specific work in exchange for remuneration for the entire job, without considering the time invested to carry it out;
- contract for a specific work or service that is part of the course of the business. Once the job or activity for which the worker was hired is completed, the employment relationship will end;
- incidental contracts for satisfying the employer's special demands, such as for replacing personnel on vacation, leave, sick leave, maternity leave and like situations;
- seasonal contracts that, owing to custom or collective hiring, are executed between a company or employer and a worker or group of workers, to carry out cyclical or periodic work. Owing to the discontinued nature of the work, this kind of contract confers stability, understood as the worker's right to be rehired each season as required;
- casual contracts for attending to urgent or special needs not related to the employer's regular business. The duration cannot be more than 30 days a year; and
- job-by-job basis: the work is done by piece, fragments, surface measurements, and in general, units of work, and remuneration is agreed for each one of them, regardless of the time invested to get the job done.

12 What is the maximum probationary period permitted by law?

Contracts generally provide for a legal trial period of 90 days, but the parties may waive the trial period.

13 What are the primary factors that distinguish an independent contractor from an employee?

What distinguishes the two types of contract is the relation of dependency and decision. Mainly, the relationship with the individual's freedom to act, meaning the level of dependency in the manner of acting. Independent contractors have more independence than employees. On this point, there are various rulings that might be considered contradictory in some cases. In summary, the rulings state that individuals who may work without a schedule, without having to report each day to another person, or individuals who independently perform their jobs and do so, by their own criteria and decision, without receiving a fixed remuneration, but charging for the service provided through invoices, are independent contractors. The individual's invoices must be in his or her name and include his or her taxpayer identification number.

14 Is there any legislation governing temporary staffing through recruitment agencies?

No. This is prohibited in Ecuador.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

In general, the law stipulates a maximum percentage of 20 per cent with respect to foreign employees, meaning at least 80 per cent of personnel must be Ecuadorians. For contracts with the state, the stipulated percentage of 20 per cent may be slightly raised. Legal representatives and attorneys-in-fact are not subject to limits in terms of the number of foreigners, but are with respect to the company's capital and assets. The company's capital or capital and assets must be at least US$25,000. If there is more than one foreigner in the company requesting a legal representative or attorney-in-fact visa, an additional US$12,500 will be required.

16 Are spouses of authorised workers entitled to work?

No. Based on the spouse's visa, a dependant's visa may be obtained for family members. This visa does not allow the spouse to work.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

In accordance with the law, the foreigner must have a resident's visa for Ecuador enabling him or her to work. If the foreigner does not, then the company will have to obtain a work visa for him or her. Likewise, foreigners without a work visa may provide professional services for a period of not more than 180 days.

If a foreigner without a visa is hired and works more than 180 days for a company, the foreigner will be deported and the company fined.

18 Is a labour market test required as a precursor to a short or long-term visa?

Based on Ecuadorian legislation, it must be proven that there are no qualified personnel in the country to fill the position in question. However, this rule has certain exceptions, especially when the contract is with the state and is of national interest. Furthermore, this condition may be avoided with the commitment to train Ecuadorian or foreign residents in Ecuador in the area for which the visa is requested.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Yes. The maximum work shift is eight hours a day and not more than 40 hours a week. Saturdays and Sundays are considered mandatory days of rest.

There are special shifts accepted for certain sectors, such as the case of underground work or work by adolescents.

A night shift is between 7pm and 6am and may have the same duration as the day shift and the same wages, although increased by 25 per cent.

Per an agreement with the workers and with the prior approval of the Labour Ministry, special work shifts may be established for a job. If the shift is more than eight hours a day or 40 hours a week, the additional time will be regarded as overtime, paid with a surcharge.

For work done beyond the eight-hour workday or 40-hour week, the worker is entitled to overtime pay.

Upon the prior agreement between the employer and workers, and with the approval of the Labour Ministry, in special cases the length of employment cannot be more than six months, but may be renewed for another six months on a onetime basis, the work shift may be reduced by up to 30 hours a week. Furthermore, and also on an exceptional basis, the work shift may be modified to exceed eight hours a day, but without surpassing the maximum of 40 hours a week or 10 hours a day. In this case, the work shift may be distributed irregularly throughout the five working days of a week.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime that is paid at time and a half and at double time cannot exceed four hours a day or 12 hours a week. If overtime is performed during the day or up until 12am, the employer has to pay wages at time and a half for each hour of overtime. If overtime is between 12am and 6am, the worker is entitled to overtime pay at double time. To calculate overtime, the worker's hourly wage for the day shift is used as the base.

To calculate overtime pay, the monthly salary is divided by 240 hours to obtain the hourly wage to which 50 per cent or 100 per cent thereof is added.

21 Can employees contractually waive the right to overtime pay?

No. Only employees with duties of trust are not entitled to charge for overtime. In general, those employees hold the highest positions in the company and are in charge of managing its different areas.

22 Is there any legislation establishing the right to annual vacation and holidays?

Besides Saturdays and Sundays, mandatory days of rest are: 1 January, Good Friday, 1 and 24 May, 10 August, 9 October, 2 and 3 November, 25 December, and the Monday and Tuesday before Ash Wednesday.

All workers are entitled to vacation each year for an uninterrupted period of 15 days, including non-working days. This right cannot be replaced with payment for vacation days. In addition, workers who have provided services for more than five years to the same company or the same employer are entitled to one extra day of vacation for each year after five years or may receive money for the salary corresponding to the extra days.

Workers under 16 are entitled to 20 days of vacation, and workers over 16 but under 18 to 18 days of vacation each year.

Extra vacation days because of seniority cannot exceed 15 in total, unless more vacation days are granted pursuant to an individual or collective contract.

23 Is there any legislation establishing the right to sick leave or sick pay?

In the case of a non-occupational illness or non-job-related accident, if the employee is not enrolled in the IESS or is not yet entitled to the IESS health care service, then the employer has to pay the worker. The amount to be paid is 50 per cent of the worker's salary in the case of a non-occupational illness, up to two months each year, based on a prior doctor's certificate stating that it is impossible for the employee to work or that the worker is in need of rest.

When the employee is entitled to seek medical attention from the IESS and the employee's absence is not owing to an occupational illness or to a job-related accident, the employer pays only 50 per cent of the salary for the first three days. In general, employees are enrolled with the IESS. If the employer fails to enrol an employee, the employer will have to pay 100 per cent of social security taxes, plus interest and fines. In certain cases, the worker may not have yet met the minimum requirements for being able to access the service and for the IESS to assume the payment.

In the case of absence caused by non-occupational illnesses or accidents, the employer must keep the employment agreement in force, without paying salary except in the cases listed above, for a period of one year. When a worker is granted permission or when it has been declared that the worker is in service commission for up to one year, the worker is entitled to receive salary for up to six months. The employee must have been employed for over five years, but not less than two years of work with the same company, to be a scholarship recipient in order to study abroad a subject related to his job. Also, permission may be granted to the worker to specialise in the country's official establishments, as long as the company has at least 15 workers and the number of scholarship recipients does not exceed 2 per cent of the total number of workers. When returning to the country, the scholarship recipient must provide his or her services to the same company for at least two years.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

All female workers are entitled to 12 weeks of compensated leave for the birth of their child. In the case of multiple births, the time period is extended 10 extra days. Absence from work is justified by submitting a certificate from a doctor from the IESS or other professional. The certificate should state the likely or actual date of delivery. In this case, 25 per cent of the worker's salary is paid by the employer and 75 per cent by the IESS.

The father has the right to 10 days of compensated leave for the birth of his child, in the case of normal deliveries. For multiple births or delivery by Caesarean, the leave is extended an additional five days.

In the case of premature babies or newborns requiring special care, compensated paternity leave is extended another eight days. If the newborn has a degenerative, terminal or irreversible illness, or a severe disability, the father may receive 25 days of compensated leave. These circumstances have to be justified by submitting a medical certificate by a doctor from the IESS or otherwise another professional.

In the case of the mother dying during delivery or maternity leave, the father may use the entire or remaining leave of the mother, respectively. Both mother and father are entitled to 15 days of leave for the adoption of a child, which starts on the date the child joins the family.

The right of workers to maternity/paternity leave has been improved. Once the maternity or paternity leave is over, the mother or father may request an optional and voluntary, uncompensated leave for up to nine months more to care for their children. The leave also applies in the case of adoptive parents.

Furthermore, female and male workers are entitled to 25 days of compensated leave for the medical treatment of children with degenerative illnesses.

In the case of justified absence for military service or for filling mandatory public positions, workers are granted one month of uncompensated licence, although that time may be extended by agreement of the parties.

25 What employee benefits are prescribed by law?

With regard to salary, employees must receive pay equal to at least the minimum wages and salaries set by the Labour Authority. In addition to their salaries and wages, workers are entitled to receive the following:

- Christmas bonus or a thirteenth salary: the equivalent of one-twelfth of what the worker earned in the 12 months between 1 December of the previous year and 30 November of the year in which payment is made;
- school bonus or a fourteenth salary: one unified base salary that is paid once a year. Presently, the unified base salary is US$366;
- employers or companies must also pay employees 15 per cent of net profits. Ten per cent is distributed among the company's employees regardless of their salaries for the corresponding year. The remaining 5 per cent is paid directly to the company's employees in proportion to their dependants, which are the employee's spouse, children under 18 and disabled children regardless of age. When a worker has not completed a full year of work, he or she will receive the proportional part corresponding to the time of service; and
- profits shared with workers cannot exceed 25 times the unified base salary for workers in general. Any surplus has to be delivered to the IESS joint service system.

Other employment benefits apply in addition to those listed above, such as the benefits for pregnant women.

The employer is obligated to discount from the worker's salary a sum corresponding to the worker's personal contributions to the IESS. This is 9.45 per cent of the worker's salary in general; the employer's contribution is 11.15 per cent. In addition, workers employed for at least 25 years on a continuous or interrupted basis are entitled to receive an employer-paid pension.

Workers who have provided 25 years of service to the same company are entitled to receive retirement pay from their employer; if the worker is dismissed before completing the 25 years, but has worked for

the same employer for 20 years or more, the worker will receive the proportional part of employer-paid pension.

The law guarantees the freedom to form unions and the employer must provide the facilities for this purpose.

Employees have the right to strike. Although the law prohibits dismissal during the formation of a labour organisation or when there is a strike, in practice a worker may be fired, such as when workers take over the workplace during a strike. The employer must pay extra compensation when the dismissal is without just cause.

Workers receive indemnification when they suffer from an accident on the job or an occupational illness, except where that accident or illness is covered by the IESS or is the consequence of the worker's negligence.

Dining areas are provided for workers when they total at least 50 in number at the factory or company and the workplace is located more than two kilometres from the closest town.

Elementary schools must be constructed to benefit workers' children when permanent work centres are located more than two kilometres from the town and as long as the school population is at least 20 children. Besides this, there are other corporate obligations concerning illiterate workers.

If factories or other companies have at least 10 workers, stores with basic commodities must be set up with the commodities sold at cost to their workers and workers' families in the quantities necessary for their subsistence. Companies have to comply with this obligation directly by opening their own commissaries or by contracting this service from other companies or third parties.

Workers must, in a timely manner, be supplied tools, instruments, and materials necessary for performing their work, in conditions that are appropriate for doing the job.

Workers are granted the time necessary for voting in popular elections established by law, but not more than four hours, as well as the time necessary for receiving care from the General Security Office for Individual and Family Health of the Ecuadorian Social Security Institute, or for meeting judicial requirements or notifications. Permission is granted without any salary deductions.

Employment certificates are issued to the worker free of charge and as many times as requested. When the worker leaves permanently, the employer is obligated to grant him or her a certificate, stating:

- the time of service;
- the kind or kinds of job; and
- the salary or wages earned.

There is also payment to workers to cover their round-trip fare, lodging and meal expenses when they are required to travel on business.

Fifty per cent of the fines imposed on the worker for failure to perform his or her employment contract is delivered to the association to which the fined worker belongs.

Companies with at least 100 workers are obligated to contract the services of a qualified social worker. Companies with at least 300 workers must contract an additional social worker for every 300 workers in excess.

Each year, the employer has to provide without cost at least one set of work clothes to anyone providing services.

Workers are entitled to three days of fully compensated leave in the case of the death of a worker's spouse or common-law spouse or relatives at a secondary level of blood or family relation.

The monthly payrolls stating the individual- and employer-paid social security taxes and discounts and payments of the reserve fund, stamped by the appropriate IESS department, have to be posted in a place where they may be viewed by all workers.

Unemployment insurance was amended and now may be accessed by people whose social security taxes have been paid at least 24 times and who have been unemployed for no fewer than 60 days. Unemployment pay is provided for five months at a decreasing rate and as long as the worker does not start providing services.

26 Are there any special rules relating to part-time or fixed-term employees?

Part-time work is an exception and the same rules as for full-time employees must be observed. Save for the specific exceptions listed in question 11, fixed-term contracts are not allowed in Ecuador.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

An employee is under an implied duty of secrecy or confidentiality, but these rules can be further expanded in the employment agreement and to post termination.

Criminal or civil action may be pursued to demand damages and the legal or contractual compliance with the confidentiality obligation. In many cases, however, it is difficult to prove non-compliance and the tables could turn on the employer, especially in criminal action.

Conversely, an employee cannot be demanded not to do a certain job, since that would go against the freedom to work. However, a bonus could be given to a worker to not do a certain job. Even in that case, however, it would be questionable because the right to work is one of the human rights enshrined in the Constitution.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Ecuadorian legislation does not include this payment. If, however, an agreement is reached with the employee, and the employee accepts certain restrictions regarding his or her freedom to work, he or she could sue for monetary damages because of that restricted freedom.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The employer is held liable in any case in which the employee causes damage to a third party or to third-party property while performing his work, for any reason, including the worker's negligence. Payment may be recovered from the employee, if proven that the employee failed to follow express instructions or acted under the influence of alcohol or drugs.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Income tax.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

If the invention is the product of the work for which the employee was hired, then for material and economic purposes it will be deemed that the invention is the property of the company or the employer. However, moral rights must be acknowledged, meaning the name of the person who created the invention has to be stated. If the invention is not related to the employee's job, then the invention will belong to the employee.

32 Is there any legislation protecting trade secrets and other confidential business information?

The Intellectual Property Law governs these aspects, and special laws provide supplement criminal rules.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Ecuadorian Constitution establishes that the collection, filing, processing, distribution or disclosure of personal data or requests for information either require authorisation from the person in question or have to be required per the law. Any information collected has to be informed to the interested party, in this case, the worker. Likewise, the employee has the right to know how the information will be used, the purpose, source and use of the personal information, and the time the file or the data bank will be in effect.

Employers and workers or former workers have to create a user name and secret password at the Labour Ministry in order to access confidential information. Users are the only ones responsible for the proper or improper use of their password and the data logged onto

the system. The Labour Ministry may use such data in all of its work-related legal processes.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

If a business is sold or transferred, the new owner will be obligated to keep the employees and take over the rights and obligations in retroactive fashion.

When a business closes, the employees receive severance pay equal to compensation for dismissal without prior notice.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employee may be fired only for a just cause, which has to be qualified by a labour inspector; the unique and specific causes are listed in question 37.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Employees can notify the termination of their employment agreements; the employer cannot. See the cases listed in question 11.

If the employee or employer notifies the desire to terminate the employment contract without just cause, the employee will receive a bonus equal to 25 per cent of his or her last monthly salary for each year of service.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

A worker cannot be fired without a prior notice, since it would be regarded as a dismissal without prior notice. An employee may be fired at any time, receiving the severance pay established in the law and that is detailed in question 38. If the dismissed employee is a union leader or a pregnant woman, a claim could be filed to annul the dismissal. In this case, the employer would be obligated to keep the worker in his or her position.

The only way to legally terminate an employment agreement without having to pay severance is to secure official approval, which is authorisation to dismiss a worker. The causes for obtaining approval to dismiss are:

- repeated or unjustified tardiness or absence from work or abandonment of work for more than three consecutive days, without a just cause and as long as such causes occur within one working month;
- serious indiscipline or disobedience of legally approved internal regulations;
- worker's lack of probity or immoral conduct;
- serious slanderous remarks against the employer or the employer's spouse, or common-law spouse, parents, grandparents, children or grandchildren, or representative;
- worker's manifest ineptitude in his or her job or post to which the worker had committed;
- groundless accusations made against the employer with regard to his or her social security obligations; or
- failure to take safety, preventive or health measures, as required by law or regulations or by the appropriate authority; or, conversely, failure to follow a doctor's prescriptions and orders without due justification.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

If the employee or employer notifies the appropriate authority about the desire to terminate the employment contract without a just cause to do so, the employee will receive a bonus equal to 25 per cent of his or her last monthly salary for each year of service.

Furthermore, if the employer does not secure official approval to dismiss the employee, said bonus and the following must be paid.

Severance pay corresponding to a dismissal without cause, in addition to the bonus for a dismissal with the official approval explained above, includes the following:

- up to three years of service: three months' salary; and
- over three years of service: one month's salary per each year of service up to a maximum of 25 months' salary.

If the fired worker had been employed by the same company between 20 and 25 years on a continuous or interrupted basis, he or she will receive the proportional part of the retirement pension.

If a disabled individual or an individual with a disabled person under his or her care who was hired in the disabled person's place is dismissed without a cause, special severance pay equal to 18 months' remuneration must be paid.

39 Are there any procedural requirements for dismissing an employee?

Yes. The administrative process, called Visto Bueno, is the official approval process and is conducted through a labour inspector.

40 In what circumstances are employees protected from dismissal?

If a pregnant woman, a woman on nursing leave or a union leader is dismissed without a just cause, the dismissal is not valid and the employee may choose whether to return to work or to receive additional severance pay equal to 12 months of salary.

Employees cannot be dismissed when a collective bargaining contract is under negotiation.

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41 Are there special rules for mass terminations or collective dismissals?

Up until last year, a rule was in place prohibiting dismissals with prior notice within a period of 30 days for more than two employees if the company had up to 20 employees, or more than five if the company had more than 20. That rule has been since repealed.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Actions are processed on an individual basis.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The private sector cannot force a worker to retire, but the state sector can. The retirement age is 65 years and the state may force an employee to retire at the age of 70.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

No, because jurisdiction is exclusive to the labour court. Nonetheless, mandatory mediation is promoted at the same Labour Ministry.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

No. Based on the Constitution, workers' rights cannot be waived.

46 What are the limitation periods for bringing employment claims?

Three years.

Finland

Seppo Havia, Suvi Knaapila and Valtteri Tapala
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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Finnish employment relationships are governed by statutory law, collective agreements and individual employment contracts. The central provisions governing employment relationships are included in the Employment Contracts Act (2001), the Working Hours Act (1996) and the Annual Holidays Act (2005). The Act on Cooperation within Undertakings (2007) regulates the employees' collective rights to information and consultation. The Act on Protection of Privacy in Working Life (2004) and the Personal Data Act (1999) regulate data protection issues relating to employment.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The main Acts prohibiting both direct and indirect discrimination in employment are the Employment Contracts Act (2001), the Non-discrimination Act (2014) and the Penal Code (1889). Accordingly, discrimination based on age, state of health, disability, ethnic or national origin, nationality, sexual orientation, language, religion, opinion, belief, family ties, trade union activity, political activity or any other reason corresponding to these is strictly prohibited. The Act on Equality between Women and Men (1986), on the other hand, prohibits gender-based discrimination. The Occupational Safety and Health Act (2002) prohibits sexual harassment by implication, by stating that employers are required to take care of the safety and health of their employees while at work by taking the necessary measures. Moreover, the Act places a duty on the employer to address harassment or other inappropriate treatment that causes hazards or risks to the employee's health. The Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (2006) contains provisions on cooperation in matters relating to occupational safety and health in the workplace.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Economic Affairs and Employment prepares most of the new laws and amends the existing labour laws in Finland.

Equality-related matters primarily fall within the scope of the Ministry of Social Affairs and Health. The Ombudsman for Equality, which is an independent authority that monitors the compliance with the Act on Equality between Women and Men (1986), serves as supervisory body in matters related to sexual harassment. In addition, the labour protection authorities, namely the Finnish Regional State Administrative Agencies and the Ministry of Social Affairs and Health, supervise compliance with occupational safety regulations. The Non-Discrimination Ombudsman promotes equality, prevents discrimination and advances the status and legal protection of foreign nationals. The National Discrimination and Equality Tribunal is an impartial and independent judicial body, which supervises compliance with the Non-Discrimination Act and the Act on Equality between Women and Men.

The principal authority providing guidance on the processing of personal data and controlling the observance of the data protection legislation is the Data Protection Ombudsman. The Office of the Data Protection Ombudsman is an independent authority that operates within the Ministry of Justice.

The Cooperation Ombudsman advises and supervises compliance with the acts on employee cooperation and consultation.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

In Finland, collective worker representation is typically organised through collective agreements and collective employee representation. Accordingly, employees are entitled to elect one or more employee representatives, that is, shop stewards and industrial safety delegates, to represent them in matters relating to the operations of the employer that may have an effect on the employees. The Act on Cooperation within Undertakings (2007) specifies the contents and the procedure of employee cooperation. The Act must be applied by employers that regularly employ at least 20 employees in Finland.

The Act on Cooperation within Finnish and Community-wide Undertakings (2007) provides employees with certain rights to information and consultation at the European level. The cooperation is organised through 'European works councils'. The Act applies to community-wide companies that regularly employ 1,000 or more employees of which at least 150 are in two or more member states, and to Finnish companies that have a minimum of 500 employees in Finland with their subsidiaries having at least 20 employees.

The Act on Personnel Representation in the Administration of Undertakings (1990) applies to companies regularly employing more than 150 employees in Finland. According to the Act, employees are, upon request, entitled to appoint representatives to one or more decision-making executive, supervisory or advisory bodies. Altogether, one to four personnel representatives may be nominated to such bodies in addition to the members elected by the company. The personnel representatives typically form one-quarter of the members of the body in question. It is possible to deviate from the above-mentioned rules by specific agreement concluded between the employer and the employee representatives.

The Act on Employee Involvement in European Companies (2004) applies to the arrangement of employee involvement in European companies registered in Finland. The participating companies, as defined in law, shall establish a special negotiating body, representing the employees of the participating companies and the concerned subsidiaries and establishments. The members of the special negotiating body are elected or appointed in proportion to the number of employees employed in each member state by the participating companies and concerned subsidiaries and establishments.

5 What are their powers?

The shop steward's main duty is to represent the unionised employees in cooperation matters and to monitor the compliance of employment legislation and collective agreement at the workplace. Although the shop steward primarily represents the unionised employees, she or he may also represent the employees who are not members of the union. The shop steward acts as a spokesperson for the employees and has an

authority to negotiate on their behalf in matters regarding, for example, dismissals, layoffs and local agreements.

The industrial safety delegate's main duty is to monitor the occupational health and safety at the workplace. The industrial safety delegate notifies the employer on any defects relating to occupational health and safety. She or he is also entitled to take part in occupational health and safety inspections.

In general, collective agreements contain provisions that employee representatives are entitled to use part of their regular working hours for their duties as employee representatives. Employee representatives also enjoy special protection against dismissal and may only be dismissed under exceptional circumstances specified by law (see question 40).

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Background checks are generally prohibited without the prior consent of the applicant, regardless of whether the employer or a third party conducts such checks. Information on conducting a background check must be given in advance, for instance in the job advertisement. Nevertheless, an employer may primarily collect personal data from the applicant himself or herself, provided that it is directly necessary for the applicant's prospective employment relationship with the company (the necessity requirement). The necessity requirement cannot be deviated from, even with the employee's consent. Moreover, applicants to positions such as day-care teachers and teachers may be required to provide the employer with an extract from their criminal records before commencing their employment.

Background checks are carried out as basic, extended or limited. Extended background checks may only be carried out on applicants for certain extremely delicate governmental positions. Basic background checks may be carried out by any private company, provided that the position applied for relates to, inter alia, internal or external national security or a very significant private interest of a financial nature.

Background checks relating to a private individual's criminal record or financial status and credit data are covered by special regulation in Finland. It is possible to carry out such checks, but only if the criteria for them are fulfilled in each individual case. In general, only job positions where the employees are directly financially responsible for the employer's property, or which for some other reason require considerable trust from the employer, may come into question. This would most likely cover any executive position.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There are no explicit statutory prohibitions against requiring a medical examination of a job applicant, provided that receiving such information is directly necessary for the employment relationship. Nevertheless, the applicant is not obliged to take such examination. If this is the case, the employer may refuse to hire the applicant in question but must ensure that there are no discriminatory elements in such a refusal. Otherwise, the refusal may be considered a violation of the non-discrimination legislation referred to in question 2.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

An employer has a right to ask a job applicant who is selected for a job that requires precision, reliability, independent judgement or quick reactions to provide a drug test certificate stating whether the employee has used drugs for non-medical purposes in a manner that has impaired his or her working or functional capacity. The employer has this right only if carrying out the said work under the influence of drugs or while addicted to drugs could, for example, endanger the life, health or occupational safety of the employee or other persons, or cause financial loss to the employer or its customers. The employer may also request provision of a drug test certificate if the applicant is to carry out tasks where special trust is required or where there is independent and uncontrolled access to drugs or a more than minor quantity of medicines that could be used for the purposes of intoxication. Based on the foregoing, the use of drug screening is generally limited to certain job positions. The employer must, in connection with the job application procedure and prior to the signing of an employment contract, notify the applicant that the nature of the job is such that the employer intends to require the drug screening.

Requiring a drug test certificate is also allowed if the applicant is to carry out tasks that include teaching or caring for a minor. If the applicant refuses to provide the drug test certificate, the employer may refuse to hire the job applicant in question but must make sure that there are no elements of discrimination in such a refusal. Otherwise, it may be considered a violation of non-discrimination legislation referred to in question 2.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

As a main rule, an employer is not entitled to treat job applicants differently on the basis of gender, ethnic origin, age, disability, health, language or any other corresponding reason mentioned in section 8 of the Non-Discrimination Act (2014).

When an employer is selecting future employees, the decisions must be based on requirements of the work itself. Positive discrimination in favour of certain under-represented groups, for example, disabled persons, is generally allowed for the purpose of improving genuine equality in working life. An employer's affirmative measures must, nevertheless, be consistent and systematic.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

According to the Finnish Employment Contracts Act (2001), there are no written form requirements for an employment contract. An employment contract may be concluded orally, in writing or electronically. An employer is, however, obliged to provide an employee with a written statement of the key terms of engagement by the end of the employee's first salary period. If the employment contract is concluded for a fixed term, the employer must also specify the duration of the contract and the justification for the fixed term. Although there is no statutory requirement for a written employment contract, it is recommended and customary in Finland to have employment contracts in writing.

11 To what extent are fixed-term employment contracts permissible?

Employers must have a justified business-related reason for employing someone on a fixed-term employment contract. If no such reason exists, the employee is deemed to be employed for an indefinite term. The requirement of having a justified business-related reason for concluding a temporary employment contract applies to each and every fixed-term contract. Hence, an employer renewing such a contract for another fixed-term period always needs to establish acceptable grounds thereof.

Notwithstanding the above, employers may conclude a fixed-term contract without a justified business-related reason with a job seeker who has been unemployed for more than 12 months (long-term unemployed). The maximum duration of a fixed-term employment contract with a long-term unemployed job seeker is one year and it may, during one year from the beginning of the first fixed-term employment contract, be renewed twice. However, the total duration of fixed-term contracts cannot exceed two years.

There is no maximum duration for fixed-term contracts concluded with others than long-term unemployed job seekers. Nevertheless, a fixed-term employment contract may always be terminated by notice after five years from the commencement of the employment relationship.

If an employer and an employee have concluded a number of consecutive fixed-term employment contracts, under which the employment relationship has continued without interruptions or only with short interruptions, the employment relationship is regarded as having been valid continuously when granting employment-based benefits.

12 What is the maximum probationary period permitted by law?

An employer and an employee may agree on a probationary period of a maximum of six months starting from the beginning of the employment

relationship. The maximum length of the probationary period cannot be extended by an agreement. Nevertheless, the employer may continue the probationary period if the employee has been absent during the probationary period due to family leave or disability to work. If a fixed-term employment relationship is shorter than twelve months, the probationary period may not exceed half of the duration of the employment relationship.

13 What are the primary factors that distinguish an independent contractor from an employee?

An employee is defined as a person who, on the basis of an employment contract, agrees to personally perform work for an employer under the employer's direction and supervision, and who receives pay or other remuneration thereof. An independent contractor, on the other hand, is economically independent and free to determine his or her activities, working hours and the place of work.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Employment Contracts Act (2001) provides minimum terms which must be applied in employment relationships of temporary staffing. According to the Act, at least provisions of a collective agreement, applicable to the undertaking using temporary staffing, shall be applied to the employment relationships of temporary staffing if the recruitment agency is not bounded by any collective agreement. If no collective agreement is applied to temporary staffing's employment relationships, the terms and conditions relating to the temporary staffing's salary, working hours and annual leave must, as a minimum, comply with agreements or practices binding on and generally applied by the undertaking using temporary staffing.

According to the same Act, temporary staffing is entitled to access the user undertaking's services and common facilities provided for employees on terms and conditions under which the undertaking offers these to its own employees, unless different treatment is justified on objective grounds.

Furthermore, the Act on Posting Workers (2016) contains specific provisions regarding terms and conditions of employment relationships of foreign temporary staffing posted to Finland.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

The entry into and residence in Finland of foreign nationals is subject to the provisions of the Aliens Act (2004). A foreign worker, other than an EU citizen, must have a valid visa or a valid residence permit before entering into Finland. A visa alone, however, does not entitle a person to work in Finland; a residence permit is generally required for the purpose.

Nevertheless, foreign workers have a right to work in Finland without a residence permit if they are permanent employees of a company operating in another EU state or the EEA. This is also allowed if such employees perform temporary contracting or subcontracting and they hold permits that entitle them to reside and work in another EU member state, provided that the permits stay in force once the employees have completed their work in Finland. EU citizens do not need a residence permit to stay and work in Finland, but they do have to register their stay if it exceeds three months.

The Act on Posting Workers (2016) contains specific provisions relating to workers who are posted to Finland.

16 Are spouses of authorised workers entitled to work?

Yes. According to the Aliens Act (2004), family members, namely, a spouse, unmarried children under 18 years old and a cohabitant of a foreigner, are issued with a residence permit, together with the family member entering into Finland to work.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

According to the Aliens Act (2004), an employer must attach written information on principal terms of work and an assurance that the terms comply with existing laws or a collective agreement to an application for a residence permit. Upon request of the employment office, the employer must also attach a statement confirming that it will meet its employment-related obligations to the application. The employer is also required to ensure that an employed foreign worker has the required residence permit if such permit is needed.

An employer, who employs a person who is not an EU citizen or a foreigner residing in Finland under a permanent residence permit, shall also submit the statement of the essential terms of employment to the employment office without delay and inform the shop steward and industrial safety delegate at the workplace of the foreigner's name and the applicable collective agreement.

An employer who deliberately or through negligence employs a foreigner who does not have the right to remunerated employment may be sentenced to a fine.

18 Is a labour market test required as a precursor to a short or long-term visa?

Yes. In connection with granting the residence permit for an employed person, the needs of the labour market are taken into consideration. The aim of the residence permit praxis is to support the possibilities of gaining employment for the current job applicants.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The primary rules governing working hours are set out in the Working Hours Act (1996). According to the Act, an employee's regular working hours shall not exceed eight hours a day and 40 hours a week. However, it is typical in Finland that the regular working time for white-collar employees is 7.5 hours a day and 37.5 hours a week in accordance with the general practice set forth by collective agreements. In addition to regular working hours, employees may conduct additional or overtime work.

Additional work refers to work done on top of the regular working hours on the employer's initiative but not exceeding eight hours per day and 40 hours per week. Overtime work, on the other hand, is carried out on the employer's initiative in addition to both the regular and additional working hours.

Additional work requires the employee's separate consent, unless such work has been agreed upon in the employment contract. Overtime work can be performed only with employee consent, which must be given separately for each time concerned. The employee can, however, consent to overtime work for a short period of time, if the nature of the work arrangements so requires. The maximum amount of overtime work during a four-month period is 138 hours, and the aggregate hours of overtime work may not exceed 250 hours in a calendar year. An employer may agree with employees or their representatives on additional overtime work exceeding the above-mentioned statutory limits. Such additional overtime work is limited to 80 hours per year, provided, however, that the maximum of 138 hours' overtime within a four-month period is not exceeded. The above-mentioned limitations cannot be deviated from by agreement.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employees to whom the Working Hours Act (1996) is applied are entitled to overtime pay. The Working Hours Act is typically not applied to executives in leading positions.

The amount of overtime compensation for the first two hours exceeding eight hours per day is 50 per cent of the regular wage and 100 per cent of the regular wage thereafter. With regard to weekly

overtime, namely working time exceeding 40 hours per week that is not considered as daily overtime, the additional compensation is 50 per cent of the regular hourly pay.

21 Can employees contractually waive the right to overtime pay?

According to the Working Hours Act (1996), any agreement whereby the benefits accruing to employees under the Act are restricted is void, unless otherwise provided in the Act. However, it is possible to agree for overtime pay to be converted into corresponding free time during regular working hours. In addition, it is possible to reach an alternative agreement concerning overtime pay under a national collective agreement. Managerial and supervising employees are also entitled to enter into an agreement whereby overtime pay is paid as a separate monthly remuneration.

22 Is there any legislation establishing the right to annual vacation and holidays?

The Annual Holidays Act (2005) establishes the employee's right to a paid annual holiday.

The holiday credit year runs from 1 April to 31 March. During the first holiday credit year, employees accrue two days of holiday for each full month worked. A full month is typically a month during which the employee works at least 14 days. In the second holiday credit year and thereafter, the holiday entitlement increases to two-and-a-half days for each full month worked. Six holidays constitute one full week of annual holiday.

When the total number of holidays is calculated, a fraction of a day is rounded up to constitute one full day of holiday. The Annual Holidays Act also sets out the right for an employee to receive regular or average pay during the holiday.

23 Is there any legislation establishing the right to sick leave or sick pay?

According to the Employment Contracts Act (2001), an employee who has been employed by an employer for over a month and becomes temporarily incapable to work is entitled to full sick pay up to the ninth day following the first day of disability. If the employment relationship has lasted less than one month, the employee is correspondingly entitled to 50 per cent of his or her pay. Collective agreements, however, typically include provisions on sick pay entitling employees to full pay even up to the first six months of their sick leave.

Employees typically have a right to sickness allowance, which is paid by the Social Insurance Institution (Kela). Sickness allowance is paid after the nine-day period specified above. According to the Sickness Insurance Act (2004), the sickness allowance is paid for up to 300 days including other weekdays except for Sundays. The amount of the allowance varies, depending, for example, on the employee's taxable earnings.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The Employment Contracts Act (2001) sets out the right to several different types of family leave such as maternity, special maternity, paternity, parental and childcare leave. The employer is not obliged to pay salary to an employee on family leave. Nevertheless, such obligation may be set out by a collective agreement. During maternity, paternity and parental leave the employee is entitled to parental allowance provided by Kela.

According to the Sickness Insurance Act (2004), a mother is entitled to maternity leave and maternity allowance for 105 days. A father may take paternity leave up to 54 working days. Either one of the parents is also entitled to take parental leave, which immediately follows the maternity leave period. The parental leave lasts for a maximum of 158 days.

In accordance with the Study Leave Act (1979), an employee whose full-time employment relationship with an employer has lasted for at least one year is entitled to up to two years of unpaid study leave during a period of five years. Likewise, an employee is entitled to five days of study leave if his or her full-time employment relationship with the same employer has lasted at least three months.

The right to job alternation leave is established in the Job Alternation Leave Act (2009). Job alternation leave is an arrangement where an employee is released from work for a fixed period of time and an unemployed jobseeker, an alternator, is hired to perform his or her tasks during the period. The alternator is typically entitled to a job alternation allowance for the duration of the job alternation leave. The minimum duration of the leave is 100 successive calendar days and the maximum is 180 days in total. Job alternation leave can be taken after 20 years of working history.

During the period of notice, an employee also has a right to take employment leave as defined in the Employment Contracts Act. The length of the employment leave is dependent on the length of the notice period and varies between five and 20 days. During the employment leave, the employee is entitled to receive full pay.

25 What employee benefits are prescribed by law?

The employee's right to indemnity due to the treatment of an illness, loss of income due to a temporary disability to work, pregnancy or childcare are benefits prescribed by the Health Insurance Act (2004). The Annual Holidays Act (2005) establishes the right to holiday pay. Furthermore, the Annual Holidays Act prescribes the employee's right to holiday compensation for the accrued but unused holidays upon termination of the employment relationship. The employee's right to statutory pension is established in the Employees' Pensions Act (2006).

26 Are there any special rules relating to part-time or fixed-term employees?

According to the Employment Contracts Act (2001), an employer must not apply less favourable terms of employment to fixed-term and part-time employment relationships than those applicable to full-time employees, unless the employer has proper and justified grounds to do so. Furthermore, an employer must offer all open vacancies first to its part-time employees suitable for the said positions. The employer must provide information on the vacancies in accordance with practice generally adopted within the company or at the workplace to make sure that part-time and fixed-term employees, as well as posted workers at the company, have the same opportunities to apply for the vacant jobs as permanent or full-time employees.

For information concerning the permissibility of fixed-term employment contracts, see question 11.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

An agreement of non-competition can only be concluded for a particularly weighty reason related to the business of the employer. In assessing the particular weight of such a reason, the nature of the employer's operations and the need for protection related to retaining a business or trade secret or to special training given to the employee, as well as the employee's status and duties, for example, shall be taken into account. However, when assessing the justification of conclusion of an agreement of non-competition, an overall assessment of the case at hand shall always be made.

An agreement of non-competition may restrict the employee's right to conclude a new employment contract or to engage in competing business operations for a maximum period of six months. However, if the employee receives reasonable compensation for the restriction, the non-competition obligation may be extended to a maximum of one year.

There are no specific statutory restrictions relating to other post-termination covenants, such as non-solicitation of customers and employees and confidentiality, whereas they are subject to agreement between the employer and the employee. However, the restrictive covenants may be considered unreasonable and therefore invalid if concluded for several years without acceptable grounds.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

The employer is not obliged to pay any compensation to an employee during the post-employment non-competition period if it lasts for up to six months. However, if the non-competition obligation lasts between

six months and one year, the employer must pay reasonable compensation to the employee for the restriction. The amount of reasonable compensation is not defined by law, but legal practice suggests that it should correspond to the employee's loss of income during the period of non-competition.

As mentioned above, there are no statutory provisions regarding other post-termination covenants (such as non-solicitation and confidentiality), whereas payment of compensation for such restrictions is subject to agreement (see question 27).

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

According to the Tort Liability Act (1974), the employer is vicariously liable for damages relating to an injury or damage caused by an employee through an error or negligence at work. Nevertheless, it is also the case that an employee may become wholly or partially liable for the costs incurred by the employer in this regard, taking into consideration the circumstances at hand.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employees' obligation to pay income tax is established in the Income Tax Act (1992). Indirect employment-related costs include social security contributions, employment pension contributions, accident insurance contributions, unemployment insurance contributions and group life insurance contributions, most of which are covered by the employer and the employee. The employer automatically deducts the relevant contributions from the salary payable to the employee.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Act on the Right in Employee Inventions (1967) applies to employee inventions patentable in Finland. Accordingly, an employer may have a right to obtain the right to a patentable invention created by an employee against reasonable compensation, provided that the intellectual property (IP) is created in connection with the employee's employment and it is exploitable within the employer's business. Should the invention be created in connection with a clearly specified work assignment, the employer obtains the right to the created IP even if it would not be directly usable within the employer's current operations. The employee is always entitled to reasonable remuneration for the invention. This right cannot be validly waived beforehand by the employee.

There are no specific provisions in the general Copyright Act (1961) regarding the transfer of IP rights relating to works created by an employee, except for computer software and databases. Therefore, the legal situation is somewhat unclear in this regard, but it may be argued that a copyright relating to an employee's invention belongs to an employee unless otherwise agreed or unless regulated by common general practices in the particular area of business.

32 Is there any legislation protecting trade secrets and other confidential business information?

Various acts protect trade secrets from unlawful disclosures. An obligation not to disclose an employer's trade secrets and other confidential business information is an essential part of employees' obligations set out in the Employment Contracts Act (2001). In addition, the same kind of obligation is provided by, for example, the Act on Cooperation within Undertakings (2007).

Furthermore, the Unfair Business Practices Act (1978) supplements the provisions of the Employment Contracts Act (2001) regarding protection of trade secrets and other confidential business information. According to the Unfair Business Practices Act, no one may unlawfully obtain or seek to obtain information regarding a business secret or use or disclose information obtained in such manner. The Act prohibits anyone who has obtained information relating to a business secret while working in the service of an entrepreneur from unlawfully disclosing or using it while still in the service of the entrepreneur in order to obtain personal benefit or benefit for another or to harm another.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Employment-related data protection is governed primarily by two Finnish Acts: the Personal Data Act (1999) and the Act on Protection of Privacy in Working Life (2004). As a starting point, an employer may only process employee personal data that is directly necessary for the employee's employment relationship. The right to process employee personal data must relate to the management of rights and obligations of the parties to the employment relationship, benefits provided by the employer or the special nature of the work concerned. This necessity requirement cannot be deviated from even with the employee's consent.

The employer must collect all information concerning the employee primarily from the employee himself or herself. In order to collect information from elsewhere, the employee's written consent must be obtained.

The processing of personal, sensitive data is generally prohibited. The employer is entitled to process information concerning the employee's state of health only if the information has been collected from the employee himself or herself or elsewhere with his or her written consent. In addition, it is required that the information is needed for providing the employee with benefits during his or her sick leave or for establishing his or her right to be absent from work. Alternatively, such information may also be processed if the employee has expressly requested his or her ability to work to be assessed. Information on the employee's health can be processed only by separately appointed employer representatives, and the acquired information must be kept separate from other information concerning the employee. The use of email in the workplace as well as technical monitoring of employees is restricted by law and only allowed with certain preconditions and in situations explicitly set out in the Act on Protection of Privacy in Working Life.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

According to the Employment Contracts Act (2001), which implements Council Directive 2001/23/EC, the rights and obligations of the parties to an employment contract automatically transfer to the acquirer of business. The Act on Cooperation within Undertakings (2007) and the Act on Cooperation within Finnish and Community-wide Groups of Undertakings (2007) oblige the employer to engage in a cooperation procedure with the employees in connection with the transfer of business, typically an acquisition of assets. The Act on Cooperation within Undertakings applies to companies regularly employing at least 20 employees in Finland, while the Employment Contracts Act poses a rather simple consultation obligation on smaller employers.

Acquisition of shares is not typically considered as a transfer of business and therefore does not trigger consultation obligations.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Under the Employment Contracts Act (2001), an employer must always have a weighty and acceptable reason for the termination of an employment contract. Instead of defining the various acceptable reasons, the law recites the grounds that at least cannot be considered acceptable reasons.

The grounds for terminating an employment contract are divided into two categories: individual grounds, which relate to the conduct and performance of an individual employee, and collective grounds, which relate to financial and production-related reasons or restructuring of

Update and trends

As of 1 January 2017, a few employer-friendly amendments entered into force. For example, maximum length of probationary period was extended from four months to six months and fixed-term employment agreement can be concluded with long-term unemployed jobseekers without a justified business-related reason. Furthermore, employers' obligation to re-employ an employee dismissed on collective grounds has been shortened from nine months to four months. Although, if the employment relationship has lasted uninterrupted for more than 12 years, the obligation to re-employ is six months.

Additionally, the Finnish Pension Reform entered into force in the beginning of 2017. Among the main amendments were an increase to the general retirement age and harmonisation of the accrual percentage of employment pensions. Due to the reform, employers have had to reassess possible supplementary pension terms and conditions included in their employment agreements or in other material employment documents.

the employer company. Characteristic to all legally valid grounds for termination is the requirement of material importance. The employer has a burden of proof as to the grounds in the event the employee challenges the termination.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

An employer must provide a notice of termination to employees prior to being dismissed. The notice of termination should be given in writing to all employees whose employment contracts are to be terminated, regardless of the grounds for the termination.

An employer and an employee may agree on pay in lieu of notice. An employer may also unilaterally release an employee from his or her obligation to work during the notice period (or any other time). In such event, the employer must provide the employee with salary and all the benefits the employee would receive if he or she would be working during the said period.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Termination of employment without notice requires an extremely weighty cause, which may be deemed to exist if the employee commits such a fundamental breach of his or her employment contract as specified in the Employment Contracts Act (2001) as to render it unreasonable to expect the employer to continue the employment relationship, even for the period of notice. It is important, however, that the employer acts swiftly once aware of the breach, as termination with immediate effect must be performed within two weeks from the date when the employer became aware of the grounds thereof.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The employer is not obliged to pay any termination or severance compensation on top of the salary for notice period. However, if an employee is dismissed on insufficient grounds, he or she will be entitled to receive compensation for unfair dismissal. The compensation is decided by the court, and is in the form of an indemnity. The minimum indemnity is equal to three months of the employee's salary and the maximum is equal to 24 months' salary. If the employer terminates an employee on collective grounds in violation of the provisions of the Act on Cooperation within Undertakings (2007), the employer will be liable to indemnify the employee up to a maximum indemnity of €34,519 (in 2017).

Certain companies have established voluntary redundancy packages, which they have offered to employees who are under threat of collective redundancy. Such additional compensation does not affect the employer's liability for an unjustified termination, unless the employee concerned expressly waives his or her possible claims relating to the employment relationship and its termination upon the termination.

39 Are there any procedural requirements for dismissing an employee?

The procedure at termination varies, depending on the grounds for the dismissal. The Employment Contracts Act (2001) provides employees with a right to be heard prior to dismissal on individual grounds. With regard to the notice of termination, see question 36.

The statutory periods of notice are set out by the Employment Contracts Act. The periods range from 14 days to six months depending on the length of employment. The employee and the employer may also agree to a notice period of a maximum of six months provided that the notice period applicable by the employee is no longer than the notice period applicable by the employer. The consultation and notification procedure for redundancy-based dismissals depends on the size of the employer. The length of the consultation and notification procedure varies between 14 days and six weeks. The Act on Cooperation within Undertakings (2007) applies to terminations on collective grounds by employers that regularly employ at least 20 employees in Finland.

The main principle of the Act on Cooperation within Undertakings is that employers are not entitled to make final decisions on redundancies or major business decisions resulting from them before fulfilling their duty to negotiate with the employee representatives.

Employers that regularly employ less than 20 employees in Finland fall outside the scope of the application of the Act on Cooperation within Undertakings. Such employers have a rather simple consultation obligation set out in the Employment Contracts Act. Accordingly, an employer that intends to dismiss an employee on collective grounds must discuss the reasons for the termination with the employee in question and the alternatives, as well as the employment services available from the employment and economic development office as far in advance as possible.

No prior approval from any government agency is required for dismissing employees. The employer must, however, inform the local employment authorities of the consultations relating to the possible reduction of workforce.

40 In what circumstances are employees protected from dismissal?

Shop stewards, industrial safety delegates and personnel representatives may only be dismissed under exceptional circumstances specified by law. The protection of these groups has often been further improved by collective agreements. In addition, an employer has no right to dismiss an employee who is on family leave. If a pregnant employee is dismissed, the dismissal is deemed to have taken place due to the pregnancy, unless evidence to the contrary is provided by the employer.

41 Are there special rules for mass terminations or collective dismissals?

Mass terminations or collective dismissals are treated as redundancies. See question 39.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class actions may not be undertaken by employees. Based on the Act on Class Actions (2007), class actions are allowed only in disputes between consumers and one or several businesses. The Consumer Ombudsman serves as the plaintiff and has the exclusive right to bring a class action and to exercise the right of a party to the case to be heard in court. For the purposes of the Act, a class action is defined as an action brought by the plaintiff on the behalf of the class defined in the action, with the objective that the judgment to be delivered in the case also becomes binding on the class members (ie, the consumers requesting the action). Consequently, class actions may not be brought by the consumers in person. So far, no class actions have been undertaken in Finland based on the relevant Act.

However, at the Finnish Labour Court, operating as a special court resolving civil cases concerning the interpretation of collective agreements, employee trade unions may bring actions against employers' organisations. The judgment of the court is binding upon all members of the associations involved, and decisions of the Labour Court are final and cannot be appealed.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

According to the Employment Contracts Act (2001), an employee's employment relationship is terminated without notice and notice period at the end of the calendar month during which the employee reaches the age of 68 or 69 if the employee is born between 1958-1961, and 70 if the employee is born in 1962 or later unless the employer and the employee agree to continue the employment relationship.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Arbitration clauses are typically deemed enforceable in director agreements but not in ordinary employment contracts.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

As a general rule, employees cannot legally waive their rights set out by the mandatory law. For example, an employee whose contract is terminated on collective grounds cannot validly waive the employer's re-employment obligation in advance. Under certain circumstances, however, an employee may waive some of his or her statutory rights after the termination of the employment relationship.

46 What are the limitation periods for bringing employment claims?

There are several statutes of limitation under Finnish employment law.

According to the Employment Contracts Act (2001), claims based on the rights provided by the Act become statute-barred five years after the due date. The period of limitation concerning bodily injury caused to an employee is 10 years. Legal action relating to the employment relationship of a former employee must be initiated within two years of the date on which the employment relationship expired. However, if the provisions of the collective agreement on which the employee's claims are based are manifestly ambiguous, the claim will become statute-barred five years after the due date. Similarly, claims based on the Working Hours Act (1996) or the Annual Holidays Act (2005) must be made within two years of the end of the calendar year in which such entitlement arose.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes and regulations relating to employment are the Labour Code, the Social Security Code, administrative regulations and collective bargaining agreements, either at a field-of-activity level or at a company level. International treaties, European legislation, the Constitution of 1958 and associated sources, and the Civil Code, which contain provisions that apply to employment, should also be mentioned.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Labour Code protects employees against harassment and discrimination, either direct or indirect, at work. Pursuant to article L. 1132-1 of the Labour Code, an employer must not take into account an employee's origin; gender; morals; sexual orientation or identity; age; family situation or pregnancy; genetic characteristics; belonging or not belonging to an ethnic group, a nation, or a race, real or assumed; political opinions; union or mutual activities; religious beliefs; physical appearance; family name; place of residence; state of health; handicap; or the ability to speak in another language than French in making a decision to hire, sanction, dismiss, promote, or reward that employee.

In addition to this list, the Labour Code grants protection in favour of employees who use their right of strike and fixed-term or part-time employees as compared to permanent employees in similar situations.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The administration of French labour law is entrusted to the Ministry of Labour, which is represented by regional and departmental directors and by labour inspectors organised through regional bodies. The judicial enforcement of French labour law is the primary responsibility of the labour courts, which are competent to judge all individual disputes arising out of the employment relationship. The Défenseur des droits, a French independent administrative authority, may assist the labour courts in order to identify and assess cases of discrimination.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The employer is required to organise elections at company level for staff delegates when the number of employees reaches 11 and for the works council when the number of employees reaches 50. Subject to certain conditions, a works council must also be elected at establishment level and either at group level or European level, or both.

5 What are their powers?

The works council has both economic and social functions.

Economic function

The works council's purpose is to ensure that the employees' interests are taken into account in the framework of the decision-making of the company on matters regarding the management and the evolution of the economic and financial situation of the company, the work organisation, professional training and manufacturing technique.

It must be informed and consulted:

- each year on the strategic orientation of the company, the economic and financial situation of the company and the social policy, working conditions and employment in the company; and
- more generally on each important project concerning the organisation, management and general activity of the company.

Employers must put in place a single economic and social database accessible on a permanent basis to the works council members. The content of this database is very broad and covers the following:

- investments regarding employment, assets (both tangible and intangible) and environment;
- equity and debt;
- all elements of compensation of employees and managers;
- social and cultural activities;
- payments made to investors/funds;
- financial aid benefiting the company, including public subsidies and base-credit;
- outsourcing, recourse to subcontractors; and
- group-wide financial and commercial transfer.

Lastly, works council members have the right to be present at the meetings of the Board. They have an advisory voice.

Social function

The works council ensures, controls or participates in the management of all social and cultural activities established in the company to the benefit of employees, their families and trainees.

The works council therefore has responsibility for activities for the well-being of employees both internally and externally, and the management of social welfare, pension and mutual insurance institutions. It also regulates all aspects of social services, as well as occupational health services, leisure and sports activities.

The works council can adjust the benefits according to certain criteria such as the employees' income or the age of the children.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The employer may ask an applicant to provide information directly or through a third party to the extent that such information is necessary to assess the applicant's professional capacities that have a direct link with the position and the employee's skills (article L. 1221-6 of the Labour Code). Except where the information is relevant in the specific context of the position, the employer may not collect private background information (eg, criminal or credit record or the holding of a driver's licence).

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

A medical examination is only mandatory as a condition of employment for an employee intended to work in a particularly dangerous environment (eg, employees exposed to carcinogenic agents, lead or ionising radiation). This examination aims to verify that the applicant is not suffering from a disease that may affect his or her working environment and that he or she is physically capable of carrying out the job's future duties. A medical examination is also mandatory for employees returning from maternity leave, leave for occupational disease and leave of more than 30 days for a work-related and non-professional illness or accident. For other employees, an information and prevention visit shall take place before the end of the trial period and within the three-month period following the date of hiring.

Regarding the medical follow-up, the industrial doctor shall see each employee at least every five years. Particular provisions exist for some employees. Disabled workers and night workers, for example, must see an industrial doctor at least every three years and employees holding a high-risk position must see an industrial doctor at least every four years with an interim visit. This period may be adapted to the employee's health conditions.

In any case, the result of the examination is not communicated to the employer.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

The employer is not, in principle, entitled to ask questions about the applicant's private life and this includes questions about health. Information relating to a health condition should only be given by the applicant to the medical staff during medical examination or an information and prevention visit. The doctor may prescribe a drug or alcohol test if he or she thinks it is relevant in assessing the applicant's ability to carry out the functions of the job. The applicant has to agree to the test and must be informed by the doctor of the possible consequences. The results of the tests are not communicated to the employer; the doctor indicates only if the applicant is able to work.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

An employer cannot give preference in hiring to particular people or groups of people because it may be considered discrimination, which is prohibited by law (see question 2).

Employers with at least 20 employees are legally required to employ disabled individuals at the rate of 6 per cent of the workforce. Employers may decide to hire disabled employees, to outsource part of their activity to specified companies employing disabled persons or to pay a financial contribution to a dedicated agency in lieu. A new law added three other ways to comply with this obligation:

- adaptation of the workplace to disabled undergraduate students for internship periods of at least 35 hours;
- offering a professional immersion period of at least 35 hours; and
- subcontracting agreements or services contracts with independent disabled workers.

Temporary measures for hiring women or older employees are also authorised.

Provided that an employee dismissed for economic reasons informs his or her previous employer that he or she would like to benefit from a re-hiring priority, the employer must inform and give priority to this employee for any hiring for a position corresponding to the employee's qualification within a 12-month period following his or her dismissal.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

A written employment contract is mandatory when an individual is hired as a temporary employee or is hired on a fixed-term or part-time contract. Restrictive covenants are also required to be in writing. A written employment contract is not strictly required under French law in other cases, although it is recommended for evidentiary reasons. Moreover, the European Directive of 14 October 1991 requires employers to provide a written agreement with the essential terms of the contract such as:

- the names of the parties;
- the place of the work;
- the job position;
- a brief characterisation or description of the job position;
- the starting date;
- for fixed-term contracts, the term of the employment;
- the duration or, if not possible, the terms and conditions of annual leave;
- the duration or, if not possible, the terms and conditions of the notice period;
- the amount and components of the compensation;
- the daily or weekly working time; and
- applicable collective bargaining agreements.

The collective bargaining agreement may also impose an obligation to provide the employee with a written employment contract or with specific information.

11 To what extent are fixed-term employment contracts permissible?

The normal form of employment is the indefinite-term contract. Therefore, a fixed-term contract may only be used to hire an employee to perform a precise and temporary task in factual circumstances strictly defined by the law as follows:

- to replace an employee who is temporarily absent or whose contract is temporarily suspended;
- to temporarily replace an employee whose job is being eliminated;
- to temporarily fill a vacant job position while awaiting the arrival of a new employee (for a maximum of nine months);
- to deal with a temporary increase in business activity;
- to facilitate the hiring of certain categories of unemployed person;
- to provide specific training to the employee; or
- to hire for seasonal work or in business sectors in which fixed-term contracts are standard practice.

Usually, the maximum duration of a fixed-term contract is 18 months and may be extended to 24 months under specific conditions. There is no maximum duration when the fixed-term contract may be made to replace an employee who is temporarily absent.

Specific limitations or prohibitions apply to companies that have carried out a dismissal on economic grounds during the past six months or hiring to fill a position requiring the performance of dangerous activities, and to replace employees on strike. In addition, the conclusion of successive fixed-term contracts with the same employee or for the same position is subject to limitations.

Subject to the existence of a specific provision in a collective bargaining agreement, fixed-term contracts may be signed with executives and engineers for a period of 18 to 36 months for the completion of a specific and defined project.

12 What is the maximum probationary period permitted by law?

For indefinite-term employment contracts, mandatory probationary periods permitted by law are:

- two months for workers and employees;
- three months for technicians and supervisors; and
- four months for executives.

Longer probationary periods are authorised when they are provided by a collective bargaining agreement entered into before 26 June 2008. Shorter probationary periods are authorised when they are provided by a collective bargaining agreement or employment contracts signed on or after 26 June 2008.

Such probationary periods may be extended once, but only if provided for in the collective bargaining agreement and in the employment contract. Such an extension, which is subject to the employee's express consent, must be agreed to before the end of the initial probationary period. The duration of the probationary period including renewal cannot exceed:

- four months for employees and workers;
- three months for technicians and supervisors; and
- eight months for executives.

The probationary periods can be terminated respecting a notice period up to one month.

A fixed-term contract may provide for a probationary period that depends on the duration of the contract and may last for up to one month for contracts exceeding six months.

13 What are the primary factors that distinguish an independent contractor from an employee?

Among other case-specific elements, the primary factors that distinguish an independent contractor from an employee are that the contractor:

- does not carry out duties in a subordinate position to an employer;
- does not belong to the employer's organisation;
- carries out the duties with his or her own equipment or in premises that are different from those of the user company;
- sends invoices for specific services rendered over a specific period of time; and
- must have completed all relevant registration and declaration formalities to act as an independent contractor.

French labour law imposes a variety of requirements and obligations on the parties in an employment relationship that do not apply to independent contractors (eg, disciplinary regulations, working-time regulations and paid holidays).

14 Is there any legislation governing temporary staffing through recruitment agencies?

Pursuant to French law, recruitment agencies must only carry out activities dedicated to providing temporary employees to their client companies. They are not allowed to conduct any other business.

When a temporary employee is made available to a client, two contracts are entered into: a service contract between the temporary agency and the user company; and a mission employment contract entered into between the employee and the temporary agency. Although the temp must comply with the working conditions applicable within the user company, his or her link of subordination remains with the temporary agency (ie, his or her employer).

With regard to contract requirements and conditions under which a company can use the services of a temporary worker, see question 11.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There is no numerical limitation on short-term visas (less than three months) for foreign employees working for the same employer in France.

All foreign workers need a visa and a work permit to work in France unless they are nationals of one of the member states of the European Union. Foreign workers who are not nationals of these countries need an authorisation to stay and work in France: a residence permit, which is valid for 10 years; the temporary stay visa with an authorisation to work, which is valid for one year; and the temporary authorisation to work, which is valid for 12 months. Other authorisations exist for students, scientists, etc.

Less restrictive visa rules apply to employees seconded from a foreign corporate entity to another related entity located in France for the purpose of carrying out a service (assigned employees). The employer is required to pay a special contribution, the amount of which depends on the duration of the assignment and the employee's salary.

Moreover, certain French labour legal requirements apply to the secondee during the secondment, including working time provisions, days off, paid holidays, minimum salary, overtime and rules relating to health and safety. These requirements ensure that the secondment will not deprive the seconded employee of the rights they would have been granted under a French employment contract.

16 Are spouses of authorised workers entitled to work?

A temporary authorisation to stay in France for personal reasons is available to the extent that the individual meets the legal conditions set by French law. This authorisation is for a maximum duration of one year (automatic renewal) and allows its holder to carry out a professional activity.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The procedures to obtain a work permit depend on the place where the foreign worker lives. If the foreign worker lives in France, the employer would need to check the validity of his or her visa and authorisation to work. If the foreign worker does not live in France, the employer must prove that it has tried, with no success, to recruit a candidate in France in order to be entitled to recruit a foreign worker.

The labour authorities issue the authorisation to work. Except for certain categories of employees (such as assigned employees, artists or high-level executives), they take into account the employment situation in the area where the foreign worker would work, the employment conditions (notably salary) that would apply to the foreign worker, and the technological and commercial purposes of the stay. Any refusal shall be written and shall provide the grounds for the refusal.

The usual formalities (notably, medical examinations) and labour requirements apply to foreign workers. The employer would have to pay a specific contribution for the employment of a foreign worker.

Failure to comply with the legal requirements governing the introduction of foreign workers to France may give rise to various sanctions including criminal liabilities. Courts will impose fines and imprisonment upon the employer (up to 10 years in prison and a fine of up to €100,000 for individuals, and €500,000 for legal entities) while French authorities can withhold the employee's authorisation to work or stay in France. Additional criminal or administrative sanctions are incurred, such as confiscation of all or part of the assets, exclusion from public procurement and dissolution.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test may be required depending on the particular situation of the foreign worker and the local employment situation. Except for certain categories of employees (see question 17), the employment situation of the geographical area where he or she will work is taken into consideration by the relevant administrative authority in order to decide whether to grant the authorisation to work in France.

In addition, when the foreign worker does not live in France, the employer must post the position with the unemployment agency or with agencies that are used by the public employment service. The employer will be entitled to recruit a foreign worker only if it is unable to staff the position with someone who is already authorised to work in France.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The typical working week is 35 hours under French law, unless otherwise specified by a collective bargaining agreement (although more flexible working time organisation may be applicable to executives). The number of overtime hours that an employee may work during a calendar year is limited by a collective bargaining agreement, by a company-level agreement or by law (a legal threshold of 220 hours per year and per employee); beyond such limit, the employee must be given a compensated rest period in addition to the overtime payment (see question 20). An employee may not work more than 10 hours per day. The average number of hours that an employee may work per week over any period longer than 12 consecutive weeks may normally not exceed 44 hours, nor may the number of hours the employee works during any given week exceed 48. Each failure by the employer to abide by the applicable rules and regulations relating to working hours or overtime hours is sanctioned by a maximum fine of €750 for individuals and €3,750 for legal entities. The fine is multiplied by the number of

employees affected by the violation of the law. The employee cannot opt out of such restrictions.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employees are entitled to overtime pay, except high-level employees with management duties who have the greatest independence in carrying out their duties and in the organisation of their schedules and whose compensation is in the highest range of the organisation. Other employees (itinerant workers and executives) may be subject to a particular arrangement that excludes overtime payment within a certain limit (eg, a maximum number of hours or days of work per month or per year).

Overtime pay is calculated on the basis of the hourly rate applicable to the employee with a surcharge (eg, 25 per cent between 35 and 43 hours of work per week and 50 per cent above 43 hours).

Overtime pay may be replaced, fully or partially, by compensatory time off for overtime hours worked below the overtime threshold (see question 19). The employee must be given compensated time off on top of overtime pay for hours worked above the overtime threshold.

21 Can employees contractually waive the right to overtime pay?

Aside from a specific organisation of working time, employees cannot waive their right to overtime pay.

However, employers can propose to employees who benefit from a certain level of autonomy in the organisation of their working time a global remuneration agreement for a certain number of hours worked per week or per month, including the payment of overtime hours, within the limit of either 20.8 hours per month or 4.8 hours per week (these thresholds can be lower depending on provisions regarding working time provided in a collective bargaining agreement or an in-house collective agreement). The remuneration of employees who benefit from this working time organisation must not be lower than the minimum remuneration corresponding to their classifications, as increased by the payment of the overtime hours included in their global remuneration agreements.

A collective bargaining agreement or an in-house collective agreement may allow employers and employees to enter into a global remuneration agreement for a certain number of days worked per year, without regard to the number of hours actually worked over the year by the employees. Provisions on overtime hours are not applicable to this category of employees and they are not entitled to receive overtime pay.

22 Is there any legislation establishing the right to annual vacation and holidays?

French labour law grants employees the right to a minimum amount of paid annual vacation. Two-and-a-half workable days of annual leave are given per month in the reference year, not to exceed 30 workable days. A 'workable day' is any one of the six days in the maximum six-day working week. Individuals working a typical five-day week during a full reference year will receive 25 working days for their annual vacation. Paid vacation is in addition to public holidays.

23 Is there any legislation establishing the right to sick leave or sick pay?

An employee may be absent due to illness, provided that he or she has informed the employer and produces a medical certificate (usually within 48 hours following the absence). During the absence, the employee receives a social security allowance.

The employment contract is suspended but the applicable collective bargaining agreement or the Labour Code ensures that the employee's salary is maintained in full or in part (subject to certain conditions). The salary is maintained from the first day of absence when the absence results from illness or a work-related accident, and after eight days of absence in other cases.

Pursuant to the Labour Code, the indemnity amounts to 90 per cent of the employee's gross salary during the first 30 days of illness, and to 66.66 per cent of the gross salary during the following 30 days. Those periods are increased by 10 days for each five-year period worked by the employee above one year within a limit of 90 days of indemnification for each period (maximum 180 days of indemnification for each period of 12 months). Any social security allowance and complementary healthcare indemnity received by the employee is deducted from the amount paid by the employer.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Apart from annual vacation or absence due to illness, an employee may be absent in various circumstances including maternity or adoption leave, family reasons (eg, marriage, death or illness of a parent), parental leave, training, sabbatical leave or creation of a business. Payment and duration of the leave depend on the reasons for the leave, and the existence of specific provisions of a collective bargaining agreement or from a specific agreement with the employer.

For example, in the case of maternity, the employee is entitled to a minimum of 16 weeks of absence with a maximum of 52 weeks (in the case of a multiple pregnancy with medical risks). During the maternity leave, the employee receives a social security allowance. The collective bargaining agreement may also provide for an obligation to maintain the employee's salary in full or in part. At any time after the birth of a child, the employee who has worked at least one year with the company before the birth may ask for parental leave or to move to part-time work for a maximum period of one year, which can be renewed twice, ending on the third birthday of the child. During parental leave, except in the case of part-time work, there is no legal obligation to maintain salary unless a collective bargaining agreement provides for it.

If the employee is absent without a valid reason, he or she will not be paid and may be dismissed.

25 What employee benefits are prescribed by law?

Employees are entitled to statutory social security benefits that consist of statutory pensions and protection against exceptional situations relating to the employee's health, family events, work-related accident or illness. Employees are also covered against unemployment risk. Such benefits are sponsored by the state through social security contributions paid by the employee (at the approximate rate of 20 per cent of the employee's gross salary) and the employer (at the approximate rate of 45 per cent of the employee's gross salary).

French law requires that any company employing at least 50 employees manage a mandatory profit-sharing plan and a company saving plan.

26 Are there any special rules relating to part-time or fixed-term employees?

An employer may not discriminate against part-time or fixed-term employees based on the fact that they are not employed on a full-time or permanent basis.

At the end of the fixed-term contract, the employee must generally receive an indemnity that is equal, at least, to 10 per cent of his or her gross salary received during the contract. For fixed-term employees, refer also to question 11.

For part-time employees, specific terms and conditions are required in writing in the employment contract (qualification, compensation items, working time, weekly schedule, amendment of schedule and additional hours, etc). If a full-time position in the same professional category or with similar duties becomes open, part-time employees must receive priority in terms of both applying for and obtaining such position.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Such covenants must be agreed to in writing. The company must justify the agreement as a protection of its legitimate interests. Furthermore, the covenant must not prohibit the employee from working in his or her area of skill. The territorial scope and duration of non-competition covenants must be limited. Moreover, financial compensation should be provided in consideration of a non-compete covenant. If an employee is not compensated for his or her non-competition commitment, the covenant will not be enforceable, and the employee may make a claim for damages for the limitation of the right to work that has been suffered.

The maximum period for a non-competition covenant depends on the employment contract and the collective bargaining agreement, if any. Usually, it lasts between 12 and 24 months.

Covenants not to solicit or deal with customers or suppliers are regarded as limiting the right to work and are therefore generally subject to the same conditions as non-competition covenants.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes, with respect to non-compete covenants. See question 27.

The compensation cannot be paid during employment but only after notification of the termination. The compensation must be fixed and its amount must be determinable (eg, it cannot be paid with stock options). It is generally fixed by the collective bargaining agreement, if applicable, and is paid through monthly payments during the period of restriction.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The employer will be held liable for all acts or conduct of its employees when carried out within the course of his or her duties.

When an employee injures a third party, the employer may be held jointly or separately liable for such an injury. The employer is not liable for the acts of any of its employees when an employee acts outside of the course of his or her employment or the employee acts in violation of the terms and conditions of such employment.

Taxation of employees

30 What employment-related taxes are prescribed by law?

All employees working for an employer in France must be affiliated with the French social security system. The amount of the contribution is based on the employee's salary. In addition to social security and unemployment contributions, the main employment-related taxes are: the general social contribution, contribution to the social debt, providence (for employers employing more than nine employees), additional pensions for manager-level employees, tax on wages, construction, apprenticeship, and continuing training. The employer must withhold the employee's portion (at the approximate rate of 20 per cent) from the employee's gross salary and pay its own contribution to the social security bodies (at the approximate rate of 45 per cent) that comes on top of the employee's gross salary. Specific deductions are awarded to recently registered companies.

Specific taxes may also apply in the case of hiring foreign employees, distribution of profit sharing, free-shares, stock options, etc.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Intellectual Property Code provides the rules applicable to any invention created by an employee. When an invention is created by the employee in the performance of his or her duties, such an invention belongs to the employer and all rights shall be assigned to the employer. The employee will be eligible for additional compensation in consideration of the invention, except for software, unless otherwise provided for by collective bargaining agreements or by contract.

When the invention is created by the employee outside of normal work duties, the invention belongs to the employee. However, when such an invention has been created by the employee during the performance of normal work duties, in the field of activity of the employer, by knowledge of documents or studies belonging to the employer, or with material or installations belonging to the employer, the employer has the option to claim ownership of all or part of the rights derived from the invention. The employee will be eligible for fair compensation in consideration for his or her invention.

The employer has no rights on other inventions created by employees or on inventions created by corporate officers.

32 Is there any legislation protecting trade secrets and other confidential business information?

Article 226-13 of the French Criminal Code prohibits any disclosure of any secret information from a person to whom the information was disclosed through his or her permanent or temporary professional duties. Any secret information disclosed to third parties in this framework is punishable by imprisonment of one year and a fine of up to €15,000.

Moreover, article L. 1227-1 of the French Labour Code incriminates disclosure of trade secrets. It provides that any legal representative or employee of the company that discloses or tries to disclose trade secrets can be sanctioned by imprisonment of two years and a fine up to €30,000. Courts can impose additional penalties (eg, deprivation of civic rights). Moreover, employees are bound by a general duty of loyalty without any time limitation. However, it is strongly recommended to provide a specific confidentiality obligation in the employment contract.

Finally, for confidential information provided to employee representatives in the framework of their functions as employee representatives, the latter are bound by a duty of confidentiality for any confidential information presented by the employer as such (although it is difficult to implement in practice).

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Data Privacy Law of 6 January 1978 (as amended in August 2004) protects employee privacy and personal data. Pursuant to this rule, an employer may collect information on employees, except information regarding racial or ethnic origin, political opinions, religious or philosophical beliefs, union membership, health or sexual preferences. Pursuant to article L. 1221-6 of the Labour Code, an employer may collect personal information from an applicant only if the purpose of such collection is to assess the applicant's abilities to carry out his or her future duties or professional skills. The Data Protection Authority (CNIL) controls the collection of personal data. Based on article 9 of the Civil Code, employees have a general protection of their private life at work. The monitoring of employees in the workplace is also subject to restrictive requirements (eg, email monitoring, video monitoring). Prior to the processing or filing of data relating to its employees, the employer is required to:

- register the processing with the CNIL (a prior authorisation may be required for certain categories of data);
- inform and consult with relevant employee representatives; and
- individually inform each employee of the existence and the finality of the data processing.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Directive No. 77/187/EEC on the transfer of undertakings, as modified by Directive No. 98/50/EC (the Acquired Rights Directive), has been introduced into French law by article L. 1224-1 of the Labour Code.

Article L. 1224-1 of the Labour Code provides that individual employment contracts transfer automatically from 'one employer to another as a consequence of the transfer of the activity at which they are working if such activity meets the case law criteria of 'an economic and autonomous entity which keeps its identity and which activity is maintained'.

The characterisation of a business or activity as an economic and autonomous entity depends mainly on factual circumstances. The criteria used by the courts to determine whether such an economic and autonomous entity exists include, principally, the following elements:

- assignment of a team of employees to the activity;
- the consistency and autonomy of such a team;
- the dedication of specific assets to the activity;
- the internal rules specific to the activity and autonomous hierarchy; and
- financial autonomy.

The consequences of the application of article L. 1224-1 of the Labour Code, in the event of such an automatic transfer, are that:

- all rights and obligations under individual employment contracts are transferred to the new employer, subject to the authorisation of the labour inspector for employees' reps;
- employees continue to work for the new employer without need for any change to their contracts;
- the new employer is bound by the terms of the employment contracts; and
- employees working at the transferred activity may not refuse the transfer of their contracts. A refusal may lead, in certain circumstances, to dismissal for just cause.

The collective status of employees transferred, pursuant to article L. 1224-1 of the Labour Code, must be renegotiated with unions for the purposes of adopting a new collective status applying to the enlarged workforce.

The automatic transfer rule of article L. 1224-1 of the Labour Code may apply in outsourcing arrangements where the business or function that is outsourced qualifies as an autonomous business entity. In this case, employees assigned to such business or function automatically transfer to the services provider under the outsourcing arrangements.

In circumstances where the automatic transfer may not occur (ie, in the absence of a transfer of activity, or when the transferred activity does not qualify as an autonomous economic entity), the employees concerned are not bound to accept their transfer, and the transferee of the activity is not obliged to employ them.

The automatic transfer of the employee may also result from a collective bargaining agreement in the case of a succession of contractors on a contract for the same services (eg, cleaning, transport, security).

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer must have a real and serious cause to terminate the employment agreement and must comply with all applicable dismissal procedures (on economic or personal grounds). There is no legal definition of what is a real and serious cause. The judge will determine on a case-by-case basis whether or not the dismissal was legitimate. The cause must be 'real', meaning exact, precise and objective, and 'serious', which justifies the termination of the contract.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Whatever the cause for a contract's termination (except for serious misconduct or gross negligence), an employer must give a notice period prior to dismissing an employee (generally between one and three months, but sometimes up to six months). The employer may release the employee from working during the notice period and instead pay an indemnity in lieu of notice. The indemnity is calculated on the basis of the base salary, bonuses and benefits that the employee would have received if he or she were to work during the notice period. The employee may ask to be released from working during the notice period, and when the employer accepts the employee's request, no indemnity shall be paid.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Serious misconduct and gross negligence are legal bases for terminating an employment contract without allowing the employee to serve his or her notice period and without having to pay him or her an indemnity in lieu of notice and severance pay. The qualification used by the employer is not binding on the judge, who can order the employer to pay an indemnity in lieu of notice.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes. The employer must pay the dismissed employee a minimum legal severance pay, provided that the employee has been employed for a minimum of one year by the company. This severance pay is paid whether the grounds for dismissal are personal or economic. The severance pay is equal to one-fifth of a month's salary for each year of service increased by two-fifteenths of a month's pay per year of service longer than 10 years (ie, one-third of a month's pay per year of service after 10 years). The collective bargaining agreement may provide for higher severance pay in lieu of the legal requirement.

Update and trends

The final round of the French presidential election will take place in May 2017. Each candidate's programme contains proposals to reform the French Labour Code. Some would like to reduce the working time whereas others propose to remove the 35-hour work week limit and allow for more flexibility for companies to organise the activity of their employees. Some changes may be awaited regarding retirement and termination of an employment contract. Lastly, many candidates propose to simplify the Labour Code and to favour social dialogue.

39 Are there any procedural requirements for dismissing an employee?

Yes. The procedure to dismiss an employee is highly formalistic. The employer or its representative must ask the employee to attend a preliminary meeting in order to discuss his or her potential dismissal. After this meeting, the employer must send a dismissal letter to the employee that indicates, among various requirements, the reasons for the dismissal and the duration of the notice period.

The applicable procedure depends on the nature of the dismissal, that is, for personal reasons (including disciplinary grievances) or for economic reasons, and on the number of employees to be dismissed as well as on the number of employees in the company.

When applicable, the employer has to consult its works council regarding the economic grounds and on a redundancy plan when the number of employees who are made redundant exceeds certain thresholds. The works council has no veto power and simply provides its opinion. The employer must notify the council of the procedure and must look for any redeployment solution.

40 In what circumstances are employees protected from dismissal?

Employee representatives are covered by specific protection. A special procedure (authorisation of the labour inspector) must be followed should the employer wish to terminate the employee representatives' contracts.

Moreover, as a general rule, it is illegal for an employer to treat an employee differently based on the categories listed in question 2 when terminating an employment contract. Specific procedures apply where the employment contract is suspended (eg, for illness or maternity). Termination of fixed-term employment contracts is also subject to specific rules.

41 Are there special rules for mass terminations or collective dismissals?

Yes. The procedure is highly complex and formalistic.

The law provides for two different methods of carrying out a collective dismissal (10 or more employees dismissed in a company of 50 or more employees): negotiating a collective agreement or drawing up a 'unilateral document'.

A collective agreement must be negotiated and signed with one or several trade unions. The agreement must provide details of the content of the collective redundancy plan (measures aimed at avoiding or at least mitigating the effects of redundancies, including redeployment measures) and can also contain provisions concerning the consultation procedure to be carried out with the works council. The trade union representatives may be assisted by an expert paid by the company.

The collective agreement is sent to the labour authorities at the end of the works council consultation period for checking. If the labour authorities approve the agreement within a 15-day period, the employer can then dismiss the employees.

A 'unilateral document' drafted by the employer sets out the terms of the collective redundancy plan and other specific details concerning

the redundancies. This document is then submitted to the works council for consultation. The works council is also informed and consulted on the restructuring leading to the collective dismissals.

The final document is sent to the labour authorities at the end of the works council consultation period for checking. If the labour authorities validate the agreement and the project within a 21-day period, the employer can then dismiss the employees.

The law provides for a maximum period for the works council to give its opinion following consultation on the redundancy process (two to four months depending on the number of employees to be dismissed). If the works council does not give its opinion by the end of this period, it will be deemed to have been properly consulted.

If the works council elects to be assisted by an expert, the law also provides for a specific framework and timing for the exchange of information and questions, and requires the expert to render its report 15 days before the end of the maximum period for consultation.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Employees may assert labour and employment claims on an individual basis. However, several employees may petition the court and join their claims into one sole procedure.

Class actions are only allowed in the specific field of discrimination. They can pursue two different aims: to enjoin an infringement; and to establish the liability of the employer to obtain compensation for the prejudice suffered. Class actions can only be exercised by some particular associations or by a trade union representative of employees, before a civil court in order to establish that several applicants for a job, internship or training period at a company or several employees are subject to direct or indirect discrimination. A formal notice to cease the infringement or to repair the prejudice sent to the potential defendant is a prerequisite. No class action can take place until a four-month period has elapsed since the date on which the potential defendant received the formal notice. Any term of a contract which aims to prohibit anyone from taking part in a class action is null and void.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

No. Retirement ages are defined by statute and may not be imposed by the employer. Except in a limited number of situations which are strictly regulated (eg, public companies or companies governed by specific statute), the employer may not pension off an employee before the age of 70, and covenants imposing automatic retirement from a certain age are therefore unenforceable. Below the age of 70, the employee's express consent is required for retirement, and a specific procedure applies.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

No. If the parties to a French employment contract agree to private arbitration, the opinion of the arbitrator will have no binding effect.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

No. An employee cannot waive statutory and contractual rights to potential employment claims in advance. The only possibility is to enter into a settlement agreement after a dispute arises. The employee and the employer must agree on reciprocal concessions. A settlement agreement in which an employee waives claims in connection with employment termination is not valid when signed before a notice of termination has been given to the employee.

46 What are the limitation periods for bringing employment claims?

All claims regarding salary are subject to a three-year statute of limitations following the date of the alleged violation. Discrimination claims are also subject to a five-year statute of limitations following the revelation of the alleged discrimination. Any claim in relation to the performance or termination of the employment contract must be brought before the labour court within two years following the revelation of the employer's wrongdoing. Claims in relation to the validity of the collective agreement or the unilateral document drafted in the framework of a collective redundancy (see question 41) must be brought before the administrative court within a two-month period following the date of the notification of the authorisation or validation decision by the labour authorities. A special one-year statute of limitations applies to claims in connection with the implementation or the absence of a social plan, if it was expressly stated in the dismissal letter.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statute on individual employment law is the Civil Code, which forms the basis of all individual employment contracts. Certain details of the employment relationship are governed by separate statutes, for example, by the Part-Time and Fixed-Term Employment Act, the Remuneration Continuation Act (which deals with sick and holiday pay), the Federal Vacation Act, the Working Time Act, the Termination Protection Act and the Company Pension Act. The main non-discrimination statute is the General Equal Treatment Act. Relevant collective employment law statutes are the Collective Bargaining Agreement Act and the Works Constitution Act (regarding works councils and their rights), as well as the Co-Determination Act and the One-Third Representation Act, which both deal with employee co-determination in corporate governance.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Federal Constitution provides that no one shall be discriminated against or privileged due to gender, descent, race, language, homeland, origin, religion, political opinion or disability. This provision applies directly or indirectly to all employment relationships. Discrimination in employment is specifically prohibited by the General Equal Treatment Act. The Act prohibits direct and indirect discrimination on the grounds of racial or ethnic origin, gender, religion, belief, disability, age or sexual orientation, as well as harassment in all forms.

Different treatment may be justified by genuine and determining occupational requirements. In the case of occupational activities within churches and similar organisations, a person's religion or belief constitutes a genuine and legitimate occupational requirement with respect to the organisation's ethos. Age discrimination can be detrimental to older or younger employees and is not subject to an age threshold. Different treatment on the grounds of age shall not constitute discrimination if it is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In particular, the Act allows the fixing of ages in company pension schemes.

Employees who have been discriminated against are entitled to compensation of financial and non-financial damage but do not acquire a right to employment. If an employee can establish a prima facie case for discrimination, the employer bears the burden of proof that no discrimination has occurred.

Separate non-discrimination provisions apply with respect to an employee's genetic characteristics and in favour of part-time and fixed-term employees. In addition, employers are generally prohibited from differentiating in any way whatsoever among groups of employees without sufficient reason.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Law enforcement by government agencies plays a role only in certain areas of employment law. The most important is occupational safety and health, where jurisdiction lies with state authorities. The Federal Employment Agency has some limited enforcement powers, namely with respect to temporary workers under the Temporary Employment Act. The Federal Anti-Discrimination Agency and similar state agencies support individuals in enforcing their rights under the General Equal Treatment Act. Illegal employment, that is, employment without payment of income tax and social security contributions, is pursued by the customs administration, which is supported by the social security providers. Otherwise, employment statutes and regulations are typically enforced by individual employees, works councils or unions bringing actions in the labour courts.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

A works council may be established in any business that regularly employs at least five permanent employees who have reached the age of 18 years and at least three of whom have six months of service. Works council establishment is voluntary. A works council is only established if the employees, even a minority among them, initiate the statutory election process.

5 What are their powers?

Works councils have a variety of statutory rights to enable them to perform their statutory tasks. For this purpose, employers need to inform them comprehensively and in due time and provide them upon request at any time with all necessary documents. To the extent necessary, works councils may ask employers to make knowledgeable employees available to them for fact-finding and may use external experts, subject to an agreement with the employers. Additional statutory rights exist in relation to personnel as well as social and economic matters, ranging from information and consultation to full co-determination. Where the statute provides for co-determination, the employer needs the works council's consent in relation to these matters.

As regards personnel matters, the works council is entitled to be informed of any hiring, pay scale grouping or regrouping, and transfer, and the employer must obtain the works council's consent. Within one week of being informed, the works council may withhold consent for certain reasons set out in the Works Constitution Act, namely if such measure would be in breach of the law, any collective bargaining agreement or agreement with the works council, or if there is factual reason to assume that the measure is likely to result in the dismissal of or other detriment to employees not justified by operational or personal reasons. If the works council withholds consent, the employer needs to ask the labour court to permit such measure. Furthermore, the employer needs to inform and consult with the works council prior to giving any termination notice (see question 39).

In social matters, the following issues are subject to works council consent:

- questions with respect to maintaining order and the conduct of employees in the business;
- scheduling of the daily working hours in the business and their allocation to individual weekdays;

- temporary reduction or extension of the usual working hours in the business (including overtime);
- time, location and form of remuneration payments;
- vacation policies and plans;
- introduction and application of technical equipment that may be used to monitor employees' performance or conduct (eg, information and communication systems);
- workplace safety rules;
- institutions administering employee benefits at the business, company or group level (eg, a pension fund or a cafeteria plan);
- questions regarding the pay and benefits structure (excluding amounts);
- piecemeal pay (including amounts);
- principles regarding employee suggestion schemes; and
- principles regarding group work.

Typically, the employer and the works council enter into written agreements on such matters (works agreements). If the employer and the works council are unable to agree, each may call for a conciliation board to be formed with an equal number of representatives from both sides and a neutral chair to issue a ruling that will constitute a binding agreement between the employer and the works council.

With respect to economic matters, in a business that employs on a regular basis more than 20 employees entitled to vote, the employer must inform the works council comprehensively and in due time and consult with it about 'operational changes' (closures or downsizings of businesses or material parts thereof; relocations of businesses or material parts thereof; mergers or demergers of businesses; fundamental changes to the organisation, purpose or facilities of businesses; or the introduction of fundamentally new work or production processes). The employer and works council are required to negotiate an agreement on the implementation of such change that is intended to balance the interests of the employees and the employer (the implementation agreement). If the employer and the works council cannot reach agreement, either party may initiate the conflict resolution procedure. In this case, however, the conciliation board may only mediate and does not have the power to impose an agreement on the employer and the works council. The works council may also be entitled to demand a social plan. See question 41 for further details.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

As a rule, background checks are allowed to the extent that an employer is entitled to obtain the relevant information directly from the applicant. This is usually the case if the information sought is objectively and intrinsically linked to the specific position and relevant to the work to be performed. Within these limits, employers may, for example, check the background of an applicant by contacting his or her previous employers. Employers are not entitled to obtain an applicant's criminal or credit record directly from the relevant registers. Whether they may ask the applicant to obtain and submit such a record is questionable, since these records are standardised and may also contain information that is not relevant to the specific position. Security checks may be conducted if the position is security sensitive. Psychological, personality and graphological tests require the applicant's consent, whereas polygraph tests are unlawful. Background checks regarding union membership are not allowed, and checks regarding political or religious affiliation are lawful only if the employer is a political or religious institution. Hiring a third party to conduct background checks is subject to additional restrictions.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

An employer may request a medical examination only to the extent that such examination is relevant to the applicant's physical ability to perform the work, and only with the applicant's consent. The consent requirement, however, is of little help to the applicant, as refusal to consent may cause the employer to reject the application. HIV tests may be required only if the work bears an increased risk of infecting others. Genetic testing of applicants is prohibited.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Alcohol and drug tests may be required if an applicant, by drug or alcohol-related misconduct, could endanger himself or herself or others or cause substantial property damage. Such tests require the applicant's consent. Refusal to consent may cause the employer to reject the application.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Employers with at least 20 employees are required to employ severely disabled persons for at least 5 per cent of the positions in their businesses. However, non-compliance with this obligation does not give a severely disabled person a right to be hired; instead, such a person may be entitled to adequate compensation under non-discrimination law. The General Equal Treatment Act and the prohibition of discrimination with respect to an employee's genetic characteristics also apply in a hiring context (see questions 2 and 7).

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Statutory law requires only that employment contracts with temporary workers and those parts of employment contracts relating to fixed terms and post-termination covenants not to compete be in writing. Nevertheless, written employment contracts for all employees are a best practice. Written employment contracts are a way to comply with the Documentation Act, which requires employers to provide to employees written summaries of the essential terms of the employment relationship within one month of its commencement, including, at a minimum, the following:

- the names and addresses of the parties;
- the employment commencement date;
- for fixed-term contracts, the envisaged term of employment;
- the place of employment or, if an employee will be employed at more than one location, the information that the employee may be required to work at various locations;
- a brief characterisation or description of the work to be performed;
- the composition and the amount of remuneration, including all components as well as their due dates;
- the agreed working hours;
- the annual vacation;
- the notice periods; and
- a general reference to applicable collective bargaining and works agreements.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permitted if the limitation in time is justified by reasonable cause. Reasonable cause exists in particular (without limitation) if the operational need for work is only temporary, if an employee replaces another employee (eg, in the case of illness) or if the limitation is for a probationary period. There is no specific maximum duration for such fixed-term contracts; however, the longer the duration, the more difficult it usually is to establish reasonable cause. The successive use of fixed-term employment contracts over many years may amount to an abuse of rights, rendering the limitation unenforceable.

Reasonable cause is not required for:

- fixed-term employment of new employees and employees whose last employment with the employer ended a long time ago – usually at least three years prior to the new employment (such contract may be extended up to three times, subject to an overall maximum term of two years);
- fixed-term employment by newly established businesses, unless they are established in connection with a reorganisation of existing businesses, within four years of establishment (such contract may be extended multiple times, subject to an overall maximum term of four years); and

- fixed-term employment of employees who have reached the age of 52 years and have been unemployed for at least four months (such contract may be extended multiple times, subject to an overall maximum term of five years).

Specific statutes govern fixed-term employment of scientific and artistic university staff and of medical practitioners in further education.

12 What is the maximum probationary period permitted by law?

The statutory maximum probationary period is six months. Collective bargaining agreements may provide for a shorter or longer maximum period. An extension is only possible if a period shorter than the applicable maximum period has initially been agreed to, only up to the applicable maximum period and only by agreement with the employee. During a probationary period of no more than six months, a notice period of two weeks applies. Agreements with apprentices and other training agreements must provide for a probationary period of at least one month but no longer than four months; during such probationary period, notice of termination with immediate effect may be given.

13 What are the primary factors that distinguish an independent contractor from an employee?

An employee is defined as someone who, on the basis of a contract under private law, is obliged to work according to instructions and heteronomously in someone else's service and in personal dependence. Contrary to an independent contractor, who is essentially free to determine how to organise his or her work and when and where to work, an employee is integrated into the employer's operational organisation and subject to the employer's instructions regarding the contents, performance, time and place of work. If the wording of the contract and its practical implementation deviate from each other, practice prevails over wording. Independent contractors who are economically dependent on the employer and, comparable to employees, in need of social protection, are regarded as employee-like persons to whom some employment statutes apply.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Temporary staffing through recruitment agencies is governed by the Temporary Employment Act. Recruitment agencies are required to have a government permit to operate and are subject to detailed regulation. If a recruitment agency does not have a permit, its employees will automatically become employees of the businesses for which they work. Staffing through recruitment agencies must be temporary. Where staffing is not intended to be temporary, the works council of the business for which the temporary staff shall work may lawfully object to the staffing, thereby preventing the use of temporary staff. Recruitment agencies must grant temporary staff essentially the same terms and conditions of employment, including pay, as the businesses for which the temporary staff works grant to comparable employees of their own (equal pay rule). Collective bargaining agreements (which apply to most recruitment agencies) may provide otherwise, except for temporary staffers who had been employees of the business (or affiliated entities) during the six-month period immediately preceding temporary staffing. Businesses using temporary staff must allow them access to their collective employee services such as canteens, kindergartens and transportation. See 'Update and trends'.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Short-term visas, that is, visas for periods of up to three months, are not subject to numerical limitations.

As regards employees transferring from a foreign corporate entity to a related German entity, visas – for up to three years – are available for only two groups of employees of an internationally active business or group:

- employees with university or similar education, provided that they transfer within the framework of a personnel exchange programme in such business or group; and
- employees whose qualifications are comparable to those of a German skilled worker and who have specific, especially company-specific, know-how, provided that:
  - these employees usually work abroad;
  - they are employed in the domestic part of such business or group;
  - their employment in Germany is absolutely necessary for the preparation of foreign projects; and
  - they will work abroad in connection with the implementation of such projects.

Employees from other EU or EEA countries or Switzerland do not require visas for employment in Germany.

16 Are spouses of authorised workers entitled to work?

Subject to certain conditions, a spouse of an authorised foreign employee is entitled to a residence permit comprising permission to work. For example, in the event of subsequent family immigration of the spouse and one or more minors, the employee must have the necessary residence permit and sufficient housing space. Spouses of employees from other EU or EEA countries or Switzerland who are not citizens of one of these countries automatically receive a residence certificate and do not need permission to work.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

In Germany, employers may employ workers from other EU or EEA countries or Switzerland without the need for a specific residence or work permit. Workers from other foreign countries may be employed in Germany only if they have a residence permit that comprises permission to work. The granting of such work and residence permits is subject to detailed statutory requirements and, in principle, limited to certain occupations and categories of employees. The residence permit usually has to be applied for at the relevant German embassy before entering Germany. The embassy will involve the local foreigners' office and, unless an exception applies, the Federal Employment Agency. Employing a foreign worker who is not entitled to work in Germany constitutes an administrative offence. The maximum fine is €500,000 for the employer and €5,000 for the employee.

18 Is a labour market test required as a precursor to a short or long-term visa?

Before any visa that comprises permission to work is granted to a foreign worker, the Federal Employment Agency must be involved, subject only to limited exceptions for certain occupations and categories of employees. The Federal Employment Agency will regularly perform a labour market test unless another set of exceptions applies. It may approve such visa if the employment of foreign nationals does not cause detrimental effects to the labour market, if German employees or non-German employees with comparable status are not available for the relevant position, and if a foreign employee will not be employed under terms and conditions that are less favourable than those for comparable German employees.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The maximum daily working time from Monday to Saturday is eight hours. It may be increased to 10 hours if an average of eight hours per day, that is, 48 hours per week, is not exceeded within a period of six months or 24 weeks. Work on Sundays and public holidays, in principle, is prohibited, although numerous exceptions apply. Employees are not entitled to opt out of these restrictions.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Entitlement to and calculation of overtime pay are often governed by collective bargaining agreements, works agreements or individual employment contracts. Unless otherwise agreed (see question 21), the employer is contractually required to provide overtime pay if it

can objectively be expected on the basis of the circumstances of the individual case. Such objective expectation applies to most employees; however, it does not apply where commission is paid in addition to the base salary, nor does it apply to employees who provide certain qualified services (eg, lawyers) or whose annual remuneration exceeds the contribution assessment ceiling in the statutory pension insurance scheme (in 2017, €76,200 in western Germany). Statutory law does not require overtime pay to be higher than pay for the normal hour.

21 Can employees contractually waive the right to overtime pay?

Overtime pay governed by a collective bargaining agreement or works agreement cannot be waived just by an agreement between the employer and the employee (see question 45). Where overtime pay is governed by the individual employment contract it cannot be waived completely in advance. Provisions to that effect are unenforceable; however, the employer and the employee may agree that a certain number of overtime hours within a certain period will not be compensated separately.

22 Is there any legislation establishing the right to annual vacation and holidays?

Employees are entitled to a minimum paid vacation of 24 working days per year on the basis of a six-day working week, which translates into 20 working days in the case of a five-day working week. During the first six months of the employment relationship, vacation accrues at a rate of one-twelfth of the annual vacation per completed month. After six months of service, employees are entitled to the full annual vacation. Severely disabled employees are entitled to five days' additional paid vacation per year (on the basis of a five-day working week). Vacation is in addition to public holidays, the number of which varies from nine to 13 days per year, depending on the state where the employee works. Public holidays are also paid.

23 Is there any legislation establishing the right to sick leave or sick pay?

Employees are not obliged to work if they are unable to do so due to illness. They are obliged to submit a medical certificate for any inability to work that lasts more than three calendar days; however, an employer may ask for such certificate to be submitted from the first day. Under the Remuneration Continuation Act, employees are entitled to sick pay from their employers for a period of up to six weeks for the same illness. Sick pay is available to all employees who have completed four weeks of service. The amount is essentially equal to the employee's usual remuneration, but without overtime pay and certain expenses. If six weeks have expired and the employee continues to be sick, an employee who is a member of the statutory health insurance system is entitled to sick pay from his or her health insurance provider for a maximum period of 72 additional weeks. This sick pay amounts to 70 per cent of the employee's gross pay, but no more than 90 per cent of the employee's net pay, in each case up to the contribution assessment ceiling (in 2017, €52,200).

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

There are several types of leaves of absence, the most important being maternity and parental leave.

Maternity leave commences six weeks prior to expected childbirth and ends eight weeks after childbirth (12 weeks in the case of multiple births or pre-term birth). During maternity leave, the employee receives maternity pay from her statutory health insurance provider or the government, and the employer is required to make up the difference between maternity pay and the average net remuneration.

Parental leave may be taken if an employee lives with, cares for, and educates his or her child. Parental leave can be taken until the child's third birthday. With the employer's consent, up to 24 months' parental leave may be taken after the child's third birthday but prior to his or her eighth birthday. Parental leave is unpaid by the employer; however, a government benefit of up to €1,800 is available to employees for a maximum period of 12 to 18 months (or at a reduced rate for twice the applicable maximum period). Also, employees are entitled to work up to 30 hours per week during parental leave.

Nursing care leave may be taken by an employee who cares in a domestic environment for a close relative who is in need of care. The leave may be taken for up to six months and is unpaid. In businesses with more than 25 employees on a regular basis, the employees may take part-time family care leave with a minimum of 15 working hours per week. This leave may be taken for up to 24 months (including any nursing care leave).

A right to paid leave of absence exists where an employee is prevented from working for personal reasons through no fault of his or her own for a relatively short period of time. Examples are major family events such as weddings, medical consultations and home care for close relatives who are sick, in particular for children up to 12 years old.

25 What employee benefits are prescribed by law?

Employees are regularly insured in the social security system, which comprises statutory pension, health, nursing care, unemployment and occupational accidents insurance. High earners may opt out of statutory health and nursing care insurance and enrol in private health and nursing care insurance instead. As a rule, contributions to the statutory schemes are borne in equal shares by the employer and the employee. However, most health insurance providers charge additional contributions to employees; childless employees over 23 years of age contribute slightly more to nursing care insurance; and contributions to occupational accidents insurance are borne solely by the employer. Typical social security benefits are retirement pensions, disability pensions, survivors' pensions, healthcare and nursing care, as well as unemployment benefits. See question 22 for paid vacation and holidays, question 23 for sick pay and question 24 for maternity benefits.

26 Are there any special rules relating to part-time or fixed-term employees?

The main statute in this area is the Part-Time and Fixed-Term Employment Act. Employees with more than six months of service may request a reduction of their working time. Employers who regularly employ more than 15 employees have to accept such requests to the extent that operational reasons do not require otherwise. Such operational reasons exist, in particular (without limitation), if the reduction materially affects the organisation, the workflow or the safety of the employer's business, or if it causes unreasonably high costs. A similar right exists for employees during parental leave, limited to between 15 and 30 working hours per week. Specific statutory provisions apply to work on demand and job sharing. Pre-retirement part-time work is subject to specific requirements under a separate statute. For fixed-term employment, see question 11. See question 2 for non-discrimination.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants not to compete are invalid if they have not been agreed to in writing. They are unenforceable if the employer has failed to hand over to the relevant employee a signed document with the covenant or has failed to agree to pay compensation of at least 50 per cent of the employee's most recent contractual remuneration (pay and certain benefits) for the term of the covenant, which must not exceed two years. A post-termination covenant not to compete is unenforceable to the extent that it is not justified by the employer's legitimate business interests or makes the employee's professional advancement unreasonably difficult. If the covenant is valid but unenforceable, the employee may elect to reject or accept the covenant. If the employee accepts the covenant, he or she will be entitled to the compensation the employer has agreed to pay.

Prior to the termination of employment, the employer may waive the covenant not to compete in writing. The effect of such waiver is that the employee becomes immediately free to compete upon termination and that the employer's obligation to pay compensation terminates 12 months from the waiver. Consequently, if the employer waives the non-compete covenant at least 12 months prior to termination, no compensation will be payable.

If the employer or the employee terminates employment extraordinarily, the covenant not to compete becomes unenforceable, and no compensation needs to be paid, if the party terminating employment declares in writing within one month of the termination that it will not

be bound by the covenant. The employee may also declare that he or she will not be bound if the employer terminates employment ordinarily, unless such termination is justified by reasons relating to the employee's person or conduct, or the employer, when giving notice, agrees to pay 100 per cent of the employee's most recent contractual remuneration for the term of the covenant.

Post-termination covenants not to solicit or not to deal with customers are subject to the same rules. The same applies to post-termination covenants not to solicit employees in favour of the employee bound by the covenant, whereas such covenants are not subject to the foregoing rules and enforceable if they prohibit solicitation only in favour of such employee's new employer. Whether the aforementioned rules apply to covenants not to solicit suppliers has not yet been decided by the labour courts.

See also question 28.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes. A post-employment covenant not to compete is unenforceable if the employer has failed to agree to pay compensation of at least 50 per cent of the employee's most recent contractual remuneration (base pay, variable pay and certain benefits) for the term of the covenant. If no compensation at all has been agreed upon, the restrictive covenant is invalid. If compensation has been agreed upon but does not reach the statutory minimum, the restrictive covenant is valid but cannot be enforced by the employer. Rather, the employee may elect to reject or accept it. If the employee accepts it, he or she will be entitled to the compensation that the employer has agreed to pay.

Other employment income that the employee earns or maliciously fails to earn during the term of the non-compete covenant will be taken into account to the extent that such employment income, together with the non-compete compensation, exceeds 110 per cent of the employee's most recent contractual remuneration (125 per cent if the non-compete covenant forced the employee to relocate). The employee is obliged to inform the employer about such other employment income upon request.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Within the framework of a contractual relationship, an employer is liable for any negligent or wilful breach of contract caused to the other party of the contract by an employee whom it uses to perform its obligations under the contract, provided that an intrinsic factual link exists between the employee's act and the breach. The employer is not liable for any act the employee commits only on occasion of the performance of the contract – for example, if the employee commits a criminal offence that is in no way linked to his or her duties. As regards liability in tort in relation to third parties, the employer may excuse itself by proving proper care and diligence in selecting the relevant employee. The effect, however, of such excuse is limited due to the employer's obligation to indemnify the employee from third-party claims. Such obligation depends on the degree of the employee's fault: where there is a low degree of negligence, full indemnification; where there is ordinary negligence, partial indemnification; and where there is gross negligence or a wilful act, usually no indemnification. Personal injury to employees caused by an occupational accident for which the employer or another employee is responsible is covered by the occupational accidents insurance. Employers are directly or indirectly liable for such damage only if they have acted wilfully or with gross negligence.

Taxation of employees

30 What employment-related taxes are prescribed by law?

An employee's remuneration is subject to income tax, to the solidarity surcharge on such tax and, depending on the employee's religious affiliation, also to church tax. Income tax, the solidarity surcharge and church tax must be withheld and paid to the tax authority by the employer but are borne by the employee. The employer must also withhold the employee's share of the social security contributions (see question 25) and pay such share, together with the employer's share, to the employee's health insurance provider, which acts as a clearing centre.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Employee Invention Act governs inventions that qualify for patent or utility patent protection as well as suggestions for technical improvements, that is, other technical innovations that do not qualify for such protection. The Act distinguishes between service inventions, which either result from an employee's work in the employer's business or significantly depend on the business's experience or work, and free inventions, which include all other employee inventions. Employees are obliged to notify the employer in text form without undue delay of any invention they have made during the employment (unless it is obvious that a free invention cannot be used in the employer's business). Service inventions may be claimed by the employer with the effect that the employer acquires all proprietary rights to the invention. The employer is deemed to have claimed the invention if it does not waive the invention in text form within four months after proper notification. Free inventions must be offered to the employer first, at least on a non-exclusive basis, provided that the invention can be used in the employer's business. Employees are entitled to compensation for any service or free invention acquired by the employer and for any suggestion for technical improvement granting protection similar to an industrial property right. The compensation shall be agreed upon between the parties. Absent agreement, employees may apply for determination of the compensation by an arbitration board established at the German Patent and Trade Mark Office and, should arbitration fail, the labour court. The Employee Invention Act cannot be deviated from to the employee's detriment by mutual agreement.

32 Is there any legislation protecting trade secrets and other confidential business information?

Statutory law requires employees to treat as confidential the employer's trade secrets (ie, all facts relating to the employer's business that are known only to a limited number of individuals, are not obvious, and are to be kept confidential according to the employer's explicit or implicit will), as well as confidential facts the employer has a legitimate interest in. Examples include technical know-how, sources of goods, territories, lists of customers and prices, inventories, and financial and credit matters. This statutory confidentiality obligation may be extended by contract only to a limited extent. It also applies following the termination of the employment relationship to the extent that it does not unreasonably restrict the employee in his or her professional activities. This post-employment confidentiality obligation is to be distinguished from a post-employment covenant not to compete, which has different content and consequences (see question 27).

In the event of a suspected breach of confidentiality, the employer may demand information concerning whether and to whom the employee has disclosed trade secrets. If the employee has violated the confidentiality obligation, the employer may claim damages. Additionally, the employer may obtain an injunction against the employee enjoining future disclosures. Disclosure of trade secrets may also be punishable as a criminal offence under the Unfair Competition Act. The maximum punishment is three years' imprisonment or a fine; in particularly serious cases, the maximum punishment is five years' imprisonment.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Federal Constitution guarantees the right to privacy and the right to determine who is to receive personal data. Under the Federal Data Protection Act, an employer may collect, process or use personal data (ie, facts relating to a specific or at least identifiable individual) only if the Act or another statute or regulation so allows or orders or if the employee consents in writing, following provision by the employer of sufficient information on the envisaged purpose of the collection, processing or use. Without employee consent, the employer may collect, process or use personal data for the purposes of the employment relationship if it is necessary for the decision on whether to establish an employment relationship, or for the implementation or termination

of the employment relationship. In addition, the employer may collect, store, modify, transmit or use personal data for its own business purposes to the extent necessary to safeguard the employer's legitimate interests, provided that there is no reason to assume that the employee's interests in the omission of the processing or use prevail. Employee personal data may be collected, processed or used for the purpose of investigating criminal offences only if:

- facts (which need to be documented) raise the suspicion that the employee committed a criminal offence in the course of the employment relationship;
- the collection, processing or use is necessary for the investigation; and
- the employee's legitimate interests in the omission of such collection, processing or use do not prevail, in particular (without limitation) if the form and extent of such measures are not disproportionate with regard to the cause.

Third parties receiving personal data from the employer, particularly affiliated companies, may process or use such data only for the purposes for which they were transmitted. Certain sensitive information (eg, regarding health) is subject to additional protection. Transmission of personal data to countries other than member states of the EU and the EEA and certain other countries with a similar level of data protection is subject to further requirements. Employees have to be informed of the storage of their personal data and are entitled to obtain information as to what data are stored, to whom they are transmitted and the purpose of storage. Subject to a de minimis threshold, employers must appoint a data protection commissioner.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

There is no legislation to directly protect employees in the event of a share deal, as share deals affect only the ownership in the employing company and do not interfere with the employment relationships between the company and its employees. However, asset deals and similar scenarios, such as outsourcing, are subject to the transfer of undertaking legislation, which applies to undertakings and businesses or parts thereof that qualify as a stable economic entity (ie, an organised grouping of persons and assets facilitating the exercise of an economic activity that pursues a specific objective). In order to determine whether the conditions for the transfer of such organised economic entity are met, the courts consider all facts characterising the transaction in question, in particular (without limitation):

- the type of undertaking or business concerned;
- whether its tangible assets, such as buildings and moveable property, are transferred;
- the value of its intangible assets at the time of the transfer;
- whether the majority of its employees are taken over by the new employer;
- whether its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer; and
- the period, if any, for which those activities were suspended.

If the conditions for such transfer are met, the employment relationships between the employees employed in the relevant undertaking or business or part thereof and the transferor (old employer) pass to the transferee (new employer) with all rights and obligations (including pension liabilities). Rights and obligations from collective bargaining agreements or works agreements continue to apply between the employees and the new employer and, as a rule, must not be modified to the employees' detriment for one year following the transfer. Before the transfer, the old or new employer has to notify the employees affected by the transfer in text form of the date or proposed date of the transfer; the reasons for the transfer; the legal, economic and social implications of the transfer for the employees; and any measures envisaged in relation to the employees. Each employee is entitled to object to the transfer of his or her employment relationship to the new employer within one month from receipt of the notification and, if the notification is incomplete or incorrect, also at a later point in time. The transfer does not in itself constitute grounds for the termination of the employment relationship by the old or new employer; terminations for other reasons, however, shall remain unaffected.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

If an employer employs on a regular basis more than 10 employees (including temporary workers) in a business in Germany, and if the relevant employee has more than six months of service, the employer may ordinarily give notice to terminate only if the termination is justified by reasons relating to the employee's person or conduct or by urgent operational requirements. A typical reason relating to the employee's person is illness (for example, long-term illness or repeated short-term illnesses causing business disruption or unreasonably high sick-pay costs), provided that a medical expert confirms that future illness or illnesses have to be expected. Termination for reasons relating to the employee's conduct usually requires a breach of contract in spite of a prior warning relating to a similar breach. Urgent operational requirements exist where:

- the employer's actual headcount exceeds the required headcount;
- the employee cannot be further employed in another vacant position, even after reasonable training or under modified terms and conditions; and
- the employer, in selecting the employee from among comparable employees, has sufficiently taken into account the employee's length of service, age, number of dependants and any severe disability. Employees whose continued employment is required by legitimate operational interests – for example, due to their knowledge, abilities and performance or to ensure a well-balanced personnel structure – are excluded from this social selection.

What these statutory requirements mean in detail has been interpreted by the labour courts in countless judgments.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Written notice to terminate must be given prior to dismissal. The standard statutory notice period is four weeks, expiring on the 15th or the last day of a calendar month. The notice period for the employer increases to one month, expiring at the end of a calendar month, after two years of service, and by one additional month each after five, eight, 10, 12, 15 and 20 years of service, up to a maximum of seven months, expiring at the end of a calendar month. Collective bargaining agreements may provide for longer or shorter notice periods, and individual employment contracts for longer notice periods; however, the notice period for the employee may not be longer than for the employer. Pay in lieu of notice is only possible by agreement with the employee. Such agreement, however, is usually not advisable for the employee, as social security benefits are thereby negatively affected.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee extraordinarily with immediate effect for an important reason. This requires facts on the basis of which the employer, taking into account all circumstances of the individual case and balancing the interests of the parties, cannot reasonably be expected to continue the employment relationship until the expiry of the notice period or the agreed-upon termination date, respectively. Written notice to terminate must be given within two weeks from the employer's becoming aware of the circumstances justifying immediate termination. These statutory requirements have been further developed by the labour courts over time. Examples of reasons for extraordinary terminations are taking vacation without approval, simulated sickness, serious insult or assault against the employer or fellow employees, and criminal offences in employment, in particular to the employer's detriment.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

A statutory right to severance exists only in particular cases. An employer that has given notice to terminate for urgent operational requirements may offer the employee severance in the notice contingent upon the employee's not bringing an action in court within the statutory limitation period of three weeks. Upon expiry of the notice period, the employee is then entitled to severance equal to half the monthly remuneration per year of service. Such offer, however, is usually not advisable for the employer. Another case may arise in labour court proceedings. If the notice is invalid, but the employee cannot be reasonably expected to continue employment, he or she may apply for dissolution of the employment relationship by the labour court against payment of severance. The employer may file such application if facts exist on the basis of which continued employment cannot be expected to be beneficial for the purposes of the employer's business. Such severance may amount to up to 12 times the monthly remuneration (or up to 15 times for employees aged 50 years or older with at least 15 years of service, or up to 18 times for employees aged 55 years or older with at least 20 years of service). Monthly remuneration is defined as monetary and non-monetary earnings in the month in which the employment relationship ends, based on the employee's regular working hours. A right to severance also exists where a social plan so provides. Social plans usually include detailed provisions on how severance is to be calculated. Please note that it is also very common for employers and employees to settle termination protection claims that have been filed with the labour court in return for payment of negotiated severance. Negotiated severance is usually between 0.5 and 1.5 times the employee's monthly remuneration per year of service, but may also be higher depending on the circumstances of the individual case.

39 Are there any procedural requirements for dismissing an employee?

The works council (if any) must be informed and consulted prior to the employer's giving notice. It has seven days to raise concerns (three days in cases of extraordinary termination). A notice to terminate that is given without prior information of and consultation with the works council is invalid. Information that is available but not given to the works council at this stage cannot be used by the employer to justify the termination in any labour court proceedings that may follow. See also question 40.

40 In what circumstances are employees protected from dismissal?

Severely disabled employees may be dismissed only after prior approval by the integration office.

The dismissal of a female employee is prohibited during pregnancy and the four-month period after childbirth if the employer, when giving notice, was aware of the pregnancy or childbirth or if it is informed thereof within two weeks from receipt of the notice by the employee. The relevant state agency may approve a termination for reasons unrelated to pregnancy or childbirth in exceptional cases. Similar protection exists for employees on parental leave, nursing care leave, or family care leave.

Works council members must not be given notice during their terms of office unless reasons for extraordinary termination exist and the works council or, in lieu of it, the labour court, has approved such termination. This protection continues for one year following the termination of office, save that no works council approval is required in this case. Employees initiating works council elections, election committee members and candidates for works council elections enjoy similar protection during the election process and for a period of six months thereafter (three months in the case of initiating employees). Exceptions apply if the business is closed down, or if a department thereof is closed down and the works council member, initiating employee, election committee member or candidate working in such department cannot be employed in another department.

Employed data protection commissioners, during their terms of office and for one year thereafter, may only be dismissed with immediate effect for an important reason.

Update and trends

Amendments to the Temporary Employment Act
Effective 1 April 2017, the use of temporary staffers has become more restrictive. In particular, a maximum staffing period of 18 months was introduced. Periods during which the individual temporary staffer has previously been used by the same business are fully taken into account if no more than three months have expired between each use. A collective bargaining agreement applicable to such business' industry may provide for a shorter or longer maximum staffing period. If the applicable maximum staffing period is exceeded, a temporary staffer will automatically become the employee of the business for which he or she works, unless he or she declares within one month after exceeding the maximum staffing period that he or she adheres to the employment contract with the recruitment agency. Such declaration is only valid if the temporary staffer presents it first to the Federal Employment Agency, if the Agency adds a note including the date of presentation and that it reviewed the temporary staffer's identity, and if the recruitment agency or the business receives the declaration within three days from its presentation to the Federal Employment Agency. Exemptions from the equal pay rule have also been limited. Collective bargaining agreements may provide for less pay only during the initial nine months of staffing; alternatively, they may do so for up to 15 months, provided that, following an initial training period of no more than six weeks, pay gradually increases during such period. Finally, the use of temporary staffers as replacements for employees on strike is now prohibited.

41 Are there special rules for mass terminations or collective dismissals?

Collective dismissals regularly constitute 'operational changes', which the employer may implement only after attempting to achieve an agreement with the works council (see question 5). If the works council refuses to enter into an agreement (the implementation agreement), the employer needs to apply to a conciliation board and postpone the implementation of the dismissal until the board has met, to avoid employee claims for damages resulting from any premature implementation (premature implementation may be prevented by an interim injunction obtained by the works council). Therefore, the process of trying to achieve agreement may take up to six months, and in exceptional cases even longer. In the case of an operational change, the works council is usually also entitled to demand a social plan, providing in particular for severance to be paid to the employees to be dismissed. Failing an agreement between the employer and the works council, the conciliation board may determine the financial volume and the details of the social plan.

Before implementing a collective dismissal, the employer is obliged to inform and consult with the works council and to notify the Federal Employment Agency before it gives notice to terminate within 30 calendar days to:

- more than five employees in businesses regularly employing more than 20 but fewer than 60 employees;
- at least 10 per cent of the employees or more than 25 employees in businesses regularly employing at least 60 but fewer than 500 employees; or
- at least 30 employees in businesses regularly employing at least 500 employees.

Termination notices that are to take effect prior to the expiry of one month from the notification to the Federal Employment Agency may do so only subject to the Agency's approval. The Federal Employment Agency may (but rarely does) extend this period to two months in individual cases.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

German law does not permit class or collective actions to be brought by employees. Employees may only assert labour and employment claims on an individual basis. While employees could jointly file individual claims in the labour courts, this is rarely done in practice.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Employers are not allowed to impose, but may agree on, mandatory retirement in a collective bargaining agreement, works agreement or individual agreement. Such agreement may provide for mandatory retirement once an employee has reached the regular retirement age (traditionally 65 years, now gradually increasing to 67 years). Agreements providing for mandatory retirement at a point in time when the employee may claim a retirement pension prior to having reached the regular retirement age are deemed to mean the regular retirement age, unless the agreement was entered into or confirmed by the employee no more than three years prior to such point in time. Mandatory retirement ages that are lower than the regular retirement age require specific justification under the General Equal Treatment Act (see question 2). For example, the mandatory retirement age of 60 years for pilots and cabin crew members has been held unenforceable.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

An employer and an employee cannot submit a dispute to private arbitration.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee cannot, in advance, waive statutory rights or rights under collective bargaining agreements or works agreements. Even if a specific right (eg, to sick pay or vacation) has arisen under a statute, the employee is usually not entitled to waive it. However, the employee may waive statutory minimum wage claims in a court settlement and, following the termination of employment, statutory claims to compensation for untaken vacation. Rights resulting from a collective bargaining agreement (eg, remuneration claims) may be waived only in a settlement approved by the parties to the collective bargaining agreement, and rights resulting from a works agreement may be waived only with the works council's consent. Rights under an individual employment contract may be waived. See question 21 for waivers regarding overtime pay.

46 What are the limitation periods for bringing employment claims?

The standard limitation period for employment claims is three years and commences upon the end of the year in which a claim arises and the creditor becomes aware, or should become aware without gross negligence, of the circumstances justifying the claim and the identity of the debtor. However, a variety of other limitation periods apply to specific claims, notably to actions in court challenging a notice to terminate or the validity of a fixed term. The limitation period for such actions is three weeks from receipt of the notice or expiry of the fixed term. Claims for compensation of financial or non-financial damage under the General Equal Treatment Act must be filed with the employer in writing within two months after the employee becomes aware of the different treatment, unless otherwise provided for in a collective bargaining agreement.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Articles 648 to 680 of the Greek Civil Code on 'contract of employment' are the basic provisions that govern the employment relationship between employers and employees.

These articles define:

- the nature of an employment contract;
- the employer's and employee's main obligations;
- the time of payment of salary and the consequences of delay;
- the consequences of an employee's sickness;
- health and safety at work;
- collective employment agreements;
- the deemed renewal of an employment term;
- annual leave; and
- termination for a serious reason.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Greece has adopted Directives 43/2000/EC, 78/2000/EC, 54/2006/EC and 54/2014/EC, which govern the general framework of equal treatment in employment. The relevant national laws are:

- Law No. 4443/2016 for the application of the principle of equal treatment regardless of national, racial, religious or other orientation or beliefs, invalidity, age or sexual orientation; and
- Law Nos. 3769/2009 and 3896/2010 for the equal treatment between men and women in employment.

According to the above legislation, all direct or indirect discrimination or harassment that leads to the abuse of a person is illegal.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Labour and Social Security and Solidarity is authorised to control the enforcement of employment statutes and regulations as well as to provide necessary information to employees. This objective is realised through the creation of special authorities responsible for specific issues. The General Directorate of Conditions and Hygiene at Work, the Department of Labour Conditions, the Department of Management Information, Training and Monitoring Policy Working for Safety and Health, the Centre of Hygiene and Security at Work, the Labour Inspection Authority (LIA) and the police are authorised to control the enforcement of the whole legislative framework concerning employment. The role of the Single Body of Social Security is also very important in relation to the social security and insurance obligations of employers.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

According to Law No. 1767/1988, the employees of any business that employs more than 50 people have the right to be elected and establish works councils for their representation in the enterprise. If there is no trade union organisation within the business, the relevant threshold is 20 instead of 50 employees. The members of works councils enjoy the same protection as the administrators of trade union organisations.

5 What are their powers?

The members of works councils enjoy protection. Employers, persons acting on their behalf and any third parties are prohibited from proceeding to actions or omissions with a view to impede the exercise of the employees' rights described above and, more specifically:

- from influencing the employees by using threats of dismissal or other means to obstruct the exercise of rights provided by this Law;
- from supporting the candidature of employees with financial or other means; and
- from intervening by any means in the exercise of the employees' general assemblies.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

According to the Data Protection Law and the explanatory Directive No. 115/2001 of the Data Protection Agency (DPA), collecting and processing personal data of candidates in order to hire them is only allowed for purposes directly connected to the employment, and the employer may only refer to data that is absolutely necessary to assess whether a candidate is suitable and skilled for the position. The employer must address the candidates themselves to collect their personal data. Collecting candidates' personal data from third parties is not prohibited, as long as it is necessary for the achievement of the goal. A vital prerequisite is for the candidates to be informed in advance that information from third parties will be sought, and their explicit consent must have been given. An employer that intends to seek information from third parties has a duty to inform the candidate of the purposes of the collection and processing of the data, the sources from which information will be sought, the type of information and the consequences of a possible refusal of consent. For some posts in particular (eg, for employees managing monetary issues, teachers), the collection and processing of data regarding a person's prosecutions and convictions is compulsory.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Personal data regarding the candidate's health must be collected directly and only if it is absolutely necessary for evaluating whether the candidate is suitable and skilled for a specific post or occupation, present or potential (eg, physicals for individuals employed in nurseries, restaurants or hotels, drivers, pilots, etc); in order for the employer to perform his or her duty regarding the hygiene and safety of the workplace; or for the foundation of the employees' rights and the attribution of the relative social benefits. So, if the examination is absolutely necessary due to the nature of the post or occupation, an employer can refuse to hire an applicant who does not want to be examined.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no specific directive or regulation regarding drug or alcohol testing. As a general rule, tests, analyses and relevant procedures that are related to past convictions, habits or even the mental health status of the individual may be included in a recruitment process. Because such tests constitute a deep invasion of the candidate's personality and personal life, the general principle of proportionality dictates that they may only be conducted in exceptional cases, only if it is absolutely necessary for the achievement of a special cause directly connected to that particular post and only with the candidate's written consent.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

By virtue of Law No. 2643/1998 on care for the employment of persons of special categories and other provisions:

- Greek or foreign companies or businesses that operate in Greece and their affiliates, if they employ 50 or more persons, are obliged to hire persons of 'protected categories', as defined in the above Law, up to 8 per cent of their total workforce; and
- certain public institutions are obliged to employ persons of the same categories up to 10 per cent.

Enterprises and institutions that have had losses in the last two fiscal years are exempted from the above obligation. The above percentages are split among the following categories of protected persons, subject to the proportions provided in article 2 of the same Law:

- parents that have more than three children;
- persons with an invalidity status of over 50 per cent and persons with limited professional capacity due to any chronic bodily, mental or psychiatric illness (persons with special needs), provided they are registered in the Labour Force Employment Organisation registers of disabled unemployed;
- persons with children, siblings or spouses with a disability percentage of over 67 per cent due to severe mental and bodily illness, or with at least a 50 per cent invalidity percentage due to intellectual disability or autism;
- persons who participated in the National Resistance and their children;
- members of rebel groups that participated in the National Resistance and their children;
- surviving spouses or parents of persons that died in the dictatorship resistance against the colonel's junta;
- war victims with disabilities;
- persons incapacitated by the hardships of military service if they served, in any capacity, in the Joined Armed Forces or Security Forces, and their children;
- civilian war victims, war-disabled persons and their children;
- victims of the peace period and their children; and
- spouses of persons that have died or have been missing since the military coup and the military events in Cyprus in 1964, 1967 and 1974.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No. As a rule, the agreement does not have to be in writing. Therefore, it is possible to be made explicitly or tacitly, orally or in writing. There are cases where the law provides for an employment contract in writing, such as an employment contract with the state or a public corporation, a part-time employment contract or an employment contract by rotation (in turn). However, according to Presidential Decree No. 156/1994, the employer is obliged to notify the employee in writing, within two months of the commencement of the working relationship, of the essential terms of the employment contract, which are the following:

- the ID data of the contracting parties;
- the place of work;
- the position of the employee, as well as the object of his or her work;
- the date from which the contract is in force and its duration;
- the duration of the leave of absence with benefits the employee is entitled to, as well as the manner and time of its issuance;
- all the kinds of remuneration the employee is entitled to, and their frequency;
- the duration of the regular daily and weekly employment of the employee;
- reference to the collective regulation that applies and defines the minimum terms of wage and employment of the employee; and
- the compensation that may be owed if the contract is terminated, as well as the deadlines to be kept by both the employer and the employee, pursuant to the legislation in force in the event the employment contract is terminated.

11 To what extent are fixed-term employment contracts permissible?

They are allowed. The courts and subsequently the statutes protect the employee from the abuse by the employer of the meaning of 'fixed-term', that is, naming a contract as fixed-term when it is really an indefinite-term employment contract. Specifically, according to Presidential Decree 81/2003, article 5 (as replaced by article 41 of Law 3986/2011), if the duration of successive employment contracts exceeds three years in total, without being justified by specific reasons or needs provided by law, it is deemed that those contracts cover constant and permanent needs of the enterprise and consequently are converted into employment contracts or relations of indefinite term. If, in the duration of those three years, the number of renewals of the successive contracts or labour relations is more than three, without any legal justification, it is deemed that those contracts cover constant and permanent needs of the employer and consequently are deemed by law to be employment contracts or relations of indefinite term. The onus of proving the opposite lies with the employer. 'Successive' contracts or labour relations are the fixed-term contracts or labour relations between the same employer and the same employee, with the same or resembling terms of employment and an interval of no more than 45 calendar days.

12 What is the maximum probationary period permitted by law?

In the event of a probationary employment (ie, when the employer wishes to test the employee's capacities before definitely hiring the employee), there is a contract of employment as of the date the employee undertook employment. This probationary employment may either be a definite-term employment contract, when it is agreed that it shall be de jure terminated after the probationary period, or an indefinite-term employment contract, which therefore during the probationary period is subject to the termination clause. Article 74 of Law No. 3863/2010 defines that, in the event of an indefinite-term employment contract, the probationary period may not exceed 12 months, during which time the contract may be terminated without due notice and without any compensation for dismissal, except if otherwise agreed between the parties. The employee shall receive wages during the probationary period as well.

13 What are the primary factors that distinguish an independent contractor from an employee?

An employee is subject to a 'contract of dependent services', by which the contracting parties agree to the provision of services in advance and a salary, regardless of the way it is paid, and the employee is subject to legal and personal dependence on the employer. This dependence is expressed by the latter's right to give the employee binding commands and directions regarding the manner, place and time of the execution of services, and to monitor and control the employee to ascertain whether he or she complies with them. An independent contractor is

under a 'contract for the provision of liberal services', that is, he or she provides his or her services without being subject to anyone's control and monitoring, and without being obliged to comply with commands and directions, especially regarding the manner and time of the provision of his or her services. These are the factual circumstances that a court will look at should a dispute arise regarding the classification of a contract. Employment contracts are often hidden under 'liberal provision of services' agreements. Employers are very keen to stretch this definition in order to employ a workforce without being subject to social security contributions and without having to respect the regulations relating to overtime, annual leave, termination notice, compensation, etc. An independent contractor has different tax obligations, keeps accounting books and is liable for his or her own social security contributions without the involvement or burden of an employer.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Article 98 of Law 4052/2012 provides that there can be private employment agencies, which can mediate between employers and jobseekers, who are either Greek nationals or citizens of the EU or third-country nationals who legally reside in Greece with access to employment. They are also authorised to give advice and career guidance. The legislation does not specify the kind of employment, so they can mediate even for temporary staffing.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Yes, according to article 14(4) of Law No. 4251/2014 on the entry, residence and social integration of third-country nationals in the territory of Greece (the Third-country Nationals Law), numerical limitations apply according to relevant ministerial decisions that are taken every year and that prescribe the number of third-country nationals per region and per specialisation.

According to article 17 of the above-mentioned law, residence permits are granted to higher managerial employees and executive employees of foreign business entities that operate in Greece through a subsidiary or a branch.

According to the same article 17 of the same law, residence permits are also granted to third-country nationals – employees who are employed by foreign business entities (industrial, maritime, commercial) that legally conduct operations in Greece and foreign specialised scientific personnel may also be granted residence permits with certain limitations.

16 Are spouses of authorised workers entitled to work?

Citizens of third countries that reside legally in Greece for more than two years (in this case called 'sponsors') may request that their spouse and their underage children are given leave to enter and reside in the country for reasons of family reunification. When the 'sponsor' holds a residence permit for dependent employment or independent economic activity, the family members have, respectively, the right to dependent employment or to independent financial activity (article 70 of Law No. 4251/2014).

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Subject to the special provisions applicable to third-country nationals who are already legally residents in Greece (executive employees, family members, etc), as a general rule, in order to employ a third-country national an employer must officially 'invite' him or her, file an application to the local authority and guarantee the payment of a sum equal to the basic statutory remuneration of unspecialised workers. If, after the application is approved for the employment of the third-country national by the applicant-employer, the third-country national is granted a permission of entry for the provision of dependent employment; this is usually granted for one year, and always for a definite term. The applicant must show a contract of employment that proves that he or she shall receive remuneration equal to the above-mentioned statutory minimum. The residence permit is renewable. The sanctions for employers who employ a third-country national who is not equipped with the necessary residence permit, or at least proof that all relevant documentation has been deposited with an application at the relevant authority, are administrative fines of up to €1,500 for each illegally employed third-country national, (article 28 of Law 4251/2014).

18 Is a labour market test required as a precursor to a short or long-term visa?

The number of residence permits for dependent employment issued every year is determined according to state reports that indicate the existing needs in the workforce and the job vacancies per region.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The legal daily working hours for employees, that is, the time-work plan as imposed by the law is eight hours for enterprises employing their personnel five days per week, and six hours and 40 minutes for businesses employing their personnel six days per week. In general, an agreement between the employer and the employee is possible regarding a working schedule with fewer hours than the limit imposed by the law, but without prejudice to the entitlement of the employee for full remuneration.

Law No. 3385/2005 (article 2) provides that the employer and the employee may arrange the working hours in a different manner if this is dictated by the employer's increased needs for a specific period, which may not exceed four months per calendar year in total. Under that latter arrangement, two extra hours may be agreed per day, which are 'credited' to the employee, so that they are deducted from his or her working hours at a later stage. Alternatively, instead of less hours per day during another period, the employee may take days off. There are many other provisions regarding payment for nightshift and Sunday work, as well as public holidays, which are, as a rule, of public order, and therefore any waiver on behalf of employees from their relevant rights would be held invalid.

Law 3846/2010 (article 2) provides that during an existing employment contract or when drawing up a new contract, the employer and the employee may agree by a written individual agreement either daily, weekly, fortnightly or monthly employment, for a definite or indefinite period, which will be shorter than the full-time employment (part-time employment). If this agreement is not disclosed to the competent Labour Inspectorate within eight days of its signature, it is presumed that the employment agreement is of a full-time nature.

20 What categories of workers are entitled to overtime pay and how is it calculated?

In Greek law, two types of overtime work are recognised: overwork and overtime.

Law No. 3385/2005 (article 1) introduced the new notion of 'overwork'. This term was designed to loosen the traditionally strict statutory approach that every hour above the eighth is overtime. Therefore, 'small' excesses of the eight-hour limit are now called 'overwork'. With regard to work hours, overwork and overtime hours in general, the relative provisions apply to all salaried persons, regardless of whether they are employees or workers, except managers or directors (that is, senior employees of the enterprise – these are the persons who have administrative tasks and managerial responsibilities, and at the same time their remuneration is much higher than their colleagues).

By virtue of Law No. 3385/2005 as completed by Law No. 3863/2010, an employee may be occupied for a further five hours per week at the employer's discretion (overwork). Those overwork hours (from the 41st to the 45th hour) are remunerated with the regular wage per hour increased by 20 per cent. Employees for whom the six-working-day system applies may be occupied for eight more hours per week at the employer's discretion (overwork from the 41st to the 48th hour). The employees in this case are also remunerated with the regular wage per hour increased by 20 per cent.

Overtime work, that is, work exceeding the maximum limit of legal work of employees and providing services to employers beyond 45 or 48 hours per week – in other words, exceeding the overwork hours as well – is allowed only for specific activities that are considered to be

urgent and exceptional or extraordinary. The employment of more than 45 or 48 hours per week respectively is considered overtime and the employee is paid for these hours as follows: from one to 120 hours per year the wage is increased by 40 per cent; for more than 120 hours per year the wage is increased by 60 per cent.

For the realisation of overtime the following are required: a record of a written announcement by the employer to the LIA responsible for the region and the keeping by the employer of a special overtime book.

Managers are exempted from the application of several provisions of labour law and are not protected by the restrictions of the legal working hours (Law No. 2269/20); they may work overtime or on Sundays and during the night without compensation (Presidential Decree No. 8 of 13 April 1932). There is no concrete formula that defines a manager or director and, in cases of dispute, the courts will look into the specific facts of the particular case. A high salary will not per se guarantee that a worker shall be considered a manager, because it may well be that high remuneration is justified by the special skills that a worker has. For all other workers, the conventional work schedule of up to 40 hours per week is applied.

Specifically in relation to public servants, overtime work is not compensated unless it is necessary to cover seasonal, extraordinary or urgent public needs. According to upcoming changes that are being introduced as emergency measures in response to the Greek public debt crisis of 2010, the total payable monthly hours of overtime work per employee was diminished from 60 to 40 hours (article 6 of Law No. 3833/2010).

21 Can employees contractually waive the right to overtime pay?

No.

22 Is there any legislation establishing the right to annual vacation and holidays?

The right to annual vacation and holidays is governed by Law No. 539/1945 and articles 666 and 667 of the Greek Civil Code. Before the introduction of Law No. 3144/2003, an employee was entitled to holiday leave after being continuously employed for 10 months. Since this Law came into force on 8 May 2003, the employee is entitled to vacation leave without the 10-month requirement. The days of leave to which he or she will be entitled still depend on the months he or she has worked at the same employer; the table below applies. Vacation is paid with the normal agreed salary. Sundays, public holidays and sick leave are not included in vacation leave. If, for example, an employee takes vacation leave of 10 days and the fifth day is a public holiday, he or she will come back to work on the 11th day.

If the employer is a business that runs five days per week, the following applies:

Length of employment	Days of vacation leave	Vacation pay (salary-based)	Days of paid vacation
12 months	20	96% of salary	24
Second year	21	full salary	25
Third year or more	22	full salary	26

Employees that have been working for a period of 10 years for the same employer or for a period of 12 years for any employer under any employment relationship are entitled to 25 days of holiday leave.

If the employer is a business that runs six days per week, the following applies:

Length of employment	Days of vacation leave	Vacation pay (salary-based)	Days of paid vacation
12 months	24	96% of salary	24
Second year	25	full salary	25
Third year or more	26	full salary	26

Employees that have been working for a period of 10 years for the same employer or have been working for a period of 12 years for any employer under any employment relationship are entitled to 30 days of holiday leave.

If an employee has worked for less than a year, he or she will be entitled to two days of leave for every working month. Vacation leave without pay may also be agreed between the parties; it is not a right or an obligation of either party. It may be agreed that leave without pay is on top of the statutory holiday, etc, depending on the individual circumstances. A vacation bonus is also obligatory by statute. This equals 50 per cent of the monthly salary or (if the employee is paid per diem) 13 days' pay.

Under the current legislation, the employee does not have to submit an application (written or oral) in order to get his or her legal annual vacation. The employer is obliged to grant the legal annual vacation to the employee before the termination of the year, even if the employee did not ask for it, otherwise the employer is subject to penal sanctions.

23 Is there any legislation establishing the right to sick leave or sick pay?

According to article 5(3) of Law No. 2112/1920 and article 8 of Royal Decree No. 16 of 18 July 1920, salaried employees may be absent from their work for temporary periods due to sickness without their absence being considered as a ground for unilateral termination of their employment relationship. The employer is obliged to accept them back at work.

By virtue of article 3 of Law No. 4558/1930, a temporary sickness period is considered a period between one, three, four and six months depending on the length of the employment accrued, which would accordingly be four, four to 10, 10 to 15 and over 15 years.

In the event of sickness of salaried personnel, employees will not being paid during the whole period of their absence but as follows:

- if the salaried employee has completed a period of service exceeding 10 days but less than a year, he or she has the right to remuneration of a 15-day period (provided the sickness has a duration of 15 days or more); and
- if the salaried employee has completed a year's service, he or she has the right to a month's remuneration (provided the illness has a duration of one month or more).

If the absence is less than 15 days or a month respectively, the salaried employee shall be remunerated for the period of time of his or her absence.

In any event, the employer has a right to deduct from the abovementioned remuneration owed to the employee, due to sickness, the amount of money the latter may have received from the Social Security Fund by virtue of the law regarding obligatory insurance. In order for the employee to have the right to a sickness benefit from the Social Insurance Institute, they must have completed at least 120 days of work under the fund's insurance during the calendar year preceding the notice of sickness, or 15 months prior to the notice of sickness without calculating in the second case the days of work realised during the last calendar trimester of the 15-month period. The amount of the daily sickness benefit comes up to 50 per cent of the deemed minimum of the daily salary applicable – on the basis of the respective insurance class remuneration – during the last 30 days of work realised during the calendar year preceding the sickness. This amount constitutes the basic sickness benefit that may be increased according to the family status of the sick employee. Of course, the employer has the right to ask the salaried employee to produce supporting documents proving his or her sickness.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

There are many situations where an employee would be entitled to take a leave of absence under certain conditions.

The most significant examples, together with the corresponding maximum durations of each, are listed here below:

- leave for the education of trade unionists – up to 14 days of paid leave within the same calendar year;
- school and undergraduate university students up to 28 years of age – up to 30 days per year; remuneration under conditions is given by the Organisation for the Employment of Workforce;

- school and undergraduate university students over 28 years of age have the right to an additional 30 days' leave per year at a maximum, but only for the ordinary length of studies increased by two years, irrespectively of whether the study programme has been attended continuously or intermittently;
- postgraduate students – up to 10 days per calendar year for up to two years without remuneration;
- for voting at national elections – the number of days depends on the distance to cover to reach the town where the voter is registered; leave is paid;
- leave due to sickness of family members – the ordinary period is six days whether continuous or spread within a calendar year. The period is extended to eight days if the beneficiary has two children and to 14 days if the beneficiary has three or more children. If the beneficiaries are spouses, each one is entitled to the leave; leave is unpaid;
- special leave is provided for employees who are minors and are pupils or students at the same time. They have the right to two days' leave for each exam day they participate in. This is unpaid leave and may not be less than 14 days (even if the exams taken are less than seven);
- leave for bringing up children – following the maternity leave and until the child reaches three-and-a-half years of age, each working parent may take an unpaid leave of up to three-and-a-half months;
- leave for visiting a child's school – up to four days per calendar year; leave is paid;
- marriage and childbirth leave – five or six (depending on whether they work five or six days per week) working days for each spouse with remuneration. Upon the birth of a child, the father is entitled to two days of leave with pay;
- maternity leave – 17 weeks or 119 calendar days in total. Eight of those weeks must be allocated before the scheduled or anticipated date of birth. Leave is paid for 15 days if the young mother has not completed one year with the employer, and for one month if she has;
- leave for taking care of a newborn child – for a period of 30 months after the end of the maternity leave, working mothers may start their working day one hour later or finish it one hour earlier. Alternatively, it may be agreed with their employer that during the first 12 months they shall take two hours off accordingly; in that case they shall have one hour off for the following six months. A father would be entitled to the same time off if the right is not exercised by the mother; leave is paid;
- special provision for the protection of motherhood. This benefit is established by Law No. 3655/2008 and provides for a six-month leave for mothers insured by the Social Insurance Institute. This leave is taken after the end of the maternity leave and the leave for bringing up children mentioned above; in the event of protection of motherhood maternity leave, the Greek Manpower Employment Organisation shall pay to the employed mother monthly an amount equal to the minimum salary as each time specified in the collective employment agreement, as well as proportional holiday leave on the basis of the above-mentioned amount; and
- leave without remuneration – this is subject to agreement between the employer and the employee.

25 What employee benefits are prescribed by law?

The most important employee benefits prescribed by law are holiday bonus, unemployment benefit, child benefit, military service benefit, family benefits, sickness benefit, marriage benefit, maternity benefit, special provision for the protection of motherhood, service benefit (for employees having completed many years of service) and Christmas and Easter benefit.

In view of the recent developments in the Greek economy, many benefits applicable to public servants and employees working under labour contracts of either public or private law have been significantly cut, according to Law Nos. 3833/2010 and 3845/2010. Remuneration benefits of every kind have been decreased by 20 per cent for employees working in the core public sector (public law corporate sector, municipalities, army, police, etc) and by 10 per cent for employees working at private law corporate bodies regularly sponsored by the public sector or in which the public sector has ownership rights.

Furthermore, Easter and Christmas welfare benefits and the annual benefit of paid leave have been set at €250 to €500 each, subject to the public employee receiving a gross total pay lower than €300 per month, according to article 3 of Law No. 3845/2010. New decreases in wages and benefits took place under the recently voted Law No. 3899/2010.

By virtue of the very recent No. 6 Act of Ministerial Council, for the implementation of paragraph 6 of article 1 of Law 4046/2012, the regulatory conditions of collective labour agreements that have already expired or that have been terminated are valid only for a period of three months from the time that Law 4046/2012 has been in force. After that period and if in the meantime no new collective labour agreement is signed, then the only regulatory conditions that remain in force are those that are related to the benefits of maturation, children, education and dangerous work, under the condition that those benefits were actually provided for in the collective labour agreements that have expired or been terminated. Any other prescribed benefit shall be immediately terminated.

26 Are there any special rules relating to part-time or fixed-term employees?

Employment under rotation (or underemployment)

This is full-time work, but only for certain days of the week, certain weeks of the month or certain months of the year, or a combination of these alternatives. The daily working hours remain full. This is freely agreed between an employer and an employee, subject to the applicable statutory minimum salaries, applied accordingly to the lesser hours of work agreed. According to Law No. 3846/2010 (article 2, paragraph 3), as amended by article 17, paragraph 1 of Law 3899/2010, an agreement for underemployment must be in writing and must be submitted to the local LIA. Underemployment may also subsequently occur following a significant decrease in the employer's business activities and subject to an agreement with the competent labour union. In this case, the duration of the underemployment must not exceed nine months of the same year.

Temporary employment (part-time employment)

This is employment for all days but for fewer hours than the ordinary statutory prescribed working schedule. It is subject to the same procedural formalities as the employment under rotation (article 38 of Law 1892/1990, as amended by article 2 of Law 3846/2010). The disclosure of the part-time contract to the LIA must be made within eight days from the day on which it was signed; otherwise it is presumed to conceal a full-time employment contract. The part-time employee, provided that he or she performs work on the same terms as employees of the same class, has a right of priority to be recruited to a full-time job in the same company. Termination of the employment contract due to the non-acceptance of the employer's proposal for a part-time employment by the employee is invalid. It is noted that the earnings of employees with a part-time employment contract are calculated on the basis of the earnings of a comparable employee and correspond to the hours of the part-time employment. If the part-time employment is less than four hours per day, the remuneration of the part-time employees is increased by 7.5 per cent. By virtue of law 3899/2010 it is possible under certain conditions for the employer, in order that he or she avoids dismissal of employees, to unilaterally impose a system of part-time employment for a maximum period of nine months within the same calendar year. Among the conditions that have to be fulfilled is a mandatory consultation with the work reps of the employees.

Fixed-term employment contracts

These are freely agreed upon, subject to the condition that the meaning of 'fixed term' must not be abusively adopted by an employer who in reality intends to cover his or her permanent needs (see question 11).

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Although not explicitly prohibited, the validity of contractual clauses not to compete must not be taken for granted; these clauses are controlled according to articles 178 (contractual term contrary to moral

standards) and 179 (contractual term limiting to a great extent the freedom of the weak contractual party) of the Civil Code, following an evaluation of all the special conditions of each specific case. One basic element, which supports the validity of such a clause, is the provision of consideration to the employee for the undertaking of the obligation of non-competition that, as a rule, will be constituted by the payment of a reasonable restitution to cover the financial damage that the co-contracting party will endure during the committing period. In practice, a very high salary may justify a post-termination covenant not to compete. Conversely, the lack of provision of consideration is a very important element that would assist the weaker party to challenge the validity of a non-competition clause. There is no statutory maximum period for non-competition covenants, but a court will assess the reasonableness of the period agreed.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No, there is no such rule. However, in order for post-employment restrictive covenants to survive the anti-abuse test that will be applied by the courts, any consideration (payment, etc) given to the employee will count in the employer's favour. In Greece, in practice, such consideration would be a higher salary (during employment) and not a payment after the employment is terminated.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

According to the general provision of article 914 of the Civil Code, anyone who unlawfully damages another person is obliged to compensate him or her. According to article 922 of the Civil Code, a master or mistress would be liable for any damages that his or her servant caused to a third party by his or her acts or omissions during service. By the combination of the above-mentioned provisions, it arises that under the same circumstances, an employer is liable for compensation to a damaged party because of its own actions or omissions, it will also be liable for the actions or omissions of its employees.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Payment of income tax burdens employees, but employers are obliged by law to deduct the tax from the employees' wages and to disburse it respectively to the competent tax office. The withholding tax on income from wages – pensions is calculated according to the following scale (article 15 of Law No. 4172/2013):

Income (€)	Tax rate (%)
Under 20,000	22
20,001–30,000	29
30,001–40,000	37
Over 40,001	45

Regarding employees that are paid per month, as well as those paid each day who provide their services under an employment contract for more than a year to the same employer or under an open-ended contract of employment, the monthly net income is defined by deducting from the gross wage only the amounts of the lawful deductions for obligatory insurance contributions for which the employee is burdened. The definition of 'monthly net income' includes both salary and any other pay packets of the same period (overtime, working on a bank holiday or a Sunday, etc), which are all set in one payroll. Afterwards, every month the monthly net income is readjusted to define the overall annual net income of every employee. To calculate the overall annual net income, the net salary amount is multiplied by 12, to which is added a Christmas bonus, Easter bonus and holiday benefits. Any other additional pay packages are also added to the calculation. Afterwards, the amount of tax that has to be deducted is calculated according to the applicable tax scales. In practice, if the employee has no other sources of income, following the submission of his or her annual tax return, there will no be further tax to be paid.

Moreover, independent taxation is imposed on compensation paid to employees when they are dismissed and on vacation allowance.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

This used to be governed by article 668 of the Civil Code, which has now been abolished.

The applicable rule is now provided in article 6 of Law No. 1733/1987, according to which all rights related to an invention of an employee belong to the employee, except where the invention may be classified as:

- an 'invention of service', in which case the rights belong exclusively to the employer; or
- a 'depended invention', in which case the rights are split, with 40 per cent going to the employer and 60 per cent to the employee.

'Invention of service' is the product of the contractual relationship between an employer and an employee that is expressly aimed at the development of inventions. In cases of 'invention of service', an employee may be entitled to additional remuneration if the invention is significantly profitable for the employer.

A 'depended invention' is an invention realised by an employee with the use of the means, information and materials of the employer. In this situation, the employer has priority over the exploitation of the invention in exchange for compensation given to the employee relative to the economic value of the invention. After completing his or her invention, the employee must notify his or her employer accordingly and the employer has a time limit of four months after the notification to declare its intention to submit a common application together with the employee for the registration of the invention. Failure of the employer to declare its intention within the above-mentioned period gives a right to the employee to submit an application by him or herself and register and exploit the invention in his or her own name and account. An employee may not contractually waive any of his or her rights mentioned above.

32 Is there any legislation protecting trade secrets and other confidential business information?

There is no direct reference to the concept of trade secrets and other confidential business information in Greek law. However, the trade secrets, as an independently protected legal right, are protected by articles 16 to 18 of Law 146/1914 ('Unfair Competition') and article 45, section 1 of Law 2121/1993.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Yes, Law No. 2472/1997 (the Data Protection Law), as amended by Law No. 3471/2006, protects employee personal data. An employer is obliged to announce to the DPA the possession of a database, the transfer of a third party's database, the interconnection of databases and the existence of a closed-circuit TV system. When data is related to sensitive information (information that refers to the religious, philosophical, national, political background or beliefs, sexual life, previous criminal convictions, health, social welfare, etc, of an employee), the law requires prior approval by the DPA. For practical reasons, the law also provides for exceptions from these obligations – for example, where the processing is realised for the purposes of an employment relationship or where this process is necessary for the mutual fulfilment of contractual or legal obligations and the employee has been informed in advance. The employer, at the stage of the collection of personal data, is obliged to inform the employee of the exact identification details of the employer or his or her representative, the purpose of processing personal data and the recipients of such data. The employee must also be informed that he or she has a right of access to his or her personal data file and a right to deny the processing of his or her personal data

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

In the event of a corporation being transferred, the relevant impact on labour relations is regulated by article 4(1) of Presidential Decree No. 178/2002, through which Greece has adopted Directive 98/50/EC. In parallel, article 6(1) of Law No. 2112/1920, article 9(1) of Royal Decree No. 16 of 18 July 1920 and article 8 of the Presidential Decree of 8 December 1928 (regarding the protection of the rights of employees of public order, where no waiver of relevant rights is excused) are also in force. By the combination of the above-mentioned provisions, it is provided that:

- the protection of the employee is not limited to the protection of the right of compensation according to Law No. 2112/1920;
- the new employer assumes all the pre-existing employer's obligations;
- the labour relationship is preserved in its entirety; and
- the employment position is secured and the employee's demotion is forbidden.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Employment contracts of an indefinite time can be terminated without restraints and at any time by the employer, provided that he or she abides by the legal formalities, that is, notification to the employee of the written termination of the employment contract and payment of the lawful compensation. In the event of the duration of the employment contract being less than 12 months ('trial period', according to article 17, paragraph 5 of Law 3899/2010), the employer may terminate the contract without any formalities, having no obligation to give compensation to the employee.

Fixed-term employment contracts terminate ipso jure, without the obligation of compensation or of any other action, when their fixed duration expires. Nevertheless, in the event of a serious reason that could justify the termination of the employment contract before its expiry date, the employer (and the employee) may terminate the employment contract before that date, without recovery. The law does not specify which reasons may be considered as serious; therefore this is left to the judgement of the court. Any event that objectively, according to good faith and moral conventions, constitutes a breach of the essential terms of the employment contract, and because of which the employment relationship may not reasonably continue up to its expiry date, may be considered as a serious reason. Indicatively, case law has in the past considered as serious reasons the following:

- breach by the employee of essential terms of the contract;
- continuous and unjustifiable absence of the employee;
- improper and abusive behaviour of the employee towards his or her employer;
- non-fulfilment of his or her work with assiduity; and
- demonstration of professional insufficiency.

The invocation on the part of the employer of a serious reason is controlled under Greek law (article 281 of the Civil Code). According to this article, exercising a right is prohibited if it manifestly exceeds the limits imposed by good faith or morality or the social and economic purpose of the right.

Indicatively, case law has in the past considered as serious reasons the following:

- the employee was dismissed because he or she refused to give up his or her legal rights;
- the employee developed his or her trade union action and took part in a lawful strike;
- the employee submitted for a period off work according to the law; or
- the employee protested to the competent government authorities for violations of the law by the employer.

In the case of such an abusive and unfair cause, the employment contract is considered as not terminated and the employee still has right to the salary as provided by the law.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

This is only applicable to employment contracts of indefinite term. Compensation is calculated according to the years of service at the same employer and if the appropriate notice is given, it may be half of what would be if no notice is given. According to the new law (4093/2012), subjects relating to the notice of termination, as well as of the compensation, are regulated as follows:

Length of employment with same employer	Without advance notice	With advance notice	
	Compensation (times nominal salary)	Advance notice	Compensation (times nominal salary)
1 year completed to 2 years	2 months	1 month	1 month
2 years completed to 4 years	2 months	2 months	1 month
4 years completed to 5 years	3 months	2 months	1.5 months
5 years completed to 6 years	3 months	3 months	1.5 months
6 years completed to 8 years	4 months	3 months	2 months
8 years completed to 10 years	5 months	3 months	2.5 months
10 years completed	6 months	4 months	3 months
11 years completed	7 months	4 months	3.5 months
12 years completed	8 months	4 months	4 months
13 years completed	9 months	4 months	4.5 months
14 years completed	10 months	4 months	5 months
15 years completed	11 months	4 months	5.5 months
16 years completed	12 months	4 months	6 months
17 years completed	12 months + 1 month	4 months	6 months + 0.5 month
18 years completed	12 months + 2 months	4 months	6 months + 1 month
19 years completed	12 months + 3 months	4 months	6 months + 1.5 months
20 years completed	12 months + 4 months	4 months	6 months + 2 months
21 years completed	12 months + 5 months	4 months	6 months + 2.5 months
22 years completed	12 months + 6 months	4 months	6 months + 3 months
23 years completed	12 months + 7 months	4 months	6 months + 3.5 months
24 years completed	12 months + 8 months	4 months	6 months + 4 months
25 years completed	12 months + 9 months	4 months	6 months + 4.5 months
26 years completed	12 months + 10 months	4 months	6 months + 5 months
27 years completed	12 months + 11 months	4 months	6 months + 5.5 months
28 years completed and further	12 months + 12 months	4 months	6 months + 6 months

Note:

- Employment contracts of indefinite duration will be deemed probationary for the first 12 months from the date of effect and may be terminated without prior notice and without dismissal compensation, unless otherwise agreed by the contracting parties.
- For the calculation of extra compensation provided for the employers of 17 completed years of experience, a regular salary over €2000 is not taken into account.

Update and trends

Employment issues are pending in the agenda of the negotiations of Greece with representatives of its creditors (IMF/EU) for the completion of the current review of the austerity programme.

There are four major issues which were reintroduced in the latest meeting between the representatives of the Institutions and Labour Minister:

- Collective redundancies. The IMF is calling for the abolishment of the current role of the Ministry of Labour in preauthorising collective redundancies. It is recalled that in December 2016, the European Court of Justice held that the rule currently in force in Greece enabling the central government to preauthorise collective redundancies is not contrary to EU law.
- Collective agreements. The reintroduction of the institutional role of sectoral collective agreements is one of the main priorities of the Ministry of Labour. The 'thorny issue' in this case is the extendibility of sectoral collective agreements which the IMF firmly rejects. It should be noted that, according to a 2011 law, company-level agreements take precedence over sectoral collective agreements. Therefore, the IMF does not intend to withdraw with respect to a rule that it considers crucial for the labour market. There are different approaches on the matter from employers' organisations, as they express the view that the horizontal application of the extendibility of sectoral labour agreements to all enterprises in a sector may further exacerbate the already existing problems faced by many businesses.
- Trade union law. In this case, the IMF is calling, in addition to a change in the decision-making process with regard to strikes, for the drastic reduction of trade union 'privileges' that were established by Law 1264/82.
- Lock-out. Greece is among the countries that explicitly prohibit lock-outs. The IMF is calling for the establishment of lock-outs in Greece in spite of the fact that offensive lock-outs do not exist in any country. Conversely, defensive lock-outs exist, but under strict conditions, in several countries, such as Germany, Belgium, England and Spain.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Employment contracts of fixed term are terminated upon their expiration date, without any formalities needed and of course without any compensation paid to the employee.

Furthermore, in the event of the indefinite-term employment contract being less than 12 months ('trial period', according to article 17, paragraph 5 of Law 3899/2010), the employer may terminate the contract without any formalities, having no obligation to give compensation to the employee.

Finally, the employer may terminate an employment contract of indefinite term without prior notice and without any compensation, in the case of a submission of a criminal lawsuit against the employee for an offence committed in the course of his or her service (article 5, paragraph 1 of Law 2112/1920).

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

See question 36. Upon termination without dismissal, for example, upon the expiry of a fixed-term employment relationship, there is no right to severance pay.

39 Are there any procedural requirements for dismissing an employee?

A dismissal must be made in writing and any compensation owed to the employee must be paid upon dismissal, otherwise the termination of the employment contract is not valid. According to Law No. 3863/2010 article 74, paragraph 3, when the compensation for termination of the contract exceeds the salary of two months, the employer must pay to the dismissed employee, at the time of dismissal, part of the compensation, corresponding to salaries of two months. The remaining amount is paid in bimonthly instalments, each of which cannot be lower than earnings of two months, except the last instalment, which can be smaller. The first instalment must be paid the day after completing two months of the dismissal. A notification of the dismissal must be filed with the competent organisation for the employment of workforce or, if there is no competent office in the vicinity, at the local police station. No prior approval by any authority is required for the dismissal.

40 In what circumstances are employees protected from dismissal?

In principle, an employer is entitled to dismiss employees freely.

The following categories are generally protected:

- employees who are on leave;
- employees who are serving their military service;
- pregnant women, during their pregnancy and for one year after the birth;
- drug addicts, provided that they participate in a programme for their cure; and
- trade unionists without following a special procedure prescribed by law.

All employees are protected against unfair dismissal, inter alia, in the following circumstances:

- when dismissal is attributed to their sex or family status;
- when dismissal is attributed to the hostile or vengeful behaviour of the employer following any form of harassment to which the employee did not consent; and
- when dismissal is attributed to the fact that the employee has confessed lawfully in a court of law or other authority.

41 Are there special rules for mass terminations or collective dismissals?

Yes. Mass terminations or collective dismissals are defined as dismissals realised by companies that employ at least 20 employees, the reasons for which are not attributable to the employees and that exceed certain numerical limits. The protective provisions in relation to collective dismissals only apply to employment contracts of an indefinite term.

Mass terminations or collective dismissals must take place within the limits set by the law. Thus, the limits beyond which the dismissals are considered abusive are (according to article 74, paragraph 1 of Law No. 3863/2010) up to six employees for companies with 20 up to 150 employees; and up to 5 per cent of the personnel and up to 30 employees for companies with more than 150 employees.

An employer who wishes to proceed to collective dismissals must comply with the following procedural steps:

- inform the representatives of the employees about its intention and discuss them in order to investigate possible alternative solutions;
- notify in writing the employee's representatives of the reasons for which the collective dismissals are planned, the number of people employed in total, the number of employees that are to be dismissed classified by sex, age and specialisation and any useful information that may help the proposition of alternative solutions; and
- submit the above-mentioned documents to the prefect and LIA official.

The above procedures are followed within time limits prescribed in statute. If there is no agreement between the employer and the employees, the prefect or the Minister of Labour may not consent to the collective dismissals; in the latter case, the employer shall limit the dismissals to the number of employees limited by the prefect's or Minister's decision. If the relevant prefect's or Minister's decision is not issued within the prescribed time limits, the employer may freely dismiss the number of employees that it itself agreed to during the negotiations with the employees.

In all other respects, the provisions regarding dismissal of employees employed under a contract of indefinite term apply (written notice, compensation, etc).

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

According to article 668 of Code of Civil Procedure (CCP), during the procedure under articles 664 to 676 (labour disputes) more than one employee may sue or be sued when the rights or obligations derive only by the same legal cause.

Furthermore, article 669 of the CCP provides that recognised professional trade unions of employees or employers, recognised associations of them or chambers have the right to exercise in favour of their members the rights that derive from a collective agreement or other provisions in lieu of the collective agreement, unless the members have explicitly expressed their opposition. However, they maintain the right to intervene in favour of a party if this party is a member of them or member of any of the organisations belonging to the association; or in any proceedings relating to the interpretation or application of a collective employment contract in which they participate, or of a provision in lieu of the provisions of such a collective agreement, in order to protect the collective interest that is connected to the outcome of the trial.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Under Greek legislation, there is no provision requiring employees to cease work when they have completed the requirements necessary to reach retirement age; an employee's reaching retirement age shall not result in the automatic termination of the employment relationship between the employee and his or her employer. Provision is made within the law for a separation from employment or dismissal in return for reduced compensation under certain conditions.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

No. According to article 867 of the CCP, private law disputes may be subject to arbitration if the parties who agree to arbitration have the power to freely dispose of the subject matter of the dispute, but the article expressly excludes all disputes governed by article 663 of the CCP, that is, employment law disputes. These latter are subject to special litigation procedures that are provided in articles 664 to 676 of the CCP.

For issues concerning the procedure of resolving collective disputes, if the negotiations fail, the parties have the right to request mediation services or to resort to arbitration, according to the procedure described in Law No. 3899/2010 (articles 14 to 17).

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

According to article 679 of the Greek Civil Code, an employee may not agree to waive the specific statutory rights that are provided in articles 656 to 658, 659(2), 667, 668(2), 670, 674, 677 and 678. The most important of these rights are:

- the right to receive a salary where the employer is in delay of payment;
- the right to receive a salary when the employee is prevented from offering his or her services for serious reasons;
- rights to additional payment for additional work;
- the right to annual leave; and
- the right to terminate the contract of employment.

Also, it may not be agreed that an employer can offset an employee's salary against debts of the employee and that an employer has no responsibility for the implementation of health and safety at work regulations.

46 What are the limitation periods for bringing employment claims?

The general statute of limitations is five years, by virtue of article 250(17) of the Civil Code.

However, other provisions of special laws provide for specific limitation periods, concerning several employment claims, such as:

- any employee claim arising from invalidity of the agreed dismissal must be served by lawsuit to the relevant employer within the mandatory three-month period following termination of the employment relationship, otherwise it is inadmissible (article 6, paragraph 1 of Law 3198/1955); and
- any employee claim for payment or completion of the compensation due to dismissal, according to Law No. 2112/1920 or Royal Decree 16/18.07.1920, is unacceptable if that treatment was not disclosed to the employer within six months after it became due (article 6, paragraph 2 of Law 3198/1955).

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The principal sources of law and regulations relating to employment relationships in India are the Constitution of India, labour statutes, judicial precedence and collective and individual agreements. There are as many as 165 labour laws, including nearly 50 central (federal) laws. Most of the employment laws are applicable to employees in the category of workmen (blue-collar employees). This chapter specifically deals with the applicability of statutes to workmen, although some aspects relating to the non-workmen category of employees have also been covered here.

A workman is defined under the Industrial Disputes Act 1947 as a person who is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, excluding a person:

- who is employed mainly in a managerial or administrative capacity; or
- who, being employed in a supervisory capacity, draws a salary exceeding 10,000 rupees per month or exercises functions mainly of a managerial nature.

Apart from certain employment statutes that may be applicable to the non-workmen category of employees, the employment relationship with a non-workman is governed by the employment contract (provided the terms thereof are not less favourable compared to certain applicable statutes).

The main statutes and regulations relating to employment are:

- the Industrial Disputes Act 1947;
- the Factories Act 1948;
- the Shops and Commercial Establishments Act as applicable in a state;
- the Industrial Employment (Standing Orders) Act 1946;
- the Contract Labour (Regulation & Abolition) Act 1970;
- the Maternity Benefit Act 1961;
- the Payment of Wages Act 1936;
- the Minimum Wages Act 1948;
- the Payment of Bonus Act 1965;
- the Equal Remuneration Act 1976;
- the Employees' Compensation Act 1923;
- the Employees' State Insurance Act 1948;
- the Employees' Provident Fund and Miscellaneous Provisions Act 1952;
- the Payment of Gratuity Act 1972; and
- the Trade Unions Act 1926.

Both central (federal) and state governments have their specific rules providing the procedure for proper enforcement of a statute. States have some statutes that deal with specific issues within the broader federal statutes umbrella.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Constitution of India provides equality of opportunity in matters of public employment as a fundamental right. The Constitution of India prohibits discrimination on the following grounds: race, gender, religion, place of birth, domicile, caste and descent.

Additionally, the Industrial Disputes Act 1947 has established a list of 'Unfair Labour Practices' for employers and employees. These practices are prohibited under the Industrial Disputes Act 1947, and some may amount to harassment in the workplace.

In specific circumstances, employees in the private sector could also seek protection against such discrimination being treated as a mala fide action on the part of the employer. However, a specific statute in this respect does not exist.

As far as discrimination based on gender is concerned, the Equal Remuneration Act 1976 prohibits discrimination on the grounds of gender and against women in matters of employment (recruitment, salary, etc).

Regarding sexual harassment, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (the Act) and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules 2013 (the Rules) were notified and brought into effect from 9 December 2013. The Act lays down a comprehensive mechanism to deal with prevention of sexual harassment in the workplace as well as provides a redressal mechanism. The Act covers all women, irrespective of their age and employment status (whether regular, temporary, ad hoc or on daily wage basis, either directly or through an agent, including a contractor, with or without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise) and also covers domestic workers.

The Act mandates an employer employing 10 or more employees in a workplace to form an internal complaints committee (ICC) to look into any complaints relating to sexual harassment. An employer is required to form an ICC at every workplace location. The ICC should be a four-member committee under the chairmanship of a senior woman employee, including two employee members preferably committed to the cause of women or having experience in social work or legal knowledge and a third-party member (from an NGO, for example).

Complaints concerning any workplace employing fewer than 10 employees, or when the complaint is against the employer, will be looked into by the local complaints committee (LCC), constituted at the district level. In the absence of an ICC, a complaint can be made to the LCC, against a manager, for example.

Domestic workers have to approach the LCC in case of any complaint.

The Act and the Rules have laid down timelines for submission of a written complaint, timelines within which an ICC or LCC would have to complete the inquiry, etc. The employer is obliged to enforce the recommendations of an ICC or LCC.

If an aggrieved woman employee is in agreement, then the matter may be settled through conciliation by the ICC or LCC. However, monetary benefits cannot be the basis of any conciliation.

The Act prohibits disclosure of the identity and addresses of any aggrieved woman employee, respondent or witness. In case of violation by any person, the employer can impose a 5,000-rupee penalty, or any penalty as prescribed in the service rules.

An employer is subject to various obligations under the Act, including bringing awareness about the Act and the Rules, and introduction of a policy. An employer could be subject to a fine of up to 50,000 rupees in case of violation of its duties under the Act, and in case of subsequent violations the fine may be doubled together with a penalty in the form of cancellation of business licence, withdrawal of the registration required for carrying out business, etc.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary government agencies that are responsible for enforcement of employment law statutes based on applicable statutes are:

- the regional or chief labour commissioner – enforcement relating to payment of salary, contract labour, employee compensation, working conditions, etc;
- the provident fund commissioner – enforcement relating to the provident fund; and
- the chairperson of the Employees' State Insurance Corporation – enforcement relating to employees' state insurance, etc.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Industrial Disputes Act 1947 mandates constitution of a works committee in industrial establishments with 100 or more workmen in the event that the relevant government issues any specific or general directions to that effect.

The number of representatives of the workmen in the works committee should not be less than the number of representatives of the employer. The workmen's representatives must be chosen from among the workmen in the establishment and in consultation with the trade union, if any, registered under the Trade Unions Act 1926.

The works committee is required to promote measures for securing and preserving amity and good relations between the employer and the workmen, comment upon matters of common interest or concern and endeavour to resolve any material differences of opinion in respect of such matters.

Employers with 20 or more workmen are required to have one or more grievances redressal committees to handle matters of individual disputes.

5 What are their powers?

The works committee has the power to co-opt members (ie, select employees) who have special knowledge of a matter which is referred to the works committee in a consultative capacity. The co-opted member or members can be present at meetings only for the period during which the particular question relating to their knowledge sphere is before the works committee.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

As per the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the IT Rules), employers are required to obtain consent from employees to undertake background checks if the information proposed to be confirmed includes personal information and sensitive personal data and information as described in the said statute. The obligations on the employers or third parties engaged by them for this purpose remain the same.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There is no specific restriction or prohibition against employers requiring medical examinations as a condition of employment. However, such examinations should be relevant for the purpose of the services to be rendered by the applicants in question, or in other words, a direct relationship with the requirement of work. Employers can refuse to hire applicants who do not submit to an examination provided that the medical examination is necessary for the purpose of rendering services.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no specific restriction against drug and alcohol testing of applicants, but generally such tests are not carried out as a prerequisite for employment in India. An employer can refuse to hire an applicant who does not submit to an examination provided the medical examination is necessary to provide fitness to render services. There is no restriction on having a policy on prohibition on use of any drugs and alcohol during work hours. The Shops and Establishments Act of certain states, such as Uttar Pradesh and Delhi, provides that being under the influence of alcohol while in office shall constitute 'misconduct'.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

An employer is not allowed to discriminate against particular people or groups of people. However, in some states the industrial policy may provide for preference to be given to natives of the relevant state.

Pursuant to the provisions of the Industrial Disputes Act 1947, preference is required to be given to retrenched blue-collar employees (who are citizens of India), who offer themselves for re-employment in the event that an employer proposes to employ any person subsequently.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

There is no specific requirement for a written employment contract, however some employment statutes or state-specific statutes (or both) require an employment letter covering limited aspects to be issued. However, as a matter of best practice, written employment contracts are executed between the employer and the employee, or a detailed written appointment letter is issued to the employee, the terms whereof are required to be duly accepted and acknowledged by the employee.

The employment contracts generally used in India have the following information:

- name and address of the employer and employee;
- title of job or nature of work (or job description);
- place of work;
- probation, if any, and its term;
- option of the employer to transfer an employee from one office to another branch office, affiliate, etc;
- date of commencement of employment;
- wages or salary details;
- any concessions or benefits that an employee is entitled to;
- type of contract – permanent or fixed-term;
- period of notice required for termination of employment;
- leave entitlement;
- conditions under which the employer can terminate the contract;
- non-compete, confidentiality and non-solicitation provisions, etc; and
- working hours.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term contracts are permissible in India if the requirement is only for a specific period. Fixed-term contracts are not permissible for a regular job requirement. There is no maximum period specified for fixed-term contracts under law; however, the same should be for a reasonable period.

In the case of employees in the category of workmen (blue-collar), the law specifically prohibits replacement of one fixed-term employee by another fixed-term employee to avoid permanent employment.

12 What is the maximum probationary period permitted by law?

There is no maximum probationary period provided in statute. The probationary period is generally from three to six months and, in some cases, one year. The probationary period is primarily governed by the terms of employment (the appointment letter, employee handbook, standing orders, etc, as applicable) or varies from company to company or duly approved and adopted standing orders.

13 What are the primary factors that distinguish an independent contractor from an employee?

The primary factors that may distinguish independent contractors from employees are:

- employees act under the direct supervision and control of their employers whereas independent contractors are free from the control and supervision of their employers;
- employees are subject to the terms and conditions of employment including service rules, etc, whereas independent contractors are subject to the terms of contract but not to the service rules, etc; and
- an employer–employee relationship exists with the employees.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The hiring of temporary staff through recruitment agencies is governed under the provisions of the Contract Labour (Regulation and Abolition) Act 1970. As per the Contract Labour (Regulation and Abolition) Act 1970, temporary staff would be considered as employees of the recruitment agencies. The organisation which utilises the services of the temporary staff would be regarded as a principal employer under the provisions of the Contract Labour (Regulation and Abolition) Act 1970. In the event the recruitment agency fails to pay salary or applicable employee benefits to the temporary staff, the principal employer would be required to pay salary or applicable employee benefits to the temporary staff (the principal employer would have a statutory right to recover the amount from the recruitment agency).

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There is no numerical limitation on short-term employment visas. Depending upon the qualifications of the person, or employment contracts, employment visas can last for up to five years. The visa requirements for people on employment visas in India if they are transferred to a related entity in another jurisdiction (outside India) would depend on the visa regulation of the jurisdiction to which the employees are being transferred.

For foreign workers residing in India, in the case of changes in their employment, as per the new visa regulations, such foreign workers need not return to their home countries to arrange for new employment visas. While residing in India, such workers may be subject to fulfilment of prescribed requirements when making new applications to the government, seeking permission to change the details of their employment on the original visas.

16 Are spouses of authorised workers entitled to work?

As per the new guidelines issued by the government of India, spouses of authorised workers on dependent visas can convert their dependent visas into employment visas within India, subject to the following conditions:

- all the conditions laid down for the granting of an employment visa are fulfilled by applicants; and
- prior approval from the Ministry of Home Affairs is obtained.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The rules for employing foreign workers are as follows:

- foreign workers should be highly skilled professionals engaged on a limited-term contract or employment basis;
- foreign workers may not be granted employment visas for jobs for which qualified Indians are available;
- foreign workers may not be granted employment visas for routine, ordinary or secretarial and clerical jobs;
- foreign workers sponsored for employment visas should draw a salary in excess of US$25,000 per annum, except in cases of ethnic cooks, language teachers (other than teachers of the English language) or translators and staff working for an embassy or high commission; and
- foreign workers must comply with all legal requirements such as the payment of their tax liability, etc.

18 Is a labour market test required as a precursor to a short or long-term visa?

Yes. Employment visas may not be granted for routine, ordinary or secretarial or clerical jobs, or for jobs for which qualified Indians are available.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Normal working hours are generally restricted to nine hours per day and up to a maximum of 48 hours per week by the following, as applicable to an employer:

- the Factories Act 1948, which applies to factories; and
- the state-specific Shops and Establishment Act, which applies to establishments other than factories.

These Acts also provide for rest periods, overtime, etc. For example, in Delhi, each employee must have a rest interval of 30 minutes for every five hours of continuous work. If required to work for more than the maximum number of working hours set by the applicable statute, employees are generally paid double their normal wages.

The Factories Act 1948 and certain state-specific Shops and Establishments Acts also provide for a maximum period of working hours, including maximum overtime periods for a week, month and quarter.

There is a restriction on employers making employees work beyond the maximum working hours prescribed by law.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employees are entitled to overtime, except employees who may fall under the definition of 'employer', such as a director, occupier or manager of a factory; any other person in control of the affairs of the business are exempt under a specific applicable law or any other employee specifically exempted from its applicability. It is also possible that the applicable statutes may have a ceiling on the maximum percentage of employees so exempt.

Overtime wages are calculated at a rate of up to twice the normal wage depending on the location or place of work of an employee.

21 Can employees contractually waive the right to overtime pay?

The right to overtime is a statutory right. For any contract or agreement whereby an employee relinquishes any statutory right, including the right to receive overtime, such a waiver would be void.

22 Is there any legislation establishing the right to annual vacation and holidays?

Annual vacation legislation

- The Factories Act 1948 provides for annual vacation for employees working in a factory.

- The state-specific Shops and Establishments Act provides for annual vacation for employees in an establishment other than a factory.

Annual vacation entitlement
- Subject to an employee having worked for 240 days in a calendar year, 19 days of annual vacation is permissible to employees in factories or manufacturing units.
- Typically, 12 to 21 days of annual vacation is permissible for employees in an establishment other than a factory.

Holiday entitlement legislation
- The state-specific National and Festival Holidays Act (applicable in certain states) provide prescribed national holidays.
- The state-specific Shops and Establishments Act.

Holiday entitlement
In addition to one day a week off there are:
- three national holidays on 26 January, 15 August and 2 October; and
- festivals and other holidays as per the state-specific Shops and Establishments Act, which can normally be five days or more.

However, as per the market practice, some employers give two days a week off and 10 to 12 holidays (including national, festival and other holidays).

23 Is there any legislation establishing the right to sick leave or sick pay?

Legislation that deals with sick leave and sick pay includes the state-specific Shops and Establishment Act and the Employees' State Insurance Act 1948.

Depending upon the state, the Shops and Establishment Act may provide for sick leave ranging between seven and 14 days. Sick leave is generally paid leave in most of the states. In the case of sickness, an employee can also utilise any accrued casual and privilege leave.

In the case of employees covered under the Employees' State Insurance Act 1948, sickness benefits are paid by the government approximately at the rate of 60 per cent of the salary subject to certain conditions being fulfilled.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees can take leave of absence for sickness, accident, personal requirement, vacation or any other reasons as per their eligibility or entitlement, subject to approval by their employers.

Leave may be governed by the relevant state or federal legislation that exists where an office is located. Depending upon the location of an establishment, the total amount of leave could be between 27 and 44 days.

Employees are entitled to receive payment for leave subject to the availability of leave to their credit and approval of the leave by the employer.

25 What employee benefits are prescribed by law?

Subject to the applicability of a statute to an employee or an employer, employee benefits that are prescribed by law include the following: employee's provident fund, employee's state insurance, maternity benefit, bonus, leave (sick, casual and annual) and gratuity.

26 Are there any special rules relating to part-time or fixed-term employees?

There is no specific law for part-time employees. Part-time employees generally have all the rights of regular employees, the only difference being they receive proportionate benefits.

Fixed-term contracts of employees in the category of workmen are recognised as an exception to the definition of retrenchment (termination in the general sense), and are therefore permissible under the Industrial Disputes Act 1947 subject to the condition that such contracts are not used to avoid or deny regular employment.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination clauses such as non-compete are generally not valid or enforceable under Indian law. Non-solicitation in the absence of sufficient evidence may not be enforceable. However, it is common practice to include such clauses in the employment contract, especially in the case of senior employees, due to their deterrent effect.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

In India, post-employment restrictive covenants are not enforceable. Upon severance of the employer–employee relationship, employers are not required to pay anything to former employees, even if there is a clause relating to post-employment restrictions in the employment contract.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Employers can be held vicariously responsible for the acts or omissions of their employees under the common law, if such acts or omissions are carried out by employees either during the course of their employment or under the instructions of employers.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Income tax is employment-related tax. Employers are required to deduct the applicable taxes at source and deposit them with the concerned income tax department. In certain states, such as Maharashtra, employers and employees may also be required to deposit professional tax as per the relevant state-specific Professional, Trade, Calling and Employment Act.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

In the absence of any contract creating assignment or right in favour of the employer, an employee's invention is not automatically the employer's property, even if such invention is made:
- during the course of employment;
- with the employer's material; or
- at the expense of the employer.

Accordingly, an appropriate assignment would be required from the employee to create the interest of the employer in any invention.

32 Is there any legislation protecting trade secrets and other confidential business information?

Trade secrets are protected under Intellectual Property laws in India. However, there is no dedicated legislation in India regarding protection of trade secrets and confidential business information. Usually, trade secrets and confidential business information continue to be enforced contractually under the Indian Contract Act 1872 (Contract Act). Through various judicial precedents the courts in India have protected the rights arising out of trade secrets and confidential business information.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The IT Rules provide for privacy law in India with regard to personal information and sensitive personal data and information.

All employers (or any entity authorised on their behalf), for the purposes of collection, receiving, processing, storing, dealing or handling

of personal data and sensitive personal information, are required to have put in place a privacy policy including the following aspects:
- details regarding the handling of or dealing with such information;
- details regarding the type of information collected;
- the purpose of collection and usage of such information;
- disclosure of such information (including to a third party); and
- reasonable security practices and procedures for the protection of information, as approved and notified by the government.

Other obligations include the following:
- employers should obtain consent in writing (through a letter, fax or email) from employees if they obtain information including passwords, financial information (such as bank account, credit card or debit card or other payment instrument details), physical and mental health condition, sexual orientation, medical records and history or biometric information, or any other personal information;
- this information is to be used by employers only for the purposes for which it was obtained; and
- employers must give employees access to carry out any necessary corrections to such information, or to withdraw consent.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Employees in the category of workmen are protected in the event of a business transfer.

In the event of termination or retrenchment, employees (employed in continuous service (as defined in the Industrial Disputes Act 1947) for not less than one year) are entitled to the following benefits, as if such employees had been retrenched:
- one month's notice or salary in lieu thereof; and
- retrenchment compensation at the rate of 15 days' salary for every completed year of service or part thereof in excess of six months.

In the event that the new employer proposes to employ such employees, subject to following requirements, the above benefits are not payable to workmen if:
- the service of such employees should be uninterrupted;
- the terms and conditions with the new employer should be no less favourable than those applicable to the employees immediately before the transfer; and
- in cases of retrenchment, the new employer would pay compensation on the basis that an employee's services have been continuous and uninterrupted.

Employees in the category of non-workmen do not have any such statutory protection, and generally the terms of contract would prevail.

For workmen or non-workmen, where the terms of contract such as minimum notice period, leave or holidays, working hours, severance compensation, etc, are better than those required by law, then such terms of contract will prevail over statutory requirements.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

The laws relating to dismissal or termination are different for employees in the workmen and non-workmen categories.

Employees in the workmen category cannot be terminated without cause. Causes for termination could be misconduct, continued ill health, non-renewal of contract, redundancy, non-performance, etc.

Non-workmen can be terminated without cause (except in a few states where the reasons for termination must be provided or grounds must be disclosed) by giving requisite notice or pay in lieu thereof as per the terms of the contract or the state-specific Shops and Establishments Act. However, recently there have been judicial pronouncements wherein the courts have held that, even for termination of non-workmen, a reasonable cause must exist.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

It is possible to provide notice of termination or payment in lieu of the notice period.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

In cases of misconduct, employees can be terminated without notice or pay in lieu thereof, but an inquiry (following principles of natural justice) must be conducted before dismissing an employee in such a case.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The Industrial Disputes Act 1947 and, in some states, the applicable Shops and Establishments Act, provide for severance upon termination. Employees (workmen in continuous service for a period of not less than one year) are entitled to the following severance pay in the event of termination of employment:
- notice pay:
  - one month's notice or salary in lieu thereof if the employee is employed in any establishment (such as a factory, etc) with less than 100 employees and has completed one year of continuous service. This would also apply with respect to an establishment in the service sector (with up to 100 or more workmen); or
  - three months' notice or salary in lieu thereof if the employee is employed in a manufacturing unit (and certain other establishments) with 100 or more employees and has worked for a continuous period of one year;
- retrenchment compensation (this is only payable to employees in the category of workmen who have completed one year of continuous service). Retrenchment compensation is payable at the rate of 15 days' salary for every completed year of service or any part thereof in excess of six months;
- gratuity – every employee who has completed five years of continuous service is entitled to payment of gratuity at the rate of 15 days' salary for every completed year of service; statutorily, gratuity payments are capped at 1 million rupees;
- leave encashment – every employee should be paid for the leave that has accrued but that has not been availed of; and
- other benefits – employees are entitled to any other benefits (including any bonus that may be payable, payment for overtime work, etc) as may be agreed upon between the parties or that are part of any agreement.

Certain state-specific compliances may also need to be adhered to.

Non-workmen are entitled to a minimum of one month's notice or salary in lieu thereof as may be agreed in a contract, gratuity, leave encashment or any other benefit as agreed between the employer and the employee.

For workmen or non-workmen, where the terms of contract such as minimum notice period, leave or holidays, working hours, severance compensation, etc, are better than those required by law, then such terms of contract will prevail over statutory requirements.

39 Are there any procedural requirements for dismissing an employee?

Employees in the category of workmen can be dismissed with cause (non-renewal of contract, non-performance, continued ill health, etc). In cases of misconduct, an inquiry must be held before dismissing the employee.

To dismiss a workman in any establishment with less than 100 workmen (in case of the service industry, having up to 100 or more workmen), the workman must be given:
- one month's advance notice or salary in lieu thereof;
- 15 days' salary for every completed year of service;
- the benefit of the last-in, first-out principle; and
- other benefits to be paid as per the employment terms and intimation to concerned government department.

Update and trends

Effective from 20 January 2017, by virtue of an amendment in the Employee State Insurance (Central) Rules, 1950 an insured woman is now entitled to 26 weeks of maternity leave including the case where the mother adopts a child. However, an insured woman having two or more surviving children shall be entitled to receive maternity benefits during a period of 12 weeks of which not more than six weeks shall precede the expected date of confinement. The said benefit will only be applicable to women who are covered under the provisions of the Employees' State Insurance Act, 1948.

On 28 March 2017, the President of India gave his assent to the Maternity Benefit (Amendment) Act, 2017 (Amendment Act) which amends the existing Maternity Benefit Act, 1961. The following are the salient changes that have been brought into effect by the Amendment Act:

- maternity leaves increase from 12 to 26 weeks. However, if a woman is pregnant with her third child, she would be entitled to only 12 weeks of maternity leave;
- surrogate mothers and mothers who adopt will be entitled to 12 weeks of maternity leave;
- post the 26 weeks maternity leave, an employer may permit 'work from home' for the new mother. This would apply to only those whose nature of work allows them to work from home; and
- organisations with 50 or more employees will have to provide crèche facilities within a prescribed distance. The crèche may be within the organisation or it may align itself with another crèche providing facilities within its vicinity (in a certified area). Mothers will be allowed four visits in a day to the crèche, including during break time.

The Ministry of Labour and Employment, Government of India (Ministry) raised the maximum wage ceiling for people covered under the Employees' State Insurance Act, 1948 to 21,000 rupees per month from the earlier limit of 15,000 rupees per month. This change is applicable to both existing as well as new employees. As a result of this amendment, employers will now have to provide enhanced contribution and also for a larger pool of employees.

Facilitating the 'Ease of Doing Business in India', the Ministry (via a notification dated 21 February 2017) brought into force the Ease of Compliance to Maintain Registers under Various Labour Laws Rules, 2017 (ECMRR). The ECMRR makes it possible for corporates to keep combined registers under nine different labour law legislations. Previously, the companies were required to maintain multiple registers of a similar nature under different labour law legislations leading to multiplicity of compliances. The main intent behind introducing the ECMRR is to give an option to companies to electronically maintain a single format for:

- employee register;
- wage register;
- register of loans or recoveries;
- attendance register; and
- register of leave, rest or leave wages under The Mines Act, 1952, The Sales Promotion of Employees (Conditions of Service) Act, 1976 and The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1957 instead of maintaining multiple registers.

The formats prescribed for maintaining registers and records under the earlier applicable labour law legislations were cumbersome and their physical maintenance difficult. With the implementation of the ECMRR it is expected that there would be a significant reduction of statutory labour compliances.

In cases of misconduct, an inquiry must be held before dismissing the employee. Severance related requirements such as notice or severance compensation would not apply in case of termination for misconduct.

The employer must notify the labour department in the relevant area of the dismissal.

To dismiss a workman in a factory (or certain other establishments) with 100 or more workmen, prior approval from the relevant labour department must be sought by the employer and the workman must be given:

- three months' advance notice or salary in lieu thereof;
- 15 days' salary for every completed year of service;
- the benefit of the last-in, first-out principle; and
- other benefits to be paid as per the employment terms.

In cases of misconduct, an inquiry must be held before dismissing the employee. The requirement of prior government approval would not apply in cases of misconduct.

Certain state-specific compliances may also need to be adhered to.

To dismiss an employee in the non-workmen category:

- in cases of misconduct, an inquiry must be held before dismissing the employee (opportunity to be heard); and
- in cases of dismissal for any other reason, the employee must be given a minimum of one month's notice or salary in lieu thereof, or as agreed in the terms of employment and any other benefits as per the terms of employment.

For both workmen or non-workmen, where the terms of contract such as minimum notice period, leave and holidays, working hours, severance compensation, etc, are better than those required by law, then such terms of contract will prevail over statutory requirements.

40 In what circumstances are employees protected from dismissal?

Employees in the category of workmen (who have been in continuous service for a period of 12 months) cannot be retrenched without following the retrenchment procedure (ie, notice or pay in lieu thereof, prior government approval, if applicable, and payment of retrenchment compensation).

Generally, employees in the category of non-workmen do not have any statutory protection in the event of retrenchment, except for protection provided under certain state specific legislation.

Certain statutes, such as the Maternity Benefit Act 1961, prohibit termination of an employee while she is on maternity leave.

41 Are there special rules for mass terminations or collective dismissals?

In cases of mass termination of workmen, employers are required to follow the last-in, first-out principle and to prepare a seniority list of the employees who are being retrenched. In the event of any subsequent employee requirements, the employees (who are citizens of India) from the list are required to be considered based on their seniority.

There is no separate procedure for mass termination in the case of non-workmen.

Certain state-specific compliances may also need to be adhered to.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class or collective actions are allowed to assert labour and employment claims in India. Labour and employment claims (industrial disputes) must be class or collective actions espoused by a union, with the exception of claims relating to discharge, dismissal or recovery of money due.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

This is not mandatory in private employment. However, generally employers fix a retirement age between 50 and 60 years.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

The employees in the non-workmen category may agree to private arbitration.

Employees in the workmen category and the employer may both agree to voluntarily refer the dispute to arbitration, any time before the dispute has been referred to Labour Court or Industrial Tribunal, by a written agreement and as per the provisions of the Industrial Disputes Act 1947.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee can agree to waive statutory claims, but law provides the right to demand statutory dues, even if waived. However, no such right prevails in case of contractual dues.

46 What are the limitation periods for bringing employment claims?

In the case of claims by employees in the category of workmen relating to wrongful dismissal, discharge or termination, the limitation prescribed is three years.

In the case of any other industrial disputes by employees, no limitation period is prescribed. However, the same is required to be raised within a reasonable period.

In the case of employee compensation, claims must be raised within two years of the occurrence of the accident. However, in some cases courts have allowed or waived limitation.

In the case of any claims by employees in the category of non-workmen, the limitation period is three years.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes relating to employment are Law No. 13 of 2003 on Manpower (the Manpower Law), Law No. 2 of 2004 on Industrial Relations Dispute Settlement, Law No. 21 of 2000 on Labour Unions (the Union Law), Law No. 40 of 2004 on National Social Security System, and Law No. 1 of 1970 on Work Safety and Health (the Work Safety Law), along with a well-developed body of implementing regulations from the Minister of Manpower.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Manpower Law provides that every person has equal rights to obtain a job and receive equal treatment in the workplace without discrimination on the basis of sex, ethnicity, race, religion or political orientation, including equal treatment for disabled persons.

Indonesia has ratified the International Labour Organization (ILO) Conventions regarding discrimination in employment, as follows: ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation and ILO Convention No. 100 concerning Equal Remuneration.

With regard to harassment, the Manpower Law does not explicitly stipulate protection from harassment in the employment setting. However, a harassed employee may file a claim through criminal or civil law proceedings.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Enforcement is under the jurisdiction of the Ministry of Manpower, Industrial Relations Courts (Labour Courts), and regional Manpower Services Offices.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Yes. The Manpower Law acknowledges the right of workers to form a union in the workplace. Unions are further regulated under the Union Law.

A union may be established by any group of at least 10 employees. Following establishment, the union must register with the Manpower Services Office at the domicile of the union.

Whether or not there is a union, the Manpower Law requires that companies that employ at least 50 employees to establish a Bipartite Forum, consisting of employer and employee representatives, to serve as a communication and consultation forum regarding employment issues in the company.

5 What are their powers?

Under the Union Law, a union has the following functions:

- to negotiate a collective labour agreement (CLA) and represent the union and employees in industrial relations disputes;
- to represent employees in any cooperation arrangement with the employer;
- to create harmonious, dynamic, and fair industrial relations in accordance with applicable laws;
- to be the channel for aspirations in connection with any struggle for the right and interest of the union;
- to plan, organise and be responsible for any strikes in accordance with applicable laws and regulation; and
- to represent the employees in seeking share ownership in the company.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

There are no restrictions or prohibitions against background checks on applicants, whether conducted by an employer or by a third party.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Minister of Manpower Regulation No. PER 02/MEN/1980 on Medical Examination for Employees in the Implementation of Work Safety allows employers to request job applicants to undergo a medical examination. There is no restriction or prohibition against employers imposing a medical examination as a condition of hire.

Companies in fields mentioned in the Work Safety Law (including high-risk work, mining, agriculture, forestry, construction, transportation, shipping, diving, extreme conditions, and others) must conduct medical examinations of candidates prior to hiring them.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Minister of Manpower and Transmigration Regulation No. PER.11/MEN/VI/2005 on Prevention and Anticipation of Misuse and Illegal Distribution of Narcotics, Psychotropics, and any Addictive Substance in Work Places provides that an employer may request employees to take a drug test. There are no restrictions or prohibitions against employers imposing a drug test as a condition of hire.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Other than the basic protections against discrimination mentioned above, there is no 'affirmative action' in Indonesia. However, employers that employ at least 100 persons must hire at least 1 per cent disabled

persons from the total of employees in their company, as stipulated under Law No. 8 of 2016 on Disabled Persons.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The Manpower Law recognises two types of employment: permanent and fixed-term. An agreement for permanent employment may be made in writing or orally. If orally, a letter of appointment must be drafted to address the basic terms of the arrangement.

Fixed-term employment agreements must be prepared in writing, stating at least the following:

- name, address and business line of employer;
- name, gender, age and address of employee;
- position or type of work;
- place of work;
- wage and payment mechanism;
- terms and conditions of work;
- effective date and term of employment;
- place and date of execution; and
- signatures of employer and employee.

All written employment agreements must be executed in the Indonesian language (or in a foreign language with Indonesian translation).

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts may be based on a certain time period (time based) or completion of a certain work (work based). The Manpower Law provides that work based fixed-term employment agreements may only be used for certain types of work, which, because of the type and nature of the work, will finish in a specified time, namely:

- work to be performed and completed at once or work that is temporary by nature;
- work whose completion is estimated not to take longer than three years;
- seasonal work; and
- work that is related to a product or activity that is new or in the trial phase.

Regardless of the nature of the work, foreign employees may only be employed on a fixed-term basis.

A time based fixed-term employment agreement can be executed for an initial period of up to two years. The agreement may be extended once for up to one year upon seven days' written notice to the employee. Subsequently, the agreement may be renewed once for up to two years, but there must be a 30-day interlude between expiry of the extension and commencement of the renewal period. If the procedures for extension or renewal are not observed, and the employee continues working past the expiry date, he or she will be deemed a permanent employee as of the date of the violation.

There is diversity of opinion as to whether this latter provision applies to foreigners, as, by law, they must not be considered permanent employees. Nevertheless, many foreign expatriates are employed in Indonesia on a long-term basis pursuant to a series of fixed-term employment agreements.

12 What is the maximum probationary period permitted by law?

The Manpower Law provides that a probationary period may be imposed for a maximum of three months and only in cases of permanent employment. The probationary period must be written in the work agreement or stated in the letter of appointment if the work agreement is made verbally. If the probationary period is not notified to the employee, or if the parties attempt to insert a probationary provision into a fixed-term employment agreement, the probation is deemed non-existent. Likewise, if an employee is not notified that he or she has failed probation prior to the end of the period, he or she becomes a permanent employee by operation of law.

13 What are the primary factors that distinguish an independent contractor from an employee?

Under the Manpower Law, an employment relationship requires three elements: work, instructions, and wage. Although there is a large informal labour sector in Indonesia, meaning that many workers are de facto independent contractors, the laws define employment in the broadest sense in order to provide labour protections to the largest population possible.

An independent contractor is usually hired based on a service or consulting agreement, which does not meet the 'wage' element by virtue of the fact that the contractor receives payment for services or deliverables rendered based on an invoice (rather than an automatic wage payment). There are other factors that distinguish an independent contractor from an employee. Independent contractors are not bound by working hours, do not carry business cards bearing the employer's name, and have certain deliverables to their employer. Those factors are not found in employees.

Service and consulting agreements are governed under the Indonesian Civil Code (ICC), which does not stipulate specific terms and conditions. Absent obligatory provisions, the general freedom of contract principle in the ICC applies, such that all legally executed agreements bind the parties thereto. Nevertheless, employers should be cautious in using service agreements for work that inherently falls under the employment umbrella.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Manpower Law provides that an employer may recruit employees by itself or through a recruitment agency, whether it is for temporary or permanent employees. However, subcontracting and outsourcing are strictly regulated, and workers procured through a third-party contractor or labour supply agency must not be used to perform 'core' work of an employer. The definitions of 'core' work may vary in different sectors.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There is no general numerical limit on the number of foreign employee visas a company may sponsor, although limitations do apply in certain sectors, for example, law firms may hire a maximum of five foreign legal consultants.

All foreign employees must hold a valid work permit (IMTA), a limited stay visa (VITAS), and a temporary residency permit (KITAS). The VITAS and KITAS may be granted for periods of six months, one year, and two years; however, they are generally issued in line with the duration of the IMTA (which is only valid for one year at a time, even if the employment contract is for two years). The same requirements apply to secondees and employees who are transferred from a foreign office, as they are being employed in Indonesia.

For work of limited duration, including film making or entertainment, conducting quality control, inspection of Indonesian branch offices of foreign companies, and work relating to machinery installation, after-sales service, and market testing of new products, a temporary IMTA of up to six months may be obtained.

Foreigners who enter Indonesia for non-employment business purposes (eg, to attend meetings) may enter using a business visit visa, which is issued initially for 60 days, and may be extended up to four times, each extension for 30 additional days, and then convertible into a multiple-entry business visa, which is valid for up to five years.

16 Are spouses of authorised workers entitled to work?

While spouses of authorised workers are eligible to reside in Indonesia based on a dependent KITAS (the duration of which is tied to the working spouse's KITAS), they are not permitted to work unless they obtain a work permit.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Foreign workers may be employed in Indonesia as long as the employer has obtained an approved Foreign Manpower Utilisation Plan and the IMTA, along with necessary immigration documents. Foreign workers may only be employed for limited periods and in certain positions. Foreigners are specifically prohibited from occupying positions of authority in human resources.

Pursuant to the Manpower Law, employing a foreigner without an IMTA may subject an employer to sanctions of one to four years' imprisonment and a criminal fine of 100 million to 400 million rupiah.

18 Is a labour market test required as a precursor to a short or long-term visa?

There is no specific labour market test requirement, although the Manpower Law states that foreign workers will not be granted a work permit if local employees can perform the job. Nevertheless, an employer may hire foreign workers in order to facilitate the transfer of technology, skills, and expertise to local employees, with the objective of increasing capacity to the point that the foreign employees can eventually be replaced by local employees.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Under the Manpower Law a working week is 40 hours, with two possible arrangements: seven hours a day, six days per week and eight hours a day, five days per week.

An employer and an employee may agree to have longer working hours. Overtime is allowed up to three hours per day and 14 hours per week, subject to employee consent.

The Manpower Law prohibits employers from employing female workers aged below 18 years, as well as pregnant employees who, based on a physician's statement, are at risk of damaging their health or safety, between 11pm and 7am.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employees working outside normal working hours are entitled to overtime pay, as follows.

Overtime on working days:

- first hour: 1.5 times the hourly wage (based on prorated monthly salary); and
- subsequent hours: twice the hourly wage.

Overtime on weekends or national holidays:

- For a six-day work week:
  - first seven hours: twice the hourly wage;
  - eighth hour: three times the hourly wage; and
  - ninth and tenth hours: four times the hourly wage.
- For a five-day work week:
  - first eight hours: twice the hourly wage;
  - ninth hour: three times the hourly wage; and
  - tenth and eleventh hours: four times the hourly wage.

Managerial or professional employees and workers in certain sectors (oil and gas production, mining, and fisheries) are exempted from overtime requirements due to the nature of their work schedules.

21 Can employees contractually waive the right to overtime pay?

Overtime pay is a statutory right, but it may be waived under the terms of the employment agreement or company regulation.

22 Is there any legislation establishing the right to annual vacation and holidays?

In addition to statutory public holidays (which are determined annually by the government), the Manpower Law provides for 12 working days of paid annual leave after an employee has worked for 12 consecutive months.

23 Is there any legislation establishing the right to sick leave or sick pay?

Employers must provide paid sick leave to workers based on a physician's statement, without limit as to the number of days per year. Employers are permitted to limit the number of sick days in employment agreements or company regulations or CLA. The Manpower Law provides for reduction of salary during long illnesses, as follows:

- first four months: 100 per cent salary;
- second four months: 75 per cent salary;
- third four months: 50 per cent salary; and
- subsequent months: 25 per cent salary until the employer terminates the employment.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Under the Manpower Law, employees are entitled to paid leave under the following circumstances:

- marriage of employee: three days;
- marriage of employee's child: two days;
- circumcision or baptism of employee's child: two days;
- live birth or miscarriage by employee's wife: two days;
- death of employee's spouse, parent or parent-in-law, child or child-in-law: two days;
- death of other family member living in employee's household: one day;
- miscarriage by female employee: one-and-a-half months; and
- maternity leave for female employee: one-and-a-half months before and one-and-a-half months after delivery.

25 What employee benefits are prescribed by law?

Wage

All employers must comply with the minimum wage applicable in their region and industry. In addition, many employees receive allowances for meals, transportation or housing. If the salary is composed of basic wage and fixed allowances, the amount of the basic wage must not be less than 75 per cent of the total amount of compensation.

In addition, employers must pay religious holiday allowance of one month's salary to employees who have worked for at least one month, pro rated for employees who have worked less than 12 months.

Social security

Every employee, including foreigners working in Indonesia for at least six months, must be enrolled in the national Social Security Programmes (BPJS), consisting of the Manpower BPJS, and the Health BPJS.

Contributions are as follows:

Type of coverage	Employer share	Employee share
Workplace accident	0.24-1.74% of salary (based on industry/risk factor)	-
Death	0.3%	-
Old age savings	3.7%	2%
Pension	2%	1%
Health/medical	4% up to max. 320,000 rupiah	0.5% up to max. 40,000 rupiah

26 Are there any special rules relating to part-time or fixed-term employees?

Part-time employees

The Manpower Law regime reflects the government's policy of formalising the labour sector by promoting full permanent employment for all citizens. The Manpower Law does not specifically regulate part-time employment (nor does it cover domestic employment).

Fixed-term employees

Requirements for fixed-term employment are discussed in questions 10–12. Generally, fixed-term employees are entitled to the same rights

and benefits enjoyed by permanent employees, including all provisions on wages and benefits.

If one party to a fixed-term contract terminates the agreement prior to its natural expiry, the terminating party is liable to pay the non-terminating party the total of all wages that would be owed under the remaining period of the contract.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Non-competition and non-solicitation agreements are enforceable in accordance with the terms stipulated in the agreement, and there is no statutory maximum period, although standards of reasonableness should apply. However, a court may revoke a post-termination covenant at the request of an employee if such a covenant harms the employee.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Not unless specifically stated in an agreement between the parties.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer is liable for all acts of its employees conducted within agreed working hours, provided that the employee has performed his or her work in accordance with instructions or standard procedures stipulated by the employer.

Article 1367 of the Indonesian Civil Code provides respondeat superior liability for civil matters, as long as the employee is acting for the interests of the employer.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employees are obligated to pay taxes on all salary and income earned in Indonesia (including bonuses and religious holiday pay). Employers are required to withhold the appropriate amount of income tax and convey it to the State Treasury.

Law No. 7 of 1983 on Income Tax (as amended) applies progressive tax rates on resident taxpayers (5 per cent–30 per cent, depending on income), with 20 per cent added to the income basis for taxpayers who do not possess a taxpayer identification number. Non-resident taxpayers are taxed at 20 per cent.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Law No. 28 of 2014 on Copyright provides that even if a work is made under an employment relationship or made based on an order from the employer, the employee who creates the work will be deemed the creator and copyright holder, unless specified otherwise in the employment agreement.

32 Is there any legislation protecting trade secrets and other confidential business information?

Law No. 30 of 2000 on Trade Secrets requires employers to use all necessary efforts to keep the confidentiality of their trade secrets, including limitation of the people with access to such information and implementing internal regulations that hold workers responsible for the trade secrets.

Sanctions imposed on employees who violate confidentiality agreements depend on the terms of the agreements.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There is no specific regulation on employee privacy. At the time of writing, a Draft Bill on Protection of Private Personal Data had been circulating for some time, which if promulgated, would strengthen employees' rights to protection of 'sensitive information,' which is any information associated with religion, personal or political beliefs, physical or mental health, marital life, financial position, or any other information that may cause an individual to suffer discrimination.

Private data stored in electronic systems is subject to Minister of Communication and Informatics Regulation No. 20 of 2016 on Protection of Private Data in Electronic Systems. Although not specifically dealing with employee data, if an employer obtains employee data through electronic systems (including through email servers and electronic documents), the employer will be subject to this regulation.

Any private data that are to be saved must first be verified and encrypted, and stored for at least five years, unless stipulated otherwise by a more specific regulation.

Further, under Law No. 11 of 2008 on Electronic Systems and Transactions, which was recently amended by Law No. 19 of 2016, usage of an individual's private information contained in any electronic medium is subject to prior consent from the person in question.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

The Manpower Law provides separate rules depending on the nature of the business transfer event.

In case of merger or consolidation, employers are entitled to terminate redundant employees subject to mandatory severance payments.

In case of acquisition, the employer is not allowed to terminate employment, so it is common practice for acquiring parties to negotiate resignations (or to require the selling party to do so) prior to takeover. Employees of an acquired company have three options at their disposal:

- continue employment under the same terms;
- discontinue employment, in which case employees are entitled to enhanced severance pay, service pay, and compensation for accrued allowances; or
- constructive termination and rehiring, in which case employees receive standard severance and resume employment under new terms and conditions, forfeiting any tenure accrued to date.

The Manpower Law is silent on transfer of assets.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

In general, Indonesia does not recognise termination-at-will. Therefore, employers may not dismiss employees without cause. Termination of employment is subject to the approval of a Labour Court. Theoretically, fixed-term employees may be terminated without cause, provided the employer pays all wages remaining under the fixed-term agreement.

Other than for legitimate business necessity (permanent closure due to two years' consecutive losses, efficiency, merger, reorganisation or force majeure, change of status of the company (IPO or delisting), or bankruptcy) or prolonged illness lasting longer than one year (all of which requires a Labour Court's approval), employers may only terminate employment for specifically stipulated reasons:

- the employee violated the work agreement or company regulation;
- the employee engaged in gross misconduct resulting in a final and binding verdict from the criminal court;

- the employee is unable to work after six months of criminal proceedings (not related to violations in the workplace) or the employee is convicted of a crime before the six-month period ends; or
- the employee is absent from work for five or more consecutive working days without notice, after the employer has sent two written warnings to the employee's house.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

As termination of employment requires approval from a Labour Court, neither notice of termination nor pay in lieu of notice is recognised under the Manpower Law.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

None, save as noted in the answer to question 35, termination of employment requires approval of a Labour Court.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The Manpower Law stipulates elaborate provisions on severance (one to nine months' pay) and long-term service pay (two to 10 months' pay) based on length of employment, as well as compensation for accrued allowances and repatriation or return to the place of recruitment. Multipliers are imposed based on the reason for termination.

The concept of 'separation pay' is also mentioned, but not regulated in any detail, as it would be contractually determined.

39 Are there any procedural requirements for dismissing an employee?

All employment dismissals must be approved by a Labour Court, except:

- during the probationary period, if expressly stated in writing in advance;
- voluntary and unconditional resignation in writing;
- expiry of a fixed-term employment agreement;
- if the employee dies or reaches the retirement age stipulated in the employment agreement, company regulation or CLA; or
- if the employee is unable to work for six months during a criminal proceeding, or is convicted of a crime before the six-month period ends.

If an employee violates the employment agreement, company regulation or CLA, the employer must first issue three consecutive warning letters (except for violations subject to 'first and final' notice). If the violation continues, the parties must attempt informal resolution. If the parties fail to reach mutual agreement, a case can be filed with the Labour Court, which will prescribe a series of escalating proceedings (mediation, conciliation, trial) until a final resolution can be reached. The employer must continue to pay the employee's salary until a final and binding decree is issued by the highest court of appeal sought by the parties.

Because termination procedures are so onerous, employers often attempt to reach a 'negotiated resignation' rather than pursue formal termination.

40 In what circumstances are employees protected from dismissal?

In addition to the procedural protections noted above, under the Manpower Law, employees are protected from dismissal for the following reasons:

- long-term illness (validated by a physician) of less than 12 months;
- fulfilment of religious obligations or obligations to the state;
- marriage of employee or employee's child;
- pregnancy, delivery, miscarriage or breastfeeding;
- relation by blood or marriage to another employee, unless specifically prohibited under the work agreement, company regulation or CLA;
- participation in labour union activities;
- reporting a crime committed by the employer;
- discrimination based on religion, political view, race, gender, physical condition or marital status; and
- permanent disability or illness owing to a work accident with undetermined period of recovery.

Dismissal owing to the above-mentioned circumstances is deemed null and void, and the employer is obligated to reinstate the employee with full back pay and benefits.

41 Are there special rules for mass terminations or collective dismissals?

Pursuant to Circular Letter No. SE-907/MEN/PHI-PPHI/X/2004 on Prevention of Mass Termination, before mass termination employers must first attempt the following:

- reduce the salary and work facilities (perks) of top-level employees;
- reduce shifts;
- limit or eliminate overtime;
- reduce working hours;
- reduce working days;
- suspend employees internally for limited periods;
- not extend or renew fixed-term employees; and
- offer pension to qualifying employees.

Employers must engage in discussion or negotiation with the employees or labour union prior to pursuing mass termination. If mass termination is inevitable, the employer must obtain prior approval from the Labour Court.

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42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Collective actions through a labour union are permitted in addition to asserting claims on an individual basis. Class action lawsuits are recognised in Indonesia, although they would be rare in the employment field.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Government Regulation No. 45 of 2015 on Implementation of the Pension Security Programme stipulates a retirement age of 56. An employer may impose a different retirement age under company regulation or CLA, but employees have the right to retire at age 56.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

The Industrial Dispute Law acknowledges arbitration as an alternative method of settlement only for union-employer disputes over interests or disputes between labour unions within a single company. By law, individual employment disputes are under the jurisdiction of the Labour Court; therefore, although employer and employee may agree to private arbitration, the right to resort to the Labour Court remains.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

There is no restriction on an employee waiving his or her contractual or statutory rights in a written agreement, although it is arguable whether a Labour Court would defer to a contractual waiver of statutory rights.

46 What are the limitation periods for bringing employment claims?

An employee whose employment is terminated due to voluntary resignation or due to a criminal proceeding may file a claim with the Labour Court within one year from the date of termination. The Manpower Law originally stipulated a two-year statute of limitations to bring claims for payments arising out of the employment relationship, but a 2013 Constitutional Court decision nullified the two-year limit.

Italy

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Employment law in Italy is mainly governed by the following sources, set out in order of priority:

- European law;
- the Constitution of 1948;
- statute;
- administrative measures; and
- custom.

There is a large body of specific legislation that regulates employment under Italian law. Some of the most important statutes are:

- Law No. 604 of 15 July 1966, on protection against unfair dismissal;
- Law No. 300 of 20 May 1970 (the Workers' Statute);
- Law No. 428 of 29 December 1990, on Transfer of Undertakings;
- Law No. 223 of 23 July 1991, on collective redundancies;
- Law No. 368 of 6 September 2001, on fixed-term contracts;
- Law No. 66 of 8 April 2003, on working hours;
- Law No. 276 of 10 September 2003 regarding, for example, the rules on agency work, on-call jobs, job sharing, project work, temporary work, self-employed workers and economically dependent workers;
- Law No. 148 of 13 August 2011 concerning new rules regulating local level collective agreements (ie, territorial or plant level);
- Law No. 92 of 28 June 2012 (the Fornero Reform) introduces, inter alia, new provisions on individual and collective dismissals and amends many provisions concerning employment;
- Law No. 99 of 9 August 2013 in conversion of Decree-Law No. 76 of 28 June 2013;
- Legislative Decree No. 23 of 4 March 2015, which entered into force on 7 March 2015 and amended the provisions regulating remedies against unfair dismissals;
- Legislative Decrees Nos. 22, 80, 81, 148, 149, 150 and 151 of 2015 which implemented Law 183/2014 (the Jobs Act); and
- Legislative Decree No. 136 of 2017 on employees' secondment which implemented 2014/67/EU.

National collective agreements, on the other hand, are not statutory sources of law but are private contracts between trade unions and employers' associations. These agreements are not legally binding on all employers, as they bind only companies that are members of the relevant employers' associations. Reference can also be made to them in individual employment contracts, in which case employers voluntarily apply their terms.

Law No. 148 of 13 August 2011 introduced new rules regulating local level collective agreements (ie, plant or territorial level). This law provides that local level collective agreements, as long as they concern specific matters and are aimed at reaching defined goals, will apply to all company employees if the agreement has been signed by the most representative trade unions. Such agreements can override the provisions of national collective agreements and of national law; the only restriction is that these provisions must comply with the Constitution and European law.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The law on discrimination can be found in:

- Legislative Decrees No. 215 and No. 216 of 9 July 2003, implementing Directives 2000/43/EC and 2000/78/EC;
- Legislative Decree No. 145 of 30 May 2005 implementing Directive 76/207/EC;
- Legislative Decree No. 198 of 2006; and
- Legislative Decree No. 5 of 2010 implementing Directive 2006/54/CE.

Discrimination is defined under Italian law as any prejudicial or different treatment of individuals based on their actual or perceived membership of a certain category, such as their gender, race, skin colour, disability, age, religion, national or ethnic origin, personal or political opinion or sexual orientation.

The anti-discrimination principles apply to both the public and private sector, particularly with regard to:

- access to the job market;
- working conditions;
- access to any kind and level of professional association;
- employee and employer union activities;
- training;
- access to services, including accommodation; and
- termination of employment contracts.

Discrimination can be subdivided into the following categories:

- direct discrimination – occurs when a person belonging to a protected category, as defined by the law, is treated less favourably than another person in an equivalent situation;
- indirect discrimination – occurs when an apparently neutral requirement, criteria or general rule places a person at a particular disadvantage or in a less favourable position, unless such a requirement, criteria or general rule is objectively justified by a legitimate aim and the methods adopted are appropriate and necessary to achieve it;
- harassment – any unwanted conduct in relation to any of the grounds of discrimination with the purpose or effect of harming the dignity of a person or creating an intimidating, hostile, degrading, humiliating or offensive environment, or both;
- victimisation – treating less favourably individuals who have already been subject to direct or indirect discrimination, or any other individual, because they tried to achieve equal treatment;
- sexual harassment (according to the Italian Equal Opportunity Code – Legislative Decree No. 198 of 11 April 2006) – any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of harming a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, or both. Sexual harassment is itself considered discrimination; and
- equal pay – female workers have the same rights as male workers and should earn the same salary for the same tasks (ie, they cannot be discriminated against on the basis of their gender).

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Employment is the government department that deals with the majority of employment policies, and the detailed drafting of employment law in Italy.

Law No. 149 of 14 September 2015 recently introduced a National Labour Inspectorate which integrates the inspective services which were formerly provided by the Ministry of Labour, the National Social Security Body (INPS) and the Italian government agency for the insurance against work-related injuries.

The Inspectorate will therefore take care of applying rules regarding safety in the workplace, protection for pregnant women, disabled people and, in general, the enforcement of all employment laws. The Inspectorate also has the power to impose sanctions in the case of a breach of the regulation.

Employment tribunals are presided over by qualified judges and deal exclusively with employment claims or claims regarding commercial agency. First instance decisions can be appealed before the Employment Court of Appeal, whose judgments can be challenged before the Supreme Court.

The INPS deals with the public system for pensions and health, both for employees and self-employed people.

The Workers Compensation Authority safeguards workers against accidents at work.

The Equal Opportunities Commission aims to eliminate discrimination against women in the workplace. Furthermore, a governmental department for equal opportunities has been set up to promote equal rights in the workplace and eliminate discrimination based on racial and ethnic origin.

The data protection commissioner for the protection of personal data ensures that all the regulations regarding data protection are applied. The data protection commissioner also has the power to issue regulations and impose corresponding sanctions in the case of breach of the relevant provisions.

The National Agency for Active Labour Market Policies. It ensures the coordination of all the policies in support of people looking for a job and, on the other hand, the relocation of unemployed. It also has the role of coordinating all training initiatives promoted by regions.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Both unions and works councils exist in Italy, but membership of either is not mandatory. Furthermore, it is forbidden for employers to set up or finance unions; trade union freedom is a fundamental principle of Italian industrial relations. Freedom of association is reinforced by article 14 of the Workers' Statute, which provides that all workers have 'the right to form trade unions, to join them and to take part in union activities within the workplace'. Furthermore, article 19 of the Workers' Statute states that, on the initiative of the employees, a works council can be formed at each business unit by the unions that are party to the collective agreement applied in that unit. In companies with more than one business unit, the trade union delegates may establish coordinative bodies. Decree No. 113 of 22 June 2012 implemented European Directive 2009/38/CE on the establishment of European works councils.

5 What are their powers?

Works councils have the key function of negotiating with the employers at workplace level.

Employers must by law inform and consult with works councils on health and safety, the use of public funds for industrial restructuring, large-scale redundancies, and business transfers. On the other hand, collective bargaining agreements provide that the employer must inform and consult on topics such as: the economic and financial situation of the company; investment; the numbers employed; changes in working methods; the introduction of new technology; gender equality and training. The consultation may take the form of joint employer and union committees.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

According to article 8 of the Workers' Statute, the employer, even on behalf of a third party, cannot carry out any background checks, with or without the employee's consent, concerning the employee's political and religious opinions, trade union membership or any other facts that are not essential for evaluating proper job performance (such as information regarding gender, racial or ethnic origin, age, disability, religion, beliefs and sexual orientation).

These restrictions have been confirmed by article 10 of Legislative Decree 276/2003, which provides that employment agencies authorised by the Ministry of Labour cannot carry out any background checks, even with the consent of the worker, regarding marital status, political and religious beliefs, trade union membership, gender, race, colour, disability, age, sexual orientation, state of health or any disputes with previous employers. This type of background check is only permitted when it constitutes an essential prerequisite for the proper performance of the job.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

According to article 5 of the Workers' Statute the employer cannot personally check the physical suitability of a job applicant. The employer could, however, request that a competent body complete a pre-hire examination in order to verify the physical and general suitability of the worker for the job in question. On a side note, the law provides that, if there are no medical reasons for doing so, nobody can be compelled to take tests for HIV infection and employers are not allowed to make any enquiries to ascertain whether a job applicant is HIV-positive.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Yes, the same restrictions apply as in question 7. Such an examination may also include drug and alcohol testing. In some cases, employers are obliged to require certain categories of workers to take part in drug tests.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

No. Positive discrimination is generally prohibited by Italian law, subject to certain exceptions. In line with quotas that vary according to the size of the company, both public and private-sector employers are required to employ a certain number of disabled employees, widows or widowers or orphans (due to accident at work or war), as well as children or spouses of persons disabled due to accidents at work or war.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No, a written employment contract is not required. However, to be valid, certain conditions must be in writing such as any probationary period and any fixed-term or non-competition clauses. On the other hand, agency contracts must all be in writing.

In any case, the employer must inform the employee, within 30 days of starting employment, of the:

- identity of the parties;
- place of work;
- date on which the contract begins;
- duration of the contract, specifying whether it is fixed-term or permanent;
- probationary period (if applicable);
- job title or category;
- salary;
- paid holidays;
- working hours; and
- length of the notice period for terminating the contract.

11 To what extent are fixed-term employment contracts permissible?

The rules concerning limits on the use of fixed-term contracts have been subject to changes in recent years, therefore it is always important to check when a fixed-term contract has been signed and, therefore, which provisions apply to it.

According to provisions introduced in 2014 and confirmed by Legislative Decree No. 81/2015, it is possible to sign a fixed-term contract for a maximum period of 36 months, which also includes possible extensions to the contract (maximum of five).

The clause that sets the term must be in writing.

The law also provides for a mandatory 'stop and go', according to which the same parties cannot enter into a new fixed-term contract before a certain number of days have passed. The length of the stop and go period varies depending on the length of the first contract: it is 10 days in the case of contracts lasting up to six months and 20 days in the case of contracts lasting more than six months.

If the above-mentioned conditions are not met, the contract is deemed as open-ended and the employer is subject to administrative sanctions.

Up until 20 March 2014, the law set forth that, as a general rule, it was possible to insert a clause for a fixed-term employment contract only on the basis of temporary technical, production and organisational, and substitution (ie, to replace an employee who is ill or on leave) reasons. However, such reasons are no longer required.

It is forbidden to sign fixed-term contracts:

- to replace employees on strike;
- in productive units in which a collective redundancy procedure has been carried out in the previous six months, which involved employees assigned to the same duties, unless the fixed-term contract is entered into to replace absent employees, to hire employees on mobility lists and if the contract lasts less than three months;
- in productive units in which social shock absorbers are in force if they concern employees who carry out the same duties; or
- if the employer has not carried out the mandatory risk evaluation.

These provisions do not apply to executives' fixed-term contracts, where it is possible to enter into a fixed-term contract for a maximum period of five years.

12 What is the maximum probationary period permitted by law?

The maximum probationary period is six months and it cannot be extended even by agreement between the parties. The collective bargaining agreements (if applicable), may provide for a shorter maximum period. During this probationary period, either party may terminate the contract without notice or payment in lieu of it.

13 What are the primary factors that distinguish an independent contractor from an employee?

According to the Italian Civil Code, an employee is someone who agrees, for a fixed salary, to perform a job for a continuous period, in the employer's organisation, under the employer's control and subject to the employer's authority. Independent contractors are self-employed; they benefit from profits and bear the losses and risks of their activity.

Further to Legislative Decree No. 81/2015, effective from January 2016, employment provisions are applicable to a wider range of cases than before (ie, whenever work is personal, continual and organised by the employer).

14 Is there any legislation governing temporary staffing through recruitment agencies?

The rules governing temporary staffing through recruitment agencies have been subject to many changes throughout the years. Since September 2015 they are encompassed in Legislative Decree No. 81/2015. Temporary contracts are defined as the contracts, open-ended or fixed-term, through which an authorised agency provides the user company with one or more of its employees who, throughout the mission, carry out their activity in the interest and under the directions and the control of the user company.

During the mission, the temporary workers have the right to working conditions overall not worse than those granted to the employees of the user company of the same level.

Unless derogated by the collective bargaining agreement applied by the user company, the number of workers with an open-ended temporary contract cannot exceed 20 per cent of the employees with an open-ended contract employed by the user company on 1 January of the year in which the contract is signed.

Temporary fixed-term contracts can be entered into within the quantitative limits set forth by the collective bargaining agreement applied by the user company.

Also, it is forbidden to sign temporary contracts in the same cases listed in question 11.

As regards the employment relationship between the temporary worker and the agency, this is governed by ordinary rules on open-ended and fixed-term contracts. However, these fixed-term contracts are not subject to the same restrictions – as regards maximum duration and possible extensions – as ordinary contracts.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Every non-EU citizen working in Italy (self-employed or employee) must have a residence permit. Every non-EU citizen entering Italy for work reasons must be in possession of a work visa that has to be applied for in Italy by the Italian company in view of a new employment contract (local hiring) or for an assignment employee from a foreign company to an Italian company.

For most local hirers there is an annual quota that is fixed by the government (there are no limits on the hiring of university professors, surgeons, offshore workers, translators, etc). There are no limits on the temporary assignment of non-EU executives or very highly specialised employees to an Italian company through an intracorporate transfer or a transfer within the scope of the execution of a service agreement between the customer (Italian company) and the service provider (employer of the transferred employee). Moreover, highly skilled workers can enter Italy with a special kind of work permit called the Blue Card.

16 Are spouses of authorised workers entitled to work?

Spouses are entitled to work under a dependants' visa.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Before employing a non-EU citizen the employer must check that he or she has a valid Italian residence permit and is entitled to work in Italy. According to article 22 of the Immigration Act, 'an employer that employs, at its own instigation, a foreign employee who is not in possession of the required work permit, may be punished with imprisonment for a period of between three months and one year in addition to a financial penalty of €5,000 for each employee so employed'.

18 Is a labour market test required as a precursor to a short or long-term visa?

No labour market test is required before employing foreign workers.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The normal working week is 40 hours. The maximum average is a 48-hour working week, including overtime, calculated on a four-month basis. Collective agreements can extend this period to six or 12 months should there be objective, technical or organisational-related reasons for doing so. An employee cannot opt out of such restrictions.

The restrictions on working hours do not apply to employees where the duration of their work cannot be measured or predetermined, or where it is determined by the employees themselves (eg, executives, employees working from home, teleworkers and salespeople).

20 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime is the working time that exceeds the employees' normal working week and is regulated by and calculated according to the rules of the collective agreement that is applied. Where no collective agreement applies, overtime must be agreed between the parties. In any case, overtime cannot exceed 250 hours per year. Workers whose working time cannot be predetermined are not entitled to overtime pay. The same rule applies to workers who can determine the duration of their work, such as executives, employees working from home and teleworkers.

In case of part-time employment contract, the employer cannot ask the employee to work overtime for a number of hours exceeding 25 per cent of the agreed working hours, unless differently regulated by the collective bargaining agreement applied to the contract.

21 Can employees contractually waive the right to overtime pay?

No, the right to overtime pay falls within the 'unavailable rights' of employees, which cannot be waived.

22 Is there any legislation establishing the right to annual vacation and holidays?

All employees are entitled to a minimum of four weeks of paid annual holiday, to be calculated excluding public holidays. Two out of the four weeks must be taken by the employee during the year to which it applies, while the remaining two weeks must be taken within the following 18 months. Collective agreements, as well as individual contracts, can set out longer periods. Employees cannot waive their right to the minimum four weeks' paid annual holiday. Annual holidays cannot be replaced by payment in lieu of them, except in the case of termination of the employment.

23 Is there any legislation establishing the right to sick leave or sick pay?

Legal provisions, collective agreements or individual contracts generally provide for a period of paid sick leave during which the employee is entitled to keep his or her job. Thereafter the employer can dismiss the employee by giving notice. This period is generally between six and 12 months and applies in cases of both a single period of sick leave and multiple periods.

In the case of sickness or injury, employees are entitled to receive a percentage of their salary paid by the INPS according to the employee's status and the employer's sector of business. Collective agreements can stipulate an employer's obligation to supplement such allowance to 100 per cent of the salary.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The main circumstances that give rise to a leave of absence are as follows:

- maternity leave: five months (usually two months before and three months after childbirth). During maternity leave, employees receive an allowance from the INPS equal to 80 per cent of their salary;
- adoption leave: same as maternity leave;
- paternity leave: in the event of the death or infirmity of the mother, or if the father has exclusive custody of the child, fathers are entitled to three months' paternity leave after the child is born, under the same financial terms as employees on maternity leave; in addition, the Fornero Reform provides that fathers are entitled (during the five months of maternity leave) to accrue one day of paid leave. In accordance with Budget Law for 2016 and 2017, fathers are now entitled to enjoy two days of paid leave during the first five months of the child's life.
- parental leave: after childbirth, male and female employees can take parental leave for up to six months each (with an overall limit of 10 months combined) until the child is 12 years old. They are entitled to receive an allowance equal to 30 per cent of their salary for an overall maximum of six months until the child is eight years old;
- leave for serious reasons: in the case of serious illness of the employee's relative, an employee can take unpaid leave for a maximum period of two years that does not have to be taken all at once; and
- training leave: if an employee wants to attend a training course he or she can take unpaid leave for a maximum of 11 months, which does not have to be taken all at once. However, the employer is not obliged to grant the leave.

25 What employee benefits are prescribed by law?

Length of service may give rise to a number of statutory benefits (eg, right to increased severance pay). Collective agreements also provide for various benefits to employees depending on their length of service, including automatic salary increase, longer periods of sick leave and longer notice period.

26 Are there any special rules relating to part-time or fixed-term employees?

Fixed-term employees are entitled to the same terms and conditions as open-ended term employees. The law also protects employees from the misuse of fixed-term contracts by employers; furthermore, fixed-term employees with more than six months' service are entitled to priority if a vacancy for an open-ended contract for the same duties within the following 12 months arises, provided that they show their interest for it in the six months following the termination of the contract. Part-time employees are entitled to the same terms and conditions as full-time employees.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

According to article 2125 of the Italian Civil Code, in order to prevent unfair competition after employment ends, a non-competition covenant may be enforced if the following conditions are met:

- it is in writing;
- the restriction is confined to a specific activity;
- the restriction is confined to a specific geographical area;
- the duration is no longer than five years for executives and three years in other cases (if a longer duration is agreed upon, it will automatically be reduced to the prescribed limits); and
- it stipulates appropriate compensation for the employee (the amount should be calculated in relation to the scope, duration and geographical area of the covenant; failure to do so may result in the non- competition covenant being deemed null and void).

There are no specific legal provisions regarding non-solicitation covenants; the parties are free to agree on the terms of such restrictions.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Compensation is a requirement for the validity of post-employment non-compete obligations (see question 27). However this is not salary, merely compensation that must be proportionate to the scope of non-competition obligations.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer is vicariously liable for the acts of its employees in the course of their employment and for any damage caused to a third party. Employers are also vicariously liable for the discriminatory acts and omissions (including harassment), of its employees in the course of their employment and where the employer has failed to take reasonably practicable preventative measures.

Taxation of employees

30 What employment-related taxes are prescribed by law?

The employment-related taxes prescribed by law are those based on personal income and are currently as follows:

- 23 per cent for income up to €15,000;

- 27 per cent for income over €15,000 and up to €28,000;
- 38 per cent for income over €28,000 and up to €55,000;
- 41 per cent for income over €55,000 and up to €75,000; and
- 43 per cent for income over €75,000.

In addition, both employers and employees must pay social security contributions. Contributions are paid on a monthly basis and the rate depends on the type of business that the company carries out and the employees' position within the company (whether they are blue-collar workers, white-collar employees, managers or executives).

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Under Italian law the intellectual property rights of employees can be split into the following three categories.

Service invention
This is an invention made by employees in the course of their employment, where the activity that led to the invention was part of the scope of the contract and the employees were paid for performing that activity. In this case, the rights arising from the economic exploitation of the invention automatically belong to the employer. Employees are not entitled to specific remuneration for the invention, since their salary already covers this.

Company invention
This is an invention made by employees in the course of their employment, where the employee was not paid for performing the activity that led to the invention. In this case, the rights arising from the economic exploitation of the invention belong to the employer but the employee has the right to receive proper remuneration for the invention (called a fair reward). The amount of remuneration is decided according to the importance of the invention.

Occasional invention
This is an invention made by employees in the course of employment using their own resources but within the business sector in which the employer operates. In this case, the economic as well as the creative rights belong to the employee. However, the employer may have a right of pre-emption for either the exclusive or non-exclusive use of the invention, or for the acquisition of the patent.

32 Is there any legislation protecting trade secrets and other confidential business information?

Confidential business information is protected by Legislative Decree No. 30/2005. Protection is granted to business information and technical and industrial experiences, including commercial ones, subject to the legitimate control of the holder, whenever said information:

- is secret, meaning that it is not known or easily accessible to experts and operators of the sector in the way its different elements are arranged or combined;
- has an economic value because they are secret; or
- is subject to measures, put in place by the person to whose rightful control they are subject, aimed to keep the information secret.

Notwithstanding the provisions regulating unfair competition, the lawful possessor of the above secret information has the right to forbid third parties to acquire, reveal to third parties or use, in an abusive manner, said information and experiences, unless they have been obtained in an independent way.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Italy's Personal Data Protection Code (Legislative Decree No. 196/2003) came into force on 1 January 2004 and applies to all organisations and individuals.

The Code is unique in that it brings together all the various laws, codes and regulations relating to data protection since 1996. There are three key guiding principles behind the Code, which are outlined in question 2: simplification, harmonisation and effectiveness.

The Code is divided into three parts. The first part sets out the general data protection principles that apply to all organisations. The second provides additional measures that will need to be undertaken by organisations in certain areas, for example, healthcare, telecommunications, banking and finance, or human resources. The second part of the Code has also been further developed with the introduction of sectoral codes of practice. The third part relates to sanctions and remedies.

The Code ensures a fair and lawful processing of individuals' personal data in accordance with various principles of fair processing by respecting data subjects' rights, fundamental freedom and dignity, particularly with regard to confidentiality, personal identity and the right to personal data protection.

An employee's personal data can be collected by the employer only:

- if the data is relevant in evaluating the employee's fitness for the position;
- if prior information on the purposes of the processing is given to the data subject;
- if the data subject provides his or her consent to the processing; and
- in the case of sensitive data, with the authorisation of the data protection commissioner.

It should be noted that there are special procedures to be observed regarding the monitoring of employees' emails and internet use.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Yes, there is legislation to protect employees in the event of a business transfer. Article 2112 regulates the transfer of undertakings, and applies to transactions that, through a transfer or a merger, involve the change of ownership of an organised economic activity (both profit and non-profit making businesses) that existed prior to the transfer and that maintains its identity in the transfer, regardless of the type of legal procedure or legal deed the transfer is carried out by, including usufruct or lease of the undertaking.

Such protections also apply in the event of transfer of part of an undertaking defined as a functionally independent division of an organised economic activity, identified as such by the transferor and the transferee at the moment of the transfer.

According to the legal provision above, if the transfer of an undertaking is carried out, employees are automatically transferred with the business, with all their previous rights intact. In addition, the transferor and transferee are jointly and severally liable for all debts due to the employees up until the business transfer.

Furthermore, if a material change in conditions during the three months after the transfer occurs, employees can resign and receive payment in lieu of notice due in the case of dismissal.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Under Italian law, employees (not executives) can be dismissed only:

- without notice – when a breach occurs that is sufficiently serious that employment cannot continue, even temporarily, for example, where there is gross misconduct or behaviour that could affect the fiduciary nature of the employment relationship; or
- with notice in the case of a serious breach of the employee's legal and contractual duties or based on redundancy, involving economic factors relating to the production, the organisation of work and the proper functioning of the business.

Specific rules apply to executives. In particular, they can be dismissed:

- without notice in the case of a serious breach of contract; or
- for any reason, with notice. However, if a collective bargaining agreement applies to the employment contract, the employer must put in writing the reasons for the dismissal, which may involve a breach of legal and contractual obligations or be based on redundancy involving economic factors relating to production, the organisation of work and the proper running of the business.

Upon termination of the employment contract, the employee is entitled to receive the employment termination payment (TFR) and other amount already accrued at the employment termination date (such as unused holiday and leave, and 13th (or 14th monthly if applicable) instalments, the latter only if provided by the collective bargaining agreement applied by the employer).

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

The length of notice of termination is set out in the collective bargaining agreement applied to the individual employment contract, based on the employee's length of service, seniority, qualifications and level. If no collective agreement is applied, the length of notice can be found in the law. In the case of dismissal, the employer can also make a payment in lieu of notice, on which social security contributions must be paid. Notice for resignation is usually shorter than for dismissal.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employee can be dismissed without notice (or given payment in lieu of it) for just cause, meaning a serious breach of the employment contract.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

In all cases where an employment contract is terminated, the employer must pay the employee TFR, which is due in all cases of termination of the employment relationship, even if there is just cause for dismissal. The amount payable (index-linked annually), is equal to the sum of each annual salary divided by 13.5 (in practice, 7.4 per cent of the annual gross salary). Furthermore, on termination of the employment contract, for whatever reason and in addition to a notice period, when applicable, the employer must make the following payments to the employee:

- pro rata supplementary monthly payments: the employer must pay the employee the sum of the pro rata supplementary monthly payments accumulated during the employment contract. In these circumstances, the employer must pay the amount due up to the date of the termination of the employment contract, including the pro rata sum accrued during the notice period; and
- payment in lieu of unused holiday; if dismissed employees have not taken up all of their holiday allowance before the employment contract is terminated, they are entitled to a payment in lieu thereof.

39 Are there any procedural requirements for dismissing an employee?

A dismissal must always be in writing.

If the dismissal is based on an employee's breach of contract, a special procedure (disciplinary procedure) must be followed prior to dismissal. Under this procedure the employer must:

- promptly send the employee a letter describing the facts on which the breach is based;
- wait for the employee's reply – if any – which must be received within five days (or a longer period if provided for in the particular collective bargaining agreement, if any); and
- send the employee a letter of dismissal, explaining why the employer does not accept his or her justifications.

According to Law 92/2012, if the dismissal of an employee is based on redundancy and the company has more than 15 employees in the business unit (or more than 60 employees in Italy), a compulsory procedure has to be followed:

- the intention to dismiss has to be communicated in advance to the local labour office and to the employee;
- the labour office has a seven-day period to call a meeting with the employer and employee in order to reach agreement on the planned dismissal;
- if the meeting is not called within seven days, the dismissal can be served; and
- if the meeting is called, the parties have to try to reach an agreement (for a maximum period of 20 days); in the case of failure, the dismissal can be served.

If an agreement on the dismissal is not reached, the content of the communication of the intention to dismiss and the parties' behaviour during this new procedure may be taken into account by the judge in his or her decision. The law expressly authorises the parties to be assisted during the procedure.

Pursuant to Legislative Decree No. 23 of 4 March 2015, the procedure described for individual dismissals based on redundancy reasons does not apply to employees hired after the new provisions entered into force (ie, after 7 March 2015) or if an employee was hired before such date but the company met the threshold of more than 15 employees in the business unit (or more than 60 in Italy) after it.

All the resignations and mutual termination agreements must be carried out online through a specific and mandatory procedure.

40 In what circumstances are employees protected from dismissal?

The following categories of employees enjoy special protection against dismissal:

- disabled employees: the dismissal of disabled employees for economic reasons or as part of a collective redundancy is not valid if the number of disabled employees in the workplace is lower than the law requires. If a disabled employee's contract is terminated, the employer must inform the labour office within 10 days to substitute the dismissed employee with another disabled employee;
- employees entitled to maternity or paternity rights: employers cannot dismiss female employees during pregnancy or until the child is a year old (the same applies to a father who takes paternity leave instead of the mother) unless the dismissal is due to:
  - just cause;
  - the employer's business closing down;
  - expiry of a fixed-term contract; or
  - unsatisfactory completion of a probationary period;
- female employees who have been married for no more than one year: employers cannot dismiss female employees from the date of request for publication of the marriage until one year after the date of the marriage. The dismissal is null and void unless the employer demonstrates that the reason for the dismissal constitutes just cause, the employer's business is closing down or is due to the expiry of a fixed-term contract; and
- works council representatives: any dismissal on union grounds is invalid.

The law also provides for different kinds of remedies, in the case of unfair dismissal, depending on the grounds for dismissal.

The provisions regulating remedies against unfair dismissal have been amended by Legislative Decree No. 23/2015, which only applies to employees hired after 6 March 2015 and to those hired by companies that meet the threshold of having more than 15 employees (or more than 60 employees in Italy) due to the hiring of new employees after 6 March 2015. Therefore, it is important to be aware of both the old and the new rules.

Based on the old provisions, which are still applicable to employees hired before 7 March 2015, if the court ascertains that there are no grounds for dismissal, it may order the following remedies.

If the dismissal is unfair because the grounds do not exist or the disciplinary provisions applicable to the contract provide for sanctions less severe than dismissal, the consequence is reinstatement and damages equal to full salary from the date of dismissal to the date of reinstatement, capped at 12 months' salary (any other income earned or potentially earned by the employee in the relevant period will be deducted from the amount awarded). As an alternative to reinstatement, the employee (not the employer) can opt for the payment of 15 months' salary as compensation. This also applies in the event of unfair dismissal based on the employee not being suitable for the job because of a disability.

In any other case in which a court finds a dismissal on disciplinary or redundancy grounds or just cause to be unfair, the dismissal remains (termination of the employment relationship is confirmed)

Update and trends

During 2016, the Italian Parliament started the discussion in order to approve a new innovative regulation of distance working.

'Smart working' is work carried out both from the office and outside it, without any fixed place of work outside the company premises, and possibly with the support of IT devices.

Milestones of this new piece of legislation will be:

- employees must not exceed the daily and weekly working hours, as specified in the Italian legislation and collective bargaining;
- the parties are required to draft a written smart working agreement concerning working conditions, the IT tools provided, how the managerial power or authority is exercised and rest times for the employee;
- the smart working agreement must regulate how managerial (including extent activity monitoring) and disciplinary power is exercised when the employee works outside the unit;
- the employee shall use and keep with extreme care and diligence all the working tools and maintain them efficiently. The employee is responsible for adopting the necessary precautions to prevent third parties from accessing confidential information; and
- the employer must ensure the health and safety of employees working in 'smart working' mode.

New pieces of legislation adopted in 2016, some of which are in force as of 1 January 2017, support the uptake of private welfare measures by extending the types of tax-exempt benefits offered by employers.

According to the current legislation, the value of services of goods provided by employers to their employees or their relatives can be deducted from the latter's taxable income based on conditions set forth by the Consolidated Act on Income Taxation.

The categories eligible for tax deduction are the following:

- complementary health and social security contributions;
- meals provided through canteen services or meal vouchers;
- collective transport services;
- educational services for family members;
- fringe benefits; and
- company shares.

A significant change occurred to educational services for family members after 2016. Previously, provisions for an employee's family members applied only in relation to attending nursery schools or summer camps, or for scholarships; the exemption now applies to all educational services for family members, as well as to care services for elderly or dependent relatives.

New pieces of legislation entered into force as of 1 January 2017 provided for new obligations concerning call center activities. In particular, in case of business outsourcing in a non-EU country, the company has a communication obligation. In case of missing or belated communication, an administrative sanction equal to €150,000 applies.

With reference to the pensions reform mentioned above, the aim is to provide tools to facilitate the access to retirement. A system of capped loans, which will enter into force from 1 May 2017, will guarantee specific categories of workers that they will stop working before reaching the age of retirement.

From a criminal law perspective, on 9 February 2017 the Italian High Chamber started discussions about a bill introducing the crime of manslaughter occurring during working hours and the increase of employer responsibility in case of serious injuries.

but compensation is awarded to the claimant (ranging from 12 to 24 months' salary).

In the event that the dismissal has grounds but is issued without an explanation of the grounds or in violation of the procedure, the court will declare the contract terminated at the date of dismissal and order the employer to pay compensation ranging from a minimum of six to a maximum of 12 months' salary.

Only if the employer employs 15 employees or fewer in the place of employment and 60 or fewer employees in the whole of Italy, the employer must either re-hire the employee or pay the employee compensation equal to an amount ranging from 2.5 to six months of the employee's last annual salary (the employer has the choice). In determining the precise amount of damages to award within the range of 2.5 to six months' salary, the judge will take into account the number of employees, the size of the company, the employee's length of service and the parties' conduct.

On the other hand, pursuant to the new provisions, which, as mentioned above, apply to new hires and also to all employees of companies that meet the threshold of more than 15 employees (or more than 60 employees in Italy) due to the hiring of employees after 7 March 2015, the following remedies may be ordered.

In all cases in which the court ascertains the unfairness of a dismissal on redundancy grounds, disciplinary grounds or just cause, the court will declare the termination of the employment contract at the date of dismissal and order the employer to pay compensation, not subject to social security contributions, equal to two months for each year of service, with a minimum of four and a maximum of 24 months.

Only where a dismissal based on a contractual breach is found to be unfair due to the inexistence of the grounds is the resulting consequence reinstatement and damages equal to the full salary and social security contributions due from the date of dismissal to the date of reinstatement, capped at 12 months' salary (any other income earned or potentially earned by the employee in the relevant period will be deducted from the amount awarded). As an alternative to reinstatement, the employee (not the employer) can opt for the payment of 15 months' salary as compensation.

In the event that the dismissal has grounds but was issued without an explanation of its grounds or in violation of the procedure, the court will declare the contract terminated at the date of dismissal and order the employer to pay compensation (not subject to social security contributions) equal to one month's salary for each year of service, with a minimum limit of two months' salary and a maximum cap of 12 months' salary.

If the employer has 15 employees or fewer in the place of employment and 60 or fewer employees in the whole of Italy, the applicable rules are the same with the following exceptions: the remedy of reinstatement, applicable in the case of inexistence of the grounds, does not apply; and compensation applicable in the case of unfair dismissal on redundancy grounds, disciplinary grounds and just cause, and compensation applicable in the case of violation of procedures, is halved and, in any case, cannot be higher than six months' salary.

Both under the old and the new provisions, if a dismissal is deemed as having discriminatory nature and when the law expressly provides for the nullity of the dismissal, the dismissal is declared null and void and the judge will order the employer to reinstate the employee in his or her job.

Following the order of reinstatement, the employment relationship is terminated only if the employee does not resume work within 30 days of the employer's invitation to do so, apart from cases in which the employee requests the compensation of 15 months' salary.

With the reinstatement order the judge will also order the employer to pay compensation for damages suffered by the employee as a result of a null dismissal equal to the salary accrued from the date of dismissal until the date of reinstatement. Any other income earned by the employee in the relevant period will be deducted from the amount awarded. In any case, compensation cannot be less than five months' salary. The employer will also be ordered to pay social security contributions on such compensation.

As an alternative to reinstatement, the employee is entitled to ask the employer to pay compensation equal to 15 months' salary, without prejudice to the right to compensation for damages.

The rules described in this question also apply to dismissals found to be ineffective because they were served orally and to unfair dismissals based on the employee being unsuitable for the job because of a disability.

41 Are there special rules for mass terminations or collective dismissals?

Collective redundancy occurs when an employer with more than 15 employees in a single business unit intends to dismiss at least five employees (including executives) within a period of 120 days, either within one business unit or more than one business unit located in the

same province, due to a reduction or transformation of business. A special information and consultation procedure with the unions or works councils (that lasts for a maximum of 75 days) must be carried out before serving the dismissals. The parties consult and negotiate with one another to examine the causes that have given rise to the redundancy and try to find alternative solutions to the dismissals or mitigate the effect of the dismissals.

While there is no obligation to reach an agreement, if and when an agreement is reached, the procedure is complete (even before 75 days have elapsed). In any case, the employer cannot terminate the employment contracts until the end of the procedure.

The criteria for selecting the employees to be made redundant can also be negotiated with the unions. Italian law sets out mandatory selection criteria, which include length of service in the company, family circumstances or dependants, and technical, production and organisational needs. These criteria will be applied in the absence of alternative criteria drawn up and agreed upon during the consultation process with the unions.

After the procedure has been completed, the company can serve notice to the redundant employees. When serving the dismissals, the employer must also communicate to the relevant authorities the employees' specific personal and employment details, together with the description of how the selection criteria were applied.

Remedies against unfair dismissals were amended by Legislative Decree No. 23/2015.

Under the old provisions, which still apply to employees hired before 7 March 2015 by companies that already had more than 15 employees (or 60 in Italy), if the dismissal is not served in writing, the consequence is reinstatement plus damages (full salary from dismissal date to reinstatement, and in any case no less than five months' salary). If the company fails to comply with the information and consultation procedure, it must pay damages ranging from 12 to 24 months' salary. In the case of breach of the criteria for selecting employees, the consequence is reinstatement and compensation (the salary from dismissal to reinstatement is capped at 12 months' salary).

On the other hand, under the new provisions, which apply to all employees hired after 6 March 2015 (and to all employees of a company that started to have more than 15 employees after such date), the new provisions covering dismissal expressly prescribe that:

- If the company fails to comply with the information and consultation procedure or breaches the employee selection criteria, the court will declare the termination of the employment contract at the date of the dismissal and order the employer to pay compensation that is not subject to social security contributions, equal to two months for each year of service, with a minimum limit of four months and a maximum of 24 months.
- If the dismissal is not served in writing, the consequence is reinstatement plus damages (entire salary from dismissal date to reinstatement, in any case no less than five months' salary).

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Collective claims are not allowed. Employees may only present labour and employment claims on an individual basis.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Italian legislation only allows employers to dismiss employees at will who have already satisfied the retirement age requisites. For further information, at the beginning of 2017 the Italian government started a huge process of reform of the retirement system which will be carried out during the following two years; see 'Update and trends'.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Law No. 183/2010 introduced new rules to encourage parties to take part in arbitration in relation to employment disputes. The parties have two opportunities to take part in arbitration, both during the pre-litigation 'settlement stage' and again before a panel of arbitrators. In any case, the parties may opt to participate in arbitration at any time before court proceedings are issued.

Notwithstanding the above, previous rules concerning arbitration in the collective bargaining agreements for executives are still in force, some of which provide for a special arbitration committee to be established in the event of dismissal.

The parties can also, in certain predefined circumstances, insert an arbitration clause into the employment contract, whereby certain employment disputes can be decided upon by a panel of arbitrators.

In any case, if the parties fail to mediate their dispute through arbitration, they are entitled to sue before the employment court.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee can waive all claims or rights of any nature whatsoever relating to or arising from the employment contract or its termination, as well as any claim for damages. The agreement is fully binding. However, a six-month 'protected period' is provided by law, during which the employee can change his or her mind about such waivers. In order to avoid such 'protected period' applying (so the settlement cannot be changed), the agreement containing an employee's waiver of his or her statutory rights must be signed before:

- local Ministry of Labour offices;
- union offices; or
- tribunals and courts at each phase of the process, as well as being signed by the judge.

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Also, disputes can always be settled with an agreement before or during the relevant lawsuit.

As far as such settlements are concerned, Legislative Decree No. 23/2015 provides for a particular incentive designed to encourage parties to reach an agreement.

The incentive applies to employees hired from 7 March 2015 and to those hired by companies that meet the threshold of more than 15 employees (or more than 60 employees in Italy) due to the hiring of new employees after 6 March 2015. In these cases, the employer may offer the employee – within 60 days of the dismissal in one of the appropriate venues provided for by law – an amount that is not subject to taxes and social security contributions, equal to one month's salary for each year of service, with a minimum of two months' salary and a maximum of 18 months' salary, by means of a cheque given to the employee.

This amount is halved, and in any case cannot be higher than six months' salary, if the employer employs 15 employees or fewer in the place of employment and 60 or fewer employees in the whole of Italy.

The employee's acceptance of the cheque in the above venues entails the termination of the employment contract at the date of the dismissal and the employee's waiver of any claim against the dismissal, even if already filed. Any other sums that are agreed upon during the above procedure, for the purpose of settling any further dispute relating to the employment contract, are subject to the ordinary tax regime.

46 What are the limitation periods for bringing employment claims?

Depending on the type of claim, the prescribed limitation period varies from between five to 10 years.

Unfair dismissals have to be challenged by employees in writing within 60 days from the notification of the dismissal. The employee then has 180 days to file a claim in court. The same terms are also applicable to the following types of employment-related claims:

- dismissal of a worker under a project-based contract, which is deemed an employment contract;
- the validity of the term of certain self-employment contracts;
- change in the place of work; and
- transfer to a different employer (ie, request to nullify the termination of the employment contract occurring under a transfer of undertakings situation).

In the event of missing the 180-day deadline, the right to file a claim before the employment tribunal will be lost.

Japan

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Japan's Constitution, its fundamental law, sets out the basic principles of labour law: the right and duty of all people to work, and the rights of workers to organise and to bargain and act collectively. The labour statutes originate from these principles and are established as special rules of the civil, criminal and administrative laws. Court precedents and interpretations and guidelines issued by the administrative authorities also play important roles in practice.

With respect to individual labour relations, the Labour Standards Act (LSA) has long been the most important statute. This sets out minimum standards for labour conditions as well as regulatory provisions through administrative supervision, and criminal penalties may be imposed against violations of this law. In addition, the Labour Contract Act (LCA), which sets out the comprehensive rules regarding employment (from hiring to termination of employment), has been implemented from 1 March 2008. The LCA provides that the employment relationship is determined by agreement between the employee and the employer based on equal footing, and that such agreement shall be reasonable and considerate to the equilibrium between employer and employee as well as the balance between work and life for employees.

The LCA does not include new rules such as 'white-collar exemption' and 'financial settlement of dismissal', which were contemplated in the course of deliberating the enactment of this law, and which would have caused significant changes to Japanese employment practice. At first, the enacted LCA mostly confirmed the rules regarding employment set forth by court precedents, so it did not cause a big change to employment practice directly. However, it does set forth some new rules such as an employer's obligation to deepen the employee's understanding of the work conditions and the terms of the employment contract (article 4.1); to provide contents of the employment contract in writing as much as possible (article 4.2); and that an agreement that a work condition cannot be changed by way of changing the work rule will have preference over a change in work rules (unless it is a change to improve a work condition for the employee when the condition under the work rule is better than what is set out in the contract; article 10). Furthermore, the introduction of written policies that heretofore necessitated knowledge of court precedents is expected to raise awareness regarding employment-related rules for both employees and employers, and promote the application of such rules. Moreover, the LCA was revised on 3 August 2012, and it now provides: the rule that an employer cannot refuse renewal of a fixed-term employment when it is repeatedly renewed, etc (article 19); a fixed-term employee's right to convert his or her employment into a non-fixed-term employment, when the fixed-term employment has been renewed at least once and as a result lasts for more than five years in total (article 18); and an employer's obligation to avoid unreasonable difference in the working conditions of a fixed-term employee and those of a non-fixed-term employee (article 20), so it now has an impact on employment practice (see question 26).

In addition to the above, as employment is a contract, the provisions of the Civil Law apply, as a general rule, to matters not provided in the labour-related statute.

With respect to collective labour relations, the Labour Union Act gives substance to the constitutional rights of organisation, collective bargaining and collective action.

There are other labour-related laws such as the Employment Security Law, which regulates the market for job applications and recruitment; the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (Worker Dispatch Act); the Law on Promoting the Resolution of Individual Labour Disputes, which sets out special procedures for the settlement of labour-related disputes; the Law on Securing Equal Opportunity and Treatment between Men and Women in Employment (the Equal Employment Opportunity Law); the Industrial Safety and Health Act; the Security of Wage Payment Law; and laws concerning public servants that constitute parts of the labour-related laws.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Article 3 of the LSA is a comprehensive anti-discrimination provision that prohibits employers from discriminating against workers with respect to wages, work hours and other working conditions for reasons of nationality, creed or social status.

Article 4 of the LSA prohibits wage discrimination based on gender. The Equal Employment Opportunity Law comprehensively prohibits discrimination based on gender. Further, the Equal Employment Opportunity Law and the Child and Family Care Leave Law prohibit employers from unfairly treating employees on account of pregnancy, giving birth, taking child and family care leave, or similar personal circumstances, and obligates the employer to take necessary measures to prevent harassment of employees by their employer, supervisors and co-workers for taking child or family care leave or similar personal circumstances. Examples of such measures are:

- setting out the employer's policy to prohibit sexual harassment and issuing or making such policy known to its employees, which can be implemented through setting out what constitutes sexual harassment and prohibiting such harassment in the work rules, company newsletter, pamphlet or homepage and distributing such material;
- developing a system enabling the employer to deal appropriately with employees' claims regarding sexual harassment, such as establishing a harassment consultation system with an outside counsellor;
- taking appropriate measures when employees' claims regarding sexual harassment are actually raised, such as confirming the facts, taking appropriate personnel measures, and taking preventive measures;
- providing a means to protect the privacy of both the complainant and the accused; and
- providing means to ensure that there will be no unfair treatment due to raising a complaint of sexual harassment or cooperating with the investigation into the harassment, and informing employees thereof (Ministerial Notice No 314 of 2016). Such Notice also clearly indicates that sexual harassment can be committed against someone of the same gender.

As the employer's obligation to take anti-harassment measures under the Equal Employment Opportunity Law is a public law obligation, it does not in itself provide a basis for a complaint against the employer. Such a complaint will generally be made based on provisions of the Civil Law (eg, breach of contract, tort). However, the newly provided obligation to take certain measures under this law and the guidelines is likely to become relevant in determining the existence and the content of the responsibilities of the employer in a harassment complaint.

Article 10 of the Employment Promotion Law prohibits age restriction when recruiting or hiring employees except under specific circumstances, such as when recruiting or hiring young persons for an open-end contract to form a career based on long-term service, or when there is a genuine need to employ actors of a certain age in the arts and entertainment field.

Another Japanese employment law that concerns discrimination is the Act on Improvement, etc, of Employment Management for Part-Time Workers (the Part-Time Labour Act) – see question 26.

Furthermore, owing to the recent amendment to the LCA, as of 3 August 2012 it is prohibited to discriminate against a fixed-term employee unreasonably (see question 26).

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The competent regulatory agencies to enforce the LSA under article 97 therein are:

- the Labour Standards Bureau within the Ministry;
- the Prefectural Labour Bureaus; and
- the Labour Standards Inspection Offices within the jurisdictional area of each prefecture.

Among these agencies, the Labour Standards Inspection Offices are the front-line organisations that cover the enforcement of statutory minimum labour conditions and improvement of labour conditions, enforcement of safety and sanitation regulations, provision of benefits relating to workers' compensation insurance and other activities for enforcement of the LSA and other regulations.

The Labour Relations Commission, an organisation established under the Labour Union Act, also functions as a regulatory agency with respect to collective labour relations by handling such matters as examining unfair labour practice charges and examining the qualifications of a labour union's application.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

There is no general statutory regulation for establishment of an employees' representative; however, the employer is required to execute a labour management agreement with the employee representative if there is no trade union representing a majority of employees in the workplace, if the employer:

- wishes to require employees to work overtime and during holidays;
- would like to adopt a certain scheme, such as an irregular working hours system, a flexitime system, a discretionary labour system, or would like to deduct certain expenses from employees' salary; or
- wishes to create an exception to the employer's obligation of providing employees with a break time at the same time, etc.

The Constitution of Japan and the Labour Unions Act ensure the right of workers to organise and to bargain and act collectively, namely, the establishment of a labour union. It is common for a company to have a system where union representatives and representatives of management hold periodical meetings that function as opportunities for a union and management to conduct collective bargaining and otherwise discuss and resolve employment issues; however, this is not a system defined under law, nor does it constitute an established legal concept such as a works council, and is a de facto organisation.

5 What are their powers?

The employees' representative has the power to execute a labour management agreement with the employers. For example, the law specifically prohibits the employer from requiring employees to work more than eight hours per day and 40 hours per week, and the employer may be subject to a penalty of imprisonment for six months or less or a fine of ¥300,000 or less if it breaches such provision. The employer will only be permitted to require employees to work overtime and during holidays through the execution of a labour management agreement with the employees' representative.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Article 5-4(i) of the Employment Security Law provides that when an employer that is recruiting employees collects, keeps or uses personal information of applicants, it must do so only within the range necessary for business purposes, except when an employer has a legitimate reason, such as when the applicant consented.

In addition, the Ministry has issued an Employee Information Action Guideline (20 December 2000), which, inter alia, provides that an employer is prohibited from acquiring the following background information, unless otherwise provided under laws and ordinances or such information is essential for an employer to carry out its business and the employer obtains such information from an applicant by indicating the purpose thereof:

- race, ethnic group, social status, family origin, legal domicile, birthplace or other information that may become a cause for social discrimination;
- creed or personal beliefs; and
- (unless otherwise provided under laws and ordinances, collective agreement, or in order to implement an obligation under laws and ordinances or collective agreement) union membership or union activities.

These guidelines apply whether an employer directly conducts the background checks or hires a third party to do so. If the background check is performed in an inappropriate manner in light of social convention, it may constitute an illegal act pursuant to the Civil Code (see question 7).

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There is no explicit provision that prohibits an employer from requiring an applicant to undergo a medical examination. However, the courts ruled in cases in 2003 that an employer's performance of HIV and hepatitis B testing without obtaining the applicant's consent were illegal acts that violated the right to privacy. The Employee Information Action Guideline prohibits employers from conducting an HIV test as a general principle. Furthermore, the Ministry has issued Notice No. 1029009 of 29 October 2004 on points of concern for employers handling medical information of employees in light of the high sensitivity of such information; the Notice sets forth that an employer should not acquire information regarding infection of HIV, hepatitis B, hepatitis C and other infectious diseases that are unlikely to be transmitted or spread in the workplace, or genetic information such as a test for colour blindness, unless there is a special occupational need.

The employer may require the employee to undergo medical examinations not specified in legislation (regular medical examinations at the time of hiring and periodically thereafter are specified in legislation) to the extent that the purpose and content of the examination is reasonable and relevant. The Ministry also advises that an employer gives careful consideration to the necessity of an applicant's medical examination, so as not to discriminate. Therefore, an employer may refuse to hire an applicant who does not submit to an examination only where that medical examination is necessary to determine an applicant's qualifications and abilities.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

The Ministry, in principle, prohibits an employer from requiring applicants (as well as employees and former employees) to take drug or alcohol tests. An employer may provide these tests as long as the clear

consent of the applicant is acquired and there are adequate business-related reasons to require those tests.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

As a general rule, employers are free to hire anybody by any standard they choose, under the principle of 'freedom with respect to hiring'. Certain restrictions such as prohibition of discrimination based on gender or on union activities do apply, and an employer that violates such prohibition may be subject to claims for damage from applicants or administrative guidance, etc, but employers are not legally required to give preference in hiring employees of certain gender or active in unions.

An exception to this rule is provided under the Law for Promotion of Employment of Disabled Persons. Private firms shall hire persons with physical, intellectual or mental disabilities at a rate of 2 per cent or more of the total number of their employees (the rate was raised from 1.8 per cent to 2 per cent on 1 April 2013). If the number of employees with disabilities is less than the number required by law, the employer will be obligated to make an employment payment to the Japan Organisation for Employment of the Elderly and Persons with Disabilities (JEED), which will equal the numerical shortage of disabled employees multiplied by ¥50,000 per month. The employer is not currently obliged to hire disabled persons or make an employment payment if the number of its permanent employees is 200 or less. A change to this threshold to extend the scope to firms with 101 employees or more from 1 April 2015 has been enacted. The employment payment to JEED is reduced to ¥40,000 in relation to firms with 201 or more and 300 or less employees until 30 June 2015, and to firms with 101 or more and 200 or less employees from 1 April 2015 to 31 March 2020.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No. As explained in question 1, the LCA sets out that the employer and employee should set out the terms of an employment contract in writing as much as possible. However, there is no legal requirement that an employment contract be executed in writing in order to become effective.

However, when concluding an employment contract, article 15.1 of the LSA and article 5 of the Enforcement Regulations of the LSA require employers to set out in writing the following terms:

- term of employment;
- place of work and job description;
- working hours, overtime work, rest period, holidays, leave and the change in shifts (if employees work in two or more shifts);
- determination, calculation and payment of wages (except retirement allowance and extraordinary wages), the dates for wages calculation and payment of wages and wage increase; and
- termination of employment (including resignation, retirement, dismissal or any other cause for termination).

In the event an employer sets out any of the following terms of employment, these terms must also be made clear to employees, although these terms need not be expressed in writing in the employment contract (they do need to be set out in the work rule for employers that are obligated to provide a work rule):

- scope of workers covered under the retirement allowance policy, determination of retirement allowance, calculation and payment of retirement allowance and the dates for payment of retirement allowance;
- extraordinary wages (excluding retirement allowance), bonuses and minimum wages;
- meal expenses, work supplies and the like to be borne by employees;
- health and safety;
- vocational training;
- workers' compensation as well as assistance for injury or illness suffered off duty;
- commendation and sanction; and
- leave of absence.

The requirement to express certain terms of employment is normally fulfilled by setting these out in full in either the employment contract or a relevant notification of appointment (offer letter). This requirement, however, can be satisfied by providing an employee with a copy of the work rules upon execution of the employment contract and indicating those sections of the regulations that would be applicable.

In addition, the Part-Time Labour Law requires employers of part-time workers to set out in written form (email and fax can be used when the employee so requests) whether or not raises, retirement allowance and bonuses are provided.

11 To what extent are fixed-term employment contracts permissible?

As a rule, the maximum term of fixed-term employment contracts is three years. For employees who have a high level of specified professional knowledge, skill or experience, or employees who are 60 or older, the maximum length is five years (LSA, article 14). There is no restriction on the number of renewals of fixed-term contracts. However, if refusal of renewal of a fixed-term employment that has been repeatedly renewed can be deemed the same as a dismissal of a non-fixed-term employment, or a fixed-term employee has reasonable grounds to believe that his or her employment must be renewed at the expiry of the term, the employer cannot refuse renewal of the fixed-term employment at the expiry of the fixed-term employment unless there are objective reasonable grounds to refuse such renewal (LCA, article 19; see question 26). LCA, article 17.2, provides that an employer shall be considerate so that it does not set out a fixed term that is shorter than necessary in light of the purpose of the employment and repeat renewals.

12 What is the maximum probationary period permitted by law?

There is no law that sets out a maximum probationary period. Probationary periods tend to run from one to six months, and most commonly for three months. A probationary period is interpreted as an employment contract that reserves the employer's cancellation right and thus leaves the employee in an unstable position. Thus, although a statutory limit does not exist, an unnecessarily excessive period may be determined to be against public policy and void, or interpreted that the cancellation right had expired. Also, an extension of a probationary period is interpreted to be prohibited unless the possibility and potential causes of extension and its term are reasonable and clearly stated in the work rules or employment contract.

13 What are the primary factors that distinguish an independent contractor from an employee?

An employee, as defined under the LSA, is a person who is employed at a business establishment or office and is paid wages, regardless of the person's type of work.

An independent contractor, on the other hand, is a person who works as an independent service provider, and is not subject to instruction or supervision by the particular business entity that is the outsourcer, unlike an employee. In determining whether an outsourcee is an independent contractor, a court will consider whether he or she:

- possesses the discretion to accept or refuse a job offer;
- has the discretion to decide how to perform his or her service and management of his or her work, as well as evaluation of his or her workers, who are not supervised or directly managed by the outsourcer;
- possesses the discretion to decide and give orders to workers regarding the working hours, work days as well as management of attendance;
- conducts management for keeping order of the workplace, choosing the workers to work for the particular task, etc;
- assumes responsibility for damage regarding his or her performance and otherwise all responsibilities as a business entity regarding the performance of the service;
- procures his or her own funds and makes payments necessary for the task; and
- owns the instruments or materials to perform the work, or pays compensation for any instruments leased by the outsourcer, and does not simply provide physical labour.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Worker Dispatch Act sets out the regulations on the dispatching of workers through recruitment agencies and the protection of such dispatched workers.

The Worker Dispatch Act requires dispatching agencies to obtain permission from the Ministry in order to pursue worker dispatching business. In general, the company accepting worker dispatch (worker accepting companies) can only accept a dispatched worker in a certain division for a period of three years, and will need to change such worker before the three-year limitation (article 35-3 of the Worker Dispatch Act). Further, worker accepting companies can only accept dispatched workers for up to three years in the same workplace, and may only extend such period for another three years by listening to the opinion of the majority labour union or an employee representative. However, there are some exceptions to this limitation, such as dispatched workers who are employed by dispatch agencies under no fixed term and dispatched workers who are more than 60 years old, etc (article 40-2 of the Worker Dispatch Act).

Dispatch agencies and worker accepting companies are under obligations to secure proper operations and to provide protection to dispatched workers, such as obligations to take actual measures to 'take proper care' in promoting equal treatment between dispatched workers and regular employees, to develop the careers of the dispatched workers, and to stabilise the employment of dispatched workers, etc.

It should also be noted that the Worker Dispatch Act provides dispatch workers with the legal right to establish a direct employment relationship between the dispatch worker and the worker accepting companies in the event of a dispatching arrangement being illegal (article 40-6 of the Worker Dispatch Act). In this regard, it is necessary for the worker accepting company to pay careful attention to its obligation to ask for and abide by the opinion of the employee representative (or the majority union) in each business place every three years, or otherwise, it could trigger direct employment claims against such worker accepting companies. The 'illegal dispatching arrangement' mentioned above includes the illegal arrangements referred to as *giso-ukeoi* (ie, consignment in disguise) under which a company accepts a worker as a 'contractor', but in reality such worker is working under the client's direction and supervision in what is substantially a worker dispatch arrangement. In this regard, worker accepting companies must be careful in accepting such arrangements to ensure that they do not trigger direct employment claims against them.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There are no limitations on the number of short-term visas (for a 'temporary visitor' whose permitted period of stay is 90 days or less) or long-term visas to be issued by the Japanese government. (Long-term visas include any type of work visa for which the permitted period of stay is usually five years, three years, one year or three months. The upper limit was extended from three years to five years as part of the transfer from a foreign resident registration system to a new foreign resident management system using a resident card from 9 July 2012.) An employee who is transferred from one corporate entity outside Japan (foreign entity) to a related entity in Japan, such as the main office or branch office of the foreign entity (Japanese entity), for a limited period, may be eligible for a work visa as an 'intra-company transferee' on the condition that the two entities have certain capital relationships, the employee has been employed at the corporate entity outside Japan continuously and immediately before the transfer for at least one year (one-year criteria) for work described under 'engineer' or 'humanity, international service' prior to the transfers and the wages for the service provided will be equivalent or higher if a Japanese national were to provide the same service. From 1 July 2010, a period of employment with the Japanese entity can be included in the period to fulfil the one-year criteria (eg, an employee who has worked for three months in the Japanese entity, then worked for nine months in the foreign entity immediately before the transfer to the Japanese entity, will have fulfilled the one year criteria after 1 July 2010). An employee who does not fall under this category may be eligible for other types of work visas (eg, 'engineer', 'humanity, international services') if he or she has a direct contract with the entity in Japan.

16 Are spouses of authorised workers entitled to work?

A spouse of a work-residence status holder (with the residence status of 'dependant') is not allowed to work, unless he or she obtains permission at the local immigration bureau, which will allow him or her to work for a maximum of 28 hours per week. If such spouse were to work more than 28 hours a week, he or she must obtain a residence status that permits him or her to work independently, that is, not as a 'dependant'. A foreign national who holds a residence status of 'spouse of Japanese national' is able to work without limitation.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

An employer who has had a foreign national engage in illegal work (including having had an unauthorised foreign national work) shall be punished with imprisonment with forced labour of not more than three years or a fine not exceeding ¥3 million (or both).

The Employment Promotion Law obligates an employer to report the name, resident status, period of stay, nationality, etc, when hiring and terminating a non-Japanese national to its local Public Employment Security Office (also called 'Hellowork'). If the employer is a non-Japanese entity, and is relocating a non-Japanese employee to Japan for an intra-company transfer, the employer will need to disclose the commencement and end dates of the transfer. Punishment for non-compliance is a fine of up to ¥300,000. However, the reporting requirements above are not applicable to non-Japanese nationals who are permanent residents, or diplomatic or public status employees.

18 Is a labour market test required as a precursor to a short or long-term visa?

No.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

See question 20.

20 What categories of workers are entitled to overtime pay and how is it calculated?

As a general rule, the statutory maximum normal working hours for any employee are 40 hours a week and eight hours a day, excluding breaks (LSA, article 32).

Labour management agreement

Under article 36 of the LSA, an employer may extend working hours when the employer concludes a labour management agreement with a union that is constituted by a majority of its employees or, if there is no such union, the representative of the majority of employees at their workplace, to the extent agreed (there are administrative limitations). This agreement must be filed with the Labour Standards Inspection Office.

Increased wages for overtime

If an employer extends working hours beyond statutory maximum hours, the employer must pay increased wages for work during such hours at a rate of 25 per cent in addition to the normal wages per work hour. This rate increased to 50 per cent in addition when an employee exceeds 60 hours of overtime work in one month from 1 April 2010. Exemption for this new rule exists (such exemption is scheduled to be reviewed three years after implementation) for small and medium-sized employers, which are defined as employers whose capital or amount of investment is ¥300 million or less (¥50 million or less for employers who primarily conduct business in the retail or service industry, ¥100 million or less for employers who primarily conduct business in the wholesale industry), or employers whose usual number of employees is 300 or fewer (50 or fewer for employers who primarily conduct business in the retail industry, 100 or fewer for employers

who primarily conduct business in the service or wholesale industry). The employer must also pay 35 per cent in addition to the normal wages per work hour for work on holidays (if an employee is not given at least one holiday per week or four holidays in four weeks – see question 22). An additional increased 25 per cent for work from 10pm to 5am is also mandatory (thus, if an employee works overtime between 10pm and 5am, the employer needs to pay an additional 50 per cent as well as the normal wages for the hours worked). Family allowances, commuting allowances and other wages as specified by ordinance are excluded from the basic wages upon which increased wages are calculated.

Special work-hour plans

Work rules or labour management agreements may allow arrangements for more flexible working hours. One such work-hour system is the working-hours averaging system, where the employer may require an employee to work more than eight hours in one day or 40 hours in one week without paying overtime wages, as long as the average working hours for that employee over a certain period do not exceed eight hours a day or 40 hours a week. There are also special methods for calculating work hours. One is the discretionary labour system available for employees in certain positions or with certain skills. Another is work performed away from the workplace, for which a certain number of working hours is allocated; if the allocated working hours are within the eight-hours-a-day or 40-hours-a-week threshold, and do not include late-night or holiday work, the employer is not obliged to pay increased wages.

Special circumstances

For employees caring for a child of pre-primary school age or for a family member who requires special care, the employer may not require such employees to work more than 24 hours of overtime a month and 150 hours a year, or to work between 10pm and 5am, if exemption from such work is specifically requested by the employees. For pregnant employees or employees within one year of childbirth, the employer may not require overtime, holiday or midnight work if exemption from such work is specifically requested by the employees. In addition, for employees caring for a child of three years old or below, the employer may not require such employees to work overtime if exemption from such work is specifically requested by the employees from 30 June 2010.

Exemptions

The provisions concerning restrictions regarding working hours do not apply to persons engaged in agricultural, forestry, animal husbandry or marine products enterprises. They also do not apply to 'persons in a position of supervision or management or persons handling confidential matters, regardless of the type of enterprise' and 'persons engaged in keeping watch or in intermittent labour, with respect to which the employer obtained approval from the administrative office'.

21 Can employees contractually waive the right to overtime pay?

An employer is under an obligation to pay a salary, including overtime pay, to its employees in full (LSA, article 24); therefore, an agreement under which an employee comprehensively agrees to waive the right to overtime pay prior to the accrual of a specific right to overtime pay would be invalid. On the other hand, with regard to the waiver of a specific amount of overtime payment, such waiver is valid only if it is given with the true consent of an employee. It should be noted that the courts tend to scrutinise whether consent was truly given with the free will of the employee in light of factors such as whether explicit consent has been given, whether there was a reasonable reason to provide such consent, whether the employer has obtained the consent in a way such that the employee truly understands the effect, etc.

22 Is there any legislation establishing the right to annual vacation and holidays?

An employee is guaranteed a minimum of 10 working days of paid leave for the year if he or she has been employed continuously for six months and has worked for at least 80 per cent of the working days during that six-month period. For subsequent years, where attendance at work is at least 80 per cent of the working days for the previous year, the number of guaranteed days of paid leave increases. This continues until the number of guaranteed days reaches 20 days a year, as set out below:

Period of continuous employment	Number of days paid annual leave
After 6 months	10 days
After 1 year and 6 months	11 days
After 2 years and 6 months	12 days
After 3 years and 6 months	14 days
After 4 years and 6 months	16 days
After 5 years and 6 months	18 days
After 6 years and 6 months	20 days

See question 26 for annual holidays for part-time employees. In Japan, there are 15 national holidays, although these are not statutory holidays. Under the LSA, an employer is required only to give its employees a minimum of one day off per week or four days off every four weeks. Employers do not have to grant employees national holidays as additional days off. In practice, however, most businesses close during national holidays.

23 Is there any legislation establishing the right to sick leave or sick pay?

There is no legislation concerning sickness, injury or disability that does not arise from employment or commuting, although many companies make their own rules in reference to sick leave or sick pay in such cases (an employer that sets out terms relating to 'leave of absence' due to sickness must set them out clearly; see question 10). Such rules usually set out the term of sick leave, which subjects an employee to be suspended due to sickness or injury, which may become a cause for dismissal if the employee does not recover before the expiry of such term, and works as a mechanism to delay dismissal for the provided period. Such a period, when provided, is generally set out for a fixed period of between three and six months, and a wage is usually not provided during such period.

The Industrial Accident Compensation Insurance Act covers most of the compensation for employees' injury, sickness and disability due to employment or commuting in the form of insurance, and is in effect the principal law governing compensation for employees' injury, sickness and disability.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

An employee can take a leave of absence in the following circumstances. However, the employer is not obliged to pay the employee during such leave, except for annual paid leave.

Maternity leave

A pregnant employee can have up to six weeks, or 14 weeks in the case of a plural pregnancy, of maternity leave before, and eight weeks after, delivery. Maternity leave before delivery is optional and at the employee's discretion, but maternity leave after delivery is mandatory. The period of post-delivery leave may be reduced by two weeks upon the request of the employee, subject to obtaining a doctor's permission to return to work.

Menstrual leave

When a woman who experiences especial difficulty in working during menstruation requests leave, the employer may not make the woman work on days of her menstrual period.

Childcare leave

An employee who has a child under one year of age may request childcare leave (except for certain employees, eg, employees with a prospective fixed-term employment contract that would not continue after the child reaches one year of age). From 30 June 2010, the length of this leave can be extended until the child reaches the age of one year and two months if the spouse of the employee has already taken (or will take) childcare leave prior to the employee, and the employee will start taking the leave before or on the day the child reaches the age of one, and thus both parents are taking childcare leave (the upper limit of one year per parent does not change, so in practice, this is leave that allows employees to take a combination of childcare leave until the

child reaches one year and two months if the spouse of the employee also takes leave). The employee can extend the childcare leave until the child reaches one-and-a-half years of age in certain circumstances.

Sick or injured child leave
An employee who has a pre-primary school-aged child may take up to five days of leave for sickness or injury of such child per year. From 30 June 2010, the number of days increases to 10 days if the employee has two or more children who have not yet reached the time to enter elementary school. From 1 January 2017, an employee can take this leave not only on a full-day basis, but also on a half-day basis.

Nursing care leave
An employee who has a family member (spouse, parent or child, etc) requiring constant nursing care because of injury, sickness or physical or mental disability may take nursing care leave each time a family member is in such situation. The maximum period of nursing care leave is 93 days in total per family member for a condition requiring nursing care. From 1 January 2017, employees can take family care leave in parts, up to three instances, with a maximum of 93 days in total per family member for a condition requiring nursing care.

Nursing care short-term leave
From 30 June 2010, employees may take up to five days of leave for accompanying a family member who requires nursing care for a hospital visit, etc (the limit increases to 10 days if there are two or more family members who require nursing care). From 1 January 2017, employees can take this leave not only on a full-day basis, but also on a half-day basis.

For annual paid leave see question 22 and for injury or sickness leave see question 23.

25 What employee benefits are prescribed by law?

One employee benefit mandated by law is social insurance. All employers have a legal obligation to provide employees with unemployment insurance and workers' accident compensation insurance. Also, an employer that is a corporation or that hires five or more employees, even if the employer is not a corporation, has a legal obligation to provide employees with health and pension insurance by making its employees members of the health insurance association and employees' pension fund insurance. Further, employees who are 40 years of age or older must be enrolled in nursing care insurance.

26 Are there any special rules relating to part-time or fixed-term employees?

Part-time employees and fixed-term employees generally receive the same treatment under labour-related laws as full-time employees or employees with open-ended contracts. The main differences in the treatment of part-time and fixed-term employees are as follows.

The first exception is annual paid leave for part-time employees. Employees who work more than four days per week, more than 216 days per year or 30 hours per week or more are entitled to the same paid leave as full-time employees; however, those who work less are entitled to less annual paid leave, in proportion to their working hours.

A second exception is social and labour insurance. Employees who work 20 hours or more per week at their place of employment and plan to be employed for 31 days or more are treated equally to full-time employees under the Employment Insurance Law. As for health insurance and employee pension insurance, if an employee generally works more than three-quarters of the daily or weekly hours, or of the number of days in a month compared with full-time employees, and receives an annual income of ¥1.3 million or more, then they are generally treated as insured persons. Part-time employees are treated equally with full-time employees for workers' accident compensation insurance.

The Act on Improvement, etc, of Employment Management for Part-Time Workers (the Part-Time Labour Act) is a rule to procure appropriate work conditions for part-time employees. The first revision of this Act came into effect on 1 April 2008. The revision prohibits employers from discriminating against 'part-time' workers who substantially provide the same service as full-time workers in light of the content of their work, responsibility, whether the part-time workers are integrated in a long-term employment system and other work conditions, and mandates equal treatment with full-time workers (article 8). The second revision of this Act came into effect on 1 April 2015 and further broadened the protection of part-time workers from discriminatory treatment compared to regular employees. Previously, only part-time workers who had entered into an indefinite-term employment contract were protected; however, after the revision, fixed-term part-time workers will also be protected. These revisions, among other revisions to promote the stability of working conditions for part-time workers, were introduced to ensure fair treatment of part-time workers in light of the rise in diversity in work styles (ie, diversion from the traditional format of full-time working), which necessitated a wider range of treatment of part-time workers, including equal treatment with full-time workers. Although it is generally considered that only about 5 per cent of part-time workers actually qualify as being equivalent to full-time workers, many companies have already started to implement measures to improve the treatment of part-time workers and to change the workers' statuses from part-time to full-time employees to meet increasing competition to employ the best workers.

Part-time and fixed-term employees are not entitled to childcare and nursing care leave under certain conditions.

As explained in question 11, there is an upper limit on the duration of a fixed-term agreement, although such an agreement can be renewed. The LCA (see question 1) clarifies that a fixed-term employee may not be dismissed unless there is a compelling reason, and requests employees to endeavour to refrain from setting terms that are too short in light of the type of work to be done, as it results in multiple renewals and places the employees in an unstable position. Also, even at the expiry of the term of a fixed-term employment, an employer cannot refuse renewal of the employment unless there is objective reasonable grounds to refuse such renewal; if refusal of renewal of a fixed-term employment that has been repeatedly renewed can be deemed the same as a dismissal of an employment without a fixed term; or a fixed-term employee has reasonable grounds to believe that his or her employment should be renewed at the expiry of the term (LCA, article 19). The Japanese courts have repeatedly used these rules regarding refusal of renewal, and the rules were legislated in the LCA on 3 August 2012. Furthermore, when a fixed-term contract has been renewed at least once and as a result lasts for more than five years in total, or the fixed-term employee requests his or her employer to convert his or her fixed-term employment to non-fixed-term employment before the term of employment expires, the employer is deemed to have accepted such request, and the fixed-term employment will automatically convert to a non-fixed-term employment at the end of such fixed term (Conversion Rule, LCA, article 18). The renewal and five-year period starts from 1 April 2013 when the amendment came into force. If there is six months or more between the former fixed-term employment and the new fixed-term employment of the same employee, the count of renewal and period will be reset, and the renewal period will recommence from the beginning of the new employment. The working conditions after conversion, other than term, are the same as those before the conversion, unless otherwise provided in the employment contract or the work rules. Upon the fulfilment of the conditions stipulated in the Act on Special Measures regarding fixed term employees with expertise, etc, which came into effect on 1 April 2015, certain employees, such as those with expertise and those employed after the mandatory retirement age, would be exempted from the above Conversion Rule.

In addition, the difference between the working conditions of a fixed-term employee and those of a non-fixed-term employee cannot be unreasonable considering content of duty, extent of responsibility, possibility of change in duty, position or workplace and other circumstances (LCA, article 20).

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The validity and enforceability of a post-termination non-compete, non-solicitation or non-dealing clause is determined upon considering the balance between the necessity of the particular clause to protect the employer's legitimate benefits (eg, to protect trade secrets or the relationship with its clients) and the extent it would restrict the employee's right to choose his or her occupation, which is a constitutional right, and the freedom to pursue such occupation.

The criteria of a valid and enforceable post-termination non-compete, non-solicitation or non-dealings clause have been developed through court decisions; the courts have considered whether a restriction is reasonable and not against public policy in view of the following factors:

- the employee's previous position (eg, whether the employee had been in a position to acquire trade secrets);
- the scope of the business to be restricted by the non-compete clause (eg, what kinds of business are prohibited);
- the duration of the employee's non-compete obligation (the general maximum period is two years);
- the geographical area to be restricted by the non-compete clause;
- the manner in which the competition or solicitation or dealing is done;
- the existence and amount of any compensation to the employee for the restriction; and
- other relevant facts.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No, but the existence and amount of compensation to the former employee is a very important factor when the considering whether a restrictive covenant is valid. When an employer continues to pay an amount equivalent to the former employee's salary throughout the restrictive period, it is very likely that such restrictive covenant will be valid unless other factors (see question 27) exist.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The first circumstance for an employer's liability is where an employee causes damage to a third party in relation to his or her work (eg, an employee driving a car belonging to the employer on business causes a traffic accident). In this case, the employer may be liable for civil responsibilities for the acts of that employee. Such responsibility arises first, where the employee acts within the authority granted by his or her employer; and second, where the third party believes in good faith that the employee has acted within such authority, irrespective of whether or not the acts fall within the actual scope of the employee's ordinary duties, which will be deemed as being engaged in the course of work for the employer.

The second circumstance is where an employee causes damage to a person who has some kind of contractual relationship with the employer – for example, when an employee authorised to act on behalf of the employer causes damage to a customer, an employee is subject to sexual harassment by another employee and the employer does not take adequate measures to prevent that sexual harassment, or an employee is injured or killed in an accident caused by the acts of another employee acting with the employer's apparent or actual authority and under the control of the employer – in such cases, the employer may be liable for the acts of that employee pursuant to the particular contractual obligations.

In addition, the employer can be subject to criminal sanction or administrative guidance, etc, for the conduct of its employees where the law stipulates such obligation.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Income tax

Income tax is mandated on the employees' income. All exclusions and deductions (including social insurance contributions set out above) are withheld from the employees' gross income at the source of employment.

Resident tax

An employee residing in a particular area shall be liable for its prefectural and municipal resident tax. This tax is also withheld. A local resident tax is levied on a per capita and income level basis. The per capita tax is levied on persons who possess a residential address.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Patent

After the partial revision of the Patent Law came into force on 1 April 2016, when an employee creates an invention in the course of employment, the right to obtain a patent will be vested in the employer at the timing which the right becomes effective, if it is so stipulated in the employment regulations or any other contract in advance (article 35.3 of the Patent Act). On the other hand, if there are no such provisions, the employee's inventions in principle belong to the employee, and if the employee obtains a patent, the employer company simultaneously receives a non-exclusive licence.

In either case, the employee has the right to receive a reasonable remuneration or other economic profit in exchange for the right to obtain a patent (article 35.4 of the Patent Act).

The remuneration, provided for in the employee invention contract, shall not be regarded as unreasonable taking in consideration of the following factors (article 35.5 of the Patent Act), and more specific details are defined in the guidelines by the Minister of Economy, Trade and Industry:

- negotiation between employer and employee in the course of establishing the criteria for determining the remuneration;
- disclosing the criteria established;
- giving the employee the opportunity to state his or her opinions regarding calculating the amount of the remuneration; and
- other factors (interpreted to include price).

If there is no provision regarding the remuneration, or the remuneration stipulated in advance is unreasonable, the remuneration shall be determined by considering the amount of profit that the employer will make from the invention, the burden assumed and the contribution made by the employer in connection with the invention, the treatment of the employee and other relevant factors (article 35.7).

Copyright

In comparison, if any work subject to copyright is produced to be published or made public in the name of a company, then the company is the copyright owner unless the relevant employment contract or work rules expressly state otherwise (article 15 of the Copyright Act).

32 Is there any legislation protecting trade secrets and other confidential business information?

The Unfair Competition Prevention Act (UCPA) protects trade secrets and other confidential business information by regulating actions such as:

- the acquisition, use or disclosure of a trade secret acquired by illegal means or intentions;
- the acquisition, use or disclosure of a trade secret disclosed through wrongful disclosure with knowledge or without knowledge due to gross negligence; or
- the distribution, such as sales, delivery, etc, of the trade secret acquired through the above-mentioned wrongful methods (article 2.1 (4) to (10) of the UCPA).

These actions may be subject to criminal penalties.

For the trade secrets and other confidential business information to be regarded as a 'trade secret' protected under the UCPA, the information must be determined as useful for commercial activities such as manufacturing or marketing methods, kept secret and not publicly known (article 2.6 of the UCPA). More specific details of the conditions under which information can be considered as a trade secret are stipulated in the Guidelines for Management of Trade Secrets published by the Ministry of Economy, Trade and Industry.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Act on the Protection of Personal Information (the Act) imposes various obligations on any entity that uses personal information stored

in database format or in other systematic structures to allow retrieval of specific personal information, and has under its control personal information of more than 5,000 individuals (including employees) for its business, on any specific day within the past six months. The Act also applies to the personal information of the employee that the employer possesses. These obligations include:

- use of the personal information;
- implementation of safety measures to manage personal information in a secure manner;
- monitoring of employees and contractors handling personal information;
- restriction of unapproved transfers of personal information to third parties; and
- obligation to accept requests for disclosure and amendment of personal information from the individual.

Entities breaching these obligations are subject to administrative guidance or an order by the minister in charge. Disobeying those orders may be punished by imprisonment with forced labour for a period of not more than six months or a fine of not more than ¥300,000.

The revision to the Act, which was promulgated on 9 September 2015, will come into full force and effect on 30 May 2017, and includes amendments to enhance the protection of personal information, such as the following:

- expanding the application of the Act even to entities holding less than 5,000 items of personal information and foreign entities which have obtained personal information;
- clarifying that fingerprint data, facial recognition data, passport number, driver's licence number and My Number (personal 12-digit individual number) are all included in the definition of 'personal information';
- newly introducing 'special care-required personal information' which comprises sensitive personal information such as race, religion, medical history, and other personal information which has the potential to bring about unjustifiable discrimination or prejudice. Such information cannot be collected, in principle, without obtaining the individual's consent, and cannot be provided to third parties by opt-out methods;
- obligating employers to obtain their employees' prior consent in order to transfer personal information to a third party outside of Japan, unless the third party is in a country where regulation on personal information protection is considered to be equivalent to that of Japan or the third party maintains an internal personal information protection system consistent with the standards set by the Japanese government;
- when providing or receiving personal information to or from a third party, employers must keep records of information such as the name of the third party, the dates of provision, etc; and
- when providing personal information to a third party, employers must provide prior notification to the Personal Information Protection Committee, which is a newly established governmental committee assuming the investigatory, advisory and enforcement powers under the Act.

In addition, Ministry Notice No. 314 of 2016 on sexual harassment provides that in implementing the measures provided therein, the employer must also provide means to protect the privacy of both the complainant and the person accused of the harassment.

See question 6 for rules relating to the Employment Security Law.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

There is no legislation that specifically addresses treatment of employees in a business transfer owing to sale or acquisition of assets or outsourcing, as opposed to a company split where rules and procedures of whether and how employees will be transferred are set out in detail.

As a general rule the parties to a business transfer are free to set out the scope of rights and obligations (including rights as employers) to be transferred, although in order to transfer an employee, his or her consent is necessary. If the transfer of employees takes the form of resignation from the transferor and a new employment contract with the transferee, the transferee has the discretion to hire persons it chooses. However, cases where all or substantially all of the business of the transferor is transferred, excluding certain employees from the scope of transfer, or the transferee's refusal to employ certain employees, could be determined as void by a court. The Japanese courts have used principles such as piercing the corporate veil (where the transferor and transferee are substantially the same entities in light of business content, personnel, shareholder, etc), prohibition of unfair labour practice and public policy to include employees who were left out of the scope of the business transfer when, in essence, such exclusion is seen as an attempt to circumvent strict restriction on dismissal, disadvantageous change for employees in work conditions or other statutes.

Business transfer through sale or acquisition of shares does not cause any change to employment relationships in itself. However, in exceptional circumstances where the principle of piercing the corporate veil applies, the courts have found the shareholder that became the parent company of the particular employer to be the employer. A recent report by a committee organised by the Ministry stated that an investment fund could be viewed as the employer of the employees of the acquired corporation if the fund in essence controls the terms of employment.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer may only dismiss an employee for reasons that are objective, logical and reasonable, and a dismissal without objective and logical reasons in accordance with society's standards will be invalid and deemed an abuse of rights (LCA, article 16).

In practice, Japanese courts strictly define what is 'objective, logical and reasonable'. Examples of 'objective, logical and reasonable' reasons for dismissal are: an employee's inability to work or insufficient ability to work because of reasons such as illness or injury, or where the employee is performing at a consistently low level in carrying out his or her duties and the employer can prove that improvement is unlikely even if further training or chances are provided; an employee has materially breached his or her employment contract or work rules of the company; and decisions by the management to restructure the company because of either suspected or potential insolvency of the company and as a result of such restructuring there is a need to reduce the workforce, and certain criteria are fulfilled.

As explained in question 26, employees cannot be terminated during a fixed-term contract unless there is a compelling reason.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Notice of termination must be given 30 days prior to dismissal, unless the employer's work rules state or the employment agreement stipulates that the employer shall give a longer notice period or a higher amount of payment in lieu of such notice. An employer may provide a payment, however, in lieu of such notice, equivalent to the particular employee's average wage for 30 days, which should be paid when notifying the employee of the dismissal (LSA, article 20.1). An employer may also give a combination of notice and payment where the employer must pay for the number of days of notification short of 30 (eg, if the employee gives 14 days' notice, the employer must pay an amount equivalent to 16 days' worth of the average wage of the particular employee) (LSA, article 20.2).

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee without notice or payment in lieu of notice in the event that the enterprise cannot continue to function because of a natural disaster or other unavoidable cause, or when reasons for dismissal are attributable to the employee. Under these circumstances, the employer must obtain the approval of the administrative office with respect to the reason in question (LSA, article 20.1 and 20.3).

In addition, the employer may dismiss, without notice or payment in lieu of notice, employees who are:

- employed on a daily basis and have not been employed consecutively for more than one month;

Update and trends

Death from overwork (*karoshi*)
The Labour Standards Inspection Office (LSIO) ruled the December 2015 suicide of a young woman fresh from university who entered Japan's top advertising agency was the result of 'death from overwork' (*karoshi*). In its ruling, the LSIO found that the employee had worked over 100 hours of overtime per month prior to the month she exhibited mental illness. As a result, the LSIO concluded that her suicide was due to the psychological burden of such a large amount of overtime. A handful of other cases of *karoshi* and overwork have also been reported recently, and this issue has come to the forefront as a significant social problem in Japan.

The authorities in turn are strengthening regulations against overtime work by taking actions such as issuance of guidelines and policies to prevent excessive overtime work and *karoshi*. In particular, on 20 January 2017, the Ministry of Health, Labour and Welfare issued a notice, titled 'Issuance of guidance to top executives of companies by the Head of Labour Bureau and publicising company names in the case of illegal long overtime work or death by overtime work has been found in multiple business places', which both relaxes the standard to publicise names of companies which had ordered illegal overtime work from 'over 100 hours per month' to '80 hours per month' and stipulates that such publicity may be made in cases where employees die from overtime work in multiple company locations in a year. Further, as of February 2017, the government is currently considering setting an upper limit of 80 overtime work hours per month on the employer's ability to extend overtime work beyond the upper limit currently stipulated by law, pursuant to a special clause of labour management agreements regarding overtime and holiday work.

Consequently, employers are strongly recommended to take due care of their employees' health and implement appropriate working conditions to seek to lessen the burdens of overtime. The actual measures which any company needs to take, of course, vary depending on the company and its business, but employers must at least strictly monitor their employees' working hours and make efforts to control the amount of overtime work performed.

Amendments to the Child Care and Family Care Leave Act
The amendment to the Child Care and Family Care Leave Act (the Amended Leave Act) came into force on 1 January 2017 and seeks to assist employees in having a good work-life balance as well as to be able to take care of their dependent children and family members. The Amended Leave Act expands the types of fixed-term employees who can take child care leave and family care leave. Also, the Amended Leave Act allows employees greater flexibility in order to take care of their children and family members by:

- permitting employees to take nursing care leave for sick/injured children and family care leave both on full-day basis and a half-day basis;
- prior to the Amended Leave Act, the law entitled employees to take, in principle, only one instance of family care leave up to 93 days per family member for a condition requiring nursing care; however, the Amended Leave Act now enables employees to take family care leave periodically, up to three instances, again with a maximum of 93 days in total per family member;
- prior to the Amended Leave Act, the law only entitled employees to take family care leave and to have shortened working hours up to 93 days in total; however, the Amended Leave Act allows employees to take a maximum of 93 days of family care leave, and requires employers to offer systems which facilitate employee nursing care needs, such as by shortening working hours, permitting flextime arrangements, establishing staggered work hours and similar schemes; and
- the Amended Leave Act entitles employees to request that their employers refrain from having them work beyond their prescribed working hours (ie, that the employees not be assigned, or expected, to work beyond finishing time) during the period in which the requesting employees are taking care of family members who require care.

Further, in addition to obligating employers not to unfairly treat employees on account of pregnancy, giving birth, taking child and family care leave, or similar personal circumstances, employers are now obligated to take necessary action to prevent harassment of employees by their supervisors and co-workers for taking child or family care leave or similar personal circumstances.

Personal information protection
The amended Personal Information Protection Act (the Amended PIPA) will come into full effect on 30 May 2017 and will expand both the scope of companies to which the act applies (including foreign companies) as well as the obligations imposed on such companies. The main points of the Amended PIPA are:

- prior to the effectiveness of the Amended PIPA, only employers that possess personal information of more than 5,000 individuals are regulated. However, the Amended PIPA eliminates this threshold and any employer holding personal information will be covered by the law;
- the Amended PIPA clarifies that fingerprint data, facial recognition data, passport numbers, driver's licence numbers and My Number are all personal information;
- the Amended PIPA newly introduces the term 'special care-required personal information', which is sensitive personal information such as race, religion, medical history and other personal information that has potential to be the subject of unjustifiable discrimination or prejudice. Employers can collect ordinary personal information without an employee's consent, just by notifying their staff of their purpose of use. However, in order for employers to collect special care-required personal information from their employees, the employer must, in principle, obtain the employee's affirmative consent. Moreover, this category of information cannot be provided to third parties by employers relying on opt-out methods of consent;
- in order to secure the traceability of the provision of personal data to third parties, the Amended PIPA requires employers to maintain records of personal data transferred or received, including the name and address of the receiving or transferring third party, when providing or receiving personal information to or from a third party;
- under the current law, transferring personal information to a third party outside of Japan is not regulated. However, the Amended PIPA will now regulate these transfers and will require employers to obtain the prior consent of their employees when they seek to transfer personal information to a third party outside of Japan, unless the third party is in a country where regulation on personal information protection is considered to be equivalent to that of Japan or the third party maintains an internal personal information protection system consistent with standards set by the Japanese government; and
- the Amended PIPA will now require employers wishing to provide personal data to third parties, to provide prior notification to the Personal Information Protection Committee. The Personal information Protection Committee is a newly established governmental committee that will have investigatory, advisory and enforcement powers under the Personal Information Protection Act.

- employed for a fixed period not longer than two months and have not been employed consecutively for more than that period;
- employed in seasonal work for a fixed period not longer than four months and have not been employed consecutively for more than that period; and
- in a probationary period and have not been employed consecutively for more than 14 days (LSA, article 21).

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

No. However, companies usually establish a severance pay system under their work rules, employment agreements or collective agreements (with a condition that it will not be paid (or not paid in full) if the employee was dismissed due to a cause for disciplinary action, which

is valid in cases where the employee's actions were so serious that it extinguished or diminished his or her achievements). In general, the amount of severance pay is calculated based on an employee's contribution to the company, such as term of employment.

39 Are there any procedural requirements for dismissing an employee?

The Japanese courts have established precedents for the criteria for dismissal that include procedural requirements. In cases of dismissal due to restructuring of a company (see question 35), the following requirements have been formulated by courts as general criteria in determining the validity of a dismissal:

- necessity of labour reduction;
- necessity to select dismissal instead of other available measures; for example, could the employer have avoided dismissal by using means such as soliciting early retirement;
- appropriateness in the selection of the employee being dismissed; and
- appropriateness of the procedure; for example, did the employer provide sufficient explanation and opportunities for consultation.

Procedures such as sufficient explanation and consultation are also given importance in dismissal due to other causes. See also question 36.

In addition, in the event of one of the following occurrences, an employer must notify the Public Employment Security Office in advance:

- 30 or more employees leave (including by dismissal) within one month;
- five or more employees who are 45 or older and younger than 65 reach retirement age, are dismissed or otherwise leave due to a cause made by the employer within a one-month period;
- when an employee who is a foreign national leaves (including by dismissal) (see question 17);
- dismissal of people with a disability (under certain conditions); or
- withdrawal of job offers, extending the time of joining the company regarding new graduates or cancelling or downsizing hiring plans of new graduates.

40 In what circumstances are employees protected from dismissal?

Aside from the general restriction on dismissal as explained in question 35, an employer may not dismiss an employee during a period of rest for medical treatment with respect to injuries or illnesses suffered in the course of duty, nor within 30 days thereafter and (for women) during a period of rest before and after childbirth in accordance with the applicable statute, nor within 30 days thereafter (LSA, article 19).

In addition, an employer is prohibited from dismissing an employee for:

- discriminatory reasons (LSA, article 3);
- being a union member or having engaged in proper union activities (Labour Union Act, article 7);
- being female, getting married, becoming pregnant or giving birth (Equal Employment Opportunity Law, article 8);
- requesting maternity or family care leave, or having taken such leave (Family and Medical Leave Law, articles 10, 16, and 16-4);
- making the declaration of unlawful situation to the competent authorities (LSA, article 104-2); or
- the reason that an employee has disclosed information in the public interest under certain conditions (Whistle-blower Protection Act, article 3).

41 Are there special rules for mass terminations or collective dismissals?

Yes, if an employer dismisses 30 or more employees within a single month. See question 39.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

There is no system of 'class action' that allows an employee to represent the interests of a group in a lawsuit, but employees may file a lawsuit collectively. Even when more than one lawsuit is filed separately, such lawsuits can be consolidated if rights or obligations that are the subject matter of the lawsuits are common or are based on the same factual or statutory cause.

As to extrajudicial acts, employees are entitled to organise a labour union and bargain collectively.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Yes. An employer may impose a mandatory retirement age if the age is set at older than 60 years (Act for Stabilisation, etc of Employment of Older Persons etc, article 8). However, an employer must select one option among the following three options if the mandatory retirement age is set below 65 years (Act for Stabilisation etc of Employment of Older Persons, etc, article 9):

- abolish the mandatory retirement age;
- raise the mandatory retirement age to 65 years or older; or
- keep the mandatory retirement age below 65 years, and implement a continued employment system to enable, at the employee's request, the continued employment of an employee who reaches the mandatory retirement age until such employee reaches 65 years of age.

An employer used to be able to set requirements for continued employment upon entering into a labour management agreement with a union that is constituted by a majority of its employees or, if there is no such union, the representative of the majority of employees in the employees' workplace. However, the Act for Stabilisation etc of Employment of Older Persons etc was revised, and an employer became obligated to re-employ all the employees who request continued employment after the mandatory age, until they are 65 years old, from 1 April 2013.

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However, employers who have set the requirements by 31 March 2013 may tentatively and partially apply the requirements for 12 years (an employer may apply the requirements to employees who are 61 years old or older from 1 April 2013 to 31 March 2016; to employees who are 62 years old or older from 1 April 2016 to 31 March 2019; to employees who are 63 years old or older from 1 April 2019 to 31 March 2022; and to employees who are 64 years old or older from 1 April 2022 to 31 March 2025). The requirements for continued employment must be specific and objective so as to enable each employee to foresee whether the employee would fulfil the requirements when he or she reaches the retirement age and to avoid the employer's arbitrary rejection of the employee's continued employment.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Yes; however, an arbitration agreement is only valid if it is agreed after the dispute arises, and an agreement in advance is void. The parties can agree to private arbitration of employment disputes, but it is uncommon in Japan to resolve disputes by arbitration. In Japan, litigation and mediation are the common procedures for resolving employment disputes. The mediation procedure is divided into two types: one is operated by the courts and the other is operated by a commission based on the Law on Promoting the Resolution of Individual Labour Disputes. Recently, the latter has been gaining popularity in Japan. Even if an employee files mediation against an employer, the employer does not have an obligation to attend the procedure. An employer's refusal to attend the procedure shall result in the end of the mediation. In the mediation by commission procedure, the commission members talk with the parties in camera to resolve disputes on a voluntary basis.

In addition, the Labour Trial Law came into force on 1 April 2006. A decision is rendered by a court consisting of one judge and two persons with special knowledge and experiences of labour-related matters. More and more disputes are resolved comparatively quickly in accordance with the Labour Trial Law because, under that Law, the number of court hearings shall be limited to three unless it is an exceptional case.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee may not agree to waive statutory rights to potential employment claims. On the other hand, an employee may waive contractual rights as long as such waiver is not in conflict with laws.

46 What are the limitation periods for bringing employment claims?

The right to claim wages and other claims under the LSA lapses by prescription if not made within two years, and the right to claim retirement allowances lapses by prescription if not made within five years (LSA, article 115).

Under the LSA, there is no restriction on the period that an employee may assert a claim to seek reversal of a dismissal. The court, however, might not accept the employee's claim based on the principles of the loss of a right under the good-faith principle (article 1(ii) of the Civil Code) if the lawsuit is brought long after the dismissal.

Kazakhstan

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes relating to employment are:

- the Kazakhstan Constitution, which sets out the basic rights relating to employment; and
- the Labour Code, which regulates employment and related matters, social partnerships, safety and protection of labour.

There are various other laws and normative acts that regulate specific labour-related matters. For example, the Law on Migration regulates aspects of foreign labour and Government Regulation No. 559 of 27 June 2016 regulates work permits issued to foreign nationals.

A special employment regime is set out for the citizens of the member states of the Eurasian Economic Union in accordance with the International Treaty among Kazakhstan, Belarus and Russia on Eurasian Economic Union, dated 29 May 2014.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Kazakhstan Constitution generally prohibits discrimination based on descent, social, occupational and financial status, gender, race, nationality, language, religion, opinion, place of residence and any other grounds. Discrimination in employment is specifically prohibited by the Labour Code, which guarantees:

- an equal opportunity to enjoy labour rights and freedoms;
- non-discrimination in labour rights on the grounds of gender, age, physical shortcomings, race, nationality, language, social, occupational and financial status, place of residence, religion, political opinion, clanship or social class, or public associations; and
- the right to sue for discrimination.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Labour and Social Protection is responsible for the enforcement of employment statutes and regulations. Certain labour matters, for example, those related to the employment of foreign nationals, may be enforced by the Ministry of Internal Affairs.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Labour Code allows employees to establish the following types of commission in the workplace:

- A collective bargaining agreement commission established to negotiate and draft collective bargaining agreements. Collective bargaining agreements may be initiated in local companies, as well as in branches and representative offices of foreign legal entities.
- A conciliation commission established to resolve individual labour disputes if employees cannot resolve the disputes directly with the employer. If the decision of the conciliation commission is not implemented within the period set out in the commission's resolution, the employee or employer, as the case may be, may apply to a court for enforcement of the decision.
- A mediation commission established to resolve collective labour disputes (eg, employer's compliance with labour law or collective bargaining agreement).
- A safety and labour protection work council may be established by the initiative of the employer or employees (or both).

All of the foregoing commissions should be established on a parity basis; the number of representatives and the order and terms of operations of each of the commissions are established on a case-by-case basis.

5 What are their powers?

Collective bargaining agreement commission
The employees are obliged to consider and discuss the draft collective bargaining agreement prepared by the commission. The commission should revise the draft collective bargaining agreement subject to the employees' comments.

Mediation commission
A duly taken resolution of the mediation commission is binding on the parties. If the mediation commission fails to reach agreement on a dispute, the dispute may be conveyed to labour arbitrage – an ad hoc commission that includes representatives of the employer, employees and state authorities.

Safety and labour protection work council
The council includes, on a parity basis, representatives of the employer and employees, including technical labour inspectors. The council's decision is binding on the employer and employees. The council's purposes are to:

- arrange joint actions of the employer and employees to ensure compliance with labour safety rules;
- prevent workplace injuries and occupational illness; and
- arrange for workplace inspections.

Status, rights and obligations of the technical labour inspectors, as well as their supervision procedures, are to be determined by the council's decision.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Employers are entitled to obtain the relevant information directly from employees, but cannot obtain an applicant's criminal or credit record directly from publicly available sources. Security checks may be conducted if the position is security-sensitive (eg, national security officers). Hiring a third party to conduct background checks is not regulated and does not appear to be prohibited, provided the third party conducts its activities in accordance with the law.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There are no prohibitions on requiring a medical examination as a condition of employment. In fact, medical examination as a condition of employment is expressly required for certain occupations where the physical ability and condition of an applicant are essential to the work to be performed (eg, heavy lifting or dangerous work, work under harmful or hazardous conditions), and for certain categories of applicants (eg, employees of public food courts or children's healthcare organisations). Moreover, under the Health and Healthcare System Code, employers may not employ persons who have not undergone medical examinations for certain activities. Therefore, an employer may in some cases refuse to hire an applicant who does not undergo a medical examination and submit the results to the employer.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions on drug and alcohol testing of applicants. Moreover, certain normative acts even require such tests prior to employment (eg, for those who want to be employed in national security forces).

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

No, there are no such legal requirements (see question 3). The Labour Code permits an employer to provide exceptions, preferences and benefits to citizens requiring social and legal protection, and such exceptions, preferences and benefits are not considered discrimination.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes, a written employment contract is mandatory. Employment contracts must contain the following:

- parties' details:
  - for an employer–individual: surname, name and patronymic (if specified in the document certifying the identity); address of permanent place of residence and information on registration at such address; name, number and date of issue of the document certifying the identity; and individual identification number (business identification number);
  - for an employer–legal entity: full name and address of the employer; number and date of the state registration; and business identification number; and
  - for an employee: surname, name and patronymic (if specified in the identification document) of the employee; address of permanent place of residence and information on registration at such address; name, number and date of issue of the identification document; and individual identification number;
- job description in accordance with specific profession or qualification;
- location of work;
- employment contract term;
- starting date;
- work hours and rest time;
- remuneration;
- description of work conditions, guarantees and privileges where the work is recognised as heavy or is performed under harmful or hazardous conditions;
- rights and obligations of the employee;
- rights and obligations of the employer;
- procedure for the amendment and termination of the employment contract;
- liabilities of the parties;
- date of the employment contract and its serial number; and
- contract with a disabled person should also include terms and conditions on equipping the workplace.

11 To what extent are fixed-term employment contracts permissible?

The general rule is that employment contracts should be valid for at least one year. A fixed-term employment contract for a period of less than one year is permissible only:

- when there is a need for substitution of a temporarily absent employee;
- for the duration of a specific project or for the performance of seasonal works; or
- within the term of a work permit or permission of a foreign employee or foreign labour immigrant.

An expired employment contract may be extended for an undefined period or a period of not less than one year (such one-year extension may happen only twice). An employment contract with an employee of retirement age may be extended every year. An employment contract with the executive body of a legal entity (eg, CEO or president) must be concluded for a fixed term established by a company's constitutional documents or as agreed between an employee and employer in the employment contract within the permitted maximum term.

12 What is the maximum probationary period permitted by law?

The maximum probationary period is three months. However, such term may be extended up to six months for the CEO and his or her deputies, the chief accountant and his or her deputies, and heads of branches or representative offices.

13 What are the primary factors that distinguish an independent contractor from an employee?

Independent contractor work is governed by civil law contract rules (eg, service agreement). Independent contractors are free to determine and agree on the terms and conditions of their work. Employees, on the other hand, are hired based on employment contracts governed by the Labour Code, are part of an employer's operational organisation, perform work personally and specific to their roles within the organisation, are paid on a monthly basis regardless of the results of their work and must comply with internal labour policies. Independent contractors may be subject to, depending on the terms and conditions of the relevant service agreement, material (commercial) liabilities for undue provision of services.

14 Is there any legislation governing temporary staffing through recruitment agencies?

No, there are no such specific regulations. Recruitment agencies may provide their services based on regular commercial service agreements.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Business visas are issued to foreign nationals travelling to Kazakhstan for short-term business purposes. There are three categories of business visas depending on the purpose of entry. Within each category, single-entry and multiple-entry visas may be issued. A single entry visa is issued for 90 calendar days. Multiple-entry business visas may be issued for the maximum period of one year. Depending on the category, the duration of a foreign national's visit to Kazakhstan should not exceed 30–90 days.

An employee transferring from a foreign corporate entity to work for a related entity in Kazakhstan must obtain a work visa. A work visa is issued on the basis of a work permit and for the term of three years or the term of the work permit.

16 Are spouses of authorised workers entitled to work?

No, spouses of authorised workers (ie, workers holding a valid work permit) are not entitled to work.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

A Kazakhstan employer may employ foreign nationals on the basis of a validly issued work permit. The number of issued work permits may not exceed the yearly quota for foreign labour set annually by the Kazakhstan government. The issuance of work permits is subject to detailed statutory requirements. Certain foreign nationals and categories of employees are exempt from work permit requirements. Obtainment of work permits is a time-consuming and document-intensive process.

Employing a foreign national who is not entitled to work in Kazakhstan constitutes an administrative offence. The maximum fine is approximately US$7,000 for the employer, and foreign nationals illegally residing in Kazakhstan and engaged in labour activity without a required work permit may be fined up to approximately US$175, be arrested for 10 days or be deported from Kazakhstan.

18 Is a labour market test required as a precursor to a short or long-term visa?

Labour market tests are not required for short- or long-term business visas, as well as for most work permits. A labour market test is, however, a prerequisite to receiving a certain type of work permit (inter-corporate transfer) and subsequent work visa. The authorities will consider a work permit application if there are no local employees qualified for the vacancy. The employer is required to notify a state authority about the open position. If within 15 days no local candidates with sufficient qualifications have been found, the employer may apply for an inter-corporate transfer.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Under the Labour Code, the number of normal working hours should not exceed 40 hours per week.

The following limited working hours per week have been established for those younger than 18 years old:

- from 14 to 16 years old – not more than 24 hours; and
- from 16 to 18 years old – not more than 36 hours.

For employees involved in dangerous work or working under harmful or hazardous conditions, and for certain disabled people, the maximum number of hours is 36 hours per week.

The maximum daily working hours in a regular working week (Monday to Friday) or extended working week (Monday to Saturday) is eight hours. Alternative daily working-hour arrangements may be established for certain categories of employees (eg, sportspeople or journalists).

Overtime work should not exceed two hours a day for each employee or one hour for employees engaged in dangerous work or working under harmful or hazardous conditions. The total amount of overtime work for all employees should not exceed 12 hours a month and 120 hours a year.

Also, the Labour Code permits shift work and cumulative hour schemes for work that, owing to its nature, cannot follow regular working-hour requirements.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All workers are entitled to overtime pay if they are engaged in overtime work. Pregnant women, disabled employees and employees younger than 18 years old cannot be engaged in overtime work. The Labour Code sets minimum rates for overtime pay, which may be increased by employment contract or collective bargaining agreements. The calculation of overtime pay depends on the payroll system established by the employer; however, overtime pay must be no less than 50 per cent or 1.5 of the daily (hourly) rate of the employee.

21 Can employees contractually waive the right to overtime pay?

As a matter of practice, yes. However, the state labour authorities do not support such practice and this type of contractual waiver may result in the administrative liability of an employer.

22 Is there any legislation establishing the right to annual vacation and holidays?

Annual paid vacation is mandatory. Minimum annual paid vacation is 24 calendar days, unless a greater number of days are provided by some other regulatory legal act, employment contract, collective bargaining agreement or the employer. Additional paid vacation must be provided to the following employees:

- persons engaged in dangerous work or working under harmful or hazardous conditions: at least six additional calendar days per year; and
- disabled persons of the first and second categories: at least six calendar days per year.

Annual paid vacation accrues at a rate of one-twelfth of the annual paid vacation per completed month. The amount of annual paid vacation is calculated in calendar days without counting holidays that fall on vacation days, regardless of applicable work regimes and work schedules. When calculating the total amount of an annual paid vacation, additional paid vacation must be added to the main annual paid vacation.

There are 12 public holidays per year.

23 Is there any legislation establishing the right to sick leave or sick pay?

Employees have the right to sick leave and sick pay. Sick leave must be supported by a medical certificate issued by a licensed doctor. Sick leave cannot be longer than two months. The level of sick pay is determined on the basis of the employee's average daily income multiplied by the number of working days during which the employee was on a sick leave.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The Labour Code sets out the following types of leave of absence (in addition to annual vacation described in question 22):

- leave without pay;
- study leave;
- maternity leave or leave for adopting a newborn child; and
- leave without pay for taking care of a child under three years old.

Employers are obliged to grant employees leave without pay for up to five calendar days for marriage registration, birth of a child, death of close relatives and as provided in employment contracts and collective bargaining agreements. In other cases, employees are allowed to take leave without pay with the employer's prior consent.

Study leave is granted to employees enrolled in educational institutions to prepare for and take tests or exams, participate in training or research projects, prepare and defend theses (projects), or participate in military training programmes. Paid study leave is determined by employment contract and collective bargaining agreement.

Maternity leave commences 70 calendar days prior to expected childbirth and ends 56 calendar days after childbirth (70 days in the case of multiple births or post-birth complications). Leave for adoption of a newborn children is provided to one of the parents on the day of adoption and for 56 days after childbirth. During maternity leave or leave for adopting a newborn child, a woman (parent) receives social parental pay from the government, and the employer is required to make up the difference between maternity pay and the employee's average net compensation if such obligation is provided in the employment contract or collective bargaining agreement.

Leave for taking care of children under three years old is provided to one of the child's parents and is not paid by the employer.

25 What employee benefits are prescribed by law?

There are several types of social benefits and compensation packages, such as:

- mandatory pension deductions;
- social security benefits (comprises contingencies such as disability, survivorship, job loss, pregnancy and childbirth, adoption of newborn children, taking care of a child under one year old);
- occupational accidents insurance (borne by the employer);
- employees' temporary disability benefits (borne by the employer);
- compensation to workers employed in areas of environmental disaster and radiation risk;
- compensation to employees whose employment duties are associated with extensive travelling or away from their place of domicile; and
- compensation to employees with respect to dismissal from office due to:
  - downsizing or liquidation of the employer;
  - non-compliance of employer with the terms and conditions of the employment contract; or
  - decrease of production, works and services volume that resulted in a worsening of the employer's economic conditions.

26 Are there any special rules relating to part-time or fixed-term employees?

In general, no. The key difference is in the number of working hours only.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The Labour Code supports and provides for a non-compete and non-solicitation agreement between employer and employee. The practice on enforcement of these agreements is yet to be developed.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No, there is no such obligation under the law. The parties may agree on such terms in a non-compete and non-solicitation agreement.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Generally, an employer is liable for damages caused by the acts of its employees if those employees were performing employment duties or acted on the instructions and under the supervision of the employer.

An employer is not liable for damages caused by the acts of its employees if an employee commits an offence that does not fall under the employee's employment duties. Under certain circumstances, an employer may seek restitution from the employee for incurred damages.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employee remuneration is subject to income tax, mandatory pension fund contributions, social tax and social insurance contributions. Income tax and pension fund contributions are deducted from the employees' gross wages and withheld and paid to the state budget by the employer. Social tax and social insurance contributions are the responsibility of the employer. The remuneration of foreign national employees is also subject to taxation in Kazakhstan, but they are not required to make mandatory pension fund contributions.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Employer and employee IP relations are primarily governed by the Civil Code and the Law on Copyright and Related Rights. Generally, IP created by employees as a result of performing employment duties becomes the employer's property.

32 Is there any legislation protecting trade secrets and other confidential business information?

The Labour Code provides for an employee's obligation not to disclose commercial and other protected secrets that he or she learned while or as a result of performing employment duties. Under the Civil Code, an employee who breached his or her non-disclosure obligations under the employment contract should compensate the employer for any damages caused.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Labour Code protects employee personal information. An employer's obligations with respect to employee personal information include:

- prohibition to disclose employee personal information to third parties without the employee's written consent;
- arranging access to employee personal information only to authorised persons (the employer must designate a person or persons within the organisation to be responsible for maintenance of employee personal information);
- provision of employee personal information within the employer's organisation in accordance with Law No. 94-V on Personal Data and Protection, dated 21 May 2013; and
- free of charge access for the employee to his or her personal information.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Change of an employer's name, departmental affiliation (for state authorities), change of owner or reorganisation should not affect employment relations with its employees.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

There must be a cause for dismissal of an employee upon the employer's initiative. The Labour Code provides the following exhaustive grounds (causes) for the dismissal of employees at an employer's initiative:

- the employer undergoing liquidation or ceasing entrepreneurial activity (for individuals);
- the employer downsizing personnel;
- the decrease of production works and services volume that resulted in worsening the employer's economic conditions;
- the employee not being qualified to perform his or her duties as confirmed by the results of the relevant performance test;
- the employee repeatedly failing to pass the Health and Safety Executive (HSE) test if the employee is responsible for HSE in a production organisation;
- the employee not being fit to perform duties for health reasons;
- the employee displaying poor work performance during a probationary period;
- the employee being absent from work without a valid excuse for three or more consecutive hours during one workday;
- the employee being intoxicated or using substances that cause alcoholic, drug or psychoactive intoxication (or an analogous substance) during the workday;
- the employee refusing to undergo drug testing;
- the employee violating health or safety rules that caused or could have had grave consequences, such as injuries or accidents;
- the employee stealing or intentionally destroying or damaging other people's property and such actions being confirmed by a legally binding court decision;
- an action or omission by an employee who is responsible for valuables results in a loss of trust;
- immoral misconduct by an employee serving in an educational role resulting in such employee no longer being fit to serve in such role;

- the employee disclosing information that was acquired during the performance of his or her job duties and that constitutes a state secret or other legally protected information;
- the employee repeatedly failing to perform or repeatedly improperly performing work duties without a valid reason, if the employee has previously been disciplined;
- the employee's access to state secrets being terminated under grounds established by law;
- the employee knowingly submitting false documents or information to the employer when concluding the employment contract;
- the head of the executive body of the employer, his or her deputy, or the head of the department violating labour responsibilities, which caused material damage to the employer;
- the employee being absent from work for more than two months in a row due to a temporary disability, except when an employee is on maternity leave or if the disease is in the list of diseases for which a longer period of disability is provided as approved by the competent state authority; the employee is entitled to his or her job (position) until his or her recovery is established;
- the employee committing a corrupt offence making such employee no longer fit to serve in such role;
- the employee continuing his or her participation in a strike after a court decision declaring the strike illegal has been issued or the employee knew the strike had been suspended;
- the termination of the authorities of a CEO, board member, internal auditor, or corporate secretary in accordance with the law;
- the employee reaching the retirement age;
- the employee being absent from work for more than one month for an unknown reason; or
- conversion of a part-time contract for a fixed-term contract.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

An employer must give at least one month's notice prior to termination in case of dismissal due to the employer's liquidation and downsizing of personnel, unless a longer notification period is stipulated in the employment contract or collective bargaining agreement. Dismissal may occur earlier with the employee's written consent.

An employer must give 15 business days' prior notice of termination in the case of dismissal due to decrease of production works and services volume that resulted in worsening of the employer's economic conditions, unless a longer notification period is stipulated in the employment contract or collective bargaining agreement. With the parties' mutual agreement, the notification period may be shortened or replaced by paying salary in proportion to the notice period.

An employer must give at least one month's notice prior to termination in the case of dismissal due to the employee's reaching the retirement age.

Compensation may be paid if there is a provision in the employment contract or collective bargaining agreement. Notice is not required with respect to termination of an employee on grounds provided in the Labour Code (see question 37).

An employment contract may provide the employer the right to dismiss an employee under the parties' agreement without notification and with severance pay in an amount determined in the employment contract.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Employees may be dismissed without notice in the following cases:

- the employee not being fit to perform duties due to health reasons on the basis of a certified medical report;
- the employee not being qualified to perform his or her duties on the basis of a decision of an attestation commission;
- the employee repeatedly failing to pass the HSE test if such employee is responsible for HSE in a production organisation;
- the employee displaying poor work performance during the probation period;
- the employee being intoxicated or using substances that cause alcoholic, drug or psychoactive intoxication (or an analogous substance) during the workday;
- the employee refusing to undergo drug testing;
- the employee repeatedly failing to perform or repeatedly performing work duties improperly without a valid reason, if the employee has been previously disciplined;
- the employee being absent from his or her workplace without a valid excuse for three hours or more in one workday;
- the employee violating health or safety rules that caused or could have caused grave consequences, such as injuries or accidents;
- the employee stealing or intentionally destroying or damaging other people's property and such actions being confirmed by a legally binding court decision;
- an action or omission of an employee who is responsible for valuables, which results in a loss of trust;
- immoral misconduct by an employee serving in an educational role resulting in such employee no longer being fit to serve in such role;
- the employee disclosing information that was acquired during the performance of his or her duties and that constitutes a state secret or other legally protected information;
- the employee's access to state secrets being terminated under grounds established by law;
- the employee knowingly submitting false documents or information to the employer when concluding the employment contract;
- the head of the executive body of the employer, his or her deputy, or the head of the department violating labour responsibilities, which caused material damage to the employer;
- the employee being absent from work for more than two months in a row due to a temporary disability, except when an employee is on maternity leave or if the disease is on the list of diseases for which a longer period of disability is provided as approved by the competent authority; such employee is entitled to retain his or her role until his or her recovery is established;
- the employee commits a corrupt offence, making such employee no longer fit to serve in his or her role;
- the employee continues his or her participation in a strike after a court decision declaring the strike illegal is issued or the employee knows the strike has been suspended;
- the termination of the authorities of a CEO, board member, internal auditor, or corporate secretary in accordance with the law; or
- the employee being absent from work for more than one month for unknown reasons.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

An employee's right to severance pay is limited to a number of circumstances. An employee who is being dismissed on the ground of liquidation of the employer or downsizing of personnel or due to the employer's non-compliance with the terms and conditions of the employment contract is entitled to compensation in the amount of one average monthly salary. An employee who is being dismissed on the ground of the decrease of production, works, and services volume that has resulted in worsening of the employer's economic conditions is entitled to compensation in the amount of two average monthly salaries. An employment contract or collective bargaining agreement may provide for larger amounts of compensation payable for termination of employment. An employment contract may provide the employer with the right to dismiss an employee under the parties' agreement without notification and with severance pay in an amount determined in such employment contract.

39 Are there any procedural requirements for dismissing an employee?

Generally, dismissing an employee is an internal matter and not reported to the authorities. When dismissing an employee who is a member of a trade union, a well-grounded opinion of the trade union should be taken into account, except for cases when the dismissal was caused by the liquidation of the employer.

40 In what circumstances are employees protected from dismissal?

Generally, employees may only be dismissed on grounds provided in the Labour Code. However, an employer may not dismiss an employee

Update and trends

On 2 February 2017, the Chamber of Entrepreneurs of Almaty issued a proposal to subject workers employed in seven specific areas of business to a verification test. The proposed test would give special certificates to those who pass it. While it has yet to be decided how exactly the results of this test will be implemented, the officials of the Chamber claim that these changes are needed because certain areas of business are overemployed, especially considering Kazakhstan's relatively low population. The verification test was designed with the goals of evaluating the level of staff professionalism; contributing to the development of the quality of human capital; and creating and upholding a high standard of product quality in the country.

In addition, the new rules on issuance of work permits for foreign citizens became effective on 1 January 2017. While these rules have abolished several obligations and procedures that employers previously needed to comply with, a new work permit fee was introduced (previously it was free). In general, these new rules are more pro-employer in comparison with previous rules.

Furthermore, in 2016, professional standards for 11 different categories of employees were adopted by the National Chamber of Entrepreneurs, with even more standards currently in development. Although these standards are more of a declarative nature, all these changes follow the pro-employer trend that started with the adoption of the new Labour Code in 2015.

Finally, on 31 January 2017, the National Chamber of Entrepreneurs reached an agreement with the Ministry of National Economy to decrease the amounts of deductions employers are required to pay as a mandatory social health insurance for employees (MSHI). In 2017 the percentage of MSHI payments made by employers will drop from 2 per cent to 1 per cent. This change is aimed at optimising the tax burden on entrepreneurs and generally continues the pro-employer trend in Kazakhstan.

on temporary sick leave or during his or her annual paid holidays, except where:

- the employer is undergoing liquidation;
- the CEO, his or her deputy, or the head of the department violated labour responsibilities, which caused material damage to the employer;
- the employee was absent from work for more than two months in a row due to temporary disability; or
- the termination of the authorities of CEO, board member, internal auditor, or corporate secretary in accordance with the law.

It is also forbidden to dismiss pregnant women and women with small children under three years old, single mothers with children under 14 years old (disabled children under 18 years old) or any persons who raise such children without the mother due to staff reduction or decrease of production works and services volume that resulted in worsening of the employer's economic conditions.

41 Are there special rules for mass terminations or collective dismissals?

An employer is obligated to report to the labour authority the upcoming dismissal of employees in connection with its liquidation (termination of the entrepreneurial activity, if by an individual), downsizing of personnel (namely, reporting the number and types of employee and whom it may concern, and indicating the positions and professions, specialisations, skills, and salaries or wages of employees, and the terms under which they will be released) or decreasing production works and services volume that resulted in worsening of the employer's economic conditions, at least one month before the contemplated dismissal.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Collective actions are allowed. Collective and individual claims may be resolved through a conciliation commission, mediation commission, labour arbitration or court hearing, as the case may be (see question 4).

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

While a mandatory retirement age may not be imposed by an employer, an employer's policies may provide for material incentives for employees to retire earlier. Pension benefits are paid by the government to women from the age of 58 (this threshold is being increased gradually up to the age of 63 by 2027) and to men from the age of 63.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Parties may agree to the private arbitration of employment disputes, provided that the employment contract or collective bargaining agreement contains an arbitration clause. In practice, almost all labour disputes are resolved in the courts.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

It is impossible for an employee to waive statutory rights in full or in part. It may be possible to waive contractual rights, but the enforcement of such waivers is not well developed.

46 What are the limitation periods for bringing employment claims?

The Labour Code states that an employee may bring a job reinstatement claim to the conciliation commission within one month of receipt of an employer's notice of termination, and the court within two months of receipt of the decision of the conciliation commission. All other labour claims must be made within one year after the employee knew or should have known of the breach of his or her labour rights.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The Labour Standards Act (LSA) is the main statute that governs employment relations between an employer and employee. The main statute that governs employment relations between an organised labour union and employer is the Trade Union and Labour Relations Adjustment Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The LSA expressly prohibits discrimination based on gender, nationality, religion or social status.

The Gender Equality Employment and Work Family Balance Support Act likewise prohibits employment discrimination based on gender, focusing in particular on discrimination against women.

Under the Age Discrimination Prohibition in Employment and Aged Employment Promotion Act, all forms of age discrimination without reasonable cause in the workplace, whether direct or indirect, are prohibited.

The Employment Promotion and Vocational Rehabilitation for Disabled Persons Act prohibits discrimination against any employee based solely on an employee's disability for all work-related employer actions including hiring, promotion and job transfer.

The Protection of Fixed-Term and Part-Time Employees Act (PFPEA) and the Protection of Dispatched Workers Act stipulate that the salaries and benefits of non-regular workers should be equivalent to those of regular employees for the same or similar kinds of jobs.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Employment and Labour is the primary government agency.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Act on the Promotion of Participation and Cooperation of the Workers (the Act) mandates that a business or workplace employing 30 or more employees shall establish a Labour Management Council (LMC).

5 What are their powers?

The Act provides that certain matters are subject to consultation by the LMC. The matters subject to consultation are as follows:

- improvement of productivity and gain sharing;
- recruitment, placement, education and training of employees;
- employees' grievance handling;
- the improvement of occupational safety and health measures and working conditions and the promotion of employees' health;
- institutional improvement for personnel management;
- general rules of employment adjustment such as relocation, retraining, dismissal for managerial or technological reasons;
- administration of working hours and break time;
- improvement of system by which remuneration is paid, classified, structured, etc;
- introduction of new technology and machinery, or improvement of work processes;
- setting up or amendment of work rules;
- employees' stock ownership programme and other assistance to increase employees' property;
- improvement of welfare of employees;
- rewards given to the employee concerned for work-related inventions, etc;
- installment of employee surveillance facilities within the business place;
- supporting maternity protection and the compatibility of work and home for female employees; and
- other matters as to the cooperation between employees and employers.

Similarly, the Act requires the employer to report the following matters at ordinary meetings of the LMC:

- matters concerning the general management plan, and actual results;
- matters concerning quarterly production plans, and actual results;
- matters concerning the manpower plan; and
- matters relating to the economic and financial status of the company.

If the employer fails to comply with the above requirement, the employee members may require the employer to submit data and materials as to the matters above. If the employer, without just cause, fails to comply with the requirement, the employer may be subject to a criminal fine of up to 5 million won. On the other hand, the employee members may report and explain such matters requested by an employee to be reported at the meetings of the LMC.

The following matters are subject to resolution in the LMC:

- establishment of a basic plan on training and education, and skill development scheme;
- establishment and operation of welfare facilities;
- establishment of an Intra-house Welfare Fund;
- matters not agreed upon in a Grievance Handling Committee; and
- establishment of various committees composed of employees and management.

The LMC is required to make all resolutions known to employees promptly. A criminal fine of up to 10 million won may be imposed if one fails, without just cause, to comply with an agreement reached in the LMC.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Background checks on applicants cannot be performed without the applicant's consent thereto, if such background checks involve soliciting information that is considered 'personal information' under the Personal Information Protection Act (PIPA). Consent is still required even when the personal background information is needed for employment purposes. Furthermore, according to the guidance of relevant administrative agencies, if the employer hires a third party to conduct the background check, in addition to the applicant's consent to the collection of background information (ie, personal information), an additional and separate consent from the applicant must be obtained with regard to the employer's provision of the applicant's personal information (eg, applicant's name, etc) to the third party.

Furthermore, please note that the Act on the Lapse of Criminal Sentences prohibits, for employment purposes, checking an applicant's past criminal record and acquiring the 'investigation card materials' (which contain the personal criminal and investigation records) of an applicant, even if this information is voluntarily obtained and submitted by the applicant. Aside from the actual criminal record and investigation card materials, information pertaining to the applicant's criminal record is considered 'personal information' and, specifically, 'sensitive information' under the PIPA, and collection of this sensitive information would require consent thereto, in addition to and separate from consenting to the collection or use of other personal information.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Though it is not possible to obtain the applicant's medical records from his or her former employer (article 43 of the Occupational Safety and Health Act), it is possible to obtain them from the applicant's doctor if the applicant consents thereto (articles 19 and 21 of the Medical Act).

It is also possible to receive the applicant's medical record directly from the applicant, but in the event of requesting information about a physical examination, because information pertaining to a person's physical examination is considered 'sensitive information' under the PIPA, consent thereto must be obtained, which is in addition to and separate from any consent to the collection or use of other personal information. When obtaining consent from the applicant, the employer is required to inform the applicant that he or she has a right to refuse to give consent and, if the applicant will suffer any disadvantage from the refusal, to inform the applicant of those disadvantages as well.

If the employer informs the applicant that he or she may be refused employment if he or she refuses to consent to the collection of sensitive information, the employer can, on the basis of the applicant's refusal, reject the applicant and not hire him or her. However, if there is no reasonable ground to justify the non-hiring, the applicant could raise a claim with the National Human Rights Commission. The Occupational Safety and Health Act had previously set forth a system whereby a medical examination was to be performed at the time of hiring; however, this was repealed and removed from the Act as there were concerns that the medical examination could be misused for the purposes of restricting hiring and discriminating against those who may have an illness or disease.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions against the drug and alcohol testing of applicants. However, under the PIPA, information concerning the results of such drug and alcohol testing is 'sensitive information' and thus its collection requires consent from the applicant (which is in addition to and separate from any consent to the collection or use of other personal information). Again, when obtaining consent from the applicant with regards to the collection of this sensitive information, the employer is required to inform the applicant that he or she has a right to refuse giving consent and, if any disadvantage will result from the refusal, to inform the applicant of those disadvantages as well.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Yes, there are certain legal requirements with regard to the ratio of veterans and disabled persons that employers must hire. An employer who fails to do so will be subject to a fine (article 33(2) of the Act on the Honourable Treatment and Support of Persons, etc of Distinguished Services to the State, and article 28 of the Employment Promotion and Vocational Rehabilitation of Disabled Persons Act).

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Article 17 of the LSA requires all employers executing employment agreements in Korea to specify in writing the following: wage, working hours, weekly paid days off, paid annual leave, workplace, content of work, opening and closing hours, recess hours, holiday, shift work, calculation method of salary and other working conditions.

11 To what extent are fixed-term employment contracts permissible?

In principle, the maximum duration of a fixed-term employment contract is two years (article 4(1) of the Fixed-Term and Part-Time Workers Act).

12 What is the maximum probationary period permitted by law?

Although Korean law does not set forth the specific maximum probationary period that is permissible, a probationary period that is considered excessive and unreasonable can be deemed to be invalid or even to constitute discrimination against the employee with respect to his or her working conditions. In any case, the 'just cause' requirement to terminate an employee still applies in the case of termination of employment at the end of the probationary period, though the standard for evaluating whether the requirement was met may be more flexible in the case of termination of an employee during or at the end of the probationary period.

13 What are the primary factors that distinguish an independent contractor from an employee?

When determining whether an individual is an independent contractor or an employee, the Korean courts will not restrict their review to the form or terms of the contract executed between the parties but will examine the substance of the relationship between the employer and individual to see whether the individual was paid wages for work performed and if the individual was in a subordinate relationship to the employer. The following are the primary factors that are considered:

- whether the individual's scope of work is determined by the employer;
- whether the individual is subject to the employer's rules of employment or other internal policies;
- with respect to the work performance, whether the individual is subject to the employer's specific, individualised instruction and supervision;
- whether the individual's working hours and workplace are determined by and subject to the employer;
- whether the individual is replaceable in that the individual can hire a third party to perform the work in his or her place;
- whether it is the employer or individual who possesses the equipment, tools and raw materials;
- whether the payment provided to the individual is compensation for work performed, has a base amount and is of a fixed nature, and is subject to withholding taxes for income tax purposes;
- whether the relationship between the individual and employer is of an ongoing and exclusive nature;
- whether the individual is recognised and treated as an employee under the social security system and related laws; and
- the totality of circumstances, including the parties' economic and social conditions.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Employment Security Act sets forth the requirements for conducting a recruiting business in Korea. Under the Employment Security Act, a person who wants to engage in a recruiting business for profit shall be registered with the Ministry of Employment and Labour (MOEL) or local municipal government office and a person who wants to engage in a recruiting business for non-profit shall file a report to the MOEL or local municipal government office. The Employment Security Act prohibits the recruiting agency from false advertising or stating false recruiting conditions and provides that a job offeror who files a job-offering application with the head of an employment security office shall specify the details and working terms and conditions of the job in which the job applicant is to be employed. A violation of the requirements of the Employment Security Act may result in the responsible persons at the recruiting agency being subject to criminal liabilities.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

The short-term business visa, which permits stay in Korea for up to 90 days, does not have a specific limitation as to the maximum number of times an individual can enter into and stay in Korea during the visa period. However, a foreign worker who will be repeatedly entering into and staying in Korea on short-term business visas for a total period of four to five months or more in a one-year period should obtain an alien registration visa or other form of long-term visa from the immigration office. It is possible for a foreign worker who will be staying in Korea on an alien registration visa to change his or her place of employment to the Korean subsidiary of the offshore company and work as an employee of the Korean subsidiary.

16 Are spouses of authorised workers entitled to work?

The spouse of an authorised worker who is eligible for an F-3 dependent visa (ie, meets the F-3 visa requirements regarding work experience and educational qualifications) may work in Korea upon obtaining an F-3 dependent visa from the immigration office.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Under articles 18 and 94 of the Immigration Law, for a foreigner to be employed in Korea he or she must meet the requirements for staying in Korea and may only work at his or her designated workplace. A foreigner who does not meet the requirements to lawfully stay in Korea may be subject to a criminal penalty of up to three years' imprisonment or a fine of up to 20 million won (if he or she works in Korea or is hired by an employer in Korea), and may be subject to a criminal fine of up to 10 million won or one year's imprisonment (if he or she works at a place that is not the designated workplace).

18 Is a labour market test required as a precursor to a short or long-term visa?

Yes, a labour market test is required. In Korea, the work visa system (ie, the C-4 visa for a work term of less than 90 days, and the E-7 visa for a work term of 90 days or longer) was put in place to protect the domestic labour market and with the objective of limiting the employment of foreign workers to specialised positions that cannot be filled by the domestic workforce. In this regard, the authorities will check whether an employer who applied for a work visa for a foreign worker who is being hired first made an effort to hire a domestic worker for the position. Such efforts must be sufficiently explained and set forth in a work visa application. Also, though not required, it is advisable for employers to try to find a domestic worker for such position first with the help of headhunters or recruiters.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The working hours should be at most 40 hours a week (eight hours a day), but upon mutual agreement of the parties, may be extended by up to 12 additional hours of overtime per week (articles 50 and 53 of the LSA). Overtime work can be categorised as holiday work (ie, work performed on a holiday), extended work (ie, work performed beyond 40 hours a week or eight hours a day) or night-time work (ie, work performed between 10pm and 6am).

In the past, the Ministry of Employment and Labour was of the position that any holiday work (eg, work performed on Saturday and Sunday) performed would not be counted towards the 12 additional hours of overtime work permitted under the law and, therefore, it was possible for an employee who worked for an employer with a five-day working week to lawfully work an additional 16 hours of holiday work (eight hours per each weekend day). However, recently, lower courts have held that holiday work performed counts toward the 12 additional overtime work hours limit and, thus, employees now can only work at most 52 hours a week (40 working hours plus 12 additional overtime hours). This issue is currently pending at the Supreme Court.

A pregnant female employee, however, is prohibited from working overtime, whether in the form of holiday work, extended work or night-time work (article 74 of the LSA). Also, a female employee who has given birth in the past year may not be required to work more than two hours of overtime work a day, more than six hours of overtime work a week or more than 150 hours of overtime work per year (article 71 of the LSA).

20 What categories of workers are entitled to overtime pay and how is it calculated?

All workers except those whose work involves surveillance or intermittent work and for whom the employer has obtained approval not to provide overtime pay from the Ministry of Employment and Labour, supervision or management of others, or handling of confidential information, are entitled to compensation for holiday work, extended work and night-time work performed.

The compensation for overtime work (whether holiday work, extended work or night-time work) is the normal wage for those hours worked plus a 50 per cent wage premium for those hours worked (article 56 of the LSA). Wages in this case refer to ordinary wages, which include any payments to the employee that are regular, fixed, uniform and paid for an employee's prescribed labour. There is a question about whether the 50 per cent wage premium for work performed during these hours is calculated in the aggregate (ie, whether an employee who works on Sundays or other days off is entitled to receive the 50 per cent wage premium for overtime work and a 50 per cent premium for holiday work, resulting in a 100 per cent wage premium). The Supreme Court is expected to rule on this issue soon.

21 Can employees contractually waive the right to overtime pay?

Yes, if the waiver is genuinely voluntary. However, if the employer and employee agree ahead of time that the employee shall waive all rights to future overtime pay and statutory allowances, such waiver is a violation of article 15 of the LSA and shall not be deemed effective.

22 Is there any legislation establishing the right to annual vacation and holidays?

Under the LSA, an employer must allow its employees one paid holiday per week on average, which in practice is the Sunday of each week. Further, 1 May of each year is designated as Labour Day in Korea and is a paid holiday. An employer has no legal obligation to treat other national holidays as paid holidays, but treating them as such is a firmly embedded market practice.

Under the LSA, an employer must allow 15 paid annual vacation days to employees who have worked 80 per cent or more of one work year from the commencement of work. One day of paid leave every month is permitted for employees who have worked for a month (every

30 days from the commencement of work) but who have continuously worked for less than one year or employees who have worked for a month but have worked for less than 80 per cent of the previous year.

An employer must grant additional paid leave days that are calculated by adding one day for every two continuously worked years after the first year if an employee has worked for three or more years; however, in no event shall the additional paid leave days exceed 25 days per year.

23 Is there any legislation establishing the right to sick leave or sick pay?

Employers are required under the LSA to provide paid leave for work-related illnesses or injuries, but there is no legal requirement for employers to provide paid sick leave to employees for non-work-related illnesses or injuries. However, it is not uncommon for companies to provide paid sick leave whether or not an injury or illness is work-related under the Rules of Employment.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Many employers in Korea voluntarily provide paid leave, including marriage leave, bereavement leave and leave for academic pursuits, but it is not mandatory.

25 What employee benefits are prescribed by law?

Retirement benefits, employment insurance, industrial accident compensation insurance, national health insurance and a national pension are required by law.

26 Are there any special rules relating to part-time or fixed-term employees?

The PFPEA provides certain protections to fixed-term and part-time employees and it applies to all businesses or workplaces in which no fewer than five employees are ordinarily employed.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Korean courts determine the enforceability of non-compete or non-solicitation covenants on a case-by-case basis, taking into consideration the totality of all relevant facts and circumstances. The Supreme Court ruled that, in determining enforceability, the courts must consider the interests of the employer that are worth protecting, the status of the former employee at the time of termination, the period, territorial boundary and profession (type of work) subject to the restrictive covenant, whether consideration for the restrictive covenant has been offered, the circumstances behind the employment termination, public interest and any other relevant factors (2009Da82244, Supreme Court, 11 March 2010).

If the term of the restrictive covenant is deemed excessively long, the court may, at its discretion, adjust the term to a reasonable period. Subject to variations depending on the individual case, the courts have generally found terms of six months to two years enforceable.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

There is no statutory duty to pay the former employee any consideration for the restrictive covenant. Theoretically, therefore, a restrictive covenant without any pay could be found enforceable. In practice, however, the courts will take into account the fact that no consideration is paid as a factor in determining the enforceability of the covenant.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

In general, an employer may be held liable for damages to a third party for the acts committed by an employee in connection with performing his or her duties (article 756 of the Civil Act).

Court precedents suggest that an employer may be found liable irrespective of the formalities of employment (eg, whether there is an employment agreement between the employer and the employee, and whether the agreement is an employment agreement or an independent contractor agreement), as long as the employer had actual supervision and control over the employee. The employer may also be found liable even if the act itself is not the employee's duty, as long as the act objectively appears related to his or her duties (ie, the act is committed in the course of performing the duties, in close proximity to the employer's business in terms of time and location, or the motive for committing the act is related to performing the duties).

However, taking substantial precautions in appointing the employee and exercising supervision and control over the employee may be a defence for the employer. In other words, if the employer had taken substantial steps to try to prevent such act, the employer may be exonerated from liability for damages even if the employer did not actually prevent the act.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Income tax on wages. An employer has a duty to withhold taxes on remunerations paid. The tax rates vary depending on the type of remuneration (eg, the tax rate for severance pay is lower than the tax rate on bonuses).

Aside from taxes, an employer is obligated to make social insurance contributions (in whole or in part depending on the type of social insurance), including the following:

- national pension (social security);
- medical insurance;
- unemployment insurance; and
- industrial accident insurance (workers' compensation).

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Employee inventions are generally governed by the Invention Promotion Act (IPA). Under the IPA, an 'in-service invention' is an invention created by an employee in relation to his or her duties, which by its nature falls within the scope of the business of the employer, and creating the invention falls within present or past duties of the employee (article 2, subparagraph 2 of the IPA).

In general, patent rights (including rights under the utility model and design registrations) vest in the employee who created the invention, in the absence of any contractual provision or the employer's internal regulation to the contrary, or a separate contract of assignment. The employer is entitled to a royalty-free, non-exclusive licence to use in-service inventions (article 10 of the IPA).

32 Is there any legislation protecting trade secrets and other confidential business information?

In South Korea, trade secrets are protected under two statutes, which are known as the Unfair Competition Prevention and Trade Secret Protection Act (hereinafter the Unfair Competition Prevention Act) and the Act on Protection and Prevention of Disclosure of Industrial Technology Act (hereinafter the Industrial Technology Protection Act), as well as the general Civil Code and the general Criminal Code. The relevant protections under such laws are described below.

Unfair Competition Prevention Act

The Unfair Competition Prevention Act is the basic law regarding the protection of trade secrets. Both civil and criminal actions may be brought for misappropriation of trade secrets under the Unfair Competition Prevention Act, which prohibits improperly acquiring the trade secrets of another party or using or disclosing (including informing under confidence) the trade secrets acquired in such a manner.

Industrial Technology Protection Act

The Industrial Technology Protection Act protects what is known as 'industrial technology'. Both civil action and criminal action may be brought for misappropriation of industrial technology under the

Update and trends

Discrimination and harassment claims
We are seeing an uptick in discrimination claims filed by employees. The discrimination claim is often based on the employee being a fixed-term employee (versus a permanent employee) or a manufacturing employee versus an office employee. Korean law provides for treble damages for discrimination violations against non-regular workers.

Similarly, we are seeing an uptick in the amount of harassment claims being filed by employees, including power harassment and sexual harassment. In principle, sexual harassment in the workplace is not criminally punishable. Only serious sexual violence is criminally punishable. However, the trend seems to be that the authorities are taking sexual harassment claims very seriously and more readily treating them as sexual violence crimes that are criminally punishable.

Also, while in the past Korean courts generally did not award significant damage compensation for mental distress claims, the trend seems to be that higher and higher damage compensation awards are being given to plaintiffs.

Expanding the scope of 'employee'
When it comes to using subcontracted workers, the principal company cannot supervise and control them. Based on past case precedents, companies could minimise the risk of violating the law by not co-mingling the subcontracted workers with its regular employees (ie, by having the subcontracted workers work in a physically different location or office space). However, according to a recent court case, just segregating the subcontracted workers is not enough. In that case, even though the subcontracted workers were segregated, the court found that the subcontracted workers were working under an 'integrated system' which was supervised and controlled by the principal company.

This creates greater risk to companies that use sub-contracted workers and therefore great care should be taken to avoid even the appearance of supervision and control.

MOEL's inspection plan to improve health and safety of workplaces
For 2017, MOEL's key objective in the area of compliance to the Occupational Safety and Health Act is to implement a more robust inspection regime, focusing on workplaces where the following types of activities are carried out:

- activities with risk of fire and explosions;
- activities involving the handling of hazardous chemical substances;
- operation of dangerous machinery and equipment; and
- dangerous construction activities.

In this regard, we expect that the MOEL will target several companies that present a risk to employee safety and health.

Reduction of working hours
Under the current law, it is permissible for an employee to work during holidays (when requested by the company) provided that the total number of holiday work hours does not exceed 16 hours. Under the Ministry of Employment and Labour's administrative interpretation, the 16 holiday work hours are excluded from the maximum overtime work hours permissible under the law (12 hours per week). Technically, therefore, it is permissible for an employee to work up to 68 hours per week (40 normal work hours plus 12 overtime work hours plus 16 holiday work hours) according to such interpretation.

Overtime allowance and holiday work allowance are premiums that must be paid on top of the normal hourly rates. However, in cases where an employee works during a holiday at hours that are not normal work hours (ie, 9am to 6pm), the question is whether both the overtime work allowance and the holiday work allowance must be paid – the Supreme Court is expected to rule on this issue, but the matter has already been pending for more than one year. In addition, a bill proposing to include the 16 holiday work hours in the maximum overtime work hours is pending before the National Assembly.

Industrial Technology Protection Act. Certain information can sometimes (but not always) constitute both a trade secret (protected under the Unfair Competition Prevention Act) and industrial technology (protected under the Industrial Technology Protection Act).

Civil Code
Although the Civil Code does not specifically cover breaches of trade secrets, such a breach may be considered a tort under the Civil Code. It is therefore possible to claim for damage compensation for such breach under the Civil Code in addition to remedies under the Unfair Competition Prevention Act.

Criminal Code
Although the Criminal Code does not specifically cover breaches of trade secrets, there are some provisions in the Criminal Code that may apply to such breaches.

The most commonly cited charge under the Criminal Code in relation to trade secrets is the breach of occupational duties under article 356 of the Criminal Code, which is a more serious form of breach of trust (sometimes referred to as a breach of fiduciary duty) than the general prohibition against breaches of duties under article 355. A breach of occupational duty is a breach committed by an individual who has a continuous contractual relationship with the principal (eg, an employee in an employee–employer relationship). Such a breach calls for greater sanctions than ordinary cases of breach of trust.

A typical case of breach of occupational duty in connection with trade secrets involves an employee obtaining files containing trade secrets in the course of his or her work, taking away such files (including through downloading them to an external disc drive or emailing them to a personal email account) or failing to delete or to return such files after the end of employment. Even when such an act may not meet all the requirements for a violation under the Unfair Competition Prevention Act, it might still be punishable under the Criminal Code as a breach of occupational duty.

If the former employee supplies to a competitor the confidential information he obtained in the course of his or her employment, this may constitute a leakage of trade secrets which could be subject to punishment under the Unfair Competition Prevention Act.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The PIPA regulates the collection, recording, keeping, use and disclosure of an individual's personal information.

In general, an employer may only collect the personal information of an employee to the minimum extent necessary. The employer must obtain the consent of the employee before collecting his or her personal information (unless expressly exempted by law), and the employer may not disclose or supply such information to another without consent of the employee.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Employment is generally transferrable in mergers, business transfers and splits. In the case of a merger, the employment is transferred automatically by operation of law (there is no duty to obtain consent of the employees). In the case of a business transfer, the courts have ruled that the employee has a right to refuse to be transferred. In the case of a split, court precedents suggest that discussion with and cooperation of employees is necessary (an employee is deemed to have no right to refuse being transferred if such steps have been taken by the employer).

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Korea is not an 'employment-at-will' jurisdiction. Under the LSA, an employer with five or more employees may not dismiss, suspend, transfer or take any other adverse employment action without establishing 'just cause' for its action (article 23 of the LSA).

What constitutes just cause is not expressly defined. Therefore, if a termination is challenged by the affected employee, the labour

authorities and courts will consider the totality of the circumstances to determine whether an employer has satisfied its burden of establishing 'just cause'. As a matter of practice and interpretation, it is a highly stringent and difficult standard to meet.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

If an employee is terminated on an involuntary basis, the company shall provide the employee with 30 days' prior notice or 30 days' ordinary wages in lieu thereof (article 26 of the LSA). The termination notice must be given in writing, specifying the reason for termination and the effective date (article 27 of the LSA).

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

The employer may be exempt from this requirement if it can establish that it is impossible to maintain its business due to a natural disaster or other unavoidable reason, if the employee intentionally causes substantial problems for the company or intentionally damages company property, or when the employee is within the probation period (article 26 of the LSA).

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Statutory separation pay

Under the Employee Retirement Benefit Security Act (ERBSA), the legal minimum separation payment obligation for employers is 30 days' average wage for each consecutive year of service. For purposes of calculating separation payments, 'average wage' includes all wages paid by the employer to the employee for the three-month period prior to the date of resignation or termination, divided by the total number of days during the same period (article 8 of the ERBSA).

Retirement benefits-defined benefit pension plan and defined contribution pension plan

Under the ERBSA, an employer may utilise private investments to create retirement and savings benefits for its employees. The employer will be required to adopt at least one of the following retirement benefit plans: a separation pay plan along the lines discussed above; or a retirement pension plan in the form of a defined benefit pension plan or defined contribution pension plan. The principal difference between these two pension plans is that, under the defined contribution pension plan, the amount of contributions made by the employer is fixed in advance, whereas under the defined benefit pension plan, the amount to be paid to employees upon their separation is fixed in advance.

39 Are there any procedural requirements for dismissing an employee?

An employer must provide the employee with 30 days' prior notice or 30 days' ordinary wages in lieu thereof (article 26 of the LSA). The termination notice must be given in writing, specifying the reason for termination and the effective date (article 27 of the LSA).

In the case of 10 per cent or more of the employees being laid off, the employer must file a report with the Minister of Employment and Labour at least 30 days before the layoff (article 24 of the LSA).

40 In what circumstances are employees protected from dismissal?

An employer may not dismiss an employee during the period of the employee's suspension from work and 30 days thereafter for medical treatment for injury or illness suffered while performing his or her duties, unless the employer has paid a lump sum compensation for his or her treatment in accordance with the LSA, or the employer can no longer carry out his or her business (article 23(2) of the LSA).

An employer may not dismiss an employee during the period of the employee's suspension from work for childbirth (whether before or after childbirth) and 30 days thereafter. The employer may not dismiss an employee during the period of the employee's childcare leave (article 23(2) of the LSA).

41 Are there special rules for mass terminations or collective dismissals?

An employer may collectively dismiss workers if it can satisfy the following four requirements:

- 'urgent business necessity';
- fair criteria for selecting the employees subject to layoffs;
- making every effort to avoid layoffs; and
- 50 days' prior notice and engaging in good-faith consultation with the labour union or representative of employees (article 24 of the LSA).

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Collective actions are permissible for labour unions that are duly established pursuant to the Trade Union and Labour Relations Adjustment Act.

An employee may assert labour and employment claims on an individual basis.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Under the Age Discrimination Prohibition in Employment and Aged Employment Promotion Act, the minimum retirement age shall be

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60. This will be effective from 1 January 2016 for companies with 300 or more employees and from 1 January 2017 for companies with fewer than 300 employees.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Yes. However, such agreement to private arbitration does not deprive an employee of his or her legal right to file a civil or criminal claim with the labour authorities.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

In principle, an agreement to waive claims or rights that have not vested is deemed null and void.

An agreement to waive claims or rights that have vested is enforceable as long as the agreement was reached voluntarily (without undue influence).

46 What are the limitation periods for bringing employment claims?

The statute of limitations for unpaid wage claims is three years.

Luxembourg

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Luxembourg employment law is primarily regulated by the Labour Code that came into force on 1 September 2006.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Law of 28 November 2006 (articles L251-1 to L254-1 of the Labour Code, as far as employment law is concerned) prohibits any direct or indirect discrimination based on religion, convictions, disability, age, sexual orientation, real or supposed belonging to a race or ethnic origin. Harassment or encouragements to harassment are considered as discrimination.

This prohibition applies to all persons, public or private, physical or moral as regards:

- conditions of access to employment, non-wage-earning activities or work, including the selection criteria and the recruiting conditions, whatever the business sector is, and to all levels of professional hierarchy, including in terms of advancement;
- access to all types and levels of professional orientation, professional training, improvement and training to change profession, including the acquiring of practical experience;
- conditions of employment and work, including conditions of dismissal and remuneration; and
- affiliation and commitment to a professional organisation (employees' professional organisation or employers' professional organisation) or to an organisation whose members practice a particular profession, including the benefits given by such types of organisations.

The Law of 13 May 2008 (article L241-1 to L245-8 of the Labour Code, as far as employment law is concerned) prohibits any direct or indirect discrimination based on gender in reference, notably, to gender reassignment, family situation or matrimonial situation. Harassment and sexual harassment as well as encouragements to harassment are considered as discrimination.

This prohibition applies to all persons, public or private, physical or moral as regards:

- conditions of access to employment, non-wage-earning activities or work, including the selection criteria and the recruiting conditions, whatever the business sector is, and to all levels of professional hierarchy, including in terms of advancement;
- access to all types and levels of professional orientation, professional training, improvement and training to change of profession, including the acquiring of practical experience;
- conditions of employment and work, including conditions of dismissal and remuneration; and
- affiliation and commitment to a professional organisation (employees' professional organisation or employers' professional organisation) or to an organisation whose members practice a particular profession, including the benefits given by such types of organisations.

In addition, article 454 of the Penal Code prohibits all discrimination on the grounds of origin, colour, sex, sexual orientation, family status, age, state of health, disability, moral, political or philosophical opinions, trade union activities, actual or supposed belonging to an ethnic group, a race or a particular religion, and belonging or not belonging to a group or a community. This article applies to natural persons as well as to members of a legal person. The latter may not be discriminated against because of the characteristics of its members.

The non-discrimination principle in the employment relationship is also notably provided by the following legislation:

- article L122-10 of the Labour Code on employees with fixed-term employment contracts provides that they may not be discriminated against in comparison with employees having open-ended employment contracts, notably as regards their remuneration conditions; and
- article L123-6 of the Labour Code as regards part-time workers, who may not be discriminated in comparison with full-time workers.

Finally, it should be noted that on 25 June 2009 the Luxembourg social partners reached an agreement on bullying and violence at work, which has been declared a general obligation by a Grand-Ducal Regulation dated 15 December 2009. It has, therefore, acquired full legal value and is now applicable to all companies established on Luxembourg territory since 16 January 2010.

Pursuant to article 2 of this agreement, bullying occurs when a person who is dependent upon the enterprise commits unauthorised, repeated and deliberate actions towards a worker or a manager, with the aim or effect of:

- either infringing their rights or their dignity;
- or damaging their working conditions or jeopardising their professional career by creating an intimidating, hostile, degrading, humiliating or offensive environment; or
- causing damage to their physical or mental health.

Acts can only be classified as bullying if they occur repeatedly. The agreement requires companies to introduce a transparent procedure for the prevention and management of bullying and violence at work.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Labour Inspectorate and the Labour Administration are responsible for the enforcement of employment statutes and regulations.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Labour Code provides for the compulsory establishment of:

- a staff delegation in companies regularly employing 15 workers or more, 12 months prior to the first day of the month of the posting of the announcement of elections; and
- employees' participation in the board of directors and supervising committee of a public limited company employing 1,000 workers or more over the past three years.

A major reform of employees' representation within companies was implemented on 1 January 2016, which notably abolished the Joint Works Councils (JWC). The most important change introduced by this reform is that, from the social elections taking place as from 1 January 2016, the staff delegation will take over the powers of the JWC in companies with 150 employees and more over the past 12 months.

Luxembourg legislation does not prohibit employers from establishing a works council or workers' committee in the workplace on a voluntarily basis, as long as the compulsory establishment of a staff delegation (and, if required, employees' participation in the board of directors and supervising committee of a public limited company) is observed.

In addition to the staff delegation, the Labour Code also provides for the establishment of special employees' representatives in certain companies:

- European Work Councils in companies employing 1,000 workers or more in European member states and at least 150 workers in two of these member states; and
- employees' participation in Societas Europaeas and in Cooperative European Companies.

5 What are their powers?

The staff delegation is vested with the general mission of protecting and defending the employees' interests.

In order to do so, the Labour Code provides that the staff delegation is vested with the following general attributions:

- to prevent and settle, with cooperation in mind, all individual and collective litigation that may arise between the employer and the salaried workers;
- to inform the employer about any claim, individual or collective;
- to seize, whenever one of the abovementioned litigations and claims could not be settled, the Labour Inspectorate of any complaint or observation as regards the application of legal, regulatory, administrative and conventional provisions concerning work and employment conditions, employees' rights and employees' protection during the practice of their profession;
- to be informed and consulted as regards the business life;
- to be informed and consulted concerning technical, economical, and financial matters in companies with 150 employees and more over the past 12 months; and
- to participate in some of the company's decisions in companies with 150 employees and more over the past 12 months.

In companies with 150 employees and more, the staff delegation shares the power of decision with the employer on certain specific matters:

- introduction or application of technical installations for the purpose of monitoring staff conduct and performance in the workplace;
- introduction or modification of measures concerning the health and safety of staff as well as the prevention of occupational illnesses;
- establishment or modification of the general criteria concerning the selection of persons with regard to recruitment, promotion, transfer, dismissal and, where applicable, priority criteria for early retirement;
- establishment and implementation of collective programmes or undertakings regarding continuing vocational training (new competence);
- establishment or modification of general criteria for the appraisal of the staff;
- preparation or modification of the internal regulations in accordance with the collective agreement in force; and
- granting of rewards to the staff who, through their initiatives or suggestions for technical improvements, have made a particularly useful contribution to the business.

As previously explained, the JWCs will cease to exist as from the social elections taking place after 1 January 2016. As from these elections, the tasks and duties previously assigned to JWCs will be transferred to the staff delegation within companies regularly employing 150 workers and more, 12 months prior to the first day of the month of the posting of the announcement of elections.

However, JWCs already in existence on 1 January 2016 will continue to carry out their tasks until the next social elections (eg, they will continue to hold the power of decision on the specific matters listed above, excepted as regards establishment and implementation of collective programmes or undertakings regarding continuing vocational training, which is a new competence of the staff delegation).

The suppression of the JWCs means that, beyond the social elections held after 1 January 2016, the employer will be required to inform and consult with the staff delegation, instead of (previously) the JWC, regarding technical, economic and financial issues as well as: facilities and equipment, manpower needs, training requirements, economic or financial decisions that may have a decisive impact on the business structure or employment level, economic and financial development of the business and information and consultation in joint stock companies, non-profit associations, cooperatives or foundations.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The legislation does not specifically rule, restrict or prohibit background checks on applicants. However, background checks must comply with the general principles resulting from the legislations on privacy, protection of personal data and discrimination. Hence, an employer or a third party may conduct background checks only if applicants are informed of the background checking process, its purposes as well as their right to access and rectify data. Furthermore, the processing operations shall be legitimate, operated loyally and proportionate to the objective sought (ie, limited to the data directly linked to and necessary for filling the vacant position). The processing of sensitive data such as religious beliefs, political opinions, sexual orientation or ethnicity, is subject to very restrictive rules.

In any event, any processing carried out on behalf of the data controller (ie, the prospective employer) must be subject to a written contract or legal instrument binding the third party (the processor) to the employer (the controller) and providing in particular that:

- the processor will act only under the instructions of the controller; and
- the controller's obligations regarding the security of processing operations will also be incumbent on the processor (article 22(3) of the Personal Data Law).

Finally, the processing of criminal data (ie, convictions, judicial proceedings, etc) shall be prescribed by law, otherwise it is strictly forbidden. Following the reform of the legislation on criminal records – in force as of 1 February 2017 – the employer may request the applicant's criminal record under the condition that such request is specified in the job advertisement and is justified by the specific needs of the position. The criminal records of an applicant cannot be kept longer than one month following the conclusion of the employment contract, whereas the criminal records of unsuccessful applicants must be destroyed immediately.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Article L326-1 of the Labour Code requires the fulfilment of a medical examination to be carried out by the medical officer prior to any employment (for jobs with a risk factor and night workers) or within the two-month period following the beginning of the employment relationship.

In the event of secondment or posting of employees from a foreign country to Luxembourg, a medical certificate from the country of origin is also required (posted work information, a specific form to be provided to the Labour Inspectorate, amended in December 2013).

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no specific legislation on drug and alcohol testing in the context of employment. Consumption of drugs and alcohol is part of individuals' private life.

On the other hand, the employer is responsible for health and security at work. The objective sought through drug and alcohol testing therefore needs to be balanced with individuals' rights to privacy. According to case law, drug and alcohol testing shall not be systematically performed on all employees, without regard for the nature of their position. Furthermore, only employees in high-risk positions shall

be subject to alcohol and drug testing with the aim to prevent security breach.

There is no known judgment on similar testing of job applicants. By way of deduction, applicants shall not systematically be subjected to drug and alcohol testing and, if done, such testing shall be limited to applicants in very specific positions with a high-risk profile. Consequently, prior to hiring an employee, the employer shall inform the medical officer of all the risks inherent to the job to be filled. The employer might also ask the medical officer to carry on further special medical tests and examinations. The medical officer alone will eventually decide whether to carry out the requested examinations.

Alcohol or drug tests might be considered as medical examinations (eg, biological samples such as urine tests), which can only be carried out by a physician, not by the employer.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Article L562-3(2) of the Labour Code requires the full-time employment of at least one disabled person in companies of at least 25 employees, if the Employment Administration (ADEM) receives a job application from a disabled person who meets the abilities and requirements of the company.

In companies of at least 50 employees, minority groups shall represent 2 per cent of the employees if the ADEM receives sufficient job applications from disabled persons who meet the abilities and requirements of the company. In the same circumstances, the rate of disabled workers should be 4 per cent in companies employing at least 300 workers.

The non-discrimination legislation described in question 2 is also applicable to applicants and newly hired employees. Thus, it is notably prohibited to directly or indirectly discriminate against applicants and newly hired employees based on gender, origin, family status, matrimonial situation, religion, convictions, disability, state of health, age, sex, sexual orientation, or real or supposed belonging to a race or ethnic origin or community.

In addition, according to article L242-3 of the Labour Code, an employer who wants to hire a person from the under-represented sex is allowed to notify or edit offers of employment favouring workers from the under-represented sex. To ensure full equality between men and women, the employer may provide for specific advantages aimed to facilitate the pursuance of a professional activity by the employees of the under-represented sex or to prevent or compensate the disadvantages occurring in the professional careers of these persons. To implement this discrimination, the employer shall hold a written certificate from the Ministry of Equal Chances stating that the under-represented sex may be favoured.

Article L243-1 of the Labour Code underlines that positive discrimination actions may be implemented to favour persons from the under-represented sex or compensate disadvantages in their professional careers. These positive discrimination actions may be provided within the frame of the recruitment process (before or after the recruitment), as well as within a new work organisation, specific training actions, measures related to the change of employment, promotion actions, actions favouring the access of the under-represented sex to high-responsibility jobs and measures aiming at a better reconciliation of professional and private life. Such positive actions shall fall within the frame of the company's corporate objectives.

Finally, it should be noted that article L241-4(2) of the Labour Code allows the keeping or the passing of specific measures aimed at preventing or compensating disadvantages on the ground of the person's family situation or matrimonial situation in order to guarantee equal treatment in practice.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

All employment contracts must be evidenced in writing and contain the following essential terms:

- names of the parties;
- date of the beginning of the employment relationship;
- place of employment (or employer's address if various places of employment);
- nature of employment (description of the tasks if necessary);
- employee's daily or weekly standard working hours;
- standard working schedule;
- employee's remuneration and accessories;
- length of paid holiday or method for determining it;
- length of notice period in the event of contract termination or method for determining it;
- length of trial period;
- any complementary provisions;
- any collective bargaining agreement governing the employee's working conditions; and
- any supplementary pension scheme.

In the absence of a written document, the employment contract may be proved by any other means of evidence by the employee.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible for the realisation of a definite and non-lasting task. They may not be concluded for filing a post resulting from the normal and permanent activity of the company.

In principle, such contracts may be renewed twice within a 24-month maximum period.

12 What is the maximum probationary period permitted by law?

The normal maximum probationary period is three months.

It is possible to extend the probationary period to six months for employees who have a professional qualification (ie, a certificate of technical and professional capacity).

Finally, a probationary period of up to 12 months can be fixed if the concerned employee earns a monthly salary of at least €4,258.73. The probationary period initially determined in the employment contract cannot be extended for the same position.

13 What are the primary factors that distinguish an independent contractor from an employee?

An employee may be distinguished from an independent contractor thanks to his or her subordination link. The independent contractor is entirely free to act as he or she wishes for the realisation of his or her work, whereas an employee is not.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Temporary work through agencies has been introduced by a Law of 19 May 1994. This Law has been then codified by the Law of 31 July 2006. The temporary work is now regulated by articles L. 131-1 to 131-21 of the Labour Code.

Two collective bargaining agreements covering the temporary sector have been signed by the social partners:

- collective bargaining agreement applicable to temporary agency workers; and
- collective bargaining agreement applicable to permanent workers of temporary work agencies.

These two collective bargaining agreements have been declared applicable to all temporary agency workers and to all permanent workers of temporary work agencies in Luxembourg through two grand-ducal regulations of 10 June 2014.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Third-country nationals who plan to enter Luxembourg territory must have a valid travel document (ie, ID or passport) and, if required a valid Schengen Visa (see Council Regulation (EC) No. 539/2001 of 15 March 2001 listing countries for which a visa is required). Third-country

nationals who intend to stay in Luxembourg for a short period, namely, less than three months, do not need a special permit to do so, except if during the stay they intend to take up employment or work freelance, they need prior work authorisation accordingly. Nevertheless, some activities, listed in article 35 of the amended Law of 29 August 2008 on the free movement of persons and immigration, are exempted from such prior authorisation of work if it is for less than three months.

The Uniform Schengen Visa stands for a permit of one of the Schengen Area member countries to transit or reside in the desired territory for a certain period of time up to the maximum of 90 days every six-month period starting from the date of entry. According to the purpose of travel, the Uniform Schengen Visa applies to all of the three categories, A, B and C.

C category stands for a short-term visa that allows its holder to reside in a Schengen country for a certain period of time depending on the visa validity. Short-term visas are also valid for the other member states of the Schengen Agreement, unless otherwise specified on the visa.

When applying for a visa extension, you must show that due to force majeure or for humanitarian reasons or for serious personal reasons it is not possible for you to leave Luxembourg before the expiry of your visa or the authorised period of stay. As a rule, the visa can only be extended if you have stayed for less than 90 days in the Schengen area, in the course of the past 180 days, and if your current visa is not expired.

A short-term visa does not allow its holder to work as an employee or as an independent. A work authorisation should be obtained in this regard. However, no work authorisation is required for third-country nationals who intend to carry out an intragroup provision of services (except the cases mentioned in article 35 of the amended Law of 29 August 2008 on free movement of persons and immigration).

16 Are spouses of authorised workers entitled to work?

The residence authorisation (allowing its holder to work) is not required for:

- the spouse, whatever his or her nationality, of a citizen from an EU member state or a citizen from one of the EEA countries or a citizen of Switzerland, who legally resides (with a temporary or permanent residence authorisation) in Luxembourg. Such spouse is allowed to work as an employee or as an independent (article 22 of the amended Law of 29 August 2008 on the free movement of persons and immigration); or
- the spouse, whatever his or her nationality, of a Luxembourgian citizen who resides in Luxembourg.

Nevertheless, a work permit is required for the spouse of an EU member state citizen who studies or follows professional training in an accredited private or public educational establishment in Luxembourg (article 22 of the amended Law of 29 August 2008 on the free movement of persons and immigration).

In all other cases, the residence authorisation granted to the worker's spouse does not give the right to work unless an authorisation to work as an ancillary occupation is requested.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Pursuant to the amended Law of 29 August 2008 on free movement of persons and immigration, only one single document, referred to as 'residence authorisation', serves the purposes of work permit and of residence permit. The extent of the residence authorisation depends on the applicant. The law mainly distinguishes four different types of applicants for work:

- workers as employees;
- highly qualified workers;
- workers temporarily assigned in Luxembourg within an intra-company transfer; and
- workers temporarily assigned to Luxembourg under the terms of a cross-border services agreement (posting of workers).

Please note that the new legislation transposing directives 2014/36/UE and 2014/66/UE provides new cases giving right to residence permit:

- workers holding a corporate mandate in addition to an employment contract;
- investors;
- seasonal workers;
- third-national workers temporarily assigned in Luxembourg in order to ensure the continuation of their entity's business – provided that the entity is duly registered as a certified entity in Luxembourg – in case of a major incident preventing the normal performance of the entity's business in the country of origin; and
- intra-corporate transfer for managers, specialists and trainee employees. The new legislation also distinguishes in this framework between a short (90 days within 180 days) and a long-stay (more than 90 days) permit.

A residence permit as worker is granted on request to the third-country national if the four following conditions are fulfilled (article 42 of the amended Law of 29 August 2008 on free movement of persons and immigration):

- it is not prejudicial to the priority of employment offered to some workers by EU regulations;
- the economic interests of the Grand-Duchy of Luxembourg must be served;
- the worker must have the required professional qualifications to carry out the activity; and
- the worker must hold an employment contract for this position, which has been previously declared vacant at the Employment Administration (ADEM) by the employer;

The residence authorisation as an employee is in this context valid for a period of one year, in one profession and one business activity, for any employer. It can be renewed for a three-year period, for whatever the profession or business activity.

One of the following conditions must also be fulfilled for the case of a worker holding an employment contract and a social mandate in the company, for which he or she could hold an establishment authorisation:

- the company must belong to a group of companies that will be established in Luxembourg. The company must also perform an activity provided by the law governing access to craft trade, commercial and industrial occupations, as well as certain professions, provided that the group has performed this activity for at least 24 months abroad and is considered as a medium-sized or large enterprise within the meaning of the Regulation (EC) No. 651/2014, or this activity fulfils a specific condition; or
- the company is established and truly active on Luxembourg territory.

A third-national allowed to stay must also demonstrate that he or she has appropriate accommodation at his or her disposal.

Thus, the employer shall first make a declaration of a vacant position to the Employment Administration (ADEM), in order to obtain, within three weeks, a certificate from the director of ADEM which states that no national has been hired and that the employer may hire the foreign worker. Then, the worker shall submit his or her request for a residence authorisation from his or her home country (ie, before his or her entry into Luxembourg), and send it to the Ministry of Foreign Affairs and Immigration. In the event of acceptance, the Ministry of Foreign Affairs and Immigration will send a letter ('temporary residence authorisation' (AST)), to the worker in his or her home country stating that he or she will receive his or her final residence authorisation once in Luxembourg. The worker then has three months from the date of issue of the AST to enter Luxembourg.

The worker shall also request a visa if needed in his or her country before entering Luxembourg. On entering Luxembourg, the worker needs to declare his or her arrival (ie, commune) to the town administration stating where he or she will be residing within the three days following his or her arrival. Finally, the worker shall present his or her declaration of arrival and the AST to the Ministry within the three-month period following the delivery of this letter, in order to obtain his or her 'final' residence authorisation.

The permit always has a fixed term, which is determined following the category of permit, and is renewable on request.

When an employer wishes to employ a group of workers subject to a residence authorisation allowing them to work, the employer may request a collective authorisation from the Ministry of Foreign Affairs and Immigration.

As regards highly qualified workers, a European Blue Card may be delivered to third-country workers with a higher education degree or at least five years of professional experience comparable to a higher education degree whose qualifications are needed for the position. The worker shall receive a remuneration that equals at least 1.5 times the average gross annual remuneration to be published on an annual basis by Grand-Ducal Regulation (or 1.2 times in specific cases not yet determined by the government). Currently, the minimum gross annual remuneration for all qualified workers requesting a Blue Card is fixed at €73,296 for 2016 (€58,636.80 for highly qualified workers in specific professions where the government has noticed a particular need to employ third-country nationals (mathematicians, actuaries and statisticians, systems analysts, software developers, web and multimedia developers, applications programmers, software and application developers and analysts, multimedia developers not listed elsewhere, database designers and administrators, systems administrators, computer network professionals, database and network professionals not elsewhere classified)).

The first residence authorisation for a highly qualified worker is valid for four years or for the length of the employment contract plus three months, provided that the length of the employment contract is less than four years, in the activities for which he or she received the European Blue Card, for any employer. It can be renewed upon request for four years or for the length of the employment contract plus three months, provided that the length of the employment contract is less than four years and for any employment contract which fulfils the conditions of higher professional qualifications.

As regards workers temporarily assigned (article 47 of the amended Law of 29 August 2008 on free movement of persons and immigration) also called 'transfer of employee' in Luxembourg within an intra-corporate transfer, a residence authorisation may be requested by the host company in Luxembourg for third-country national temporarily transferred to Luxembourg. The host entity shall:

- provide evidence that the host entity and the undertaking established in a third country belong to the same undertaking or group of undertakings;
- provide evidence of employment within the same undertaking or group of undertakings, from at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees;
- present a work contract and, if necessary, an assignment letter from the employer containing the following:
  - details of the duration of the transfer and the location of the host entity or entities;
  - evidence that the third-country national is taking a position as a manager, specialist or trainee employee in the host entity or entities in Luxembourg;
  - the remuneration as well as other terms and conditions of employment granted during the intra-corporate transfer; and
  - evidence that the third-country national will be able to transfer back to an entity belonging to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer;
- provide evidence that the third-country national has the professional qualifications and experience needed in the host entity to which he or she is to be transferred as manager or specialist or, in the case of a trainee employee, the university degree required;
- where applicable, present documentation certifying that the third-country national fulfils the conditions laid down under which union citizens exercise the regulated profession to which the application relates;
- provide evidence of having, or, having applied for, sickness insurance.

This residence authorisation (ICT) shall be submitted to the authorities of the member state where the first stay takes place. Where the first stay is not the longest, the application shall be submitted to the authorities of the member state where the longest overall stay is to take place during the transfer. An ICT permit is valid for at least one year or the duration of the transfer to Luxembourg, whichever is shorter, and may be extended to a maximum of three years for managers and specialists and one year for trainee employees.

During the period of validity of an intra-corporate transferee permit, the holder shall enjoy at least the following rights:

- the right to exercise the specific employment activity authorised under the permit in accordance with Luxembourg law in any host entity belonging to the undertaking or the group of undertakings in Luxembourg and to benefit from Luxembourg provisions of public order, including maximum working hours, minimum wage, minimum rest times applicable also during a secondment; and
- the right to the recognition of diplomas, certificates and other professional qualifications.

These rights shall also be enjoyed by holders of ICT delivered from a first member state

As regards cross-border services agreement (article 48 of the amended Law of 29 August 2008 on free movement of persons and immigration), also called 'secondment of employee', a residence authorisation shall be requested for foreign citizens temporarily assigned to Luxembourg under the terms of a cross-border services agreement entered into with companies established outside EU member states, EEA states or Switzerland.

This residence authorisation is not needed for foreign workers temporarily assigned to Luxembourg under cross-border services agreements with companies established in EU member states, EEA states or Switzerland as long as the assigned workers are authorised to work and stay in the country where their employer is established.

If the assignment exceeds a three-month period, the worker shall automatically be granted a residence authorisation bearing the words 'worker for a provider of community services'.

The work contract between the posted employee and the home company is of an undetermined duration and that the start date of this work contract must be at least six months prior to the request start date of the secondment.

This residence authorisation is valid for the duration of the period during which the services to be rendered on behalf of the company by whom he or she is seconded are to be provided. The authorisation can be renewed under exceptional circumstances if these services need to be continued over a longer period of time.

Sanctions for employing a foreign worker who does not have a right to work in the jurisdiction

If the employer employs a non-authorised workforce, he or she may be liable for an administrative fine of €2,500 for each non-authorised worker in accordance with article L-572-4 of the Labour Code.

An employer may also be liable to imprisonment from eight days to up to one year and a fine of €2,501 up to €20,000 for each unauthorised worker or to one of these sanctions (article L-572-5 of the Labour Law) if the employer fulfils one of the following conditions:

- the infringement is persistently repeated;
- the infringement concerns the simultaneous employment of a significant number of illegal third-country nationals;
- the infringement is accompanied by particularly exploitative working conditions;
- the infringement is committed by an employer who uses work or services from an illegally staying third-country national with the knowledge that she or he is a victim of trafficking in human beings; or
- the infringement relates to the illegal employment of a minor.

In addition, article L-572-6 of the Labour Code also foresees accessory criminal sanctions such as:

- interdiction up to three years to practise a social or professional activity related directly or indirectly to the primary infraction; or
- the temporary foreclosure up to five years of the definitive foreclosure of the company or establishment that was used for the primary infraction.

If the employer employs a worker without having notified a declaration of a vacant job to the National Employment Administration, it may be subject to a fine of €251 to €2,500.

18 Is a labour market test required as a precursor to a short or long-term visa?

As a reminder, short and long-term visas are required only for third-country citizens.

Short-term visa (ie, less than three months): there is no labour market test required because the short-term visa does not allow the holder to work in Luxembourg.

For a stay and work for more than three months: the employee must apply from his or her country of origin for an AST before entering Luxembourg. In this case, the employer must advertise the position at the Luxembourg employment office (ie, ADEM) through a declaration of a vacancy of the job. This declaration must include the employer's identity, the job description, the requested profile of the candidate, the work conditions and the offered salary, and be signed. The vacancy will be posted on the internal website of the ADEM for one month, to enable Luxembourgian citizens and other European Union nationals to apply for the job. Luxembourgian citizens and European Union nationals must be given priority.

An employer who has not been presented with a suitable candidate from ADEM within a reasonable delay following his or her declaration of a vacant position can request a certificate from the director of ADEM that will allow the employer to recruit a third-country national. In the case of a secondment, an additional procedure of notification has to be followed with the Inspectorate of Labour and Mines. This procedure (declaration of vacancy and certificate) is not necessary for highly qualified workers, intragroup transferred workers and workers temporarily assigned in Luxembourg under the terms of a cross-border services agreement.

Then, once arrived in Luxembourg, the applicant must apply for his or her final residence authorisation at the Immigration Directorate of the Ministry of Foreign Affairs before arrival in Luxembourg. This final residence authorisation will be granted to him or her after declaration of arrival in Luxembourg.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Luxembourg legislation establishes the normal working hours at eight hours per day and 40 hours per week. An employee may not opt out of such limitations.

It may be extended to a maximum of 10 hours per day and 48 hours per week provided that the average weekly hours over a reference period (four months maximum if there is no collective bargaining agreement) do not exceed 40 hours or any relevant collectively negotiated limit. A 'work organisation plan' shall be drawn up five days at the latest before the start of the work planning, submitted for the opinion of the employees' representatives if any, and displayed at the workplace. A work organisation plan may be replaced by a 'flexible organisation regulation', which allows salaried workers to organise their daily working hours and time on an individual basis in accordance with their personal needs as long as they respect operational needs, co-workers' justified needs and the maximum work time allowed (ie, 10 hours a day and 48 hours per week). An employee may, in principle, not refuse to opt for this work organisation.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employees (except executive managers) are entitled to time off at the rate of 1.5 hours of paid free time for each worked overtime hour. This time off may be replaced by a salary increase at the rate of 40 per cent of their working hour salary.

Overtime is work performed above eight hours per day and 40 hours per week, or above the average 40 hours per week of a reference period in case of a 'work organisation plan' or 'flexible organisation regulation'. There are also special dispositions relating to a reference period above one month, in case of change of work planning, and for part-time workers.

21 Can employees contractually waive the right to overtime pay?

In principle, employees cannot contractually waive the right to overtime pay. Such a clause would be declared as null and void by a tribunal in the case of litigation for being not favourable to the employee and contrary to public order. Nevertheless, there are some situations in which the employee may work more than eight hours per day and 40 hours per week without receiving overtime pay. This is notably the case when a work organisation plan or a flexible organisation regulation has been implemented within the company. Further, conditions for overtime pay shall not apply to workers who are executive managers; thus, when the employee is an executive manager, he or she may contractually waive the right to overtime pay.

22 Is there any legislation establishing the right to annual vacation and holidays?

The Labour Code provides that all full-time employees in the private sector are entitled to 10 public holidays (1 January, Easter Monday, 1 May, Ascension Day, Whit Monday, 23 June for the birthday of the Grand-Duc (national day), the Assumption, All Saint's Day, and 25 and 26 December) and to a standard period of annual leave of 25 working days, irrespective of the employees' age, upon the condition of a continuous service.

Annual leave must usually be taken during the calendar year but can exceptionally be postponed until:

- 31 March of the following year if the justified needs of the business or the legitimate wishes of other employees did not allow the employee to take the annual leave during the calendar year; or
- 31 December of the following year if the annual leave could not be taken during the first year of employment of the employee, provided that the employee asked for this postponement.

If the annual leave could not be taken during the calendar year due to the employee's sickness, parental or maternity leave, the leave is postponed until the employee is in a position to take his or her leave. If the employee does not take the leave while he or she was in a position to take it, the leave is lost for the employee at the above-mentioned dates.

23 Is there any legislation establishing the right to sick leave or sick pay?

The health insurance regime provides that for work incapability due to sickness or accident, loss of income is compensated by a monetary sickness indemnity.

Since the implementation of the Law on the single status on 1 January 2009, the employer has to pay the first 77 days of sickness of its employees (calculated using a 12-month reference period and without distinguishing whether the sickness period is interrupted by periods of work) as well as the end of the month during which the 77th day occurs. The employer will be reimbursed by the Employers' Mutual Insurance at the rate of 80 per cent of the wage declared to the Joint Centre Social Security Institute (in some cases, 100 per cent).

Then the employee receives indemnities from the Health Insurance Fund. The right to the monetary indemnity is limited to a total of 52 weeks within a base period of 104 weeks.

The Labour Code provides that employees shall inform their employer of their sickness, orally or in writing, on the first day of leave. In addition, at the latest on the third day of leave, employees shall deliver a medical certificate to their employer certifying their inability to work and the foreseen duration of the leave. If these conditions are fulfilled, the employer may not terminate employment contracts nor appoint employees to a pre-dismissal meeting during the 26-week period starting on the first day of the incapacity to work.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The Regulation of 30 March 2006 carrying the declaration of general obligation of an agreement on inter-professional social dialogue as regards the individual access to continuing vocational training provides for a right to unpaid leave. Only employees with at least two years' seniority may request unpaid leave. The vocational training must be delivered by legally recognised institutions. During the unpaid leave period, the employment contract is suspended. The unpaid leave period is not taken into account to calculate the employees' seniority. After the period of unpaid leave, the employer shall propose the same job or an equivalent one to the employee.

The total unpaid leave period may not exceed two years for each employer for whom the employee has worked. The minimal duration

of unpaid leave is four consecutive calendar weeks, and its maximum duration is six consecutive months.

Luxembourg legislation on labour law does not provide other unpaid leave, except through certain collective bargaining agreements, under specific conditions. Apart from collective agreements, such leave in the private sector is usually the result of a clause in the employment contract or an addendum to the contract of employment between the employer and the employee, in the manner determined by them.

Apart from those procedures, any leave of absence must be paid. However, the employee may not receive pay during leave that is not legally authorised or that has not been previously authorised by the employer.

Employees are nonetheless entitled to the following extraordinary paid leave days:

- one day on the death of a relative of second degree of the employee or of his or her spouse or partner and one day before the beginning of military service;
- two days for marriage or declaration of partnership of a child; moving house; hosting of a child under 16 for adoption purposes, unless the employee already benefits from a welcoming leave;
- two days for the father for the birth of a legitimate child or for the birth of a recognised natural child;
- three days on the death of a spouse or partner or relative of first degree of the employee or of his or her spouse or partner; and
- six days on the employee's own marriage or declaration of partnership.

They may also benefit from special paid leave periods such as maternity leave, parental leave, leave for individual training (80 days per professional career), linguistic leave to learn the Luxembourgian language (200 hours at the maximum), leave for sporting purposes, social mandate leave (as members of a professional chamber or representative in social institutions or associate judge in labour tribunals), youth leave, leave for development cooperation purposes and leave for family reasons.

25 What employee benefits are prescribed by law?

Luxembourg law provides for a minimum monthly gross salary as of 1 January 2017:

Employee's age	Monthly minimum wage (€)	Hourly minimum wage (€)
18 years and over (qualified workers)	2,398.30	13.863
18 years and over (non-qualified workers)	1,998.59	11.5525
17 to 18 years	1,598.87	9.242
15 to 17 years	1,498.94	8.6644

The wages provided for by the law, the collective labour agreements and the employment contracts are index-linked according to the cost of living. The index currently stands at €794.54.

26 Are there any special rules relating to part-time or fixed-term employees?

Part-time and fixed-term employees are subject to the same rules applicable to employees benefiting from indefinite employment contracts. Cases of resorting to fixed-term employment contracts are limited by law.

Regarding fixed-term employment contracts, the Law of 23 December 2013 notably modified article L.122-10 of the Labour Code and obliges the employer to inform employees engaged for fixed-term employment contracts of any vacant permanent position in the company.

It should be noted that part-time employees are nonetheless subject to restrictive rules as regards the pursuance of overtime working hours.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The non-compete clause must:

(i) be in writing and included in the employment contract;
(ii) be only applicable to employees running their own undertaking after the contract's termination;
(iii) be agreed by an employee who is at least 18 years old at the time of the signature of the agreement;
(iv) be applicable only where the annual salary of the concerned employee is at least €54,164.35at the date of termination of the contract;
(v) refer to a professional sector or to professional activities that are similar to those performed in the former company;
(vi) be limited to a 12-month period after the termination of the employment contract;
(vii) be geographically limited within the Grand Duchy of Luxembourg; and
(viii) be applicable only if the legal proceedings to terminate the employment contract have been respected by the employer.

If a court decides that points (ii), (v), (vi) (vii) or (viii) have not been respected, the clause will still be valid but will not be enforceable as regards the elements that are contrary to the law. On the other hand, if the court decides that points (i), (iii) or (iv) have not been respected, the clause will be null and void.

Luxembourg law does not specifically deal with the non-solicitation clause. Following article 1134 of the Civil Code, the contracts must be executed in good faith. Case law admits that regarding non-compete clauses, this principle can continue after the termination of the contract. As an application of the principle of good faith, the non-solicitation clause could also be admitted.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

There is no legal requirement in this regard. In particular, the non-compete clause is not subject to a payment by the employer.

However, additional payments may be negotiated as a counterpart to the restrictive covenants.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Article L121-9 of the Labour Code provides that the employer is generally liable for the risks generated by his or her company's activities. The employees are, however, liable for any damage owing to their voluntary acts or serious negligence.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Luxembourg's individual income tax rate is progressive and depends on individuals' personal status. Its marginal tax rate varies from zero to 42 per cent (for 2017 incomes).

As regards social security services, the chargeable rates vary upon the type of insurance and the type of sector of activity. On average, the total chargeable rate for sickness is 6.1 per cent (3.05 per cent paid by the employee and 3.05 per cent by the employer). It is 16 per cent for pension allowances (8 per cent paid by the employee and 8 per cent by the employer), 1.4 per cent for dependence insurance (paid by the sole employee), 1 per cent for accident insurance (paid by the sole employer), 0.51 to 2.92 per cent for employers' mutual insurance (paid by the sole employer), 0.11 per cent for health at workplace (paid by the sole employer). The state contributes towards family benefits.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Intellectual property rights in Luxembourg are governed by the modified Law of 20 July 1992 on patents and the modified Law of 18 April 2001 on copyright, related rights and database. As regards patents, unless the employment contract states otherwise, the invention will belong to the employer if it is discovered by the employee in the course of an inventive mission corresponding to his or her actual tasks or in the course of research explicitly delegated to him or her, or if the invention is devised by an employee in the course of his or her duties, in the company's particular field of activity, through the knowledge or use of techniques or means specific to the company or data procured by it.

The employee shall inform the employer of his or her invention and the latter shall confirm receipt. The employee and the employer shall communicate to each other all necessary information concerning the invention.

The employee is entitled to a fair share of the profits earned by the company thanks to his or her invention, provided the invention entails considerable profits for the company.

It shall be noted that although all other inventions belong to the employee, they may be transmitted.

As regards copyrights, related rights and databases, the authors have financial rights, moral rights, related rights and computer rights. Economic and financial rights arising in connection with computer programs belong, unless stated otherwise, to the employer whereas the moral right stays attached to the employee. Nonetheless, the moral right can be transferred from the employee to the employer.

32 Is there any legislation protecting trade secrets and other confidential business information?

Trade secrets and other confidential business information are protected by the Luxembourgian legislation and notably by the Criminal Code.

Article 309 of the Criminal Code provides a special protection for trade secrets during the execution of the employment contract and within a two-year period after the expiry of the contract. Indeed, article 309 of the Criminal Code provides that:

> *Whoever, being or having been employee, worker or apprentice to a commercial or industrial company, with the intent to compete with or harm his/her employer, or to obtain an improper advantage, uses or discloses during the term of his/her contract or within two years after its expiration, trade or fabrication secrets of which he or she has knowledge by reason of its position, shall be punished with imprisonment from three months to three years and a fine of €251 to €12,500.*

Pursuant to article 309, section 2 of the Criminal Code, the same punishment applies to anyone who, having the knowledge of trade or fabrication secrets belonging to a person, being through an employee, apprentice or worker acting in violation of the requirements of the preceding paragraph, or by an act contrary to law or morality, uses or discloses the secret, either for the purpose of competition or with intent to harm the person to whom they belong, or to obtain an improper advantage.

The use of trade or fabrication secrets can also constitute an act of unfair competition in certain circumstances under the Law of 30 July 2002.

Finally, article 1134 of the Civil Code states that agreements must be executed in good faith. According to this legal provision employees have a general obligation of loyalty during the execution of the employment contract. Such obligation survives to the contract. Article 1134 of the Civil Code could thus be invoked in a general manner if one party of the employment contract adopts an antitrust behaviour which causes harm to the other. The court will, however, analyse at its discretion whether damages are due for violation of article 1134 of the Civil Code.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Apart from international provisions, privacy is protected in Luxembourg by the Constitution and national laws.

According to article 11(3) of the Constitution, the state guarantees the right to protection of an individual's private life, except where the law provides for exemptions.

According to article 28 of the Constitution, the secrecy of correspondence is inviolable.

In application of the Law of 11 August 1982 on the protection of private life, everyone has a right to the protection of his or her private life. Consequently, nobody may open, read or listen to another person's private correspondences or conversations, without his or her consent.

In addition, article L261-1 of the Labour Code provides that an employer may collect by technical means and use personal data for the purpose of performing surveillance in the workplace only where it is necessary:

(i) for employees' health and safety reasons;
(ii) to protect the company's properties;
(iii) to monitor the production process relating only to machines;
(iv) to temporarily monitor the employees' production or performance where it is the only way to determine their remuneration; or
(v) the scope of a working organisation based on flexible working hours.

To date, the employer still needs to obtain the prior authorisation of the National Committee for the Protection of Data (the authorisation procedure is set forth in the Law of 2 August 2002 on the protection of personal data as amended (the Personal Data Law)), but this requirement is expected to be abolished by the reform of the Personal Data Law which shall precede the entry into force of the European General Data Protection Regulation in May 2018.

The employer is also compelled to inform employees prior to the implementation of the processing of data. The staff delegation – or, where still applicable, the JWC – shall consent to the surveillance in the workplace when the foreseen activity is justified by one of the reasons stated in (i), (iv) and (v) above (from the next social elections, staff delegations in companies with 150 employees and more will replace the JWCs).

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Articles L127-1 to L127-6 of the Labour Code protect employees in the event of a business transfer by securing their rights.

Thus, the rights and obligations arising from an employment contract or an employment relationship existing at the date of the transfer toward the grantor are transferred to the transferee.

All the employment contracts and employment relationships that have continued to exist until the date of the transfer between the grantor and the employees are automatically transferred to the transferee as well as the employment conditions. The transferee does not have to conclude new employment contracts with the employees.

After the transfer, if necessary, the employment contracts may be modified in a more favourable way for the employees.

However, if the transfer involves a disadvantageous substantial change of the employment contract for the employee, the contract will be considered as terminated by the employer if the employee refuses this change and does not perform his or her work. The termination will be regarded as an unfair dismissal and contrary to social and economic reasons.

The transferee may nevertheless still terminate an employment contract after the transfer if it is justified on grounds related to the employee's attitude, conduct or arising from the operating needs of the company.

Likewise, the grantor may terminate an employment contract prior to the transfer as long as it is based on a ground related to the employee's attitude, conduct or arising from the operating needs of the company.

Nonetheless, it should be noted that, in both cases, a termination solely based on the transfer itself may not be considered as based on a lawful reason (see question 35).

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer may not dismiss an employee for any reason. It must be for a lawful reason or founded on valid grounds. Indeed, a dismissal is regarded as unfair and contrary to social and economic reasons if it takes place for unlawful reasons or if it is not founded on valid grounds – namely, grounds related to the employee's aptitude or conduct, or arising from the operating needs of the business, establishment or department.

Dismissals for 'unlawful reasons' are notably dismissals:

- for legal strikes duly declared;
- notified during the protection period of an employee who is on sick leave;
- based on the transfer of undertaking where the employee refuses substantial changes brought to his or her employment contract;
- in response to a complaint of sex discrimination or harassment;
- based on the employee's refusal to accept part-time or full-time work;
- based on the employee's refusal to accept overtime work under other conditions than provided for in the employment contract;
- for part-time workers, pregnant women or breastfeeding women; and
- based on the employee's refusal to waive his or her right to early retirement indemnity.

In addition, the dismissal of protected employees is void where it does not abide by special termination procedures provided by law (eg, dismissal of employees' representatives, disabled employees, victims or witnesses of sexual harassment, employees on maternity leave or parental leave, dismissal based on the wedding of a woman and dismissals prior to the conclusion of a social plan).

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Notice of termination must be given prior to dismissal, except for dismissal for gross misconduct. The duration of the notice period depends on the length of service of the employee within the company.

In the case of employment for a period shorter than five years, the notice period shall be two months. If the employee is employed for five to nine years, the notice period extends to four months; and in the case of employment for at least 10 years, the notice period is six months. These delays are reduced by half when it is the worker who terminates the employment contract.

The employer may not provide pay in lieu of notice. If the employer releases the employee from work during the notice period, it will nevertheless have to continue to pay the monthly salary of the employee until the end of the notice period.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee without notice and without payment of notice in the event of dismissal for gross misconduct.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Luxembourg legislation provides the right to layoff pay upon termination of employment to any dismissed employee after at least five years of service, except in cases of gross misconduct.

In the case of seniority of five to nine years, the departure allowance shall equal one month of gross salary; in the case of seniority of 10 to 14 years, it shall represent two months of gross salary; in the case of seniority of 15 to 19 years, it shall equal three months of gross salary.

In the case of employment for 20 to 24 years, the departure allowance shall equal six months of gross salary; if employees are employed for 25 to 29 years, it shall equal nine months of gross salary; and if they are employed for more than 29 years, it shall represent 12 months of gross salary. The seniority is assessed on the date of expiry of the employment contract, even though the employee is released from work during the notice period.

The severance pay is calculated on the basis of the gross remunerations paid to the employee during the last 12 months prior to the month of notice of termination.

In the case of litigation, pursuant to article L124-12 (3) of the Labour Code, the labour court, which concludes as to the formal irregularity of the dismissal due to the infringement of a substantial formality (eg, the preliminary meeting) must scrutinise the case and condemn the employer, if it judges that the dismissal is unfair, to pay the employee an indemnity that cannot be more than one month's salary. This indemnity is not owed if the dismissal is not unfair.

Concerning the claim for damages, Luxembourg labour law does not provide for predetermined compensation for damage. The severance pay the employee may claim for unfair dismissal may be classified as 'material damages' (material losses) and 'moral damages' (intangible losses, compensation for injury to feelings). The labour courts have the widest powers to appreciate at their own discretion the amount of the severance pay.

Compensation for damages in general is determined as follows:

- moral damage – in the event of unfair dismissal, the following criteria are taken into consideration to assess the amount of the damages: troubles raised by the dismissal, age, health condition of the employee and length of service. Although it is rather difficult to specify exact figures, on average the amounts vary between €500 and €12,500; and
- material damage – this greatly depends on the professional situation of the employee after the dismissal.

For unfair dismissal, material damage is determined on the basis of the difference of remuneration between the salary received from the former employer and the salary received from another employer or the unemployment benefits if the employee has not found another job, over a reference period deemed to be necessary for the employee to find another job, taking into account personal circumstances and the situation of the employment market at the time of the dismissal.

As a result, the duration of the reference period (usually four to 24 months) is based on the following criteria: age of the employee, length of service, field of activity, efforts made by the employee to find a new job, etc.

39 Are there any procedural requirements for dismissing an employee?

Except in cases of gross misconduct, a notice of dismissal in writing shall be sent by registered mail or by way of an employee's acknowledgment of receipt. The period of notice may only start on the first or the 15th day of the month following the date of the sending of the dismissal notice.

The employee may request communication of the reasons for the dismissal by registered letter within one month. The employer must then provide very detailed reasons within one month by way of registered letter. Otherwise, the court may declare the dismissal as unfair.

In companies employing over 150 workers, the employer has to convene a meeting with the concerned employee prior to the notice of dismissal.

Usually, individual dismissals are not submitted to special permissions. However, certain employees may not be dismissed, except in cases of gross misconduct and upon the prior authorisation of the labour court, namely, employees' representatives and women on maternity leave.

In cases of gross misconduct, the letter of dismissal must immediately detail the reasons of the dismissal.

40 In what circumstances are employees protected from dismissal?

Employees are generally protected against unfair and unjustified dismissal.

Employees' representatives, employees on maternity leave, discriminated or harassed employees, employees on sick leave and parental leave, and employees internally reclassified also benefit from an increased protection.

41 Are there special rules for mass terminations or collective dismissals?

In the case of foreseen dismissals for economic reasons (over four dismissals during a reference period of three months or over seven dismissals during a reference period of six months), articles L513-1 of the Labour Code set up a procedure aimed at the establishment of an Employment Safeguard Plan by social partners.

In the case of collective dismissals (at least seven employees within a period of 30 days or at least 15 employees within a period of 90 days), article L166-1 of the Labour Code provides that a social plan has to be established and negotiated with the staff delegation, the JWC, if any, and the trade unions if a collective bargaining agreement is applicable. (It should be noted that the Law of 23 July 2015, on the reform of the social dialogue in undertakings – which came into force on 1 January 2016 – has abolished the JWCs. JWCs that were already in place on 1 January 2016 continue to exist until the following social elections (which should take place in November 2018 for companies where the staff delegation has been elected in November 2013) and, at that time, all the rights and attributions previously granted to the JWC will be transferred to the staff delegation in companies with 150 employees and more over the past 12 months.)

The Labour Inspectorate shall be informed about the outcome of the negotiations.

If no agreement is reached within 15 days between the parties, the minutes of the negotiations signed by the parties must be communicated to the Labour Administration and to the Labour Inspectorate. In addition, the parties must submit their disagreement to the National Conciliation Office in order to reach an agreement. The result of these negotiations is communicated to the Labour Administration as well as to the Labour Inspectorate.

No notice of termination may be sent to employees before the signature of the social plan or before the signature of a statement of non-conciliation at the end of the conciliation procedure before the National Conciliation Office.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Employees and former employees may not bring claims on behalf of other workers (collective or class actions). Indeed, the plaintiff must have a 'personal interest' when filing his or her claim before the courts. No class actions under existing law are allowed as such.

In the field of discrimination, claims relating to discrimination grounds may nonetheless be filed before the courts by a non-profit organisation or a trade union in the name and on behalf of the employee under specific conditions.

Trade unions can also introduce legal actions regarding application or interpretation of collective bargaining agreements in the name and on behalf of the employee.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Pursuant to article L125-3 of the Labour Code, the employment contract automatically ends the day the employee is granted a retirement pension or at the latest when the employee reaches 65 years old if the employee is entitled to a legal retirement pension. The latter is granted if the employee has contributed for at least 120 months to the pension insurance.

If no retirement pension is granted to the employee before the age of 65 and if the employee is not entitled to a legal retirement pension at 65, the employment contract is not automatically terminated. In such case, the employer may not dismiss the employee on the sole fact that the employee reached a specific age. In the event of litigation, such dismissal would, in principle, be considered as discriminatory pursuant to article L251-1 of the Labour Code and as such unlawful.

Update and trends

The reform of parental leave which came into force on 1 December 2016 was a hot topic in Luxembourg in 2016. The main objective of the parental leave reform was to encourage conciliation between family life and professional life, to create a solid relationship between children and their parents, to respond better to parents' needs, to increase the proportion of fathers benefiting from this in order to foster equal opportunities, and to increase the number of people using it in general. Now, parents can choose between three options that can be further broken down into six parental leave arrangements, including a split parental leave enabling parents to reduce their working time. One other major change is the introduction of a real replacement income: the fixed-rate allowance is replaced with a real replacement income with a lower limit of €1,998.59 a month (statutory minimum monthly wage to unskilled employees) and with an upper limit of €3,330.98 a month (based on a full-time schedule).

The tax reform which came into force on 1 January 2017 was also a hot topic in 2016. The reform introduces new tax measures affecting employment law. First of all, as of 1 January 2017, the face value of lunch vouchers increased from €8.40 to €10.80. The employee's contribution rate hasn't changed. The tax reform has also impacted the benefit in kind as regards company cars. For the new leasing company car contracts starting on 1 January 2017, the monthly benefit may vary between 0.5 and 1.8 per cent of the vehicle's initial purchase price per month, depending on carbon emission and fuel type.

It should also be noted that from 1 January 2017, wage incomes increased by 2.5 per cent following the wages' indexation and the social minimum wage for non-qualified workers increased from €1,922.96 to €1,998.59.

The posting of workers and immigration issues will be hot topics for 2017, as well as the reform of some legal extraordinary leaves, such as maternity leave, leave for familial and personal reasons.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Private arbitration is in principle allowed in the case of individual employment disputes. However, such procedure does not protect the parties of a possible litigation before the Labour Courts. It is also important to highlight that arbitration clauses in employment contracts are forbidden.

The arbitration procedure is also provided for in the case of collective disputes before the National Conciliation Office if the parties (ie, the employer and the trade unions) make such request to this body in the event where no agreement has previously been reached.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee may agree to waive statutory and contractual rights to potential claims as soon as the element that may lead to such claim is born. In addition, a settlement agreement may always be signed between the parties where there is a dispute. In such case, the employee's agreement to waive statutory and contractual rights may only be valid if it is offset by a specific advantage granted to the employee by his or her employer (additional financial compensation, etc).

However, an anticipated agreement would always be void since it would lessen the advantageous situation granted by law prior to any dispute.

46 What are the limitation periods for bringing employment claims?

The limitation periods for bringing employment claims depend on the type of claim involved. Thus, for example:

- a lawsuit for the payment of the employee's remuneration should be introduced within a three-year period from the due date;
- upon dismissal, the employee may initiate a court claim within three months from the date of the notification of the dismissal or

of the notification of the motivation letter to obtain damages for unlawful dismissal (article L124-11 of the Labour Code);
- if the employee challenges in writing the reasons of his or her dismissal to his or her employer, the period is extended to one year starting from the date of the sending of this letter;
- in the case of dismissal of a pregnant woman, the latter has 15 days to ask the judge, in summary judgment, to notice the illegal dismissal and to ask for her reinstatement in the company;
- the same rule applies to a dismissal with notice of an employee on parental leave; and
- in the case of dismissal of a staff delegate, the latter has:
  - one month to ask the judge, in summary judgment, to notice the illegal dismissal and to ask for his or her reinstatement in the company; or
  - three months from the date of the notification of the dismissal to obtain damages for unlawful dismissal and specific damages regarding his or her special statute.

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Malaysia

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes and regulations relating to employment in Malaysia are as follows:

Employment Act 1955 (EA)
The EA applies to employees employed in West Malaysia who:
- earn a monthly salary of 2,000 Malaysian ringgit and below; or
- regardless of salary quantum, are employed:
  - as manual labourers or supervisors of manual labourers;
  - to operate or maintain any mechanically propelled vehicle for the purpose of transporting passengers or goods or for reward or commercial purposes;
  - as a domestic servant; and
  - in certain positions on seagoing vessels.

The states of Sabah and Sarawak in East Malaysia have equivalent legislation (with some differing provisions) that cover similar categories of employees.

Industrial Relations Act 1967
This Act applies to all employees in Malaysia and governs the relations between employers and employees (including trade unions) and the prevention and settlement of disputes.

Trade Unions Act 1959
This Act regulates the registration and constitution of trade unions and the rights and liabilities of trade unions.

Employees Provident Fund Act 1991 (the EPF Act)
The EPF Act applies to all employees in Malaysia. The Act makes it mandatory for all employers and most employees to contribute to a state-managed provident fund. Contributions by foreign nationals employed in Malaysia and domestic servants are voluntary. All employees, except for those excluded from the application of the EPF Act, are entitled to contributions that are no less than at the rate prescribed by the EPF Act.

Employees' Social Security Act 1969 (the SOCSO Act)
This Act provides social security for all employees. The Act makes it mandatory for employers and employees to contribute to the fund at the rate prescribed by the Act.

Occupational Safety and Health Act 1994 (OSHA)
The OSHA is based on the philosophy of self-regulation; and imposes general duties on employers to secure the safety, health and welfare of persons at work. Certain obligations are imposed on employees as well.

Minimum Wages Order 2012
This Order prescribes the minimum wage payable to employees as being 100 ringgit per month or 4.81 ringgit per hour for employees in Peninsular Malaysia, and 900 ringgit per month or 4.42 ringgit per hour for employees in Sabah, Sarawak and the Federal Territory of Labuan. The minimum wage may be revised on a periodic basis.

Minimum Retirement Age Act 2012 (MRA)
This Act sets the minimum (not mandatory) retirement age at 60 years old. An employer may not retire an employee before he or she attains this age. Any existing contractual term that provides for retirement at an earlier age is revised by law to 60 years. However, optional early retirement according to the employee's contract of service or any applicable collective agreement is allowed.

Personal Data Protection Act 2010 (PDPA)
The PDPA regulates the processing of personal data and sensitive personal data, including employee data.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

There are no specific statutes or laws that prohibit discrimination save for the Federal Constitution that provides that all persons are equal before the law and that there shall be no discrimination against citizens on the grounds only of religion, race, descent, place of birth or gender in:
- any law;
- the appointment to any office or employment under a public authority;
- the administration of any law relating to the acquisition, holding or disposition of property; or
- the establishing or carrying on of any trade, business, profession, vocation or employment.

Based on that principle, ordinarily, when an employee faces discrimination, he or she may have recourse to remedy. On the other hand, decisions that affect a group of employees would not be considered discriminatory even if they are along gender or age lines.

Although there is no specific anti-harassment legislation in place, the principle that an employee should have a safe and conducive workplace would apply in dealing with harassment complaints. The EA also provides for a mechanism by which an employee who is a victim of sexual harassment may seek redress and the concerns of an employee who feels discriminated against as a result of his or her or another employee's status as a foreign national may be addressed. Regulations to deal with sexual harassment complaints in the workplace have been proposed and are presently under review.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Director General of Labour (appointed under the EA) has the power to investigate complaints of discrimination related to a foreign employee, sexual harassment or a breach of the terms and conditions of employment. The latter category extends to employees who earn no more than 5,000 ringgit a month.

The Employees Provident Fund Board and the Social Security Organisation have powers to examine, make inquiries and prosecute for offences under the EPF Act and the SOCSO Act, respectively.

An officer appointed under the OSHA may enter, inspect and examine any place of work and, in keeping with his or her authority to conduct a proper inspection and examination, he or she has powers to issue directives and to examine witnesses.

The Personal Data Protection Commissioner has the authority to inspect, make recommendations pursuant to inspections, investigate complaints and issue enforcement notices pursuant to investigations.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Works councils do not exist in Malaysia. However, workers' trade unions do exist and are permissible. The Industrial Relations Act prohibits any person from interfering with or restraining an employee from forming, assisting in the formation of or joining a trade union. However, it is not mandatory for workers to join a union once formed.

5 What are their powers?

Trade unions have the right to do collectice bargaining on behalf of their members. They may also represent their members in disciplinary proceedings. A trade union may call for a strike or picket if certain conditions are met.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The law does not prohibit or restrict background checks. However, the legal requirements under the PDPA (ie, the notice and consent requirements) should be complied with.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There are no restrictions or prohibitions against requiring a medical examination as a condition of employment. There are also no restrictions on an employer refusing to hire an applicant who refuses to submit to a medical examination.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions against drug and alcohol testing of applicants. An employer may refuse to hire an applicant who refuses to submit to such a test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

The Persons with Disabilities Act 2008 provides that persons with disabilities shall have the right to access employment on an equal basis with persons without disabilities. Additionally, certain licences may impose conditions to facilitate affirmative action.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The EA (which applies only to employees who come under the purview of the EA) provides that employment contracts lasting for more than one month must be in writing. However, under local laws, the lack of a written contract does not by that reason alone invalidate the employment relationship or the contractual terms. The EA also provides that the employment contracts must include a provision for termination.

11 To what extent are fixed-term employment contracts permissible?

There are no restrictions in law against fixed-term contracts and neither are there maximum durations determined by law. However, in the event of a dispute as to whether a contract of employment is of a permanent nature or fixed term, the court will look at several factors, including whether the nature of the work was such that the employee's services were in fact genuinely required for a fixed term only, whether there were automatic successive renewals, the duration of the contract and all contractual terms. Additionally, the MRA provides that the minimum retirement age does not apply to fixed-term employees who are employed for not more than 24 months (inclusive of extensions), and fixed-term employees with basic wages of 20,000 ringgit per month who are employed for more than 24 months but not more than 60 months (inclusive of extensions). This suggests that all other fixed-term contracts may be treated as permanent contracts for the purposes of the MRA.

12 What is the maximum probationary period permitted by law?

The law does not prescribe a maximum probationary period. The probationary period may be extended if the employee does not meet the expected standard of employment. It is recommended that the contract of employment reserves the employer's right to extend the probationary period.

13 What are the primary factors that distinguish an independent contractor from an employee?

There is no single test that is available to distinguish an independent contractor from an employee. The entire facts, circumstances and features of a person's engagement will be identified and considered as a whole in determining the nature of the relationship. Among the matters that may be taken into consideration are:

- the nature, degree and extent of control exercised over the engaged person;
- whether what was done under the engagement was an integral part of the business or was merely ancillary to it;
- whether there is a fixed compensation package or whether the individual undertook a business risk;
- exclusivity (ie, whether there is an obligation to work or provide services only for the business);
- provisions for working hours, overtime, holidays and benefits such as medical expenses;
- arrangements for income tax, EPF and SOCSO deductions and contributions;
- how the contract may be terminated and the nature of the work involved;
- whether the establishment retains disciplinary rights over the individual;
- which party provides the tools and equipment and ultimately bears the risk of loss and the chance of profit; and
- the way in which the parties themselves treat the contract and describe themselves in the contract.

14 Is there any legislation governing temporary staffing through recruitment agencies?

There is no legislation governing the hiring of temporary staff through employment agencies.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There are no fixed limitations on the number of visas that will be issued to an employer. Visas are available to foreign nationals hired to work in Malaysia, whether hired directly or transferred from a different jurisdiction. The issuance of visas is subject to the employer fulfilling certain requirements.

16 Are spouses of authorised workers entitled to work?

Spouses of expatriate employees holding dependant passes are permitted to work without having to change their dependant passes to employment passes on the condition that they obtain approval from the Immigration Department.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The rules depend on the type of visa. The types of pass issued by the Malaysian government for those entering for business or employment-related purposes are:

Short-term social visit pass
Short-term social visit passes are issued at the entry point to foreign citizens for social and business visits, and are usually valid for 30 days or less. The duration is discretionary but is usually for a period of 30 days. Examples of the limited business purposes include: attending meetings, conferences, business discussions or seminars; inspecting or setting up factories; auditing a company's accounts; signing agreements; surveying business opportunities and investment potential.

Professional visit pass
Professional visit passes are issued to foreign citizens who hold acceptable professional qualifications for the purpose of taking up professional work in Malaysia for a Malaysian entity for a short-term period (including extensions) not exceeding 12 months. Applications must be made by the Malaysian entity concerned.

Employment pass
Employment passes are issued to foreign citizens who enter Malaysia to take up paid employment under a contract of service with an employer, referred to as expatriates. The duration of the employment passes depend on the nature of employment and the needs of the employer. The maximum period employment passes are issued for is five years and the norm is between two and three years.

Applications must be made by the employer, and the requirements below must be met before an application will be considered by the Immigration Department:

- minimum paid-up capital of employer ranging between 250,000 and 1 million ringgit;
- recommendation from monitoring agencies;
- registration of employer with relevant monitoring agencies;
- minimum monthly salary of at least 2,500 ringgit;
- the skill, qualification and experience required for the expatriate position must be such that it cannot be fulfilled by local candidates; and
- the expatriate's role must be relevant to the activities of the employer.

Residence pass – talent
The residence pass – talent is only available in Peninsular Malaysia and is issued to foreign citizens considered to be high-achieving individuals with the capacity to drive business results that contribute towards the national key economic areas (NKEA). The 12 industries that form part of the NKEA are Greater Kuala Lumpur/Klang Valley; oil, gas and energy; palm oil; financial services; tourism; business services; communication, content and infrastructure; electronics and electrical; wholesale and retail; education; healthcare; and agriculture. A high-achieving individual with the capacity to drive business results that contribute towards Malaysia's economic transformation may apply for the residence pass – talent. Applications must be submitted by the foreign citizen online at https://rpt.talentcorp.com.my.

Applications are reviewed against a set of criteria meant to gauge both the applicant's qualifications and economic contributions to the country. The applicant is required to:

- have worked in Malaysia for a minimum period of three continuous years;
- hold a valid employment pass at the time of the application;
- hold a PhD, master's degree, bachelors degree or diploma in any discipline from a recognised university or a professional or competency certificate from a recognised professional institute;
- possess five years of total work experience; and
- earn a basic salary of 15,000 ringgit per month.

Visit pass (temporary employment)
These passes are issued for the employment of foreign nationals as semi-skilled, unskilled or domestic helpers, from specific source countries in certain sectors of the economy, such as agriculture, construction, manufacturing, plantation and various types of services.

Different procedures for the recruitment of foreign workers are applicable to employers in Peninsular Malaysia, Sabah, Sarawak and the Federal Territory of Labuan.

Any person who employs one or more foreign nationals who are not in possession of a valid pass or visa shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than 10,000 ringgit but not more than 50,000 ringgit, or to imprisonment for a term not exceeding 12 months, or both, for each such employee. If any person has, at the same time, employed more than five such employees, that person shall, on conviction, be liable to imprisonment of not less than six months but not more than five years, and shall also be liable to a whipping of not more than six strokes. Where the offence is committed by a corporate body, any person who, at the time of the commission of the offence, was a member of the board of directors, a manager, a secretary or a person holding an office or a position similar to that of manager or secretary of the corporate body, shall, on conviction, be liable to the same punishment. Further, any person who, without reasonable cause, contravenes or fails to comply with any condition imposed in respect of, or instruction endorsed on, any pass, permit or boundary pass, shall be guilty of an offence and liable on conviction to a term of imprisonment not exceeding six months or to a fine not exceeding 1,000 ringgit, or both.

18 Is a labour market test required as a precursor to a short or long-term visa?

Generally, there is a requirement to show that there is a need to hire a foreign national, but the requirement is often fulfilled by submitting an application setting out the reasons for hiring a foreign national and substantiating the application with the foreign national's qualification, skills and experience.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Limitations on working hours are only applicable to employees who come within the purview of the EA (EA employees). The limitations are as follows:

- not more than eight hours a day or more than 48 hours a week, or more than five consecutive hours without a break of at least 30 minutes; and
- one whole day of rest each week (rest day).

An EA employee may work in excess of the above hours under the circumstances described in question 20. The working hours of non-EA employees are subject to contract.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Only EA employees are entitled by law to overtime pay. Overtime pay for a monthly paid EA employee is calculated as follows:

- for any overtime work carried out in excess of normal hours of work, at a rate that is not less than 1.5 times the hourly rate of pay;
- for work on a rest day:
  - for any period of work that does not exceed half the normal hours of work, wages equivalent to 0.5 times the ordinary rate of pay for work done on that day;
  - for any period of work that is more than half but that does not exceed the normal hours of work, one day's wages at the ordinary rate of pay for work done on that day; and
  - for any work carried out in excess of the normal hours of work at a rate that is not less than two times the hourly rate of pay; and
- for work on a public holiday, in addition to the day's wages, two days' wages at the ordinary rate of pay, regardless of whether the

period of work done on that day is less than the normal hours of work, and for work in excess of the normal hours of work, at a rate that is not less than three times the hourly rate of pay.

Notwithstanding the payment of overtime pay, no EA employee should be required to work more than 12 hours a day or in excess of 104 hours of overtime in any one month.

21 Can employees contractually waive the right to overtime pay?

All employees, other than EA employees, may contractually waive their right to overtime pay.

22 Is there any legislation establishing the right to annual vacation and holidays?

The EA prescribes minimum paid annual leave and public holiday entitlements. It is only applicable to EA employees.

An EA employee is entitled to paid annual leave of:

- eight days for every 12 months of continuous service if he or she has been in employment for a period of less than two years;
- 12 days for every 12 months of continuous service if he or she has been in employment for a period of two years or more but less than five years; and
- 16 days for every 12 months of continuous service if he or she has been in employment for a period five years or more.

An EA employee is entitled to 11 paid gazetted holidays, five of which must be:

- the National Day (31 August);
- the birthday of the *Yang di-Pertuan Agung* (Malaysia's monarch and head of state) (first Saturday of every June);
- the birthday of the ruler of the state (differs from state to state) or the federal territory (1 February) in which the employee wholly or mainly works;
- Workers' Day (1 May); and
- Malaysia Day (16 September).

For non-EA employees, entitlement to paid annual leave and public holiday is subject to contract.

23 Is there any legislation establishing the right to sick leave or sick pay?

The EA prescribes minimum paid sick leave entitlements, which are only applicable to EA employees.

Where hospitalisation is not necessary, an EA employee is entitled to paid sick leave of:

- 14 days in each calendar year if he or she has been in employment for a period of less than two years;
- 18 days in each calendar year if he or she has been in employment for a period of two years or more but less than five years; and
- 22 days in each calendar year if he or she has been in employment for a period five years or more.

If hospitalisation is necessary, an EA employee is entitled to sick leave of 60 days in each calendar year, provided the total number of days of paid sick leave in a calendar year to which the employee is entitled does not exceed 60 days in aggregate.

For non-EA employees, entitlement to paid sick leave is subject to contract.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Other than annual leave, sick leave and public holidays referred to in questions 22 and 23, all female employees are entitled to paid maternity leave of no less than 60 consecutive days. This entitlement is limited to employees who have been in employment for no less than 90 days in the nine-month period immediately preceding confinement, which must include employment in the four months immediately preceding confinement. An employee is also not entitled to paid maternity leave if she has five or more surviving children.

25 What employee benefits are prescribed by law?

Employees are entitled to contributions to EPF and SOCSO at the rates prescribed by the relevant legislation (see question 1). Additionally, employees are entitled to maternity leave (see question 24). EA employees are also entitled by law to annual leave, sick leave and public holidays (see questions 22 and 23).

26 Are there any special rules relating to part-time or fixed-term employees?

The Employment (Part-Time Employees) Regulations 2010, which come under the EA, provide that the normal hours of work of a part-time employee shall be 70 per cent of the normal hours of work of a full-time employee. Where the normal hours of work of a full-time employee cannot be ascertained, they shall be deemed to be eight hours in one day or 48 hours in one week. A part-time employee who is required to work beyond his or her normal hours of work is entitled to overtime pay as follows:

- not less than his or her hourly rate of pay for each hour or part thereof that exceeds his or her normal hours of work but does not exceed the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise; and
- not less than 1.5 times the hourly rate of pay of the part-time employee for each hour or part thereof that exceeds the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise.

A part-time employee shall be entitled to a rest day in each week if he or she works five days or more with total working hours of not less than 20 hours a week.

A part-time employee who is required to work his or her normal hours of work on a rest day is entitled to overtime pay as follows:

- not less than two days' wages at the ordinary rate of pay he or she is entitled to for that day;
- for work beyond his or her normal hours of work, not less than 1.5 times his or her hourly rate of pay for each hour or part thereof; and
- for work beyond the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise, not less than two times his or her hourly rate of pay for each hour or part thereof.

A part-time employee is entitled to a paid holiday of no less than seven gazetted public holidays in a calendar year, four of which shall be:

- the National Day (31 August);
- the birthday of the *Yang di-Pertuan Agung* (first Saturday of every June);
- the birthday of the ruler of the state (differs from state to state) or the federal territory (1 February) in which the employee wholly or mainly works; and
- Workers' Day (1 May).

If a part-time employee is required to work on any paid holiday, he or she shall be paid overtime as follows:

- for his or her normal hours of work, not less than two days' wages in addition to the holiday pay he or she is entitled to for that day;
- for work beyond his or her normal hours of work, not less than two times the hourly rate of pay for each hour or part thereof; and
- for work beyond the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise, not less than three times the hourly rate of pay for each hour or part thereof.

A part-time employee shall be entitled to paid annual leave of:

- six days for every 12 months of continuous service if he or she has been in employment for a period of less than two years;
- eight days for every 12 months of continuous service if he or she has been in employment for a period of two years or more but less than five years; and
- 11 days for every 12 months of continuous service if he or she has been in employment for a period of five years or more.

A part-time employee shall be entitled to paid sick leave of:

- 10 days in each calendar year if he or she has been in employment for a period of less than two years;

- 13 days in each calendar year if he or she has been in employment for a period of two years or more but fewer than five years; and
- 15 days in each calendar year if he or she has been in employment for a period of five years or more.

However, a part-time employee shall not be entitled to paid sick leave on his or her non-working day.

There are no special rules or regulations for fixed-term employees.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-employment covenants that restrict an employee from being involved in a business or employment are not enforceable. Section 28 of the Contracts Act 1950 provides that 'every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void'. However, a covenant to refrain from using confidential information gained from employment is enforceable, as is a covenant to refrain from interfering with the business of the ex-employer, including by soliciting employees.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Not applicable (see question 27).

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer may be held liable for acts and conduct of employees carried out in the course of the employees' duties or under the instructions of the employer.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Income tax is chargeable on all income earned from an employment relationship. Income includes wages, salary, remuneration, leave pay, fees, commissions, bonuses, gratuities, perquisites or allowances (whether in money or otherwise) in respect of having or exercising the employment, an amount equal to the value of a benefit or amenity provided by the employer (subject to certain exclusions), monies received from a pension or provident fund, scheme or society not approved for the purpose of the Income Tax Act, 1967, and monies received as compensation for loss of the employment.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Copyright Act 1987 provides that, where an invention is made in the course of employment, the copyright is deemed to be transferred to the employer, subject to any agreement between the parties excluding or limiting such transfer.

The Patents Act 1983 provides that the rights to a patent for an invention made in the performance of a contract of employment or in the execution of work are deemed to accrue to the employer. However, where the invention acquires an economic value much greater than the parties could reasonably have foreseen at the time of concluding the contract of employment, the inventor is entitled to equitable remuneration, which may be fixed by the court in the absence of agreement between the parties. Where an employee whose contract of employment does not require him or her to engage in any inventive activity makes, in the field of activities of his or her employer, an invention using data or means placed at the employee's disposal by the employer, the right to the patent for such invention is also deemed to accrue to the employer. In this case, the employee is entitled to equitable remuneration which, in the absence of agreement between the parties, may be fixed by the court taking into account the employee's emoluments, the economic value of the invention and any benefit derived from the invention by the employer.

The employees' rights to equitable remuneration in the above scenarios may not be avoided by contract.

32 Is there any legislation protecting trade secrets and other confidential business information?

There is no legislation other than those referred to in question 31.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The PDPA imposes obligations on employers who process personal data to comply with the Personal Data Protection Principles set out in the PDPA. Among other obligations, the employer is required to inform the data subject (the employee) of the personal information or data that is being processed, and consent of the data subject is required in most situations where data is collected, processed or disclosed. The employee also has a right to access and correct his or her data.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

There is no automatic transfer of employees to the new owner of the business in the event of a business transfer. However, in such an instance, Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 provides that the contract of service of an employee shall be deemed to be terminated unless the new owner (within seven days of the change in ownership) offers to continue to employ the employees on terms and conditions no less favourable than those under which the employees were employed prior to the change in ownership. Therefore, if the new owner makes such an offer, there will be no termination of the employees and termination benefits are not payable. There are, however, certain other legal requirements to be met.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employee may only be terminated for just cause or excuse. 'Just cause or excuse' is not defined by legislation. Generally, misconduct, poor performance and redundancy are accepted as just cause for termination.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Notice of termination must be given. Salary in lieu of notice may be paid.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee without notice or payment in lieu of notice where the dismissal is for misconduct or poor performance.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Severance pay is payable where the termination is by way of retrenchment or upon closure of business. Case law dictates that, if the financial position of the employer permits it, and especially if the retrenchment exercise is carried out with the aim of increasing efficiency and profits, fair and reasonable benefits should be made available. Currently, one month's salary for each year of service is considered fair and reasonable. However, for EA employees, the law prescribes that the statutory minimum termination benefits are as follows and pro rata in respect of an incomplete year of service, calculated to the nearest month:

- 10 days' wages for every year of employment if he or she has been employed for a period of less than two years;

Update and trends

A bill for a proposed Employment Insurance Scheme to assist retrenched workers is likely to be tabled in Parliament this year.

- 15 days' wages for every year of employment if he or she has been employed for a period of two years or more but less than five years; and
- 20 days' wages for every year of employment if he or she has been employed for a period of five years or more.

39 Are there any procedural requirements for dismissing an employee?

Approval of a government agency is not required prior to a dismissal. However, depending on the grounds for dismissal, there are differing procedural requirements.

40 In what circumstances are employees protected from dismissal?

All employees are protected from unjust dismissal.

41 Are there special rules for mass terminations or collective dismissals?

Mass or collective dismissals are subject to the same rules. In addition, prior notice has to be given to the Labour Department at least 30 days before the termination date.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Employees may make claims only on an individual basis for unjust dismissal. However, the courts may hear the matters together.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Yes. The minimum retirement age is 60.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Yes.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

Ordinarily, any waiver of statutory rights by an employee, even if for consideration, is not enforceable. Contractual rights may be waived for consideration, whether economic or otherwise.

46 What are the limitation periods for bringing employment claims?

A claim for reinstatement pursuant to an unjust dismissal claim under the Industrial Relations Act must be commenced within 60 days of the dismissal date. All other employment claims are generally subject to a limitation period of six years.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Labour and employment matters in Mexico are mainly regulated by article 123 of the Constitution of the United Mexican States (the Mexican Constitution) and the Federal Labour Code (FLC); however, the Social Security Law (SSL) and the National Housing Institute Law must also be carefully considered when analysing employment-related matters in Mexico.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes. The FLC expressly prohibits discrimination in the workplace on the basis of ethnic origin, citizenship, gender, age, disability, social status, health conditions, religion, opinions, sexual preference, marital status or any other circumstance against human dignity; and prohibits sexual harassment in the workplace. Further, the Mexican Anti-Discrimination Law was enacted in March 2014 and while it does not have a direct impact on employers, it may come into play if an individual believes he or she has been discriminated against in an employment setting.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Local and federal labour boards are the main labour and employment law enforcement agencies in Mexico. Labour boards function as trial courts and their awards may be appealed to federal courts. There are, however, other agencies in charge of supervising and enforcing compliance of specific employer obligations, mainly, the Employment and Social Prevention Secretariat, the Mexican Social Security Institute (IMSS), the National Housing Fund Institute (INFONAVIT) and the National Immigration Institute (INM).

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Yes. Mexican employers are required to establish committees formed by a combination of employer and employee representatives:

- the Safety and Hygiene Committee;
- if there are more than 50 employees, the Training Committee;
- the Profit Sharing Committee;
- the Seniority and Tenure Committee; and
- the Internal Work Regulations Committee.

Employer representatives are usually the head of human resources and another high-level administrative executive. Employee representatives can be any other company employees.

5 What are their powers?

The committees described in question 4 have limited authority. They have the power to negotiate and approve applicable employee handbooks, internal regulations or policies and their implementation procedures, as and when needed.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Employers in Mexico are free to establish the necessary requirements for employment, including the submission of job applications asking for background and personal information so long as the information is relevant to the position. Notwithstanding the foregoing, as discussed in question 33, employers must comply with data privacy obligations under Data Privacy Laws in Mexico.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Except for pregnancy-related questions or examinations and, in general, any other type of discriminatory conduct, there are no restrictions on medical examinations under the FLC. Notwithstanding the foregoing, as discussed in question 33, employers must comply with data privacy obligations under Data Privacy Laws in Mexico.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

No. Employment may be denied solely by reason of the applicant's refusal to take a drug and alcohol test; however, the employer must be mindful of its obligations to comply with Data Privacy Laws in Mexico and avoid engaging in discriminatory conduct.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Yes. Under equal circumstances, employers are required to give preference in hiring to:

- Mexicans over foreign nationals;
- employees with more seniority;
- individuals who are economically responsible for their families and whose employment is their sole source of income;
- individuals who completed the obligatory basic education;
- trained individuals;
- individuals with the skills and knowledge required for the job; and
- unionised employees.

See question 2 for a discussion on anti-discrimination obligations under Mexican law and question 15 for a more detailed discussion on preference in hiring Mexican employees.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes, the FLC provides that an employment agreement must be in writing.

However, an agreement's existence is not essential to the creation of an employment relationship and the lack of a written contract

will not affect the employee's rights under the FLC. In the event of litigation, the absence of a written contract will be weighed against the employer by the labour boards and, as a result, the evidentiary burden to the employer will be increased.

Employment contracts must include at least the following information:

- name, nationality, age, gender, tax and personal identification numbers, and domicile of the employee and employer, as applicable;
- the term of employment (indefinite or for a specific project or period);
- indication of whether employment is subject to a trial period;
- the services to be rendered by the employee, as well as the position of employment;
- place or places where the services must be rendered;
- work schedule and number of hours worked throughout the week, with at least one weekly rest day;
- compensation;
- training programmes and requirements;
- fringe benefits payable to the employee; and
- any other condition of employment that is not contrary to the law.

11 To what extent are fixed-term employment contracts permissible?

A fixed-term employment contract is permissible only if the nature of a particular task or service requires such employment or the employee is required to temporarily substitute for another employee.

12 What is the maximum probationary period permitted by law?

Probationary periods may not exceed 180 days for employees performing leadership and management positions, or for technical or specialised professional work; or 30 days for base-level employees. Employment of trainees may not extend beyond 180 days for employees in leadership and management positions, or for technical or specialised professional work, or 90 days for base employees.

In no event may temporary employment be consecutive (eg, re-employ on a temporary basis after the expiration of a temporary employment) or last for more than one year.

13 What are the primary factors that distinguish an independent contractor from an employee?

Under the FLC, employment is presumed whenever an individual renders subordinated services to another person for remuneration, regardless of the legal origin of the relationship. In that sense, when analysing an independent contractor relationship as regards an employment relationship, labour boards undertake a detailed factual analysis and disregard the form given to the agreement. As a general matter, the two distinctive elements identified by labour boards as fundamental to a labour relationship are economic dependence, and subordination, understood as the authority of the employer to dictate the actions of the employee, and the employee's duty of obedience.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Yes, hiring of personnel staffed through recruitment agencies (outsourcing) is permitted as long as it is limited to specialised jobs during a reasonable period, and for activities not similar to those carried out by other employees during the ordinary course of business of the employer. Note, however, that outsourcing services had been used for decades by employers in Mexico to avoid or mitigate the burden of certain mandatory benefits (eg, profit-sharing obligations). Recent reforms to the FLC and the SSL make outsourcing arrangements meant to avoid employment obligations or payment of benefits illegal. Companies using outsourcing arrangements to avoid employer obligations under the FLC could be subject to fines and penalties.

For an outsourcing agreement to be enforceable: the agreement should not cover all of the company's activities; the agreement should not cover employees with tasks equal or similar to the ones carried out by other company employees in the ordinary course of business; and the outsourced positions must be justified by the specialised nature of the jobs, such as work that requires a company to occasionally bring in a specialist. See question 11 discussing temporary employment.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

No, there are no numerical limitations on short-term visas or visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction. However, under the FLC and applicable Mexican immigration law, work visas are required for foreign individuals to work in Mexico and the employee base of Mexican employers must be made up of at least 90 per cent Mexican citizens. The exception to the general rule is that, with respect to technical and professional employees, employees have to be Mexican citizens, but foreign employees may be employed on a temporary basis if there are no Mexican employees available with the required skills for the position, in which case Mexican employees must be trained to permanently occupy that position. Mexican citizenship restrictions do not apply to chief executive officers, or general managers or administrators. Further, an employer's doctors, where required, must be Mexican citizens.

16 Are spouses of authorised workers entitled to work?

To the extent the spouse is granted a visa as an economic dependant of the employee holding the 'primary' work visa, that spouse will not be allowed to work in Mexico unless a change in migratory status is obtained from the INM.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

See question 15. From an immigration law perspective, penalties imposed by the INM vary depending on several factors (eg, recurrence) and may range from nominal fines to deportation of the applicable employee. In addition, the employer also risks being 'red flagged' by the INM and may face enhanced scrutiny when petitioning work visas in the future from the INM. Under the FLC, violators may face fines of up to 2,500 times the minimum wage.

18 Is a labour market test required as a precursor to a short or long-term visa?

No labour market test is required as a precursor to a short or long-term visa; however, while denials are unusual, immigration officers have ample authority to grant or deny short or long-term visas based on evidence presented and the in-person interview. See question 15 in connection with the percentage requirement of Mexican citizens under the FLC.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

There are restrictions on working hours/shifts and the FLC does not allow waiving or opting out of those provisions. Maximum work shifts are divided into three: day shift – 6am to 8pm with a 48-hour maximum; night shift – 8pm to 6am with a 42-hour maximum; and mixed shift – with a 45-hour maximum. In addition, the maximum overtime that employees can be required to work is three hours per day, three days per week. That is, the maximum overtime permitted by the FLC per week, in the aggregate, is nine hours.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employees are entitled to payment of overtime, regardless of their positions or any other qualification. Overtime is paid at a 100 per cent premium for the first nine hours of overtime per week and at a 200 per cent premium for any additional hours.

21 Can employees contractually waive the right to overtime pay?

No, employees cannot contractually waive the right to overtime, and any agreement to that effect would be deemed null and void by labour boards.

22 Is there any legislation establishing the right to annual vacation and holidays?

The FLC establishes the following mandatory vacation time for all employees: seven days of mandatory holiday per year, in addition to the presidential inauguration day every six years and election day; and six paid vacation days for the first year of employment, with two more days added each additional year of employment until the fifth year of employment; thereafter, employees are entitled to two additional days for every five years of service.

Further, the FLC sets forth the following dates as mandatory holidays: 1 January of every year (New Year's Day); the first Monday of February of every year (Constitution Day); the third Monday of March of every year (President Benito Juarez Day); 1 May of every year (Labour Day); 16 September of every year (Independence Day); the third Monday of November of every year (Revolution Day); 1 December of every sixth year (Presidential Election Day); and 25 December (Christmas Day).

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes. The FLC and the SSL establish the right to sick leave and sick pay. However, there is no annual entitlement for these concepts. Employers are required to register their employees with the IMSS. In the event sick leave is needed, an employee is required to obtain a certificate from the IMSS describing the type of illness or injury suffered by the employee and the length of the applicable sick leave. It is the IMSS that decides whether sick leave is warranted, as well as the amount to be paid to an employee during the illness or injury. The IMSS pays this amount directly to the employee, and the employer is not obligated to pay the employee's salary during the justified sick leave period.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Under the SSL and the FLC, employees are entitled to: up to 52 weeks of leave (which may be extended for an additional 52 weeks) in connection with a temporary incapacity (as declared by the IMSS); and permanent leave in connection with permanent incapacity. In addition, the FLC provides that if the incapacity is the result of a non-employment-related risk and it prevents the employee from performing his or her duties, the employer may terminate the employment with cause, but the employee will be entitled to a mandatory severance payment equal to one month's salary and 12 days of wages per year of employment. Note that the employee may request that the employer, if possible, provide employment in another position that is appropriate to the employee's disability in lieu of termination.

Maternity leave is separately regulated by the FLC and the SSL. So long as the mother has contributed to the IMSS at least 30 weeks in the previous 12 months, then she has the right to a 12-week paid maternity leave, during which she will be entitled to receive full wages for 42 days (six weeks) before childbirth and 42 days (six weeks) after. Under certain circumstances, it is possible for the employee to transfer four of the six pre-delivery maternity leave weeks to the post-delivery period.

25 What employee benefits are prescribed by law?

The FLC establishes the following mandatory benefits for all employees:

- seven days of mandatory holiday per year, in addition to the presidential inauguration day every six years and election day;
- six paid vacation days for the first year of employment, with two more days added each additional year of employment until the fifth year of employment; thereafter, employees are entitled to two additional days for every five years of service;
- a vacation premium equal to 25 per cent of their daily base salary for each day of vacation used;
- a year-end bonus of at least 15 days' salary; and
- participation in the distribution of 10 per cent of the pre-tax profits of the employer. Employers may contractually grant other benefits to their employees, which are commonly known as 'extra-legal benefits'.

26 Are there any special rules relating to part-time or fixed-term employees?

Part-time employees are entitled to the same benefits as full-time employees.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Non-compete arrangements on individuals are generally unenforceable under Mexican law, as they are perceived by courts to limit an individual's constitutional rights to employment and to exercise a profession. That said, the Mexican Supreme Court has ruled that under very limited circumstances (eg, where there is proportionate compensation, and limitation of time and geographic scope), non-compete agreements may be enforceable. The enforceability of non-compete and no-solicitation arrangements in Mexico must be carefully analysed on a case-by-case basis. Notwithstanding the foregoing, confidentiality arrangements (whether included in the employment agreement itself or in a post-termination arrangement) can restrict employees from disclosing or using confidential information, even after the employment relationship has ended. An employee's breach of this agreement or clause can result in civil and criminal liability.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

See question 27.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

As a general matter, an employer is liable for damages caused by its employees to third parties in the course of the employee's employment.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Any income related to employment, including the mandatory annual profit-sharing distributions and any income derived as a consequence of termination of employment, will be subject to taxation. Payroll tax, income tax, and social security contributions are the employment-related taxes prescribed by law; however, employers are also required to contribute to INFONAVIT and an employee retirement savings fund. All contributions are calculated based on the employee's salary, up to certain maximum levels.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The general rule under the FLC about employee-created intellectual property (IP) is that the employer owns the IP on any invention developed by its employees, provided that the development of the invention was within the scope of the employment relationship. If the employment agreement is silent regarding ownership of work product, but it establishes that research or improvement of the employer's processes are within the scope of employment, then the rightful holder is the employer. Notwithstanding the foregoing, if an employee's invention benefits the employer in such way that the employee's wage is not proportional to the benefit received by the employer, the employee has the right to receive additional compensation. The parties must agree on the amount of the additional compensation, and in the absence of agreement, the labour boards will decide. In all other instances (eg, inventions developed by an employee without the proper provisions in the employment agreement, even if using the employer's resources), the proprietary rights associated with the invention belong to the employee; the employer only has a right of first refusal in case the employee decides to assign applicable IP rights (eg, to file the patent or

Update and trends

On 24 February 2017, articles 107 and 123 of the Mexican Constitution were amended to accurately reflect the new organic structure of the authority in charge of resolving labour and employment disputes. The Conciliation and Arbitration Boards will disappear and Labour Courts will now be in charge of the administration of justice on labour and employment disputes. In other words, the administration of justice on labour and employment matters will cease to be governed by the executive branch and will now be a part of the judicial branch of government, at both the federal and local levels. Further, these Constitutional amendments include the creation of 'conciliation centres' in each state, which shall be consulted and used prior to the commencement of any employment or labour-related judicial dispute. The practical effects of these amendments remain uncertain; however, the ultimate goal of the amendments is to promote transparency in the administration of justice in labour and employment disputes. Within a one-year period from the date of publication of the applicable Decree, the federal and all local legislatures shall undertake the necessary actions to implement these reforms; provided that the Secretariat of Labour and the Federal and Local Conciliation and Arbitration Boards will continue to operate in the meantime.

design application or the corresponding patents, design registrations or patents or design applications).

As to work product that is susceptible to copyrights, the employer will only be entitled to be acknowledged as the copyright holder if there was an individual employment agreement in writing with the employee. Further, that employment agreement must specifically state that all economic rights related to the copyrighted work product belong to the employer; otherwise, the default rule is that 50 per cent of the economic rights belong to the employer and 50 per cent to the employee. If there is no written employment agreement, or if it is silent about copyright ownership, then the employee will be entitled to all economic rights. The exception to this rule is copyright on software developed by an employee as part of his or her work duties, where in the absence of a written employment agreement or if an employment agreement is silent in connection with copyright ownership, the work product (software) belongs to the employer.

32 Is there any legislation protecting trade secrets and other confidential business information?

Yes. The FLC provides that the disclosure of trade secrets and confidential information is a cause for termination of employment. In addition, the Mexican Intellectual Property Law includes several provisions protecting trade secrets and business information, including an obligation on the part of employees to maintain the confidentiality of information or trade secrets and the imposition of penalties to employers that hire employees for the purpose of obtaining trade secrets.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Yes. The Federal Law on the Protection of Personal Data in Possession of Private Parties (Privacy Act) protects employee privacy and personal data by, among other matters, requiring employers that intend to collect, use, disclose or store personal data of employees and personnel to provide a privacy notice including, at the very least, the following elements:

- identity and domicile of the data controller;
- purpose of the data processing;
- the option and means offered to the data owners (employees and other personnel) to limit the use or disclosure of personal data;
- the means for data owners to exercise the data owner rights in accordance with the Privacy Act;
- the type of data transfers intended to be made, if any;
- the procedures and means by which the data controller will notify the data owners of changes to the privacy notice; and
- when applicable, an indication that sensitive personal data will be processed. Personal data may then be processed but only for the purposes described and permitted under that notice.

Except for limited exceptions, the employees, as data owners, have the right to: request access to their personal data and the applicable privacy notice; request the correction of personal data when it is inaccurate, incomplete or outdated; request the deletion of personal data from a database; and decline the request of a data controller to process their personal data.

Express consent for storage, use, or transmittal is necessary when handling sensitive personal information (eg, race, ethnicity, health-related information, genetic information, religion, sexual, political, moral or philosophical preferences; union affiliation; etc – in general, any information that could lead to discriminatory conduct). If the information is not considered sensitive personal information, the employer may rely on implied consent.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Yes. A business transfer is not a cause for termination of employees under Mexican law.

With respect to asset sales, the FLC incorporates the concept of 'employer substitution'. Under this concept, if an asset deal involves assets that are essential for the business operation, an employer substitution occurs automatically for all employees. On the other hand, if only certain assets are transferred, the employees whose jobs are related to those assets may be subject to an employer substitution. When an employer substitution is triggered, the transferred employees' employment (eg, seniority, benefits, etc) continues as if the transfer had not occurred, and the seller and purchaser remain jointly liable for all employment obligations (including social security obligations) relating to the transferred employees for six months following the employer substitution notice.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Employees may only be terminated for 'cause'. The FLC includes the following list of 15 events that constitute cause:

- use of false documentation to secure employment (applicable only within the first 30 days of service);
- dishonest or violent behaviour on the job;
- dishonest or violent behaviour against co-workers that disrupts work discipline;
- threatening, insulting, or abusing the employer or his or her family, unless provoked or acting in self-defence;
- intentionally damaging the employer's property;
- negligently causing serious damage to the employer's property;
- carelessly compromising safety in the workplace;
- immoral behaviour in the workplace (including harassing or sexually harassing any individual in the workplace);
- disclosure of trade secrets or confidential information;
- more than three unjustified absences in a 30-day period;
- disobeying the employer without justification;
- failure to follow safety procedures;
- reporting to work under the influence of alcohol or non-prescription drugs;
- prison sentence that makes it impossible for the employment relationship to continue or failure to deliver documents required by law to provide the employee's services; and
- the commission of any other acts of similar severity.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

A notice of termination is not required for terminations without cause. In the case of terminations for cause, employers are required to provide a written notice describing the conduct that triggered the termination

and the date on which the conduct occurred or notify the applicable labour board in writing of the cause of termination within five days of the date of termination. No payment in lieu of a termination notice is allowed under the FLC.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

As discussed in question 35, employees may not be terminated unless there is cause.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes. The FLC establishes the right to severance pay upon termination of employment without cause, but no severance pay is applicable to terminations with cause. As a general rule, in the event of a termination without cause, the employee is entitled to accrued wages and benefits, three months of integrated salary, and a seniority premium of 12 days of salary for each year of service (capped at twice the minimum salary). In addition, an employee dismissed without cause is entitled to claim his or her reinstatement. If an employee prevails in a lawsuit for wrongful dismissal, in addition to the employee's reinstatement, the employer will be liable for back pay from the date of the dismissal, with a one-year cap (plus a 2 per cent monthly surcharge thereafter). The employer may avoid reinstatement by making an additional severance payment for an amount equivalent to 20 days of integrated salary per each year of employment.

39 Are there any procedural requirements for dismissing an employee?

In the case of terminations with cause, a written notice of termination is required. If notice is not delivered, the termination will be deemed to be without cause.

40 In what circumstances are employees protected from dismissal?

As discussed in question 35, employment in Mexico is protected as a general matter and an employee may only be terminated for 'cause' as defined by the FLC.

41 Are there special rules for mass terminations or collective dismissals?

Yes, depending on the cause of the reduction in force, the employer may need authorisation from the applicable labour board; however, reductions in force must be carefully analysed, as the request for authorisation is often burdensome and impractical. Direct negotiation with the employees and unions is customarily recommended.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

The FLC recognises employees' right of association to defend a common interest. Class or collective actions are generally filed by unions. Employment-based claims, outside of union-related claims, are filed on an individual basis.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

No.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

No; employment disputes must be heard by the labour board and any agreement to the contrary is null and void.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

The rights and benefits afforded by the FLC are of public interest and, therefore, may not be waived; however, upon termination of employment, the employer and employee may enter into a full waiver and release agreement that must be signed in front of, and authorised by, the applicable labour board. That waiver and release is generally accompanied by the payment of a settlement or severance amount, which includes – among other things – accrued wages and benefits.

46 What are the limitation periods for bringing employment claims?

The general limitation period for bringing employment claims is one year. However, some types of claims have different limitation periods:

- an employer's right to file a claim and terminate the employment with cause expires one month after the employer becomes aware of the cause for termination;
- an employee's right to file a claim of termination of employment without cause expires two months after her or his date of termination; and
- an employee's right to file a claim for unpaid amounts related to employment disabilities expires two years after the date when the employee disability is determined.

The right to request that the labour board enforce a labour resolution or settlement expires two years after the date that the labour board notifies the respective party of the resolution or settlement.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

There is no employment code regulating employment matters. There are employment laws on different employment issues. These are quite old and most date back to the 1950s to 1970s.

These provisions are related to individual employment situations (hiring, employment contracts, dismissal indemnities, paid holidays, work duration, parental leave, etc), collective matters (staff representatives, trade unions, collective dismissal, etc) and entities in charge of employment regulation (Labour Inspectorate, Office of Medicine at Work, Labour Court, Employment Commissions, etc).

Beyond these legal provisions, employment regulation within Monaco is mainly based on case law.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

To date there are no specific provisions prohibiting harassment in employment, even though there has been a project under study for years.

Currently harassment would be caught on the basis of the civil duty of good faith which is applicable to all contracts, including employment contracts, or on the basis of criminal law.

Discrimination is forbidden by both general provisions such as the Constitution of Monaco and labour law. The Monaco Constitution forbids discrimination based on religion, opinion or trade union membership.

The Labour Act No. 739, dated 16 March 1963, requires gender equity for salary.

Despite the lack of specific provisions, discrimination may always be called in front of the labour court to support an employee's dispute on employment conditions or termination, depending on evidences.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Department of Employment is in charge of the implementation of labour legislation and regulations, and the information of employers and employees on issues related to employment regulation.

The Department of Employment includes the Employment Office and the Labour Inspectorate. The Employment Office's main missions are recording applications for authorisation to hire employees, registrations and issuing work permits and ensuring compliance with Act No. 629 of 17 July 1957 regulating the conditions for recruitment and dismissal in Monaco.

The Labour Inspectorate ensures compliance with legal, regulatory and contractual provisions relating to labour law, as well as health and safety at work. Labour Inspectors also prevent, mediate and arbitrate on individual or collective dispute on employment matters.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Under Labour Act No. 459 of 19 July 1947, all companies that employ more than 10 employees must have staff representatives.

In addition, Labour Act No. 957 of 18 July 1974 provides that in all establishments with at least 40 employees, each trade union to which members of the personnel are adherent, may be represented by one or more union delegates.

5 What are their powers?

Staff representatives make the employer aware of any individual or collective grievance concerning the application of the employment regulations (enforcement of employment regulation, salaries, working hours, health and safety, benefits, etc).

Staff representatives are also consulted on the establishment of internal regulations within the company and both on the grounds and implementation of collective redundancies.

Trade unions represent the profession and branch of activity and make the employer aware of any grievance concerning the application of the employment regulations.

With regard to their collective missions, both staff delegates and unions are protected against dismissal.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

There are no specific restrictions or prohibitions against background checks on candidates. Checks could be managed in the same way by a recruitment agency or the employer itself.

The only general limit to these investigations would be the right to respect private and family life. This constitutional right implies that any breach to a person's privacy must be proportionate to a legitimate goal. In other terms, any research made into previous jobs held or a person's criminal record must be both considered as legitimate. Investigation into family status for example would be considered as an abusive breach to the right of privacy.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Medical examinations as a condition of employment are more than a simple opportunity given to the employer, they are in fact a legal requirement. The examination is carried out by the labour doctor who notifies advice for medical fitness or unfitness in order to deliver a work permit.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no legal provision regarding drug testing within a company. Alcohol testing could be provided by internal regulation of the company, subject to prior approval of the Labour Inspector and for a limited list of employees.

Before employment, an employer is free to hire or not any employee on the basis of its own criteria, including drug use, but may not use discriminatory criteria (religion, gender etc). Nevertheless, if a recruitment commitment has been made in writing, the breach of this engagement on the basis of the future employee's refusal to undertake drug testing may be considered as abusive, depending of the nature of the job.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Monaco law provides a list of people benefiting from employment priority status. They are in the following order of priority:

- individuals of Monaco nationality;
- children or spouses of individuals of Monaco nationality;
- residents of the Principality of Monaco; and
- residents of the surrounding communes (Cap d'Ail, La Turbie, Beausoleil, Roquebrune-Cap-Martin) who have already been employed in Monaco.

As a consequence, every job offer must be submitted to the Employment Office who will then forward the suitable candidates who have priority status in terms of employment in Monaco.

Employers would be allowed to hire candidates with no priority status after receiving priority candidates if they do not comply with the company's needs.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

A written contract is not mandatory in Monaco, either for non-fixed term or fixed-term contracts.

Only a work permit is required. This authorisation to work in Monaco only mentions the identity of the worker (name, address, date of birth), the start date, the title of the position and the employee's coefficient.

A written contract may be helpful in order to secure the employment relationship with, for example, a non-compete clause or condition of exclusivity.

11 To what extent are fixed-term employment contracts permissible?

There is no limited duration for fixed-term contracts. Also, contrary to other countries, the choice of fixed-term contract does not need to be motivated by the employer.

Nevertheless, a fixed-term contract could be requalified as non-fixed term contract by the judge, depending on the circumstances. This might be the case if the fixed-term contract has been renewed several times, without interruption and for the same task.

12 What is the maximum probationary period permitted by law?

The duration of a probationary period is limited by law to three months. The parties are allowed to contract for a shorter duration, with renewal at the case may be, subject to the maximum limit of three months.

13 What are the primary factors that distinguish an independent contractor from an employee?

Formally, the employee and contractor hold different types of authorisation to be allowed to work within Monaco. The employee needs an authorisation of hire requested by his or her future employer and formalised by a work permit delivered by the Employment Office.

An independent contractor without Monaco nationality must complete a request with supporting documentation to acquire a business permit issued by the Minister of State.

On their merits, the main distinction between an independent contractor and an employee is that the first one is considered as an independent worker (subject to the rules of authorisation to act in Monaco), in an equal relationship with his or her contractors. In this regard, independent contractor work issues are submitted to civil rules.

On the other hand, employees are considered as subordinate to their employer within the relationship. This criteria of subordination justifies, regarding labour law, a specific protection and regulation of this particular relationship.

If there is an issue about the real nature of the contract, the judge would check, on the basis of evidence, whether the claimant was, during his or her work, subordinate or not to the other party while doing his or her job.

As the case may be, the judge would requalify the independent contract as an employment contract despite the terms of the contract signed by both parties. This requalification leads to the application of labour law on termination (valid grounds, payment of indemnities, potential damages).

14 Is there any legislation governing temporary staffing through recruitment agencies?

There is no specific legislation regarding temporary staffing through recruitment agencies. In this hypothesis, temporary staff are employed by temporary recruitment agencies in charge of placing their staff for a temporary placement within a company. During their temporary work within a company, interim staff must comply with that company's internal regulations.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Visas are not mandatory for foreign workers. They are only required for non-residents of the European Economic Area who want to obtain a Monaco resident card. However, all foreign workers need to obtain authorisation to work in Monaco, even in case of transfer of employment contract between two entities within the same international group.

16 Are spouses of authorised workers entitled to work?

They need to obtain a work permit as do all foreign workers. There is no simplified process for spouses of authorised workers.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Foreign employees must hold a valid work permit allowing them to undertake salaried work within Monaco.

First of all, because of Monaco priority status (see question 9), employers have to start the recruitment process by providing a job offer to the Employment Office. In a second phase, employers have to interview the priority candidates sent by the Employment Office. After this they can submit a request of authorisation to hire the foreign worker. If the request succeeds, the Employment Office delivers a work permit subject to the candidate passing the medical test.

Should an employer employ a foreign worker without a valid work permit, he or she is liable to a criminal offence and penalty, plus recovery for social contributions.

18 Is a labour market test required as a precursor to a short or long-term visa?

As seen in question 15, there is no need for a visa to work in Monaco.

The recruitment of a foreign worker is subject to the delivery of a work permit given by the Employment Office and a successful medical test held by the labour doctor prior to hiring.

There are no additional tests for foreign candidates. In fact, because of Monaco priority status (see question 9), the employer is expected to justify why the candidates with priority status (individuals of Monaco nationality, children or spouses of individuals of

Monégasque nationality, residents of the Principality of Monaco and residents of the surrounding communes) do not comply with the job description to obtain the right of hiring foreign workers.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The legal working time is 39 hours per week. At the request of the employer, an employee can work more hours than the legal limit. These working hours are counted as overtime.

Furthermore, hours worked must not exceed the maximum amount of hours stipulated by law:

- 10 hours a day;
- 46 hours over any period of 12 consecutive weeks;
- 48 hours per week, subject to conforming with the average duration set out above; or
- 60 hours per week in some companies in exceptional circumstances and for short periods with the agreement of the Labour Inspector.

These restrictions are binding for both employer and employee, which means that an employee cannot give a valid consent beyond these limitations.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employees are entitled to overtime pay should they work beyond 39 hours a week following the employer's request.

This overtime, which is calculated by calendar week, entitles the employee to the following wage increases:

- 25 per cent for the first eight hours;
- 50 per cent for any subsequent hours.

Collective agreements may provide for higher overtime payments.

21 Can employees contractually waive the right to overtime pay?

No. If the contract provides that the salary is global and includes potential overtime, these provisions would not exclude the risk of employees asking for overtime pay in front of the labour court.

In this case, the employee would have to provide evidence of the alleged overtime and the prior request of his or her employer to do these overtime hours.

22 Is there any legislation establishing the right to annual vacation and holidays?

All employees have a right to paid leave once they have worked at least one month during the reference period (which runs from 1 May of the previous year to 30 April of the current year).

Employees are then entitled to two-and-a-half working days' leave for each month worked (ie, five weeks of paid leave per year worked).

In principle, only periods actually worked are taken into account when determining the entitlement to paid leave. Periods of absence from work are not counted except for periods considered as valid periods of employment (excluding maternity leave).

Paid leave dates are decided by mutual agreement between the employer and the employee, regarding the needs of the business activity.

23 Is there any legislation establishing the right to sick leave or sick pay?

The law does not provide 'a right to sick leave' but it both protects the employee in sick leave, as the illness cannot be a valid ground for dismissal, and provides rules for sick pay.

Active eemployees are entitled to benefits from daily allowances from the Social Security Department (CCSS) in case of sick leave. The amount of the daily sickness benefit is in most cases equal to half the average gross daily salary received by the employee over the 12 previous months within a limit fixed annually.

In addition, according to the Monaco National Collective Agreement Convention and after two years of seniority, employees must receive a replacement income paid by the employer.

This compensation represents 90 per cent of the gross salary with deduction of the daily sickness pay by the CCSS, so approximatively a difference of 40 per cent paid by the employer.

This payment is subject to the transmission of a medical statement within the 48th hours and confirmation of employee's benefit health assurance by the CCSS.

This compensation for the employee begins to run:

- from the first day of absence if this is due to an accident at work or an occupational disease, excluding commuting accidents;
- from the fourth day of absence when the condition on which it was based resulted in both hospitalisation of any duration and a stoppage of work of at least three weeks; and
- from the 11th day of absence in all other cases.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Monaco law does not provide a right for leave of absence. This leave can still be agreed by mutual agreement but the employer can refuse the employee's request. If the employer agrees, the leave of absence would not be paid.

Collective agreement may provide different provisions regarding leave of absence (duration, salary, employment guarantee at the end of the leave).

25 What employee benefits are prescribed by law?

Monaco law does not prescribe employee benefits. These are overall mentioned in collective agreement or employment contracts.

26 Are there any special rules relating to part-time or fixed-term employees?

There are no specific rules in Monaco law provisions relating to part-time contracts. Part-time contracts must be agreed between the employer and employees.

Fixed-term employment is governed by law. The use of fixed-term contracts is quite flexible in Monaco. The employer does not need to give specific grounds to conclude a fixed-term contract. No termination indemnity is due at the end of the contract.

Fixed-term contracts can be terminated before the term in case of gross misconduct, fair grounds (appreciated case-by-case by the labour court), act of God or for grounds provided by the employment contract or the company's internal rules. Should a fixed-term contract be renewed several times, without interruption and for the same position, the employee may be entitled to obtain a requalification to non-fixed term contract with payment of termination indemnities at the case may be.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Companies can protect their interests in entering into a non-compete clause with an employee, which will apply on cessation of employment.

A non-competition clause refrains the employee from engaging in any activity that competes with the employer once the employment relationship has ended and in particular to refrain from running a rival business for his or her own benefit or from working for or participating in such business.

The prohibition of competition must be appropriately restricted with regard to place, time and scope such that it does not unfairly compromise the employee's future activity.

There is no general rule providing maximum duration or geographic areas, or a minimal of non-compete indemnity. This would be assessed case-by-case by the labour court.

The non-solicit clause does not prohibit the employee from being hired by a competitor of his or her former employer or setting up his or her own company in the same field of activity.

Therefore, it should theoretically be considered as less restrictive than a non-competition clause. However, courts often consider that the clause which prohibits the employee from contacting, or being contacted by clients of his or her former employee is a

restriction to the liberty of work, and as such, should be analysed as a non-competition covenant.

Therefore, the covenant should comply with the above-mentioned conditions in order to be valid.

Employees who violate non-compete or non-solicit clauses are required to compensate their employers by the payment of damages. The employer must prove that it has suffered a prejudice in connection with the breach of the non-competition clause.

Under these specific clauses mentioned within the employment contract, the employee is due to comply with his or her duty of loyalty after the termination of the contract. This general duty forbids any act of unfair competition, like the use of confidential trade information for example.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

To be valid, the non-compete clause has to be remunerated. An employer who wants to enforce a prohibition of competition has to pay a non-compete indemnity to the employee for the duration of the clause. Once again the law does not provide a minimum amount, it would be assessed case-by-case and has to be proportionate to the restriction. The same rules would be applied should a non-solicit clause restrain the employee's liberty of work.

Should the employee breach the clause, he or she may have to pay back the non-compete indemnities received, plus any potential damages.

Duties of loyalty and confidentiality are considered as simple good faith and do not need to be paid.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The rule is that the employer is liable for the faults committed by its employees against any third party. This liability may be rejected should the employee have acted out of the scope of his or her work, out of his or her working hours or working areas or have committed a criminal offence.

Employers have the possibility to ask for damages from their employees should the employee commit gross misconduct.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Taxes prescribed for social contributions currently represent 15.5 per cent of gross salary. Taxes for retirement pension represent 14.5 per cent of gross salary, and the retirement supplement represents between 2 and 2.2 per cent (depending on the employee's statutes and gross salary).

In addition, Monaco employers and employees pay French contributions for supplementary pensions (tax between 7.75 and 20.55 per cent depending on employee's statutes and salary) and unemployment contributions (6.4 per cent) as Monaco is linked to French organisations for these matters.

Also, some additional taxes can be applied to only specific categories of workers. These amounts are mutually paid by employer and employees and are amended annually.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

No, there are only general provisions on intellectual property which do not provide for special rules in case of employee inventions.

32 Is there any legislation protecting trade secrets and other confidential business information?

The Monaco Criminal Code forbids persons who are guardians of secrets entrusted to them, due to their status or professions, from disclosing these secrets (except when mandatory by law). A breach of business secrets could be punished by imprisonment and financial penalty.

Employment contracts often provide specific confidentiality duty. Breach of confidentiality may lead to damages for the harm suffered by the employer.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The right to privacy for employees derives from the Constitutional right to privacy. The access and register of employees' personal data are limited by Law No. 1.165 on personal data (the Data Protection Act), which applies to automatic processing of personal data carried out by a data controller established in Monaco.

Personal data must be collected for a specified, explicit and legitimate purpose and be limited to what is necessary and otherwise proportionate for the purpose at issue.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

The law provides that in the event of a business transfer, all the employment contracts follow the transferred activity.

The current contracts are ongoing within the new entity without interruption and the employees concerned keep their employment contract provisions.

Business partners shall not deny this rule as this is a public policy provision.

The real issue is to demonstrate or challenge the effectiveness of a transfer of an independent business entity in order to obtain application or exclusion of these provisions.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Overall, an employer must dismiss an employee on the basis of a valid cause which must be notified to the employee in writing.

Dismissal may be based on personal or economic grounds. The grounds are defined and assessed by the labour court.

Personal cause concern the following: dismissal for misconduct, gross misconduct, professional insufficiency, disability certified by the labour doctor, or disorganisation of the company due to a long sick leave (beyond six months).

Dismissal based on economic grounds may be due to: an elimination or transformation of jobs in the context of economic difficulties, risk to competitiveness or technological changes. Should the employer consider at least two layoffs, he or she has to comply with the rules for collective redundancy.

In addition, article 6 of Law No. 729 enables the employer to dismiss an employee without expressly or implicitly providing a motive for the dismissal.

Such possibility is available to any employer in Monaco, unless the application of article 6 of Law No. 729 is expressly excluded by a collective bargaining agreement. To use this option, the employer has to pay a specific dismissal indemnity (see question 38).

Collective agreement or even the employment contract may restrain the number of grounds for dismissal.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

A notice period has to be given not prior to, but at the moment of the dismissal. The notice period covers the period between the dismissal and the end of the contract.

The duration of the notice period will depend principally on the type of termination, the applicable collective bargaining agreement, the professional category to which the employee belongs and the employee's length of service.

Update and trends

The Law No. 1.29 dated 4 July 2016 has implemented teleworking in Monaco for two-thirds of the weekly worktime. This development brings new opportunities and challenges within the employment relationship.

In the event of a dismissal other than for gross misconduct, the law provides that an employee is entitled to a notice whose duration varies depending on his or her seniority as follows:

- for length of service of less than six months: no notice period is applicable;
- for length of service comprised between six months and less than two years: one month's notice is required; and
- for length of service of at least two years: two months' notice are required.

In any event of dismissal, the employer has the right to choose between asking the employee to work during the notice period or to be paid without working during this period.

In either case, the employee is entitled to receive the same amount of salary, including any benefits.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

In case of gross misconduct, the employee is dismissed without notice period (or termination indemnities).

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

In addition to a notice period, the employer has to pay a legal dismissal indemnity which depends both on seniority and grounds of dismissal.

In case of dismissal (except for gross misconduct and article 6), an employee with at least two years' service is entitled to the legal dismissal indemnity pursuant to article 1 of Law No. 845 of 27 June 1968.

In substance, such indemnity corresponds to one-fifth of monthly salary multiplied by the number of years of seniority plus two-fifteenths of monthly salary for each year of service beyond 10 years. However, collective bargaining agreements often provide a calculation of indemnity that is more favourable.

In case of dismissal under article 6 (without mentioning the grounds of dismissal within the dismissal letter) the employer would have to pay the dismissal indemnity pursuant to article 2 of Law No. 845 of 27 June 1968. In substance such indemnity corresponds to one daily salary for each month of seniority. This indemnity cannot exceed six months of salary.

In case of dismissal for gross misconduct, no severance is payable.

39 Are there any procedural requirements for dismissing an employee?

Monaco law provisions do not provide a general procedural requirement to dismiss an employee. Nevertheless a prior interview is highly recommended to reduce the judicial risk and is required by case law for dismissals under article 6 of Law No. 729 (see question 35).

A specific procedure is required should an employee be under a particular protection given by law resulting whereby the required prior approval from a commission chaired by the Labour Inspector must be obtained (see question 40).

Also, collective layoffs have to be implemented following a specific procedure (see question 41).

In addition, collective agreements often mention a required formalism to dismiss an employee. In this case, these collective agreement provisions are binding for the employer.

40 In what circumstances are employees protected from dismissal?

This concerns employees benefiting from a legal protection because of their private life or their delegation. This protection applies to staff representatives, union delegates, pregnant women, fathers taking paternity leave, employees benefiting from maternity leave, adoption leave and family support leave, and labour court judges.

This protection restrains both the grounds of dismissal and the implementation of dismissal. The employer is not entitled to dismiss a protected employee during the entire duration of its protection (depending on the nature of the protection) except for gross misconduct (without any link with the event which justifies the protection) or for termination or reduction of the business activity.

In this case, a specific procedure must be followed by the employer prior to the implementation of the dismissal.

The above-mentioned protected employees shall not have their employment terminated without requiring and obtaining the prior approval of a specific commission chaired by the Labour Inspector.

Should the commission refuse the dismissal, the employer has to renounce implementing the dismissal at least until the end of the duration of the protection.

Should the dismissal not comply with these provisions, it would be declared null and void and sanctioned by the reintegration of the employee plus potential damages.

41 Are there special rules for mass terminations or collective dismissals?

The implementation of collective dismissals is mainly regulated by Law No. 629 of 17 July 1957 and Amendment No. 12 of 28 July 1970 to the National Collective Bargaining Agreement dated 5 November 1945, which imposes some procedural steps prior to implementing any such decision.

Three main issues must be considered regarding the preparation and the implementation of a collective social plan:

- drafting an information document containing all essential elements regarding the decision to restructure, its motivation, its implementation and the measures taken by employers to minimise adverse impacts on employees;
- circulating the information to staff representatives, discussing with them and collecting their comments and choices on the measures taken towards implementing the restructuring (ie, adopted to decrease the number of dismissals); and
- implementing the restructuring plan, by obtaining required authorisations as the case may be, notifying terminations, paying termination indemnities.

The duration of staff representatives' prior consultation depends on the number of dismissals and the situation of the company.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class action is not recognised under Monaco law. Until today the rule is that each employee should present an individual claim in front of the labour court. Class action differs from collective disputes in relation to a collective issue excluding all individual claims (see question 44).

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Employers are not entitled to impose or even provide a retirement age. The retirement age is provided by Law No. 455 dated 27 June 1947 on retirement for employees and fixed at 65 years old.

Employees have the right to obtain their pension early at the age of 60, or 55 for women who have brought up at least three children until the age of 16. However, this is only a decision for employees.

Employers can terminate an employee's contract for retirement only if the employee has reached the legal age for retirement (ie, 65 years old). In this case, the employer has to pay its employee legal dismissal indemnity plus notice period.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

This option is mandatory for collective dispute by Law No. 473 on conciliation and arbitration of collective disputes. In this case, there is no individual request but an issue within a company between the workers

collectively (or their representative) and the employer or, beyond one company, a dispute between the union delegates (or the majority of staff representatives) of different companies and a majority of employers.

In this case the parties are required to take part in a prior procedure of conciliation and arbitration to resolve their differences. This procedure applies for example in cases of a dispute regarding the implementation of a collective agreement in an industry. The arbitration's decision can be challenged in front of the Superior Court of Arbitration only.

However regarding individual claims, the labour court has sole jurisdiction to resolve individual disputes arising out of an employment contract. Consequently, arbitration clauses in employment contracts are prohibited and usually unenforceable.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

A waiver must be done as part of a settlement agreement. To be valid, the settlement has to be concluded after a dispute. This means that a settlement concluded before termination and an employee's dispute of a termination cannot close the judicial risk regarding termination.

In addition, the settlement must provide mutual concession by both employer and employee.

For the employee, the waiver applies to any current or potential employment claims or any action against his employer. In return, the employer must pay a settlement indemnity beyond the amount legally due to his employee.

A valid settlement closes every dispute regarding the employment relationship (conclusion, execution, termination and duties following termination) mentioned within but does not cover matters related to public policy provision. For example, a breach to legal protection against dismissal for pregnant woman or staff representatives cannot be settled.

46 What are the limitation periods for bringing employment claims?

Employment claims in front of the labour court shall not start more than five years after the occurrence which gives rise to the claim.

In addition, the amount paid to the employee under his or her last salary, including termination indemnities, cannot be challenged beyond a period of two months from the date it has been received and signed by the employee. This prescription is not binding should the employee mention that he or she reserves the right under the *solde de tout compte* principle.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Most employment contracts are regulated by the Working Environment Act. For employees in the central government sector, the Civil Service Act contains specific rules on, inter alia, protection against dismissals.

Collective agreements are an important part of employment regulation in Norway. The rules governing collective agreements and collective labour relations in Norway are found mainly in the Labour Disputes Act and the Public Service Labour Disputes Act.

Other important statutes relating to employment are the Vacation Act, the National Insurance Act, the Personal Data Act and the various Discrimination Acts.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Working Environment Act, and also the various Discrimination Acts, prohibit discrimination in employment. The protection against direct and indirect discrimination and harassment is applicable to the following categories of discrimination: age, disability, gender, race, colour, religion or belief, political opinions, sexual orientation, and national, social or ethnic origin.

Further, employers cannot discriminate against part-time or fixed-term employees (see question 26).

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

In most cases, employment statutes and regulations are enforced by Norwegian courts. However, the Labour Inspection Authority has the administrative and supervisory responsibilities for a number of acts, including the Working Environment Act and the Vacation Act. If orders from the Labour Inspection Authority are not complied with by an employer, fines may be imposed and, in serious cases, the business may be ordered to close. Further, the Labour Inspection Authority may report employers to the police for serious breaches of the acts.

Other government bodies responsible for the enforcement of specific working environment standards include the Norwegian Maritime Directorate, the Petroleum Directorate and the Civil Aviation Authority.

Further, the Equality and Antidiscrimination Ombudsman and Tribunal assist in enforcing Norway's anti-discrimination laws. Employees' rights within the public sector are also protected by the Parliamentary Ombudsman.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Working Environment Act requires that all employers in Norway with more than 50 employees must have Working Environment Committees. Employers with 20 to 50 employees are also required to have Working Environment Committees if the employees, the employees' representative or the employer requires it. In addition, the Labour Inspection Authority can decide that employers with fewer than 50 employees must establish a Working Environment Committee. Working Environment Committees are primarily dedicated to health and safety issues in the workplace.

The Basic Agreement between the Norwegian Labour Organisation and the Norwegian Business Confederation contains rules on co-determination committees, or works councils, with equal representation from management and employees in firms with more than 100 employees. Works councils must also be established in companies with fewer than 100 employees if requested by one of the parties. The right to have union representatives is based on the Basic Agreement and other collective agreements.

Another important feature of the Norwegian rules regarding worker representation is the rules regarding the employees' right to be represented on the board of directors. In accordance with the Private Limited Liability Companies Act and the Public Limited Liability Companies Act, employees are entitled to elect employee representatives on to the board of directors in companies with 30 or more employees.

5 What are their powers?

The Working Environment Committee shall consider questions relating to the occupational health service and the internal safety service, questions relating to training, instruction and information activities in the undertaking that are of significance for the working environment, plans that require the consent of the Labour Inspection Authority, other plans that may be of material significance for the working environment, establishment and maintenance of the undertaking's systematic health, environment and safety work, and health and welfare issues related to working-hour arrangements. Further, the committee shall study all reports relating to occupational diseases, occupational accidents and near accidents, seek to find the cause of the accident or disease and ensure that the employer takes steps to prevent recurrence. The committee shall have access to Labour Inspection Authority and police inquiry documents. When the committee considers it necessary, it may decide that inquiries shall be conducted by specialists or by a commission of inquiry appointed by the committee. If the committee considers it necessary in order to protect the life or health of employees, it may decide that the employer shall implement concrete measures to improve the working environment within the framework of the provisions laid down in or pursuant to the Working Environment Act.

It can be agreed that a co-determination committee or work council can also act as, and have the same rights and obligations as, a Working Environment Committee. If that is not agreed, the powers of the co-determination committee or work council will be to ensure the workers' right to be informed and consulted in good faith before management makes decisions in matters that affect the employees, or in discussions concerning the ordinary operations of the enterprise. This includes matters relating to the financial position of the enterprise, its production and its development; matters immediately related to the workplace and everyday operations as well as general wage and working conditions. Unless otherwise agreed, discussions shall be held as early as possible and at least once a month, and otherwise whenever requested by shop stewards and before any decision is taken.

Employee representatives on the board of directors have the same rights and obligations as any other member of the board of directors.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Employers are, in the main, prohibited from obtaining information that constitutes sensitive personal data under the Personal Data Act. This includes medical information and criminal records. However, in certain positions, typically involving work with responsibility for children, the employee will have to comply with statutory requirements relating to his or her background (no registered criminal offences), and in such cases the applicant must provide the employer with such information.

The same restrictions apply if the employer hires a third party.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

It follows from the Working Environment Act that the employer can ask for health data if this is necessary to decide whether the applicant is able to perform the job in question. However, the main rule is that the employer cannot require a medical examination as part of the process of selecting the right candidate. For some positions, such as pilots, the statutory provisions or regulations require applicants to undergo a medical examination as a requirement for employment. In such cases, the employer will be entitled to refuse to hire an applicant who does not accept to undergo a medical examination.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Drug and alcohol testing of applicants is only permitted under Norwegian law if this explicitly follows from statutory provisions or regulations, if the position involves particular risks, or if the employer finds it necessary for the protection of life or health.

If the employer is allowed to carry out a test, and an applicant does not submit to such test, the employer is entitled to refuse to hire this applicant.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

As a general rule, employers in the private sector can freely choose which candidate to hire, whereas employers in the public sector must hire the best-qualified candidate. Both private and public employers must comply with the prohibitions against direct and indirect discrimination on the grounds that follow from the Working Environment Act and the various Discrimination Acts.

Affirmative action is allowed for objective and legitimate reasons. This is typically the case if an employer needs to raise the employment rate of one gender.

Employees who have been made redundant, temporary employees and employees who have refused to take part in a transfer of business will also, under certain circumstances, have a preferential right to employment. Part-time employees also have, under certain conditions, a preferential right to extend their working hours.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The employment contract shall be in writing and contain information on matters of major importance for the employment. It is explicitly stated in the Working Environment Act what information the employment contract must contain, and this includes, for example, the identity of the parties, the place of work, a description of the work (or the employee's title, post or category of work), the date of commencement of the employment, the employee's and the employer's period of notice, and many other terms.

11 To what extent are fixed-term employment contracts permissible?

Until 1 July 2015, fixed-term employment contracts were only permitted under special circumstances. This included work that deviates from the work that is normally carried out in the business, work to cover the company's needs during unforeseen peaks and seasonal fluctuations, and replacement staff for employees on leave. With effect from 1 July 2015, fixed-term employment contracts of up to 12 months are also allowed without any need for specific reasons for the time limitation.

If a fixed-term employment has lasted for more than three years, four years for some fixed term employments, the employee is entitled to a permanent position. If a fixed-term employment, which has not lasted for more than four years, does not meet the legal requirements of the Working Environment Act, the employee will also be entitled to a permanent position.

For employees in the central government sector, fixed-term employments are also permitted in specific situations other than those mentioned above.

12 What is the maximum probationary period permitted by law?

The maximum probationary period permitted by law is six months. This period may not be extended at the discretion of the employer. In the case of sick leave during the probationary period, the probationary period may be extended by a period corresponding to the period of absence if the employment contract contains provisions regarding such possible extensions. The extension must be notified to the employee before the probationary period has expired and cannot be used if absence is caused by the employer.

13 What are the primary factors that distinguish an independent contractor from an employee?

There are no statutory provisions distinguishing an independent contractor from an employee, and this must therefore be assessed on the basis of guidelines following from case law.

Factors indicating that there is an employment relationship include fixed hours of work, fixed compensation paid on a monthly basis (and not reduced in the case of underperformance), notice period, and whether the employer controls and directs the person's work.

Factors indicating that the person is an independent contractor include work performed in the person's own name and at his or her own risk, compensation being reduced in the case of underperformance, and whether the work is performed with his or her own equipment and on his or her own premises.

The actual situation is decisive if this deviates from what is stated in the contract between the parties.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Workers can be hired for a limited period from recruitment agencies. Enterprises that hire workers from such agencies are obliged to investigate whether the agency is registered in the Norwegian Labour Inspection Authority's register of approved temporary-work agencies. Further, staffing through recruitment agencies is only permitted to the same extent that temporary employment is permitted, except from temporary employments up to 12 months on a general basis.

Workers can also be hired for a limited period from undertakings other than those whose object is to hire out labour, provided that certain requirements are met.

The Working Environment Act requires equal treatment of workers hired from temporary-work agencies, including the same pay and working conditions as workers employed directly by the hiring undertaking. This also includes the obligation for the hiring undertaking to provide the recruitment agency with the necessary information to ensure that the agency is able to comply with the equal treatment requirement. The workers are entitled to necessary information in order to assess whether their pay and working conditions comply with the equal treatment requirement. The hiring undertaking is jointly and severally liable for payment of salary, holiday pay and any other allowances that follow from the principle of equal treatment.

A person who is unlawfully hired from a recruitment agency may take legal action and claim compensation or permanent employment from the hiring undertaking.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Norway places a quota on work permits for foreign nationals, but up to 2015 fewer foreign citizens had applied for work permits than the quotas allow. There are no numerical limitations on short-term visas for foreign workers, and these visas will, as a starting point, not be included in the required three-year period if the foreign worker applies for a permanent residence permit.

If the employee is resident in another EU or EEA member state, and has been posted from there, no work permit is required. If the stay in Norway lasts for more than three months, the employee must nevertheless apply for a residence card no later than three months after his or her arrival in Norway. For workers outside the EU and EEA, the requirement for a work permit also applies to those who move within a company group to work.

16 Are spouses of authorised workers entitled to work?

Spouses of authorised workers can be granted family immigration status that also allows them to work while living in Norway.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Employees from the Nordic countries do not any need any visa or permits to live and work in Norway.

Further, EU or EEA citizens will, as a starting point, not need a permit, but if they want to stay longer than three months, they have to register with the Directorate of Immigration.

Employees from a country outside the EU and EEA who wish to work in Norway will need a residence permit for work. Previously this was called a work permit.

Workers applying for a job in Norway must have a concrete job offer to obtain a residence permit for work. It is also required that the terms of employment for the foreign worker are equal to or better than those provided under a Norwegian collective agreement or that are customary for the occupation or sector.

Norway also grants group work permits for transfers within a single company for the completion of special projects in Norway. These group work permits are reserved for companies that are seeking to send at least six employees to Norway, and who have special skills or qualifications that make them necessary to the success of the project.

Even though the employee is responsible for obtaining the necessary work permit, the employer risks a fine or imprisonment if a foreign worker without the necessary permit is employed.

18 Is a labour market test required as a precursor to a short or long-term visa?

Residence permits for work can only be granted if there are no workers from Norway or the EU or EEA who are willing and qualified to undertake the position offered to the foreign worker.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Pursuant to the Working Environment Act, normal working hours are limited to 40 hours per week and nine hours per day. In some industries, specific rules apply. In collective agreements and individual employment contracts, the agreement is often 37.5 hours per week and 7.5 hours per day.

These limitations can be deviated from in collective agreements, but not in individual employment contracts. On the other hand, the employer and employee can agree that normal working hours shall be calculated on average in such a way that the calculation of the maximum working hours is done over a maximum period of 52 weeks. Total working hours still cannot exceed nine hours per 24 hours and 48 hours per seven days. A similar agreement can also be entered into between the employer and a trade union.

Overtime work cannot exceed more than 10 hours per seven-day period, 25 hours overtime per consecutive four-week period and 200 hours per consecutive 52-week period. These limitations can be deviated from in agreements with a trade union and in decisions from the Labour Inspectorate Authority.

Employees have the right to an exemption from overtime based on health or other valid personal reasons.

There are no restrictions or limitations on working hours for employees in executive or particularly independent positions.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All workers who are not in executive or particularly independent positions are entitled to overtime pay. The statutory requirement is that hourly overtime compensation should be 40 per cent of the hourly salary, which comes on top of the normal hourly salary. Many employees are covered by collective agreements that stipulate that the compensation should be 50 per cent.

21 Can employees contractually waive the right to overtime pay?

As the right to overtime pay follows from mandatory rules, employees cannot contractually waive their right to overtime pay. However, the employee and the employer can agree that the overtime be taken out as spare time, in which case the employee will only be entitled to the overtime compensation and not the normal hourly salary for this overtime.

22 Is there any legislation establishing the right to annual vacation and holidays?

Employees in Norway are entitled to an annual vacation of 21 working days (or 25 days if Saturdays are included). Employees who are 60 or older are entitled to an additional week of vacation. Many collective bargaining agreements also provide for four additional vacation days for all employees.

The vacation pay is a percentage of the employer's payments to the employee during the previous calendar year (10.2 per cent in the case of 21 days' vacation, 12 per cent in the case of 25 days' vacation and 12.5 per cent for employees older than 60). In order to receive full pay for vacation days, an employee must have been employed during the entire previous calendar year. If this is not the case, the employee may still take vacation, but the vacation pay will be reduced accordingly.

23 Is there any legislation establishing the right to sick leave or sick pay?

The National Insurance Act establishes the right to sick leave and sick pay, which is available for any employee who has been employed for at least four weeks before the sick leave begins. The cause of sick leave must be documented by a self-declaration form or a medical certificate.

Employees are entitled to sick pay from the first day of absence. The employer is responsible for the sick pay for the first 16 days, and after this the National Insurance scheme takes over and continues to pay for a period of up to 52 weeks. Employers can, in collective agreements or employment contracts, undertake to cover the difference between the sick pay from the National Insurance and the employees' full salary for the same, or a shorter, period.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Leave of absence is granted in a number of situations under Norwegian law.

Pregnant employees are entitled to a maximum of 12 weeks' unpaid leave during their pregnancy and six weeks of additional leave after they give birth. The father, if he lives with the mother, is entitled to two weeks of unpaid leave to provide care to his family. Adoptive parents and foster parents are also entitled to two weeks of unpaid leave when taking over responsibility for the care of a child.

Parents (including adoptive and foster parents) are also entitled to childcare leave for a total of 24 months. For the first 12 months of this period, the parents are entitled to payments from the National Insurance.

Many employers give employees the right to full salary during the first 12 months of the period of childcare leave and therefore cover the difference between the employee's salary and the payments from the National Insurance.

Employees are also entitled to paid leave for health, social, or other material reasons related to their personal welfare, including for the care of a sick child who is 12 years old or younger. Other categories of unpaid leave include educational leave and compulsory or voluntary military service.

25 What employee benefits are prescribed by law?

Few employee benefits are prescribed by law, but important statutory rights are: pension from the employer (in addition to the pension from the National Insurance), vacation and vacation pay, and sickness benefits.

26 Are there any special rules relating to part-time or fixed-term employees?

Employers are prohibited from discriminating directly or indirectly against fixed-term and part-time employees because of their employment status. Exceptions from this are only permitted if the employer can demonstrate that the differential treatment is justified on reasonable grounds.

A part-time employee will also have a preferential right to increased working hours if he or she should wish so and the employer has a need for the labour that the part-time employee is qualified to perform.

A fixed-term employee will also have a preferential right to employment for a period up to 12 months after the employment contract expired, if there are vacant positions in the company for which the fixed-term employee is qualified.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

New rules regarding post-termination covenants not to compete, solicit or deal entered into force with effect from 1 January 2016. The most important rule now is that covenants to restrict competition by employees cannot exceed 12 months, and that the employee is entitled to compensation during the restricted period that equals his or her full salary (with some limitations for employees with higher salary). The new legislation will also be applicable to already existing restrictive covenants with effect from 1 January 2017. The restrictions will only be valid if the employer gives a written statement in which the particular need for protection is explained.

Employees who are made redundant will not be bound by the non-competition clauses in their employment contracts after the period of notice has expired. This will also be the case if the employee has resigned and the employer has given him or her a reason for the resignation by not fulfilling the employer's obligations towards the employee.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes, the employee is entitled to compensation as long as the restriction is in force. The compensation must equal full salary for salary up to 7G ('G' is the base amount in the National Insurance) and 70 per cent of salary above this. However, the employer can decide that total compensation shall be limited to 12G. See question 27.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Employers can only be held liable for the acts or conduct of their employees if the acts or conduct are negligent and carried out as a result of or relating to the employees' duties.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employees are liable to pay tax to the Norwegian tax authorities on any income from employment in a Norwegian company. Preliminary income tax is deducted from the employee's salary and paid by the employer to the tax authorities. In 2017 the income tax rate is 24 per cent (national and municipal income tax), with an additional 'top rate tax' of 0.93 per cent on income between 164,100 and 230,950 Norwegian kroner, 2.41 per cent between 230,950 and 580,650 Norwegian kroner, 11.52 per cent between 580,650 and 934,050 Norwegian kroner, and 14.52 per cent on income above this.

Employers are also obliged to deduct social security tax from the employee's gross salary and other gross employment benefits. For 2017 the social security tax rates are 8.2 per cent for salary, 5.1 per cent for pension and 11.4 per cent for other income (eg, bonuses).

Employers in Norway are also required to pay an 'employer's contribution' (or 'payroll tax') to the National Insurance. This tax is calculated as a percentage of the wages paid in the course of a year. The amount of the payroll tax varies between zero and 14.1 per cent depending on the employer's geographic location.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

It follows from the Employee Inventions Act that the employer, in the main, is entitled to patentable inventions that result from work an employee has carried out as part of his or her ordinary work, and the use of the invention falls within the employer's area of activity. Similar non-statutory rules apply to other inventions.

32 Is there any legislation protecting trade secrets and other confidential business information?

Trade Secrets are mainly governed by two set of rules under Norwegian law. The provisions that shall protect a company against the illegal use of its trade secrets by the employees, contract partners and other business partners follows from the Marketing Control Act and the Civil Penal Code. Pursuant to the Marketing Control Act a person who has gained knowledge or possession of a trade secret in connection with a position of employment or trust or with a business relationship, must not use the secret unlawfully in the conduct of business. The same applies to a person who has gained knowledge or possession of a trade secret through breach by another person of his or her professional secrecy or otherwise through the unlawful act of another person.

The term trade secret is not defined in the legislation, but it is stated in the preparatory works to the Marketing Control Act that it must be knowledge that is specific for the company and that this knowledge is of importance to the company. This knowledge can be of any nature and the company must in some way make it clear that the knowledge must be held confidential. The definition or specification of trade secrets may also follow from a clause in the employment contract or other contractual bases. Such clauses may limit the employees' possibilities to handle trade secrets even further, but if the clause is considered unfair, it may be set aside by a court.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Personal Data Act is intended to protect all individuals, including employees, against violation of their personal integrity through the processing of personal data. Enforcement of the Personal Data Act is overseen by the Data Inspectorate.

Personal data may only be processed if such processing is lawful and if the data is collected for specific, explicitly stated and justified purposes. The processing must be relevant and necessary for the purpose stipulated and personal data may not be stored for longer than necessary with reference to the specified purposes. Personal data may be processed in order to satisfy a purpose that concerns a legitimate interest of the employer, provided that this interest outweighs the interest of the registered person in terms of protection against violations of personal integrity.

Sensitive personal data (eg, information about employees' or applicants' race or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade union, or personal data concerning health or sexual preference) may only be processed in special circumstances. Employees are allowed to give consent to the processing

of sensitive data. Such consent must be specific, individual and contemporaneous. The Data Inspectorate has the authority to determine whether sensitive personal data may be processed in other circumstances if warranted by important public interests and where measures are taken to protect the interests of the individual.

The General Civil Penal Code imposes a penalty for unlawful access to data or software that is stored or transferred by electronic or other technical means. While employers do have the ability to monitor work-related email, this ability does not include private email, even if the employer is the owner of the computer system. Email considered private may not be opened or read without the employee's consent.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Norway has adopted the Transfers of Undertakings Directive by incorporating its provisions into the Working Environment Act.

Before a transfer of undertaking, the existing employer (seller) and the future employer (purchaser) must discuss the transfer with the employees' elected representatives as early as possible.

The terms of employment for the seller's employees are, in most cases, transferred to the new owner. The purchaser is also bound by any collective wage agreement that was binding on the seller. However, within three weeks following the date of transfer, the purchaser may give written notice to the trade union that it does not wish to be bound by the agreement. The transferred employees will still be entitled to retain the individual working conditions that followed from the collective agreement until the collective agreement expires, or until a new collective agreement is concluded that is binding on the new employer and the transferred employees.

Specific rules also apply to pension schemes. Although the purchaser, as a starting point, must maintain the seller's existing pension plan, the purchaser can decide to cover the transferred employees under its own pension plan, regardless of whether this pension plan provides less generous benefits than the seller's plan.

The transfer of business does not, in itself, constitute justifiable grounds for the dismissal of an employee.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

There must be a 'cause' for dismissal under Norwegian law. For employees in the central government sector, specific rules apply that are intended to strengthen their employment protection.

Dismissals during the trial period must be based on either the employee's lack of suitability for the work or lack of proficiency or reliability. When the employee has finished the trial period, a dismissal of the employee upon proper notice must be objectively justified on the basis of matters connected with the company, the employer or the employee.

There are no statutory provisions that specify or indicate by way of example what kind of employee conduct is sufficient to justify a dismissal. This is determined on a case-by-case basis.

An employee cannot be made redundant if the employer has other suitable work to offer. In addition, the needs of the company must be weighed against the inconvenience of a dismissal for the individual employee. The consequence of this rule is that, even if an employer has cause for dismissing an employee, the dismissal will not automatically be legal.

The selection of the employees who may be made redundant must be carried out in accordance with the non-statutory guidelines arising from case law or applicable collective agreements, or both. It is not always the employee whose position will be eliminated who will have to be dismissed. When making the selection for dismissals, the employer is required to take into consideration all the employees in the company. If the company is organised in divisions that are significantly different from each other, the employer must take into consideration all the employees within the division.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Notice requirements are imposed on both employers and employees. Further, to the extent possible, employers must, in advance of a dismissal, discuss the possibility of dismissal in a meeting with the individual employee, who is entitled to be assisted by an employee representative or other adviser in such meeting.

The notice period varies from one month (14 days in the trial period) to six months, depending on the employee's age and seniority.

The employer's notice of dismissal must also meet other requirements, including that it must be made in writing and state the procedure to be followed if the employee wishes to dispute the dismissal.

As the rules regarding dismissals are mandatory, payment in lieu of notice is only possible if the employee agrees to this.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Employees can be dismissed without notice in the event of a gross breach of duty or serious breach of the employment contract.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Severance pay is not prescribed by law in Norway. However, there is a severance pay scheme agreed between the Norwegian Labour Organisation and the Norwegian Business Confederation that applies to all employees in almost all companies with trade unions. This scheme provides for severance pay in case of redundancy, illness or bankruptcy. Severance pay pursuant to this agreement is granted to employees aged between 50 and 67, and varies from 20,000 to 80,000 Norwegian kroner.

Severance pay is often agreed between the employer and the employee representatives before a redundancy process is carried out.

39 Are there any procedural requirements for dismissing an employee?

After the employee has received a notice of dismissal, he or she is entitled to demand that the grounds for dismissal be stated in writing if this is not already the case. If the employee makes such a request, the employer must comply.

Prior approval from a government agency is not required by law. However, before making a decision regarding dismissal with notice, the employer shall, to the extent that it is practically possible, discuss the matter with the employee and his or her elected representatives.

In the case of redundancies, the employer also has to comply with statutory requirements regarding information and consultations with the employees' representatives and additional non-statutory requirements in advance of any dismissals, including assessments of whether there is any other suitable work available for employees who are considered redundant.

Under guidelines established through case law, in selecting the employees for dismissal, the employer must discuss the selection criteria with the employees' representatives, including formal and factual qualifications, ability, age, seniority, and social and health conditions.

An employee who chooses to dispute a dismissal, will, in the main, be entitled to remain in his or her position until an amicable solution is reached or, in case of legal proceedings, there is a final verdict from the court.

40 In what circumstances are employees protected from dismissal?

Employees who are sick or injured may not be dismissed on grounds of sickness or injury during the first 12 months after their period of sickness or injury started.

Pregnant employees may not be dismissed on grounds of pregnancy; employees who are on maternity, paternity or adoption leave may not be dismissed on grounds of absence for reasons related to their leave; and employees who are in the military or civil service may not be dismissed on grounds of absence for reasons related to their service.

Pursuant to the Basic Agreement, the employees' elected representatives are given specific protection against dismissal by requiring that due regard must be given to the special position that they have in the company.

Under the whistle-blower provisions of the Working Environment Act, employers are prohibited from dismissing, or in any other way from retaliating against, a whistle-blower who has acted in good faith when reporting on alleged misconduct in the company.

41 Are there special rules for mass terminations or collective dismissals?

Yes. Before collective dismissals (involving possible dismissal of 10 or more employees within a period of 30 days), the employer must, at the earliest opportunity, enter into consultations with the employees' elected representatives with a view to reaching an agreement to avoid employee dismissals or to reduce the number of employees who will be dismissed. For purposes of these consultations, the employer must provide the elected representatives with written notification containing information on several issues, such as the grounds for the redundancies, the number of employees who may be made redundant, the selection criteria for those who may be made redundant and the criteria for calculating extraordinary severance pay, if applicable.

The employer must also notify the Labour and Welfare Organisation of the possible mass termination, and the dismissals cannot take effect before 30 days after such notice has been sent.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class actions were not permitted in Norway until 2008. Before that, disputes that involved several employees were organised in alternative ways and with each claimant individually named in lawsuits, and these alternative procedures are still allowed.

Collective disputes regarding the understanding of collective agreements can only be brought to the Labour Court, and only by the involved trade union or employers' organisation.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Yes, under Norwegian law employers are entitled to impose mandatory retirement ages that deviate from the Working Environment Act's stipulated retirement age of 72. In most cases, the mandatory retirement age has been set to 67 years. With effect from 1 July 2015, the employer can set the mandatory retirement age to 70 if this is discussed with the employees' representatives and the retirement age complies with the prohibition against discrimination based on age, which means that the retirement age must be reasonably justified by a legitimate aim, and lowering the retirement age must be an appropriate and necessary means of achieving that aim.

Further, the retirement age must meet the following three, non-statutory requirements:

- it must be made known among the employees;
- the employer's practice regarding the retirement age must be strict – the employer cannot allow too many employees to continue their employment after the retirement age; and
- the employees must be entitled to a sufficient pension when they retire.

Lower mandatory retirement age than 70 years can only be set if this is necessary owing to health or security reasons.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Only the managing director of the enterprise can agree to private arbitration of employment disputes in his or her employment contract.

After a dispute has arisen, for example after an employee has received a notice of termination, other employees can also agree to private arbitration.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

Employees cannot agree to waive statutory rights before a dispute regarding the particular statutory right arises. Employees can, on the other hand, agree to waive contractual rights at any time.

46 What are the limitation periods for bringing employment claims?

The normal limitation period of three years will also apply to most employment claims. Some pension claims have a limitation period of 10 years.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Employment law in Portugal is mainly based on the following sources: the Constitution; Portuguese Labour Code, approved by Law 7/2009 of 12 February as amended by Law 28/2016 of 23 August; collective bargaining agreements; employment contracts; and custom.

There are also certain specific topics which are regulated on separate pieces of legislation, such as agency work and health and safety provisions, etc, but the Portuguese Labour Code comprises most of the applicable regulations. Employment contracts in the context of civil service (public functions) are regulated in Law 35/2014 of 20 June, as amended by Law 42/2016 of 28 December, and are excluded from the scope of this chapter.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Portuguese Constitution sets out a general principle of equality and prohibition of discrimination based on ancestry, sex, gender, race, language, territory of origin, religion, political or ideological beliefs, education, economic and social status or sexual orientation.

The Portuguese Labour Code further develops this principle, setting out specific prohibition statutes in relation to discriminating behaviours on an employment framework or even prior to the entering into of the employment contract. It particularly focuses on the prohibition of discrimination based on sex, setting out that nobody can be excluded or be limited to access any type of work or professional training based on a person's sex.

Under this broad framework of equality, the Portuguese Labour Code expressly prohibits any type of harassment, in particular sexual harassment, defined as any unintended behaviour, in particular based on any discrimination factor, taken on access to employment, during the performance of work or while on professional training, that aims to disturb a person affecting his or her dignity or to create a hostile, intimidating, humiliating or degrading environment for that person.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

There are basically three different government agencies involved in the supervision of the application of employment law statutes in general, each with its own areas of intervention.

The Authority for Working Conditions (ACT) is focused on the enforcement of employment statutes as provided in the Portuguese Labour Code, in particular health and safety rules, proper working conditions and minimum working standards, as well as equality and non-discrimination of employees, etc, and may also play an important administrative role in certain procedures such as employees' reduction of professional category (whenever it involves a salary reduction) or individual redundancy files. The ACT can effectively be called by the affected employee to verify some of the legal requirements on which the validity of an individual redundancy dismissal depends. Although a negative decision per se does not necessarily affect the lawfulness of the procedure, it will definitely be an important element to be taken into consideration should the employee decide to challenge the decision in a court of law.

The General Directorate of Labour and of Working Relations (DGERT) concentrates on the promotion of collective negotiations and resolution of collective disputes throughout mediation and conciliation procedures, negotiation and implementation of collective bargaining agreements (CBAs) and, in general, supervision of collective regulations. DGERT may also intervene in collective redundancy files with a view to ensuring compliance with formal termination procedures. Briefly, DGERT's main responsibility in a variety of situations is to ensure social dialogue in the context of existing disputes.

Finally, Portugal also has in place an entity focused, in general, on equality between employees in the workplace called the Commission for Equality at Work and Employment. This entity deals solely with this subject in its various perspectives and practical applications, ranging from the protection of employees and their parental rights to the enforcement of non-discrimination behaviour, making sure that employment statutes are duly complied with. It is important to note that the termination of pregnant employees, postnatal employees, breastfeeding employees, nursing employees or employees taking up their right to parental leave requires the prior approval of this agency. Should the termination be denied, the employer shall have to seek a special court order to be able to go through with the intended redundancy.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The law sets out the possibility for employees to create workers' committees to uphold their best interests and to exercise their rights as provided by the Portuguese Constitution.

Even though there are essentially two ways of representation at the workplace – trade union representatives/delegates and works committee/council – works committees/councils are scarce as they usually exist only in large companies where unions may have a strong presence.

5 What are their powers?

The rights of employees' representation structures at the workplace are regulated by the Portuguese Labour Code and are limited to information and consultation.

In summary, the trade union delegates' role includes providing a link between union members and the union, including but not limited to activities with recruitment and campaigning; ensuring that collective bargaining agreements are applied; negotiating new collective agreements at company level, etc. Trade union delegates are entitled to information on what the Portuguese Labour Code identifies as 'recent and probable development of the employer's activities and economic situation' and information and consultation on 'the situation, structure and probable development of employment', as well as planned measures to maintain staffing levels, together with 'measures likely to lead to substantial changes in work organisation'. Additionally, in areas such as working time, training and temporary close-downs, the trade union delegates should be informed and consulted, in the event that no works committee/council exists.

As for the role of the works committee/council, it is purely advisory and consultative. According to the Portuguese Labour Code, it should receive a range of economic, financial and employment information, particularly the financial plans for the business, the taxation paid, plans to alter the capital structure of the business; production levels and their implication for employment, information on sales; policy for employees and works' rules.

Furthermore, works committees/councils should also be consulted over a range of issues before a decision is taken by the employer, such as the closure of the company or significant parts of the business; any event that may produce a significant reduction in the number of employees or a major worsening of working conditions; changes in working hours and the organisation of annual holidays; changes in grading and promotion procedures.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Portuguese law sets out a general principle of good faith to be upheld by the future employer in the process of selecting an employee to hire, regardless of this being done directly or via a third party. This does not mean that the control of the company's search and selection procedures is less stringent. Quite the opposite; it reflects the obligation to conduct such procedures, at all times and under any circumstances, in ways that do not breach such good faith principle. Otherwise the company may risk civil liability for the damages caused to the candidates whose positions in said selection procedures were effectively harmed.

If the search or request for information is made in violation of privacy regulations and if the candidate's potential to be recruited is affected by that information, or by the employee's refusal to provide it, the company may also be liable for the damages caused to the candidate. In fact, the law even prevents the future employer from trying to obtain information that would be deemed private, except in cases where such information could be considered essential for the performance of work. On these privacy aspects, see question 31.

Outside those exceptional situations where a legitimate interest of the employer can be evidenced, the right of the employee to lie regarding any information that would be considered of a private nature or even irrelevant for the performance of the work is recognised.

While setting up a background checks' procedure, one should bear in mind that any such requests, in particular if they involve private or sensitive information, should be carefully justified, in writing, and reasonably connected with the job that the employees are to perform or otherwise they risk being considered unlawful. These should not be conducted in ways that reveal any sort of inadmissible discrimination of candidates. The use of any discrimination criteria would only be possible to the extent that the same would be understood as a justifiable and essential requirement for the performance of work, considering the nature of the activity and the practical aspects of its execution. The employer's objective should be legitimate and the requirement fairly proportional (ie, more than just providing a simple justification for the use of said discriminatory criteria, the 'advantages' for the employer arising from the use of this exceptional discriminatory behaviour have to be greater than the damages caused to the employee whose position, because of that discriminatory behaviour, is harmed).

Finally, please also note that these selection procedures, to the extent they are considered as personal data processing, may be subject to prior notification or authorisation from the Portuguese Data Protection Agency (CNPD).

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

With the exception of the situations provided for on health and safety matters, the law prevents employers from requiring medical examinations as a condition of employment, except when these aim to ensure the employee's protection or the protection of others, or also when particular demands connected with the performance of the work so require (see question 6). Should the employer decide to ask for those tests or medical exams, the grounds will have to be given in writing to the employee. It is prohibited, regardless of what justification the employer may have, to request a pregnancy test from a candidate for employment or from an employee.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

See question 7.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Yes, as indicated in question 7, any sort of discrimination that may result in a less favourable treatment of any person than that which was given to others in a similar situation is prohibited. It is also considered a case of unlawful discrimination whenever a certain provision, criteria or practice, apparently neutral, effectively creates a situation where a person is placed in a less favourable position than others. In this case, that would only be possible to the extent that the employer would be able to prove that such discrimination has a legitimate purpose and that the means which are being used to achieve that purpose are adequate and necessary.

In what concerns access to employment, there is a general principle of equal opportunities, according to which nobody should have any advantage or should be prevented from attaining a job position or professional training or developing their careers for reasons connected with factors such as age, race, religion, economical situation, etc.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Except in certain specific situations where employment contracts do need to be made in writing, included but not limited to fixed-term employment contracts, teleworking employment contracts, employment contracts with foreign employees, etc, it is not mandatory for employment contracts to be made in writing.

However, employers are to provide employees with proper information regarding certain aspects connected with the performance of work, such as working hours, salary, working conditions, position and job description, among others and, in that context, information in writing is necessary.

11 To what extent are fixed-term employment contracts permissible?

Except for certain specific cases set out in the law and unless otherwise provided in applicable collective bargaining agreements, fixed-term employment contracts can only be entered into when the employer has a temporary need of work which does not justify the entering into of a permanent (open-ended) employment contract.

According to the Portuguese Labour Code, fixed-term employment contracts may have a maximum duration of three years and, during that period, the maximum number of renewals is three. For fixed-term contracts whose terms are not set in accordance with a specific date but with a certain future event (of which the exact moment of occurrence is yet unknown) the maximum duration is six years.

12 What is the maximum probationary period permitted by law?

A probation period's maximum duration differs depending on whether we are looking at open-ended or fixed-term employment contracts. On open-ended employment contracts probation periods can range between 90 days (for undifferentiated employees) and 240 days for high-ranked or management positions. For fixed-term contracts, depending on whether the contracts are entered into for less or more than six months, maximum trial periods shall be of 15 days or 30 days respectively.

Trial periods can be reduced by either individual or collective agreements, but they cannot be extended for more than the maximum durations set out in the law and provided that all necessary requirements are met.

13 What are the primary factors that distinguish an independent contractor from an employee?

In principle, an independent contractor is a service provider whose work is performed without any sort of subordination (legal, hierarchical or economic) towards the 'client'. From a more theoretical point of view, independent contractors are bound to provide for a certain end-result in connection with their work, but the way, the time or the place they perform it is normally set according to the service provider's availability and will. On the opposite corner, employees are generally bound by an obligation to provide work within the context of a certain organisation and the terms and conditions for the provision of that work are normally set out by the employer (working hours, place of work, etc). However, practice shows that these differences may, in some cases, become somewhat blurred.

Not only does the law provide for a general definition of what an employment contract is, but it also sets out the criteria that may lead to the assumption of the existence of an employment contract. As a result, in principle and regardless of what the parties may have agreed in writing, it is possible for a supposedly independent contractor to claim the existence of an employment contract should those criteria be identified in the performance of the contract. For example, if the place of work of that allegedly independent contractor was determined by the company, if he or she uses company goods and if a regular 'salary' is paid on a monthly basis, then it would be possible for that claim to be brought up on the basis of this statutory assumption. A straightforward solution to avoid this risk would be to hire service providers that are companies and not individuals, since in that case the existence of an employment contract would not be possible.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Agency workers' regime is provided by the Portuguese Employment Code and by Decree-Law 260/2009 of 25 September (as amended by Law 28/2016 of 23 August) regulating the access and licensing requirements for recruitment agencies.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

In principle, EU nationals are free to circulate and provide work within the European Economic Area subject only to certain registration obligations.

A uniform Schengen visa allows third-country nationals subject to a visa requirement to enter or transit through the territory of every country composing the Schengen area (such as Portugal). A long-stay visa is regulated in the framework of the existing national legislation and may be either for temporary stays or for residence, according to the length of the stay. Such visas allow their holder to remain in Portugal for the intended purpose: for example, study, internship, work or medical treatment and there is no limitation on the number of short-term visas.

16 Are spouses of authorised workers entitled to work?

Spouses and certain family members of EU, EEA and Switzerland nationals can apply for a residency card in Portugal. Once it is granted, they are able to work in Portugal without restrictions like any other EU citizen. Outside this scenario, providing that the necessary requirements are met, a family reunification request may be filed with the competent authorities to obtain authorisation for family members to reside and work in Portugal.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Employment contracts of foreign employees (excluding EU and EEA nationals) are subject to special terms and conditions set forth in the Portuguese Labour Code. First of all, they have to be made in writing and reference should be made to the existing permits or authorisations allowing the foreign employee to perform work in Portugal, which the employee should include as an appendix to the employment contract. In addition, on top of many other necessary references to be included in the employment contract (such as the employee's workplace, the frequency of the salary payment, applicable working hours, etc), a special reference to the names and domiciles of the beneficiaries of the worker for the purpose of compensation insurance in case of death resulting from a work accident or profession-based illness, should also be added. Breach of these terms is considered serious misconduct and may trigger administrative offence procedures resulting in the application of a penalty fine.

18 Is a labour market test required as a precursor to a short or long-term visa?

Save for certain specific situations, in order for an employer to hire third-country nationals (excluding EU and EEA nationals) under an employment contract or a promise of a future employment contract, a statement from the IEFP will have to be previously obtained confirming that the employment offer is included in the legal defined quota of available jobs to third-country nationals.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Normal working hours cannot exceed eight per day and 40 per week. However, by means of a CBA the normal working hours may be increased by up to four hours per day, provided the working week does not exceed 60 hours. An individual arrangement may be made between the employee and the employer to increase daily working time by up to two hours, provided the average working week does not exceed 50 hours. In any of the above cases, this temporary increase should be compensated later on so that, on average and in a given reference period (which normally is four months), the maximum working hours limitations are observed. CBAs are flexible to set different reference periods to work on this model.

It is possible in certain cases for the employer and the employee to enter into a special working hours' exemption agreement, which allows for the employee to provide work without being limited to the maximum working periods set out in the law. The situations where this working hours exemption regime can come into play are set out in the law, but CBAs can regulate on that as well.

In any event, this regime does not affect the employees' right to compulsory and supplemental weekly resting days, nor does it affect the minimum resting period between consecutive days of work. In addition, the performance of work under this working hours exemption regime entitles the employees to special pay and only employees occupying management positions or who are directors (if applicable) may lawfully waive it.

The working day must have a period of between one and two hours' break to prevent employees working for more than five consecutive hours, or six consecutive hours in case the applicable daily working period is over 10 hours.

Employees are generally guaranteed a minimum of 11 continuous hours of rest between two consecutive working days. This does not apply to activities characterised by the need to ensure continuous service or production, provided the corresponding time off in lieu is guaranteed.

Sunday is normally the compulsory weekly resting day. In addition to this, another half or full day's rest may be granted (generally on a Saturday). However, the compulsory and the supplemental days of rest may be set on different days considering that Saturday and Sunday typically have more commercial activity.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All work requested by the employer and rendered by the employee outside normal working hours is considered overtime. Safe from some particular cases (specially protected employees such as pregnant employees or employees in the use of parental leave), employees are to provide overtime when so requested by the employer.

Overtime performed on a normal working day entitles employees to an increase in pay: 25 per cent of pay for the first hour; 37.5 per cent for subsequent hours or part-hours. Overtime worked on a compulsory or supplemental weekly resting day or on public holidays entitles

employees to an increase of 50 per cent for each hour of work done – when in a public holiday the employee is also entitled to paid time off in lieu equivalent to 50 per cent of the hours of work performed or, alternatively, to an additional increase of 50 per cent of pay. Overtime performed on compulsory weekly resting days entitles the employees to one paid day off in lieu, to be taken over the following three working days.

21 Can employees contractually waive the right to overtime pay?

Employees providing overtime cannot waive that right and will be able to claim it, as any other salary entitlement, up until one year after the termination of the employment contract.

22 Is there any legislation establishing the right to annual vacation and holidays?

The employees are entitled to a minimum of 22 days of vacations per year, the use of which should be agreed upon between employer and employee. In the absence of such agreement, the employer can determine when these 22 days are to be enjoyed by the employee, provided that prior consultation with works' councils or unions is carried out (if applicable). Except for undertakings employing less than 10 employees, holidays can only be unilaterally set by the employer from 1 May to 31 October, except as otherwise provided in applicable CBAs.

Vacation entitlement vests on the 1 January of every year and should be used in the course of that year. On the year the employment contract was entered into vacations accrue on a basis of two days per month of work and can only be used by the employee once a six-month consecutive period of work is performed. On the year the contract is terminated, the employee is entitled to be paid for the vacations that would vest on the following year, on a pro rata basis considering the duration of the employment contract on that final year. Should the employment contract not last for more than 12 months or should it be terminated on the year following that on which it was entered into, vacation entitlement is calculated pro rata taking into account the actual duration of the contract and by reference to the annual vacation period. CBAs can set out different regulations on these matters.

Holidays are set out in the law and have to be observed by the employer.

23 Is there any legislation establishing the right to sick leave or sick pay?

According to Portuguese Social Security Regulations, provided that the necessary requirements are met, employees who are temporarily incapacitated to provide work are entitled to sick leave and sick pay under the public social security regime.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The employee is entitled to take a leave of absence without pay for a period longer than 60 days, to take a course, to study or obtain professional training, provided that certain requirements are met. The employer can only refuse such request in very limited situations. In the remaining cases, leave of absence requires the employer's agreement.

25 What employee benefits are prescribed by law?

In addition to salaries, the law also references Christmas allowance, vacation pay and vacation allowance and certain other special payments connected with the performance of work (ie, overtime, working hours' exemption pay, etc). CBAs can also regulate on these benefits, but in practice most of the additional benefits (such as health insurance, company car, achievement bonuses, etc) are only set out in the companies' internal regulations.

26 Are there any special rules relating to part-time or fixed-term employees?

As a general principle, part-time employees should benefit from the same level of protection and entitlements as that of full-time employees in the same or in comparable situations.

The law sets out certain obligations to be met by the employer. For example, whenever the employer decides to enter into a part-time employment contract, it should give preference to people with family responsibilities, reduced capacity for work, people who are physically disabled, have chronic diseases or who are studying.

Employment contracts for part-time employees have to be made in writing and, among other requirements, it should state the part-time employee's normal working hours by reference and in comparison with that of full-time employees. In addition, the employer should take into consideration any requests by the employees to change from part-time to full time and vice versa and it should also provide the employees, as well as the employees' representatives, with relevant information regarding available part-time and full-time positions at the company.

With regard to fixed-term contracts, see question 11.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

In principle, post-termination restrictions that limit the employees' freedom to provide work are deemed null and void. However, it is possible to uphold non-compete covenants should the following requirements be met:

- an agreement in writing is entered into to regulate this matter;
- the activity that the restrictive covenant aims to prevent has to be reasonably able to cause a relevant damage to the employer; and
- during the period of limitation of activity the employee should be entitled to a special pay.

There is no formula to calculate this non-compete compensation but there are some court rulings that, without setting out any minimum or maximum thresholds, point to a necessary balance being established between the restrictions imposed on the employee and the amount of that compensation, so that it is a reasonable, proportional and adequate source of income.

The maximum duration of this non-compete obligation is two years, but it can be extended to a maximum of three years for employees whose jobs involve a relevant level of trust or who may have had access to an employer's information that is particularly sensitive.

Any agreement entered into by and between employers which prevents any of them from hiring each other's employees, or that imposes the payment of compensation in result of breach of such an agreement, is deemed null and void. Consequently, in contrast with other jurisdictions, in Portugal non-solicitation agreements between employers cannot be lawfully enforced.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

One of the requirements of the non-compete covenant is the payment of a special compensation. There have been some discussions around whether or not it is absolutely necessary for the payment of this compensation to occur after the termination of the contract or, alternatively, if it would be possible to pay it, for example, during the performance of the employment contract simultaneously with the employee's salary. The majority of opinions tend to consider that the existence of this compensation is mostly connected with the need to provide the employees with a minimum level of income during the period of limitation and, in that sense, payment of the non-compete compensation during the performance of the contract could potentially frustrate that objective. Consequently, in our opinion, regardless of the time such non-compete obligation is entered into, the payment of the compensation should, in principle, only occur or commence once the employment contract is terminated. In addition to this, from a practical standpoint it makes more sense not to anticipate this payment but rather to keep it and use it as an additional guarantee of due performance by the employee.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

As a general civil law rule, any person who instructs another to act on its behalf and to fulfil a certain task is jointly and severally liable for any damages caused by that person to third parties during or in connection with the performance of the task he or she was instructed with. In that same sense, any employee whose actions in the performance of the job

cause damages to third parties may render the employer jointly and severally liable before third parties, on the same terms and insofar as the employee would be if he or she were acting on his or her own behalf.

Taxation of employees

30 What employment-related taxes are prescribed by law?

In addition to withholding tax obligations, which are connected with the employees' personal income tax and whose rates are established on the basis of variable factors including the employees' martial status and household composition, contributions to the public social security system also apply.

In Portugal, with the exception of certain independent professional areas that have their own private framework, employees, independent contractors and even members of corporate bodies contribute to the public social security system on a mandatory basis.

Contributions may vary depending on the type of employment contract and job performed by the employees. Special incentive programmes are frequent as Portugal is a country struggling with unemployment issues and the government often grants special contribution rates under specific programmes to increase employment, often focusing on certain targets such as long-term unemployment situations or people above a certain age. Currently and for 2017 the general social security contributions are as follows: for the employer, 23.75 per cent of the employee's gross monthly salary and for the employee, 11 per cent of the employee's gross monthly salary.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Intellectual Property Code and the Copyright (and associated rights') Code both provide regulations on employee inventions. Insofar as the parties do not agree otherwise, in principle intellectual property rights generated by an employee in the course of the performance of the employment contract are deemed of the employer. To the extent they do not infringe the Intellectual Property Code and the Copyright Code, the parties may also specify on the employment contract specific regulation, setting out, for example, the obligation of the employee to disclose details of any inventions he or she may have created in the performance of the contract and to provide further explanations and demonstrations as the employer may from time to time request.

32 Is there any legislation protecting trade secrets and other confidential business information?

The Industrial Property Code sets out the applicable regulations concerning the protection of business secrets and other undisclosed information. As a general rule, it is unlawful to access, disclose or use business secrets of a competitor without its consent, provided that such information is not common knowledge and it cannot be easily accessed by any person normally dealing with that type of information; the information has commercial value based on the fact that it is secret and the person or company that controls the information had undertaken considerable diligences to keep it secret.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There are strong limitations to the employer's possibility to ask or access private information of the employees. Privacy rights of the employees are not only covered by Constitution but also by the Portuguese Labour Code, whereas data protection regulations are set out in Law No. 67/98 of 26 October (which transposed EC Directive No. 95/46).

The law prevents employers from requesting or trying to obtain information that would be deemed private, except where such information is strictly necessary and relevant to assess the employees' capacity to perform the work. In addition, employers are also prevented from requesting information regarding their employees', or future employees', health condition and whether or not they are pregnant, except when particularly demanding aspects of the job do so require. In any of those two cases, proper grounds for that request should be made available in writing to the employee, justifying the need for that sensitive information. Information regarding a health condition or pregnancy status should be obtained through a doctor, who will take into consideration the work demands and simply inform the employer if the employee is fit for the job.

Once the employment contract is entered into, the law sets out an obligation for the employee to provide the employer with information on all facts that may be deemed relevant for the performance of work, as well as any changes that may occur during the performance of the contract that may affect that performance. This matter is particularly discussed in the doctrine deeming the question on how far and to what extent can this obligation may be taken to on the side of the employee. From our point of view, the safest approach possible is recommended. Consequently, unless there is a very strong and relevant (proportional) connection between the private or sensitive information that would be due and the performance of work that is expected from the employee, employees are not to be held liable for not complying with that obligation.

The processing of certain personal data necessary in the context of employment, such as employees' marital status, household composition, age, address, applicable CBA, etc, is covered by special exemptions granted by the CNPD. However, the processing of personal data (as defined in the Portuguese Data Protection Regulations) excluded from those special exemption permits may be subject to prior notification or authorisation from the CNPD regardless of the employees' consent.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

EU Regulations on transfers of undertakings have been transposed into Portugal by the Portuguese Labour Code.

Should the transfer of business be implemented in accordance with Portuguese regulations, the employment contracts will be automatically transferred and the employees, in principle, will not be allowed to oppose it. There are, however, some opinions (and also some European Court of Justice rulings) recognising that possibility, in particular when the transfer itself presents a risk to the survival of the employment contract, or to the satisfaction of any existing employment entitlements. Any intended changes to the employment contracts (prior to or after the transfer), connected with employees' entitlements require their consent and, for a period of one year after the transfer, the transferor shall remain jointly and severally liable for any claims regarding the period prior to the transfer.

There is a specific procedure both the transferor and transferee need to carry out but, in the absence of a works' council or union representatives, no pre-signing or pre-transfer consultation is required.

Finally, should there be any applicable CBAs to the transferor, those shall remain valid and in force (after the transfer) to the transferee and the transferred employees until the CBA expires or for a minimum period of 12 months after the transfer – except if a new CBA (applicable to the transferee) comes into force in the meantime.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

In Portugal there is no 'employment at will' regime. Termination of open-ended employment contracts cannot be unilaterally carried out by the employer outside a 'fair cause' scenario. The most common employer-motivated terminations cases are: dismissal for just cause, as a result of misconduct by the employee, the seriousness and consequences of which make it immediately and practically impossible to continue the employment relationship; collective redundancy file and individual redundancy file.

In contrast with the first case, which is based on certain behaviour of an employee that is deemed sufficiently serious and suitable to be understood as a fair cause for termination, collective and individual redundancy files' grounds for termination have to be connected with the economic situation of the company and the need to reorganise and restructure.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

This possibility of paying in lieu of notice only exists when in connection with individual or collective redundancy files. Indeed, once the final termination decisions are taken, a statutory prior notice exists and, in those cases, it is possible for the employer to pay in lieu of notice. However, this does not affect the actual date of termination of the contract, which shall be that on which the prior notice period would end and, in that context, all employment entitlements resulting from the termination of the contract, including severance pay, should be calculated as of that date.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

See question 35.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

As in other similar situations where the termination of the employment contract is motivated by the employer, redundancy-based terminations entitle the employee to severance pay.

Currently, for employment contracts entered into after 1 October 2013, severance pay is calculated taking into consideration 12 days of salary per year of tenure, whereas formerly the formula was of one month of salary per year of tenure. These changes contemplated a reduction of more than 50 per cent on severance payments. For contracts entered into before November 2011, the legislator has introduced special transitional rules that, without jeopardising past 'entitlements' of this kind, allow for a progressive cut during successive periods from October 2012 until October 2016, consolidating one single severance pay formula for employment contracts of all types and durations.

The maximum severance pay limits are set on the following levels: the amount of the employee's basic salary to be taken into consideration cannot exceed €10,600; the maximum amount of the severance pay is either the amount corresponding to 12 times the employee's basic salary (plus seniority salary accruals) or 240 times the minimum wage (€530), ie, €127,200. These thresholds do not prevent the employer from providing employees with a higher severance pay, which may absolutely be the case in an agreed termination scenario.

Since October 2013 employers have to make monthly contributions (calculated on the basis of the employees' salaries) to work compensation funds, so that in the end, should the termination of contracts involve severance pay, employers may use up to 50 per cent of the amounts 'saved' during the performance of the employment contracts.

39 Are there any procedural requirements for dismissing an employee?

Depending on the motives for the termination, different procedures may apply. When the termination decision is based on a relevant disciplinary misconduct, the employer has to launch a formal procedure in the context of which evidence will have to be gathered to demonstrate the seriousness of the behaviour and the consequences that make it immediately and practically impossible for the employment to continue. This is quite a complex and cumbersome procedure, which will necessarily involve giving the employee the opportunity to dispute the charges made against him or her and to present evidence of the lack of fair cause for termination. Owing to the complexity of these formal procedures, they may last for some time.

It is possible and sometimes even recommended that in certain situations where the presence of the employee may be deemed inconvenient for the promotion of the formal disciplinary procedure to have the employee suspended, with pay, until a final decision is taken.

These procedures run on very tight deadlines. In a nutshell and regardless of the possibility to suspend this deadline (whenever prior investigations are required), the employer has only 60 days to start the disciplinary procedure once it becomes aware of the employee's conduct. Otherwise, the right to apply disciplinary sanctions will expire. Certain CBAs even set out shorter periods and, therefore, it is of the outmost importance for the employer to have in place the necessary mechanisms to react swiftly and efficiently whenever required.

On a different scope, collective and individual redundancy files both start with a preliminary notice of termination, on which the economical grounds for termination and corresponding evidence will have to be brought forward by the employer. The employee will also have to provide the criteria for the selection of the posts to be made redundant, which in the case of individual termination are limited to those indicated in the Portuguese Labour Code. After that initial notification, consultation with the employees' representatives may follow depending on whether or not such representative bodies exist at the company. In the case of a collective redundancy file, the employees may appoint a special ad hoc committee to negotiate with the employer whereas in individual redundancy files the employee is entitled to dispute the employer's intention in writing and to request the involvement of the authorities at that same stage. The authorities may intervene to assess the regularity of the formal procedures and to promote dialogue between employer and employees' representatives (DGERT in the context of collective redundancy files), or to verify the necessary requirements of the intended redundancy (ACT in the context of individual redundancy files). On this topic, see question 3.

Once the final termination decision is taken it will only become effective once due prior notice passes. That prior notice varies depending on the employee's tenure: 15 days for employees with less than one year; 30 days for employees with more than one year and fewer than five years; 60 days for employees with more than five and fewer than 10 years; 75 days for employees with more than 10 years. During that period and regardless of the possibility of the employee being on leave, all rights and obligations emerging from the employment contract shall remain applicable.

Finally, in certain cases prior approval from the authorities may be required. In this context, see question 3.

40 In what circumstances are employees protected from dismissal?

Certain groups of employees, such as pregnant employees, postnatal employees, breastfeeding employees or nursing employees, employees enjoying parental leave and employees on employees' representative roles, benefit from special protection.

41 Are there special rules for mass terminations or collective dismissals?

Collective redundancy files are defined as the procedure where the employer terminates, either simultaneously or within a period of three months, the employment contracts of at least two employees, in the case of undertakings with up to 50 employees (micro and small undertakings), and at least five employees, in undertakings with over 50 employees (medium-sized and large undertakings), on the grounds of the permanent closure of the business, the closure of one or more departments, or the need to reduce the workforce for structural, technological or economic reasons.

The grounds for a collective redundancy file have to be related to an economic situation of the company which calls for a restructuring operation, the outcome of which will be the necessary termination of employment contracts. In contrast with individual disciplinary dismissal, this procedure is not focused on the behaviour of the employees but, instead, on the job they perform and the way the employer envisages the future organisation of the company. The law provides for three main areas of grounds: market reasons, structural reasons or technological reasons.

Briefly, collective redundancy files start with a preliminary notice, on which the employer must notify, in writing, its intention to carry out the procedure and the criteria to be used in the selection of the employees involved. The preliminary notice stage is of fundamental importance as it is the moment the employer will define the grounds for the termination, which will have to be sustained during the negotiations with the employees and also in court should the termination decision be challenged. An information and negotiation phase follows the delivery of the preliminary notices and its purpose is to achieve an agreement on the scope and effects of the measures to be taken and to establish any potential alternatives. Once this information and negotiation phase is concluded, the employer must give written notice of the redundancy decision which will only become effective once due prior notice passes. See question 37.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

It is possible for employees to file collective legal actions against the employer, whenever the grounds for the claims and the claims themselves are similar, for example, when challenging termination under a collective redundancy file. Although in principle unions only intervene where collective rights of their members may have been breached or be at risk, it is also possible in certain cases where there is a particularly broad and frequent infringement of the individual rights of several of its members for a union to file a claim on behalf of that group of employees, or when the measures taken by the employer have affected employees who have a management role at the relevant union or who have been elected as representatives of the employees.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Retirement age is established in the law and currently it is 66 years and two months. However, in the event of the employee reaching the age of 70 without filing for retirement, then the employment contract shall be converted into a six-month, fixed-term employment contract, subject to very specific terms, which the employer may unilaterally terminate provided that it gives a prior notice of 60 days to the date on which those six months elapse. Very recently changes were brought into force concerning the early retirement regime. In 2015 and after a period of suspension since 2012, access to early retirement was once again possible under Decree-law 8/2015 of 14 January. However, this was a transitional regime initially approved only for 2015. The government's intention was to review the early retirement regime before the end of 2015, but that did not occur. Consequently, the beginning of 2016 (and the end of the special transitional regime) brought into force the former early retirement regime that had been in place until 2012. The government very recently approved new changes to Decree-Law 8/2015 of 14 January (Decree-Law 10/2016 of 8 March) providing the terms for early retirement (similar to those that were in force in 2015) until the intended review of the regime is effectively carried out. Currently, the recognition of the right to an early retirement pension depends on the beneficiary being 60 or more years of age and having 40 or more years of registered contributions.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

It is possible for the parties of a certain CBA to submit to arbitration any disputes concerning the entering into, the review, the interpretation and the application of such CBA, in accordance with the terms set out in the applicable arbitration clause or in the law.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

In relation to statutory rights, only a few can be lawfully waived by employees during the performance of the employment contract. The majority of employment rights set out in the law cannot be renounced by the employees and even those that are only contractually agreed upon may eventually be subject to the same limitation. Even if they waived their rights, nothing would prevent them from claiming unpaid salary entitlements until the statute of limitation occurs. However, it is important to note that this limitation only occurs while the employment contract is in force. Once it is terminated, any such waiver would be valid and enforceable.

46 What are the limitation periods for bringing employment claims?

There are many different types of legal actions available depending on the nature and type of claims brought up by the employer or employees and, depending on the claims, different limitation periods may apply.

Concisely and addressing only the most common ones, to dispute individual termination decisions taken in writing, such as the ones resulting from disciplinary procedures or individual redundancy files, the applicable statute of limitation is 60 days as from the date on which the termination decision was handed over to the employee. On the other hand, to challenge a collective redundancy termination decision, the limitation period is six months as from the date on which the contracts were effectively terminated. Finally, in order for employees and employers to be able to claim any employment-related entitlements, they should do so within one year following the date on which the contract ended.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Puerto Rico is a jurisdiction with a highly regulated labour and employment arena, generally protective of employee rights. As an unincorporated territory of the United States, US federal laws apply in Puerto Rico, including federal labour and employment laws.

The Puerto Rico Constitution, multiple labour and employment statutory and regulatory provisions and court decisions also govern the employment relationship. The main statutes have historically included Law 80 of 30 May 1976 (Unjust Dismissal Act), various anti-discrimination and anti-retaliation provisions, expansive wage and hour laws and regulations, statutory leaves of absence, a workers' accident compensation statutory scheme and many others. Recently, Law 4 of 26 January 2017, the Labor Transformation and Flexibility Act (the Act or Law 4), ushered in sweeping changes and flexibility to Puerto Rico's employment landscape. It is the island's first significant labour reform legislation in decades. The Act makes significant changes to more than a dozen existing statutes, including those governing employment discrimination, wrongful termination, wages and hours, entitlement to vacation and sick leave, lactation breaks, and employee benefits. In addition, it requires that all Puerto Rico employment laws or regulations, in matters similar to those regulated by a law or regulation of the United States, be interpreted consistently with the law or regulation of the United States, unless Puerto Rico law expressly requires a different interpretation.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes, there are federal and local laws in Puerto Rico prohibiting discrimination and harassment in employment. For federally protected categories, see the United States chapter for further information.

Local anti-discrimination laws include Law 100 of 30 June 1959 (General Anti-Discrimination Act) (as amended in 2013 by Law 22 and Law 107), Law 44 of 2 July 1985 (Disability Discrimination Act), Law 69 of 6 July 1985 (Sex Discrimination Act), Law 17 of 22 April 1958 (Sexual Harassment in Employment Act) and Law 3 of 13 March 1942 (Working Mother's Protection Act – Maternity Leave Law), as amended by Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), if applicable. Protected categories under local law include age; race; colour; sex; sexual orientation; gender identity; social or national origin; social condition; political affiliation; political or religious beliefs; being or being perceived as a victim of domestic violence, stalking or sexual aggression; veteran status; physical or mental disability; and pregnancy, maternity and adoption. Law 130 of 8 May 1945 (Puerto Rico Labor Relations Act) prohibits discrimination based on certain labour-related activities. Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act) further recognises the employees' right not to be discriminated or retaliated against based on criteria prohibited by law.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Aside from federal agencies such as the Equal Employment Opportunity Commission (EEOC) and the US Department of Labor, Puerto Rico has local agencies responsible for the enforcement of employment statutes and regulations, the primary ones being the Puerto Rico Department of Labor and Human Resources and its various divisions (eg, Bureau of Work Norms, Anti-Discrimination Unit) and the local workers' compensation agency (Puerto Rico State Insurance Fund Corporation).

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

As in the United States, the National Labor Relations Act (NLRA) applies in Puerto Rico to covered employers engaged in interstate commerce. The NLRA provides covered employees the right to self-organisation or to join or assist labour unions, to bargain collectively through union representatives of their own choosing, and to engage in other concerted activities for collective bargaining or other mutual aid or protection. See the United States chapter for further information.

The Puerto Rico Constitution (article II, sections 17–18) provides that employees of private employers, or of agencies or instrumentalities of the government operating as private employers, have the right to organise and to bargain collectively with their employers through representatives of their choosing and to engage in legal concerted activities. Puerto Rico Law 130 (Puerto Rico Labor Relations Act) and Law 45 (Public Service Labor Relations Act) also provide rules for union recognition comparable to the NLRA.

5 What are their powers?

See question 4.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Private employers in Puerto Rico can perform background checks (including criminal and credit checks) on job applicants subject to federal parameters, including the Fair Credit Reporting Act and recent EEOC guidance concerning the potential disparate impact of background checks. See the United States chapter for further information.

Puerto Rico courts attach great importance to the constitutional provisions protecting human dignity and privacy from invasion by both public and private parties. These provisions include article II, sections 1 ('The dignity of the human being is inviolable') and 8 ('Every person has the right to the protection of law against abusive attacks on his honour, reputation and private or family life') of the Puerto Rico Constitution.

Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act) enumerates certain rights conferred upon employees, including respect for dignity and protection of privacy, subject to the employer's legitimate interests in protecting its business, property and workplace, or as provided by law.

Further, the Puerto Rico Supreme Court found in *Rosario Diaz v Toyota de Puerto Rico, Corp*, 2005 TSPR 154 (2005), that discrimination on the basis of a prior criminal conviction is prohibited under Puerto Rico law and falls under the category of 'social condition', which is protected under Puerto Rico Law 100 (the local general anti-discrimination statute). The Puerto Rico Supreme Court set out seven factors that employers should consider in connection with an applicant who has criminal convictions:

- nature and magnitude of the crime committed;
- relationship between the crime committed, the position being applied for and the requirements and responsibilities of that position;
- the degree of rehabilitation of the applicant and any other information that the applicant or a third party can legitimately provide about that issue;
- the circumstances under which the crime was committed, including particular circumstances that were present at the time of the commission of the crime;
- the applicant's age at the time the crime was committed;
- the time period between the conviction and application for employment; and
- the legitimate interest of the employer in protecting its property, security and well-being, as well as that of third parties and the public in general.

An employer can make an adverse decision against an applicant because of a previous conviction only when, after careful consideration of these factors and under a standard of reasonableness, the employer determines that the previous conviction makes the employee unfit for the position.

The aforementioned considerations apply irrespective of whether the employer conducts its own checks or hires a third party to do so.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Subject to limited exceptions, requiring job applicants' or employees' genetic, medical and disability-related information is not permissible. See the United States chapter for further information.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Puerto Rico Law 59 of 8 August 1997 (Act to Regulate Controlled Substances Detection Testing in the Private Work Sector) permits (but does not require) private employers to establish a testing programme for the detection of controlled substances to promote the health and welfare of its employees through random selection methods. Under this law, controlled substances are defined as those substances included in the Controlled Substances Act of Puerto Rico or any other legislation of the Commonwealth of Puerto Rico or the United States of America (eg, cocaine, heroin), but specifically excludes controlled substances used by medical prescription or any other legal use.

Employers may require employees, candidates for employment and candidates for re-hire to submit to a controlled substances detection test as a condition of employment or continued employment under the following circumstances, among others:

- when an accident occurs in the workplace, attributable to the employee, in connection with his or her functions and during working hours;
- when there is reasonable individualised suspicion that the employee is using controlled substances. The test shall be made within the term of 24 hours; and
- as a precondition for recruitment and as part of a general physical-medical examination required of all candidates for employment.

Prior to implementing a drug testing programme, the employer must provide written notice of the programme to employees 60 days in advance of the implementation of the programme (and to candidates upon submitting an employment application). The notice must include very specific information about the programme (eg, effective date and the specific law that authorises its adoption). The drug testing must be carried out in accordance with the programme adopted by the employer, through regulations that shall also be provided to all employees and candidates for employment. The regulations to be implemented as part of the drug testing programme must include:

- a statement including a description of the sanctions and penalties that apply to the production, distribution, possession or illegal use of controlled substances under Puerto Rico and federal law;
- a statement specifying that the possession, distribution, use, consumption and illegal trafficking of controlled substances is conduct forbidden in the company;
- a plan developed by the employer to educate and inform the employees of the health risks associated with the illegal use of controlled substances;
- the adoption and description of programmes for assistance, treatment or orientation on the rehabilitation available to the employees; and
- the company's rules of conduct on the use of controlled substances by its employees and a description of the sanctions to be imposed on the employees if such rules of conduct are violated or if the test is positive for the use of a controlled substance.

An employee's first positive drug test result shall not constitute just cause for dismissal without first requiring and allowing the employee to attend an appropriate rehabilitation programme.

The employer may require an employee with a positive test result to periodically submit to additional tests as part of the rehabilitation programme.

If the employee expressly refuses to participate in the rehabilitation programme, or if the result of the additional test is positive, the employer may impose corresponding disciplinary actions, pursuant to the regulations implemented by the employer. In imposing the disciplinary measures, the employer shall do so taking into account the relationship between the employee's conduct and his or her duties, its effect on the proper and normal function of the enterprise, and the risk to the safety of other employees and the public in general.

Before the employer can take any disciplinary action based on the positive result of a test, the result must be verified through a confirming laboratory test. The employee or candidate for employment shall have the opportunity to notify the laboratory of any information which is relevant to the interpretation of the result, including the use of prescribed or over-the-counter drugs.

The unjustified refusal of an employee to submit to a required drug test shall constitute prima facie evidence that the result would have been positive, and shall result in the application of disciplinary measures. Employees engaged in certain activities, such as driving railroad trains, transporting passengers in a motor vehicle, handling drugs or controlled or dangerous substances, and providing security guard services, are required to submit to mandatory testing.

Other circumstances include:

- a warning that the employees or candidates for employment shall be subject to drug tests;
- a detailed description of the procedures to be followed to conduct the tests (which must be urine tests, except in very limited circumstances), including the mechanism for the resolution of disputes over the results of the tests; and
- a provision to the effect that the result of the tests shall be deemed to be and kept as confidential information. A positive drug test result cannot be used as evidence in a criminal suit against the employee, unless it is used by the employee in his or her defence.

The employer has to cover the expenses associated with the drug tests. Further, employees must be compensated for any time spent submitting to the tests.

Tests must be confidential and administered by a certified laboratory according to scientifically accepted analytical and chain-of-custody procedures, and under the Mandatory Guidelines for Federal Workplace Drug Testing Program. Every sample with a positive result shall be submitted for a second corroborative analysis. The employee shall be advised in writing that he or she is entitled to contract another laboratory to obtain a second result from the same sample, should he or she wish to do so, and the employer (or its testing agent) will be

required to provide the minimum amount required of the sample to the employee's independent laboratory. If the employer's test is positive, and the employee's own laboratory's test is negative, then the employer may suggest three laboratories from which the employee is to choose one to conduct a third final and binding test at the employer's expense.

An employee may have a cause of action against an employer if: the employer took disciplinary action or refused to hire the employee based on an erroneous test result and the employer relied on the erroneous test result through fraud, fault or negligence; or the employer damages the reputation of the employee by revealing the test results through fraud, fault or negligence. In addition, in lieu of filing suit, an employee who suffers damages as a result of a drug test performed on his or her sample may seek benefits under Puerto Rico's workers' compensation statute. However, with respect to applicants for employment, where a drug test is a precondition for recruitment required from all candidates, refusal to submit to a test may constitute unjustified refusal subject to the consequences of the employer's drug-testing programme.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

As noted above (see question 2), employers are prohibited from discriminating against applicants or employees on the basis of sex; age; race; colour; marriage; political affiliation; political or religious ideas; national origin; social origin; social condition; disability; pregnancy; genetic information; being or being perceived as a victim of domestic violence, stalking or sexual aggression; sexual orientation or gender identity; veteran status; and other categories protected by law.

Further, Law 80 of 30 May 1976 (Unjust Dismissal Act), as amended by Law 4 of 2017, requires that seniority preference be given to employees who were laid off owing to business necessities recognised under Law 80 in the event that the employer needs to employ a worker in the same or similar occupational classification to that held by the employee at the time of discharge within six months following the layoff, except in those cases in which there is a reasonably clear and evident difference in favour of the capacity, productivity, performance, competence, efficiency or conduct record of the workers compared, in which case the employer may select the less senior worker on the basis of such criteria.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No. In general, employment contracts do not have to be in writing. Certain specific, employment-related provisions – such as agreements with non-exempt employees to reduce the statutory meal period, agreements to pay a Christmas bonus at a date other than November 15 to December 15, and non-competition agreements – require a valid written agreement, some with specific terms required for enforceability.

11 To what extent are fixed-term employment contracts permissible?

Temporary employment contracts for fixed periods are permissible in Puerto Rico and, if valid, are an exception to the 'just cause' requirement under Puerto Rico Law 80 (Unjust Dismissal Act). Prior to the passage of Law 4, to be valid:

- the contract had to be in writing;
- the contract had to be for a fixed term or a fixed project, or for replacing a regular employee during a temporary absence;
- the purpose of the temporary contract and the duration of the employment period had to be expressly stated in the written contract; and
- the contract had to be signed during the employee's first workday or, in the case of employees hired through a temporary employment services company, within the first 10 days of work.

Law 4 expands the definition of temporary employment by identifying some of the situations where it may exist, such as a specific project, fixed work, replacing a regular employee during a leave or temporary absence, or an extraordinary or short-term project (including, without limitation, equipment or facility repairs, cargo loading or unloading, seasonal work, temporary order for production increases, annual inventories, or any other particular project or activity). After the passage of Law 4, written temporary agreements are no longer required (though are advisable).

There are no specific limitations as to the maximum duration of temporary contracts but, by their very nature, they must be 'temporary' and reasonably limited in duration. If the employee continues working after the end of the temporary period, he or she will become a regular employee.

Law 4 also recognises fixed term employment contracts, defined as contracts for a specific period of time or for a particular project. Written agreements are not required (though are advisable). While fixed-term contracts may be renewed, if the practices create an expectation of continuity, the relationship will not be interpreted as being for a fixed term. Fixed-term contracts not exceeding three years will be presumed to be valid and bona fide. In the case of exempt executive, administrative and professional employees, fixed-term contracts will be interpreted by the parties' will as expressed in the contract.

12 What is the maximum probationary period permitted by law?

Probationary periods are permissible in Puerto Rico and, if valid, are an exception to the 'just cause' requirement under Puerto Rico Law 80 (Unjust Dismissal Act). For the probationary period to be valid for employees hired before the passage of Law 4 on 26 January 2017:

- the probationary contract must be in writing;
- the probationary contract must be signed prior to engaging in any type of work;
- the probationary period included in the written contract must be for a fixed period not to exceed the first 90 calendar days of employment (which can be extended up to 180 days with Secretary of Labor approval); and
- the contract must establish the specific date on which the probationary period commences and the precise date on which it ends. The probationary period may not be extended at the discretion of the employer. If the employee continues working after the end of the probationary period, he or she will become a regular employee.

For employees hired on or after 26 January 2017, when Law 4 went into effect, the following rules apply: exempt executive, administrative, and professional employees have an automatic probationary period of 12 months, and all other employees have an automatic probationary period of nine months. If there is a union, the probationary period will be set by the employer and the union. Written probationary agreements are no longer required.

13 What are the primary factors that distinguish an independent contractor from an employee?

Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), creates an irrebuttable presumption that a person is an independent contractor if:

- he or she possesses or has requested an employer identification number or employer social security number;
- he or she has filed income tax returns claiming to own a business;
- the independent contractor relationship is established by written contract;
- he or she is contractually required to have licences or permits; and
- he or she complies with three or more of the following:
  - he or she has control or discretion in the way the work is performed;
  - he or she has control over the timing of the work;
  - there is no requirement to work exclusively for the principal;
  - he or she may hire employees to assist; and
  - he or she has invested to provide the services, including buying or renting tools, equipment or materials; obtaining leave from the principal to access the worksite; and renting space or equipment from the principal.

If the factors to establish the independent contractor presumption are not met, the 'common law test' is used to determine whether there is an employee or independent contractor relationship, including what the parties expressed in their contract and the degree of direct control exercised over the manner in which the work is performed. Unless required by a federal law applicable to Puerto Rico, the 'economic

reality' test should not be used to evaluate whether an independent contractor relationship exists.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Law 26 of 22 July 1992 regulates the provision of temporary employees to client companies by temporary service companies. As a general rule under Law 26, both the temporary service company and the client company are considered joint employers. However, Law 26 delineates certain responsibilities of the temporary service company and those of the client company.

For acts constituting unlawful job discrimination, sexual harassment or unjustified dismissal, whichever discriminates against or dismisses the temporary employee or takes actions sanctioned by law, be it the temporary service company or the client company, will be responsible.

Regarding an employer's obligation to retain a temporary employee's position during the effective term of the contract when the employee takes a leave of absence, the temporary service company is responsible for retaining the employee's position. But if the temporary service company does not comply, the client company where the employee was rendering services at the time he or she took the leave will be held responsible.

The temporary service company bears the responsibility for payment of the temporary employee's Christmas bonus, unless the employee has worked for the client company for more than 700 hours, or more than 1,350 hours for employees hired on or after 26 January 2017, as required by law. In any case where the temporary service company does not comply with its obligation, the client company will be responsible instead.

Further, pursuant to Law 26, temporary employees may not be contracted for the following purposes:

- as a method or mechanism for destroying or keeping labour unions out of the workplace;
- to perform any act of discrimination prohibited by law;
- as a means of evading compliance with Puerto Rico Law 80 (Unjust Dismissal Act); or
- as a means of breaking, weakening or interrupting strikes or work stoppages.

Additionally, see question 11.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Puerto Rico is subject to US federal immigration laws governing foreign workers. See the United States chapter for further information.

16 Are spouses of authorised workers entitled to work?

Puerto Rico is subject to US federal immigration laws governing foreign workers. See the United States chapter for further information.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Puerto Rico is subject to US federal immigration laws governing foreign workers. See the United States chapter for further information.

18 Is a labour market test required as a precursor to a short or long-term visa?

Puerto Rico is subject to US federal immigration laws governing foreign workers. See the United States chapter for further information.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The Federal Department of Transportation's limitations on hours of work for covered drivers apply in Puerto Rico. See the United States chapter for further information.

The Fair Labor Standards Act applies to covered employers and employees in Puerto Rico. See the United States chapter for further information.

Non-exempt employees are entitled to overtime pay for work in excess of 40 hours per week and/or eight hours in any calendar day (or, instead of calendar day, alternative 24-hour cycle determined by the employer, subject to certain requirements). Employees generally may not opt out of these statutory limitations.

Under Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), an employer and employee may agree in writing to establish an alternate workweek in which an employee works 10 regular hours for four days (which do not have to be consecutive) each week, without incurring the employer's obligation to pay daily overtime. However, if, under the alternate workweek, an employee works more than 10 hours in a day, the employee is owed overtime. Alternate week schedule agreements must be in writing and voluntary.

Law 379 of 15 May 1948 (Puerto Rico Working Hours and Days Act), as amended by Law 4, establishes generally that non-exempt employees must be allowed a fixed meal period of no less than one hour (a shorter period of at least 30 minutes may be allowed by written agreement; certain limited professions are allowed to reduce the meal period to at least 20 minutes by written agreement). The meal period generally must start between the conclusion of the second consecutive hour of work and the beginning of the sixth, so that employees are not required to work for more than five consecutive hours without a meal period. However, if an employee does not work more than six hours in a day, the employer is not required to provide a meal period. Non-exempt employees are also entitled to a second meal period if they work more than 10 hours in a day. However, if an employee does not work more than 12 hours in a day, the employer is not required to provide a second meal period if the employee took the first meal period. Minors are entitled to a second meal period after four consecutive hours of work.

Law 1 of 1 December 1989 (Puerto Rico Closing Law), which generally applied to certain retailers and wholesalers with 25 employees or more, required that covered establishments be closed from 5am to 11am on Sundays and on New Year's Day, Epiphany, Good Friday, Easter Sunday, Mother's Day, Father's Day, General Elections Day, Thanksgiving Day and Christmas Day. Certain premium pay was required for work during these days. Law 4 largely repeals the Closing Law. Establishments covered by the Closing Law prior to the passage of Law 4 must remain closed on Good Friday and Easter Sunday. Under Law 4, employers are no longer required to pay premium compensation to employees who work on Sunday.

Further, non-exempt employees covered by Law 289 of 1946, as amended by Law 4, who work six consecutive days have the right to take a day of rest. The day of rest is a calendar period of 24 consecutive hours during a calendar week. Any hours worked during the day of rest must be paid at double the rate agreed upon for the regular hours if the employee was hired before 26 January 2017, and at time-and-a-half (1.5 times the rate) if the employee was hired on or after 26 January 2017. Employees may not opt out of these statutory protections.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Regulation No. 13 of the Puerto Rico Minimum Wage Board defines the administrative, executive and professional exemptions to overtime requirements, mirroring the current regulations under the Fair Labor Standards Act (FLSA). See the United States chapter for further information. Regulation No. 13 also recognises the outside sales exemption and that certain computer professions may qualify for the professional exemption. Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act) further adopts all exemptions under the FLSA. See the United States chapter for further information.

Overtime pay is required for non-exempt employees who work in excess of 40 hours per week and/or eight hours in any calendar day (or, instead of calendar day, an alternative 24-hour cycle determined by the employer, subject to certain requirements). As a general rule, Law 379 of 15 May 1948 requires the payment of overtime at a rate equal to two times the employee's regular rate if the employee was hired before 26 January 2017. In *Vega v Yiyi Motors*, 146 DPR 373 (1998), the Puerto Rico Supreme Court stated in dicta that, in the case of employers covered by the FLSA, the employer has an obligation to pay overtime at a rate not less than time-and-a-half the employee's regular rate of pay. Still,

even in industries covered by the FLSA, if a collective bargaining agreement or Mandatory Decree of the Minimum Wage Board requires the payment of overtime at double the regular rate, then overtime must be paid at double the regular rate.

Under Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), overtime for employees hired on or after 26 January 2017 is compensated at 1.5 times the regular rate. Employees with a right to greater benefits before 26 January 2017 preserve the greater benefit while they work for the same employer.

21 Can employees contractually waive the right to overtime pay?

No, employees cannot contractually waive the right to overtime pay.

However, as noted above (see question 11) under Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), an employer and employee may agree in writing to establish an alternate workweek in which an employee works 10 regular hours for four days (which do not have to be consecutive) each week, without incurring the employer's obligation to pay daily overtime. However, if, under the alternate workweek, an employee works more than 10 hours in a day, the employee is owed overtime. Alternate week schedule agreements must be in writing and voluntary.

22 Is there any legislation establishing the right to annual vacation and holidays?

Yes, there is legislation establishing the right to vacation time in Puerto Rico.

Before Law 4 of 26 January 2017, under Puerto Rico Law 180 of 27 July 1998, all workers in Puerto Rico employed on or after 1 August 1995, with the exception of administrators, executives and professionals accrued vacation at the rate of 1.25 days for each month in which the employee worked at least 115 hours. Under Law 4, the minimum hours worked in order to accrue vacation has been increased to 130 hours per month, instead of 115 hours.

For covered employees hired after 26 January 2017, the minimum monthly accrual of vacation leave is 0.5 days during the first year of service; 0.75 days after the first year and until the fifth year; one day after five years until 15 years; and 1.25 days after 15 years. However, if an employer has no more than 12 employees, the minimum monthly accrual of vacation leave is a fixed 0.5 days a month. Employees who worked for an employer before 26 January 2017 and had rates of accrual of vacation superior to that provided for in Law 4 continue to have the same accrual rates while they work for the same employer.

There is no general law establishing the right to holidays in the private sector. However, as noted above (see question 19), establishments in industries covered by the Puerto Rico Closing Law must be closed on Good Friday and Easter Sunday.

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes, there is legislation establishing the right to sick leave in Puerto Rico.

Before Law 4 of 26 January 2017, under Puerto Rico Law 180 of 27 July 1998, all workers in Puerto Rico employed on or after 1 August 1995, with the exception of administrators, executives and professionals, accrued sick leave at the rate of one day per month for each month in which the employee worked at least 115 hours. Under Law 4, the minimum hours worked in order to accrue sick leave has been increased to 130 hours per month, instead of 115 hours. Sick leave accrual remains one day for each month the covered employee works at least 130 hours.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Federal leave laws (eg, Family and Medical Leave Act) apply in Puerto Rico. See the United States chapter for further information.

In addition, there are multiple types of leaves of absence or time off available in the private sector in Puerto Rico, including vacation and sick leave, leave under the Social Security for Chauffeurs Act, the Puerto Rico Automobile Accident Compensation Administration (ACAA), the Non-Occupational Disability Benefits Act, the State Insurance Fund, and leave for maternity or breastfeeding, jury duty, and several other reasons (eg, special sports, criminal case witness and drivers' licence renewal).

Aside from vacation and sick leave under Puerto Rico Law 4, covered above (see questions 22 and 23), the main Puerto Rico leave laws include the following.

Puerto Rico Law 30 of 30 March 1942 (Puerto Rico Working Mothers Protection Act) grants pregnant employees the right to enjoy paid maternity leave of four weeks before childbirth and four weeks after childbirth independent from, and in addition to, any other type of leave to which the pregnant employee may be entitled under other laws. Maternity leave benefits must be paid in full at the time the employee commences her prenatal leave period. In computing maternity leave pay, the average salary received by the employee during the six months immediately preceding the commencement of leave is used as the basis for payment. Law 54 of 10 March 2000 amended the Puerto Rico Working Mothers Protection Act to extend maternity leave benefits to adoption.

Law 427 of 16 December 2000 (the Breastfeeding Statute) requires that employers provide full-time (at least 7.5 hours per day) nursing mothers the opportunity to breastfeed or express breast milk for one hour each day, which can be broken up into two 30-minute periods or three 20-minute periods. Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act) extends the right to lactation breaks to part-time employees whose workday exceeds four hours. Their lactation break must be 30 minutes for each period of four consecutive hours of work. In small businesses, lactation breaks must be half an hour each workday, which can be broken up into two 15-minute periods.

Puerto Rico Law 428 of 15 May 1950 (Social Security for Chauffeurs Act) establishes a social security plan which provides sick, accident, death and other benefits to chauffeurs and other covered employees whose employers require or permit them to drive a motor vehicle in the performance of their work, as well as drivers who work for themselves in authorised public transportation. The Social Security for Chauffeurs Act leave requirements do not apply to executive, administrative or professional employees as defined by Regulation 13 of the Puerto Rico Minimum Wage Board. Besides payment of insurance, the law provides reservation of employment and reinstatement rights. The employer must reinstate the employee if:

- the employee requests reinstatement within 30 business days (almost one and a half months) from the date on which the worker is discharged from medical treatment, so long as the request is made within one year from the date of commencement of the disability;
- at the time of the request, the employee is mentally and physically able to perform his or her duties; and
- the employee's job has not been eliminated at the time of the request.

The ACAA is a government-owned corporation of Puerto Rico (created by Puerto Rico Law 138) that provides compensation for medical and disability expenses resulting from traffic accidents in Puerto Rico. The coverage offered by the corporation is mandatory, but private insurance companies are allowed to provide supplemental policies. Besides payment of medical or disability expenses, the law provides reservation of employment and reinstatement rights. The employer must reinstate the employee if:

- the employee requests reinstatement within 15 days from the date on which the worker is discharged from medical treatment, so long as the request is made within six months from the date of commencement of the disability;
- at the time of the request, the employee is mentally and physically able to perform his or her duties; and
- the employee's job has not been eliminated at the time of the request.

Puerto Rico Law 139 of 26 June 1968 (Non-Occupational (Short-Term) Disability Benefits Law), as amended by Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), was specifically enacted for the benefit of employees who lose time away from work, and their wages, as a result of a non-occupational illness or accident – that is, this law does not cover wage loss from workers' compensation accidents or injuries, or from accidents or injuries arising from automobile accidents, since other Puerto Rico government laws and programmes apply to those. Employees pay 0.05 per cent of their wages (with the employer making a matching contribution), up to a maximum of US$9,000 per year, to a government Disability Benefits Fund from

which benefits are paid to covered employees suffering from a temporary disability. Besides payment of insurance benefits, the law provides disabled employees leaves of absence and reinstatement rights. Upon recovery from the non-occupational disability, the employer must reinstate the employee if the employee requests reinstatement within 15 days from the date on which the worker is discharged from medical treatment, so long as the request is made within 12 months (not one year) from the date of commencement of the disability (or six months for employers that had 15 or fewer employees at the date of the accident or incapacitation); at the time of the request, the employee is mentally and physically able to perform his or her duties; and the employee's job has not been eliminated at the time of the request.

The Puerto Rico State Insurance Fund Corporation is the local workers' compensation agency. Besides payment of insurance benefits, including partial wage replacement payments, the law provides disabled employees leaves of absence and reinstatement rights. The employer must reinstate the employee if the employee requests reinstatement within 15 days from the date on which the worker is discharged from medical treatment, so long as the request is made within 12 months (not one year) from the date of commencement of the disability.

As noted above, there are multiple other local leave laws, each with different duration, eligibility and other requirements.

25 What employee benefits are prescribed by law?

See questions 22, 23 and 24.

Further, employers are mandated by law to provide workers' compensation and unemployment insurance coverage.

26 Are there any special rules relating to part-time or fixed-term employees?

Yes. Under Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), temporary and fixed-term employees are not subject to Law 80 of 30 May 1976 (Unjust Dismissal Act). See question 11.

In addition, Law 4's amendments to Law 427 of 16 December 2000 (the Breastfeeding Statute) provide that if an employee works part-time (ie, less than 7.5 hours a day) and the workday exceeds four hours, the employee is to be provided with a lactation break of 30 minutes for each period of four consecutive hours of work.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

In *Arthur Young & Co v Vega III*, 136 DPR 157 (1994), the Puerto Rico Supreme Court stated that in order for a covenant not to compete to be enforceable, it must comply with the following general elements:

- it must be in writing and voluntary;
- the duration of the covenant should not exceed one year;
- adequate consideration is required:
  - for current employees, continued employment is not sufficient consideration; rather, the employee must receive additional consideration for agreeing to the new restrictive condition; and
  - for applicants, no additional consideration is required; employment is sufficient consideration;
- the restriction must be clearly necessary in order to protect a legitimate interest of the employer;
- the geographic area must be specified and limited to those areas needed to prevent true competition between the employer and the employee; and
- any client limitations must be specified and should be limited to those previously serviced by the employee.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

In general, no.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

A person is generally liable only for his or her own acts or omissions, except for instances of vicarious liability enumerated in the Puerto Rico Civil Code. Article 1803 of the Civil Code provides that owners or directors of an establishment or enterprise are liable for any damages caused by their employees in the course of employment. Courts consider the following three elements in deciding whether to impose liability under the doctrine of respondeat superior consistent with Puerto Rico law: the employee's desire to serve, benefit or further his or her employer's business or interest; whether the act is reasonably related to the scope of the employment; and whether the agent has not been prompted by purely personal motives. Among these elements, 'the fundamental consideration for determination of an employer's liability is whether or not the employee's acts fall within the scope of his or her employment in the sense that they furthered a desire to serve and benefit the employer's interest, resulting in an economic benefit to the employer' (*Vernet v Serrano-Torres*, 566 F.3d 254, 261 (1st Cir 2009)).

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employers in Puerto Rico are responsible for income tax withholding and withholding for the Federal Insurance Contributions Act (Social Security and Medicare taxes), Federal Unemployment Tax Act, state unemployment, disability tax, chauffeurs' Social Security, and workers' compensation. Puerto Rico employees are required to pay federal income taxes on income from federal sources outside of Puerto Rico; otherwise they are exempt from federal income taxes. Puerto Rico imposes a separate income tax in lieu of federal income tax.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

No, Puerto Rico does not have a local law addressing employee-created intellectual property. Rather, employee inventions are handled in accordance with the federal legal framework concerning 'works made for hire' under the US Copyright Act of 1976, 17 USC sections 101 et seq. See the United States chapter for further information.

32 Is there any legislation protecting trade secrets and other confidential business information?

The model Uniform Trade Secrets Act has been adopted by Puerto Rico as the Industrial and Trade Secret Protection Act of Puerto Rico (Law 80 of 3 June 2011). Under the statute, a person who misappropriates a commercial secret is liable for damages to the owner of the trade secret. Available relief includes money damages, injunctive relief and attorney fees. See the United States chapter for further information.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The right to privacy is recognised under the Constitution of the Commonwealth of Puerto Rico and extends to private employers. For example, under articles 1, 8 and 16 of the Constitution of the Commonwealth of Puerto Rico, employers must keep personnel files of employees confidential. As another example, fingerprints are protected by the Constitution Bill of Rights as being information the disclosure or unjustified retention of which may be a violation of the employee's privacy.

Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act) enumerates certain rights conferred upon employees, including respect for dignity and protection of privacy, subject to the employer's legitimate interests in protecting its business, property, and workplace, or as provided by law.

Additionally, federal and local laws recognise the confidential nature of certain information gathered by businesses (eg, medical information). Depending on the nature of the information, particular degrees of confidentiality and reasonableness apply to the data.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

As explained below (see question 35), Puerto Rico Law 80 of 30 May 1976 (Unjust Dismissal Act) requires that there be termination for 'just cause' or the payment of a statutory severance.

Law 80 further provides that, in the case of a 'transfer of an ongoing business,' if the new acquirer continues to use the services of the employees who were working with the former owner, those employees shall be credited with the time they have worked in the business under the former owner for seniority and other purposes. In the event that the new acquirer chooses not to continue with the services of all or any of the employees and hence does not become their employer, the former employer shall be liable for the statutory Law 80 severance (see question 35), and the purchaser shall retain the corresponding amount from the selling price stipulated with respect to the business. In case the new owner discharges the employees without just cause after the transfer, the new owner shall be liable for Law 80 benefits to the employee laid off, there also being established a lien on the business sold, to answer for the amount of the claim.

Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act) defines 'transfer of ongoing business' as the sale/purchase through which one employer sells a substantial portion of the passive or active assets of the business to another; without interruption of the operations for six months or more; the new employer continues operating the same type of business in the same location, or different location but with the same equipment, machinery and inventory, providing the same services, retaining the same or similar business name or marks, so long as the majority of the employees working in the new business at any time during the six months following the transfer worked with the prior employer at the time of transfer.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Puerto Rico Law 80 (Unjust Dismissal Act), as amended by Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), requires that there be termination for 'just cause' (or the payment of a statutory severance). A termination is for 'just cause' if it is not motivated by legally prohibited reasons or the product of the employer's caprice. 'Just cause' is understood as those reasons affecting the good and normal operation of the establishment, including:

- the employee engages in a pattern of improper or disorderly conduct. Improper conduct is defined as voluntary infraction of the employer's norms or instructions that are not contrary to law; illegal or immoral acts; acts or omissions that adversely and significantly impact the employer's legitimate interests or others' well-being, done in a premeditated, intentional or indifferent manner. Disorderly conduct is defined as voluntary infraction that alters the peace, tranquility, good order and respect that must exist in the workplace;
- the employee engages in a pattern of performance that is inefficient, unsatisfactory, poor, tardy or negligent, including not complying with the employer's norms and standards of quality and security, low productivity, lack of competence or ability to perform the work at reasonable levels required by the employer, and repeated complaints from the employer's clients;
- the employee's repeated violation of the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been opportunely furnished to the employee;
- full, temporary or partial closing of the operations of the establishment;
- technological or reorganisation changes as well as changes of style, design or the nature of the product made or handled by the establishment, and changes in the services rendered to the public; and
- reductions in employment made necessary by a reduction in the anticipated or prevailing volume of production, sales or profits at the time of the discharge or with the purpose of increasing the establishment's productivity or competitiveness.

Update and trends

On 26 January 2017, Law 4, the Labor Transformation and Flexibility Act, took effect. Law 4 is Puerto Rico's first significant labour reform legislation in decades. It contains sweeping employer-friendly reform measures aimed at stimulating Puerto Rico's economy by attracting new businesses and facilitating operations for existing enterprises. Law 4 makes significant changes to more than a dozen existing statutes, including those governing wrongful termination, wages and hours, entitlement to vacation and sick leave, lactation breaks, contract principles and employment discrimination. Employers in Puerto Rico should examine their employment handbooks and policies to take advantage of the additional flexibility offered by the labour reform and avoid claims premised on outdated handbooks that do not incorporate the Act's changes.

For an overview of the statute's principal changes to Puerto Rico's labour landscape, visit www.morganlewis.com/pubs/open-for-business-puerto-rico-enacts-sweeping-labor-reform.

If the employer relies on any of the last three causes, it must retain employees of greater seniority on the job, provided there are positions that are vacant or filled by employees of less seniority within their occupational classification ('order of retention analysis'), except in those cases in which there is a reasonably clear or evident difference in favour of the capacity, productivity, performance, competency, efficiency or record of comparable employees, in which case the employer may choose based on those criteria.

Under Law 4, employers with multiple locations in Puerto Rico must, in general, consider the employees within the particular location that is to be impacted for the order of retention analysis after the Act. However, occupational classifications in other locations should be considered for the order of retention analysis if, during the year prior to the termination the employees within the impacted occupational classification transferred usually or regularly from location to location; and the employees are under direct common supervision with respect to day-to-day personnel administration. The fact that the employees in the various locations are covered by common policies or participated in common benefits is irrelevant. Only the locations that fit within these characteristics have to be considered, as opposed to all locations in the island.

Law 80 also provides certain recall rights for six months following a group layoff if the same or similar work is needed during that time. See question 9.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

The US Worker Adjustment and Retraining Notification Act (WARN) applies in Puerto Rico to mass layoffs requiring advance notice under certain circumstances. Under WARN, pay in lieu of notice may be provided in certain circumstances. See the United States chapter for further information.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

As noted above, WARN applies in Puerto Rico, including its pay in lieu of notice provisions, which provide that an employer that violates the WARN notice requirement is liable to each affected employee for an amount equal to back pay and benefits for the period of violation up to 60 days. See the United States chapter for further information.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes, as noted above (see question 35) under Puerto Rico Law 80, as amended by Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), indefinite-term employees actually or constructively discharged without just cause are entitled to severance payments.

For employees hired on or after 26 January 2017 (when Law 4 was signed), severance pay is: an amount equivalent to three months' salary; and an amount equivalent to two weeks' salary for each year of service. For employees hired on or after 26 January 2017, the severance is

capped at nine months. Employees hired before Law 4's effective date are not subject to the cap, and severance pay is based on years of service (YOS) and highest salary in the previous three years:

Years of service	Part A	Part B
0–5 years	2 months	1 week/YOS
5–15 years	3 months	2 week/YOS
15+ years	6 months	3 week/YOS

Any voluntary payment made by the employer to the employee solely because of the termination of employment can be credited to the Law 80 severance obligation.

39 Are there any procedural requirements for dismissing an employee?

No, there are not. No prior government agency approval is required for termination.

40 In what circumstances are employees protected from dismissal?

Puerto Rico is not an 'at-will' jurisdiction. Instead, Puerto Rico Law 80 requires 'just cause' as defined by law (see question 35, supra) for the termination of employment or payment of the statutory severance if there is no 'just cause'. Further, various federal and local laws prohibit discriminatory or retaliatory terminations, or termination on the basis of whistleblowing or other protected activities. In addition, various local leave laws provide for the reservation of employment during covered leave periods. See question 25.

41 Are there special rules for mass terminations or collective dismissals?

As noted above, WARN applies in Puerto Rico. See the United States chapter for further information.

Further, as noted above (see question 35), if the employer relies on a business necessity just cause as defined by Law 80, as amended by Law 4, it must retain employees of greater seniority on the job, provided there are positions that are vacant or filled by employees of less seniority within their occupational classification, except in those cases in which there is a reasonably clear or evident difference in favour of the capacity, productivity, performance, competency, efficiency or record of comparable employees, in which case the employer may choose based on those criteria.

Under Law 4, employers with multiple locations in Puerto Rico must, in general, consider the employees within the particular location that is to be impacted for the order of retention analysis after the Act. However, occupational classifications in other locations should be considered for the order of retention analysis if, during the year prior to the termination the employees within the impacted occupational classification transferred usually or regularly from location to location; and the employees are under direct common supervision with respect to day-to-day personnel administration. Only the locations that fit within these characteristics have to be considered, as opposed to all locations in the island. See question 35.

Law 80 also provides certain recall rights for six months following a group layoff if the same or similar work is needed during that time. See question 9.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class and collective actions are allowed in Puerto Rico.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

There are no Puerto Rico–specific statutes regulating employers' decisions to impose a mandatory retirement age. With few exceptions, the federal Age Discrimination in Employment Act, which applies in Puerto Rico, specifically prohibits private employers from imposing mandatory retirement on employees over the age of 40, if the retirement is based on the employee's age.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Yes, employers and employees may agree to the private arbitration of employment disputes.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

In general, employees may release employment claims for valid consideration, unless otherwise prohibited by law. For information concerning valid releases of the US Age Discrimination in Employment Act and FLSA claims, see the United States chapter.

Puerto Rico Law 80, as amended by Law 4, expressly prohibits agreements in which an employee prospectively waives Law 80 severance entitlements. However, under Law 4, once a discharge or notification of an intent to discharge has occurred, there can be a compromise as to severance whenever all the requirements for a valid settlement agreement are present.

46 What are the limitation periods for bringing employment claims?

Different statutes of limitations govern the different local employment statutes. Under Law 4 of 26 January 2017 (Labor Transformation and Flexibility Act), actions arising from an employment contract or the benefits that arise from an employment contract have a one-year statute of limitations, unless otherwise provided in a special law or in the employment contract. Causes of action that arose before Law 4 went into effect have a statute of limitations prescribed under prior applicable law. Claims for unjust termination under Law 80 that arose before

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Law 4 took effect on 26 January 2017 are subject to a three-year statute of limitations; and claims that arose once Law 4 took effect have a one-year statute of limitations. The statute of limitations for wage and hour claims that arose before Law 4 took effect is three years; and claims that arose once Law 4 took effect have a one-year statute of limitations, counting from the end of the employee's employment. The statute of limitations for retaliation claims under Law 115 is three years. Other employment claims have different limitation periods.

Russia

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

In Russia, employment matters are regulated at both the federal and regional levels, however, federal level has primacy. The key federal statutes are:

- the Constitution;
- the Labour Code;
- the Federal Law on Trade Unions, their Rights and Guarantees of their Activity;
- the Federal Law on Employment of the Population of the Russian Federation (Employment Law);
- the Federal Law on Legal Status of Foreign Citizens in the Russian Federation; and
- the Federal Law on Amendment of Certain Legal Acts of the Russian Federation (Secondment Law).

At the regional level, the agreements between the employer and employees' unions are important. Such agreements set forth enhanced employment guaranties, such as minimum wages, mass layoff criteria and employment benefits.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Discrimination in employment is prohibited. Under articles 19 and 37 of the Constitution, and articles 2, 3 and 64 of the Labour Code, no one should be discriminated against or unduly privileged as a result of gender, race, skin colour, nationality, language, origin, property and family status, social or occupational position, age, place of residence, religious views, political commitments, affiliation to any organisations or any other circumstances that are not related to professional qualities of an employee.

However, some types of work may entail certain requirements, preferences or exceptions limiting some of the employee's rights. Such limitations, stipulated by Russian law, are not deemed discriminatory.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Federal Service for Labour and Employment, including its territorial bodies, is the primary governmental agency responsible for the enforcement of employment statutes and regulations. It can impose fines or other liability measures on entities and their officers responsible for violations of employment laws.

The general prosecutor's office and its territorial bodies ensure observance of human rights and freedoms, enforce employment laws, restore the rights of violated employees and participate in court proceedings on unfair dismissal claims of employees.

Trade unions may create inspectorates to monitor compliance with employment laws, employers' policies relating to labour issues, and the terms of collective arrangements and agreements entered into by employers and employee representatives. For example, trade union inspectors can present demands to employers that operations be suspended in the event of an imminent threat to the lives and health of workers and take part in investigations of industrial accidents.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Establishment of trade unions and other representative bodies of employees is allowed and regulated by the Labour Code.

The Federal Law on Trade Unions, their Rights and Guarantees of their Activity regulates the procedures related to the formation, rights and obligations of trade unions.

Russian law does not impose an obligation on employees to become members of a trade union. Further, the fact that a trade union operates at a company does not mean that all employees are members of that trade union. There is no obligation under Russian law for an employer to create a trade union where one has not previously been formed, nor does an employer have any obligation to enhance or facilitate the establishment of a trade union within the company. However, if a trade union already exists in the company, the employer cannot wind it up, since such decision is generally made by the trade union itself.

The Labour Code provides that a trade union is to be regarded as a representative of the employees who are members of the union. Trade unions may also represent the interests of employees who are not members of those unions, upon specific authorisation. A trade union may represent all the employees of a company if it comprises more than 50 per cent of the company's staff or if it has received a mandate from a meeting of all employees or an employees' delegates conference.

The Labour Code also provides that an employer has the right to organise a works council – a consultative body that is formed voluntarily and consists of employees who have labour achievements.

5 What are their powers?

The works council prepares proposals for the improvement of production activities, introduction of new techniques and technologies, and increase of productivity and skills of employees. The works council cannot deal with issues that are within the exclusive competence of a company's management bodies, trade unions and other employee representatives.

Trade unions are involved in the adoption of certain personnel decisions.

In certain cases, the employer cannot dismiss a trade union executive (eg, the head of the trade union or deputy head of the trade union) without the consent of the superior trade union. Further, in certain cases the employer must seek and consider the 'reasoned opinion' of the relevant trade union before taking certain decisions concerning its employees. Such circumstances include, for example, dismissal of the trade union's members at the employer's 'initiative' or adoption of decisions which may affect the interests of employees and adoption of internal regulations.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Background checks are not officially recognised in Russia. Instead, article 3 of the Labour Code generally prohibits discrimination when hiring employees, where 'discrimination' is very broadly interpreted. In essence, Russian law only allows hiring decisions based on potential employees' professional skills.

Further, article 64 of the Labour Code prohibits any 'preferences' or 'limitations' when hiring. Again, this is understood to refer to decisions that are not solely made on the basis of an employee's skills.

If the employer subsequently declines to hire the applicant, the decision could potentially be challenged in court on the grounds of 'discrimination' as discussed above. The applicant could also apply to the State Labour Inspectorate or other authorities (such as the Prosecutor's Office) to complain about the employer's discriminatory practices. In theory, there is a possible risk of administrative fines for such activities.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

A medical examination as a condition of employment is mandatory in certain circumstances, which are described in the Labour Code and other federal laws (eg, for employees under 18 years of age or those applying for certain types of work, including work in the state or municipal service, in the food manufacturing industry, in medical organisations, at childcare centres and at water supply constructions, as well as work that is closely connected with moving vehicles and other dangerous or hazardous work). If an applicant does not submit to an examination, the employer is entitled to refuse to hire the applicant. For some categories of employees, medical examinations are carried out on a regular basis.

In all other circumstances, information about an employee's health is recognised as a special category of personal data (and is further classified as confidential medical information), and the processing of such data requires the prior written consent of the relevant individual under the Federal Law on Personal Data (Personal Data Law). Therefore, where it is not expressly provided for in the federal laws, an employer cannot impose medical tests as a condition of employment and, consequently, cannot refuse to hire an applicant who does not submit to such tests.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no established practice regarding drug and alcohol testing of applicants in Russia.

Under article 81 of the Labour Code, however, an employer has a right to terminate the contract of an employee who has been under the influence of alcohol or narcotics in the workplace. If the work of an employee is associated with certain additional risks (eg, police service, civilian aviation sector, railway sector, power-generating sector, work involved with the operation of vehicles and underground work), such employee must undergo a mandatory preliminary medical examination, including drug and alcohol testing, at the expense of the employer. The employer shall not permit an employee to work in these sectors without a relevant medical examination.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

In general, Russian law does not require employers to give preference in hiring to particular people or groups of people.

However, some protective measures have been established for certain groups of people. For instance, the Employment Law and the Federal Law on Social Protection of the Disabled in the Russian Federation set a quota for the number of disabled people that a company with more than 100 employees is required to hire. The quota is established by regional laws, but should be in the range of 2 per cent to 4 per cent of the total number of employees.

Russian law prohibits discrimination in employment on the basis of any criteria other than the employee's skill. In addition, article 64 of the Labour Code specifically prohibits any 'limitations' when hiring pregnant women, women with children, employees who have to be hired due to a transfer from another employer and certain other categories of employees.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The Labour Code requires that employment contracts be in writing.

Under articles 57 and 67 of the Labour Code, the terms of an employment contract required to be evidenced in writing include:

- place of work (office location);
- detailed description of duties and responsibilities;
- commencement date of employment and term of contract (if it is not an indefinite-term contract);
- salary and compensation for work under hazardous conditions (if applicable);
- probation period (if any);
- hours of work and breaks, and vacation arrangements;
- conditions of work at the workplace; and
- certain other details necessary to be included under employment laws.

The terms and conditions of the employment contract cannot be less favourable than the terms and conditions set out by employment laws, collective bargaining agreements (if any), and the internal policies of the employer.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible only in cases that are described in the Labour Code.

Under article 59 of the Labour Code, a fixed-term contract is entered into if employment cannot be established for an unlimited period. Examples include the following:

- temporary replacement of an absent employee (eg, being on pregnancy or childcare leave);
- seasonal work;
- temporary increase in production;
- performance of work that is beyond the normal activity of the employer; and
- certain other grounds.

A fixed-term contract may be entered into with certain categories of employees, such as CEOs and their deputies and chief accountants, creative employees, students, part-time employees and various other roles.

A fixed-term contract must specifically refer to the applicable grounds for allowing such a fixed term of employment, as set out in the Labour Code.

Under article 58 of the Labour Code, the term of a fixed-term contract cannot exceed five years whereas the minimum term is two months. The Labour Code also does not allow for prolongation of fixed-term employment contracts (but certain exceptions apply).

12 What is the maximum probationary period permitted by law?

The Labour Code provides for a maximum probationary period of up to three months. For some categories of employees, such as CEOs and their deputies and chief accountants, the probationary period may be up to six months. Federal laws may establish separate probationary periods for special categories of employees (eg, public servants).

The maximum probationary period permitted by Russian law cannot be extended by an employer, even upon mutual agreement with an employee; however, periods of temporary absence of an employee or any other period in which he or she is absent from work are not included in the probationary period.

If an employment contract is entered into for a period of between two and six months, the probationary period cannot exceed two weeks. If an employment contract does not include a condition on probation, it means that the employee was hired without probation. In cases

where the employee has commenced work without a signed contract, the probation period may only be established by a separate agreement between the employee and the employer, concluded before commencement of work.

13 What are the primary factors that distinguish an independent contractor from an employee?

An individual can work on the basis of an employment contract or perform services on the basis of a services contract (also referred to as a 'civil law contract').

Civil law contracts are usually entered into to achieve a specific result within a defined time period. A contractor would normally use his or her own resources and work independently without extensive supervision from the client. The contractor is usually paid after completion of the assignment or on a periodic basis as established in the contract and can engage third parties to perform the services.

In contrast, the following features are inherent to employment relations:

- an employee must perform work in person;
- an employee must work in compliance with the internal regulations of the employer and under the control of the employer; and
- an employer must provide proper working conditions (eg, working place, necessary equipment and tools) and take care of the work-related living needs of its employees.

If a dispute arises, other factors may be taken into account by the court. In practice, there is a significant risk that the relationship between an individual contractor and a client may be reclassified by the court as employment in connection with either tax disputes or the applicability of certain rights and protections for employees under the Labour Code. Court proceedings may also be initiated by an individual working under a civil law contract. Article 19.1 of the Labour Code provides that all uncertainties regarding the nature of an agreement are to be interpreted in favour of employment relations.

14 Is there any legislation governing temporary staffing through recruitment agencies?

In January 2016, the law which regulates secondment arrangements and the activities of recruitment agencies in this sector (Secondment Law) took effect. The Secondment Law sets out specific provisions to govern secondments. It also states when a secondment is and is not permitted. The Secondment Law permits temporary staffing through private employment agencies in certain cases only:

- temporary substitution of employees who are absent on vacation, maternity leave or business trips; and
- temporary fulfilment of services in response to demand for extra labour – but not for longer than nine months.

Further, under the Secondment Law, a recruitment agency is allowed to engage in temporary staffing and secondment activity only if it has obtained government accreditation for this activity.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Short-term visas, which provide for a stay of up to three months, are not subject to numerical limitations, and such visas are usually used for business trips. In order to obtain a working visa, a foreign employee should first obtain a work permit. A working visa is then issued for the term of the work permit. Depending on the type of work permit, a working visa can be issued for a term of up to three years, with an option to extend it for an additional term.

Formally, only the company that engages or hires the foreign national can apply for that individual's work permit and it will also be the inviting party for purposes of obtaining the visa. There are certain rules that suggest that such a company must be either a Russian company or a foreign company that has a registered presence in Russia.

16 Are spouses of authorised workers entitled to work?

A spouse accompanying an authorised worker in Russia is entitled to work in Russia, subject to the general requirements that apply to the employment of foreign nationals. However, certain exceptions to this rule do apply (see question 17).

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The rules applicable to local employees generally also apply to foreign employees, but there are certain restrictions on the work activity of foreigners in Russia.

The key statute in the area of immigration in Russia is the Federal Law on the Legal Status of Foreign Citizens in the Russian Federation (Foreign Citizens Law). Under the Foreign Citizens Law a foreign national can work in Russia under an employment agreement or a civil law contract. Both the employer and its foreign employee must have the relevant work permits (certain exceptions apply). For instance, diplomats, accredited journalists, foreign lecturers, foreign entities' employees in the course of maintenance of imported technical equipment, and certain other categories of employees do not need to obtain work permits.

The process of obtaining a work permit in Russia is complicated, consists of multiple stages and may take several months.

However, an employer may also employ foreign citizens under a simplified work permit procedure (again, certain exceptions apply) – the 'highly qualified specialists' (ie, foreign employees who have professional skills, knowledge and qualifications in a specific area) may use this procedure. A highly qualified specialist must have a monthly remuneration of at least 167,000 roubles. An employer who engages a highly qualified specialist does not need to have a work permit, in contrast with the general procedure, in which both the employer and the employee are required to hold work permits. Family members of highly qualified specialists are entitled to work in Russia under the same simplified work permit procedure.

The penalties for non-compliance with the procedures for the employment of foreign personnel are significant. A company that employs a foreign citizen without the required permission or without a personal work permit may receive an administrative fine of up to 1 million roubles by the Federal Migration Service (FMS) or, alternatively, the company's activity may be suspended for up to 90 days, pursuant to a court decision.

Further, the FMS may impose a fine on the company's responsible officer (such as a local HR manager) of up to 70,000 roubles. A foreign citizen working without a personal work permit may be fined up to 7,000 roubles by the FMS and may even be deported from Russia.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test is applied to a working visa issued under the general procedure, in which both the employer and the employee are required to hold work permits.

The labour market test consists of several stages. A company seeking to hire a foreign worker within the next year is required to submit a request for a relevant quota to the appropriate regional authorities, subject to certain complicated details. The request must contain such information as the qualifications, education, experience and salary of the potential worker. At the next stage, the company must apply to a local employment centre, which will attempt to find an appropriate local applicant who is an unemployed Russian citizen. If within a period of a month the local employment centre fails to find such an applicant, it will provide a written statement in support of granting the company a permit to hire a foreign employee. Following this, the company may apply to the FMS for a permit to hire foreign employees.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

In general, article 91 of the Labour Code provides for a maximum 40-hour working week. A number of categories of employees are permitted to have a reduced work schedule.

The maximum number of hours that an employee can work in a day is not specified, except for certain categories of employees (eg, employees under the age of 16 and employees working under hazardous conditions).

Generally, an employer establishes the duration of the working week, the maximum daily hours of work permitted and other work scheduling matters. These matters are included in the employer's internal regulations and are decided at its own discretion, subject to the requirements of the Labour Code, other laws and the nature of the work.

However, a standard daily shift usually does not exceed eight hours, due to the five-day working week. Night shifts are deemed to be between 10pm and 6am and are one hour shorter than day shifts, unless otherwise specifically established by Russian law.

An employer may only request that an employee work longer than the established work schedule (overtime) if it has received consent in writing from the employee, except for special emergency cases. The employer is prohibited from requesting pregnant women, employees under the age of 18 and certain other categories of employees listed in the Labour Code and other federal laws to work overtime. The amount of overtime worked should not exceed four hours in two days and 120 hours per year for each employee. An employer should arrange for keeping exact records of the overtime work duration.

Further, the Labour Code provides that the employer may request employees who have irregular working hours, from time to time, work in excess of their normal working hours without obtaining their consent. In return, such employees should be entitled to additional annual paid vacation of no less than three days.

As a general rule, work performed during weekends or national holidays is prohibited, but certain exceptions apply.

An employer is responsible for its employees' compliance with restrictions and limitations on work hours, as set out in the Labour Code. An employee's decision to opt out of such restrictions or limitations may be deemed illegitimate.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Employees with regular work hours are entitled to overtime pay if they perform work beyond their scheduled work hours at the request of the employer. Under article 152 of the Labour Code, overtime pay should be no less than one-and-a-half times an employee's usual hourly pay for the first two hours of work and no less than twice the employee's usual hourly pay for any subsequent hours worked. Definite amounts of compensation for overtime work may be determined by a collective agreement, internal regulations or an employment contract. At the request of the employee, additional rest days may be given in lieu of overtime pay for a period that is no less than the amount of overtime worked by the employee.

21 Can employees contractually waive the right to overtime pay?

The right of employees to overtime pay cannot be waived contractually. Under article 57 of the Labour Code, conditions of the employment contract that provide for a lower level of guarantees and compensations to employees than set forth by the Labour Code are void. However, instead of receiving overtime pay, the employer and the employee may agree that additional rest time be provided to the employee for working overtime.

22 Is there any legislation establishing the right to annual vacation and holidays?

An employee is entitled to paid annual vacation of at least 28 calendar days once he or she has worked with the same employer for six consecutive months (but certain exceptions apply). Some categories of employees (eg, those working in hazardous conditions or in the regions of the far north of Russia or those who have an irregular working hours regime) are entitled to certain additional paid vacation. Additional paid vacation may also be established by an industry agreement, trilateral agreement or collective bargaining agreement. The list of public holidays is contained in the Labour Code.

23 Is there any legislation establishing the right to sick leave or sick pay?

The Labour Code establishes the right to paid sick leave. To apply for sick pay, an employee must receive a medical certificate issued by a licensed medical institution or private practitioner. The employee must then submit the medical certificate to the employer following recovery (ie, on the first working day of the employee). The medical certificate serves as the ground for payment of the employee's disability allowance and proof of his or her legitimate absence. A medical certificate is issued for an employee's illness or injury, sanatorium treatment, prosthetic treatment, family member's illness that requires further care, pregnancy and childbirth, and quarantine.

The first three days of sick leave are paid by the employer from its own funds. Starting from the fourth day of sick leave, statutory established sick pay made to an employee by the employer is later credited against the employer's mandatory contributions to the State Social Insurance Fund. The amount of sick pay ranges from 60 per cent to 100 per cent of the average salary of the employee (depending on the employee's work experience) in the two years preceding the disability; however, the temporary sick pay is limited to an amount established annually by Russian law and used for the calculation of sick pay. The employer may provide additional sick pay from its own funds. In the regions of Russia's far north, sick pay is increased by regional co-efficients.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Generally, there are several types of leave of absence:

- Maternity leave: female employees are entitled to paid leave of 70 calendar days before the child is expected and 70 calendar days after the child is born. Paid maternity leave is increased to 84 days prior to the birth where more than one child is expected, and 86 days after the birth for a difficult birth or 110 days where more than one child is born. During maternity leave a woman receives a maternity allowance in the amount of 100 per cent of her average monthly salary from the State Social Insurance Fund. However, the amount of the allowance is limited and reviewed annually.
- Childcare leave: parents, grandparents, or other relatives can request childcare leave to care for a child who is less than three years old. During childcare leave a person receives an allowance until the child is one-and-a-half years old in the amount of 40 per cent of his or her average monthly salary. The amount of the allowance is also limited and reviewed annually.
- Leave for employees who adopt a child: an employee who adopts a child is entitled to a period of leave that commences on the date of the adoption and continues until 70 calendar days after the date of the adoption, or 110 calendar days where two or more children are adopted. A parent may request childcare leave to care for an adopted child who is less than three years old. The amount of the allowance is the same as for employees on maternity leave and childcare leave.
- Leave for employees who care for disabled children: parents who care for a disabled child are entitled to an additional four days off a month, which can be used by one parent or divided between both parents. Compensation payable for the additional days off is equal to the amount of the average (daily) salary of the employee concerned.
- Sick leave (see question 23).
- Annual paid vacation (see question 22).
- Leave without pay: an employer is obliged to grant leave without pay to the employee for legitimate reasons (eg, family reasons). Additionally, the employee and the employer may agree to a more prolonged leave without pay. Certain categories of employees, for example, disabled employees or old-age pensioners, are entitled to unpaid leave at their request for the term specified in the Labour Code for each category (up to 60 calendar days per year).

25 What employee benefits are prescribed by law?

See questions 22 to 24 regarding paid vacation and holidays, sick pay and maternity-related benefits.

As a general rule, employees are entitled to statutory pensions and protection against exceptional situations relating to the employees' health, family events, work-related accidents or illnesses. Employees are also covered against unemployment risk to a certain extent.

Certain categories of employees enjoy additional benefits. For example, employees working in Russia's far north regions or in adverse or hazardous conditions must receive increased salaries and/or additional paid vacations or reduced duration of the workweek. Also, the Labour Code provides for compensation of certain employees' expenses, for example, if an employee moves to a new place of work at the request of the employer or is required to travel for business purposes.

In most cases, however, the relevant benefits and compensations are highly regulated by the state and the amounts payable are nominal.

26 Are there any special rules relating to part-time or fixed-term employees?

An employee may agree with an employer, either during the hiring process or at any other time after that, to work on a part-time basis. Further, under the Labour Code the employer must establish a part-time working regime upon the request of certain individuals, including, among others, pregnant women and parents of a child who is less than 14 years old.

Part-time employees are paid pro rata for the hours they work or for the amount of work completed. Part-time employees enjoy the same rights and benefits as full-time employees, including the rights relating to the length of annual paid leave.

Please see question 11 regarding fixed-term employees.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Generally, covenants not to compete, solicit or deal (customers, employers or suppliers) are not directly prohibited by Russian law. However, such provisions will most likely be considered invalid and unenforceable by Russian courts, as they violate the principle of freedom of labour established by the Constitution and the Labour Code.

Moreover, the Labour Code expressly allows any employee (except for a CEO) to work for another employer in his or her spare time without the consent of the primary employer.

If, for example, the employee (or ex-employee) uses the employer's (or ex-employer's) commercial secrets in his or her competing business, the employer may consider alternative protections by entering into a non-disclosure agreement with the employee or suing the employee for damages; however, that will be difficult from a practical standpoint.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Russian law does not provide any specific regulation with respect to post-employment restrictive covenants and does not provide any requirement for an employer to pay a former employee during such a period.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Under article 1068 of the Civil Code, an employer is liable for any damage caused by an employee during the fulfilment of such employee's labour obligations under a labour or civil contract, or under the instruction of the employer. At the same time, article 1081 of the Civil Code permits the employer to file a recourse claim to the employee after the employer has provided compensation for the damage caused.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Taxable income includes salaries and other forms of remuneration (including insurance and other benefits) provided by an employer to its employees. The employer withholds a 13 per cent individual income tax from almost each payment made to an employee (certain exceptions apply).

Any payments that are made to Russian employees are subject to social contributions that must be paid by the employer. The basic rates and thresholds are:

- pension fund – 22 per cent, or 10 per cent for any amount exceeding a certain threshold which is reviewed annually; and
- social security fund and medical insurance fund – 2.9 per cent and 5.1 per cent, respectively.

The employer is also required to make contributions to the social insurance fund in accordance with the law on mandatory social insurance for industrial accidents and occupational diseases. The amount to be paid as contributions depends on the types of operations the employer is engaged in and the risks involved. The contribution rate starts from 0.2 per cent.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The allocation of rights relating to employee-created inventions is specifically addressed in Part IV of the Civil Code. All non-proprietary rights (personal rights) for inventions created by an employee belong to that employee and are unalienable. As a general rule, if an invention was created while an employee was performing his or her work duties or acting under the employer's specific instruction, the exclusive rights (proprietary rights), including the right to receive a corresponding patent, belong to the employer.

After the employee has notified the employer about the creation of an invention, the employer should act promptly to protect the rights to the invention. If the employer does not file a patent application, assign its exclusive rights to the invention to a third party, or decide to protect the invention as a commercial secret within four months after it has been informed of the invention by the employee, the exclusive rights to the invention transfer to that employee.

As a general rule, if the exclusive rights to the invention are vested in the employer, the employee is entitled to remuneration. The amount of such remuneration and the related payment conditions are defined either in an employment contract or in other documents agreed to by and between the parties. If there is a dispute over such payment, the precise amount of remuneration is to be decided upon and awarded by the court. The government of the Russian Federation is entitled to set minimum rates for such remuneration.

Part IV of the Civil Code also regulates rights with respect to employee-created works, other than inventions. The exclusive right to employee-created works is vested with the employer unless the employee's employment agreement or any other agreement between the employer and the employee states otherwise. If the employer does not commence using the employee-created work, does not transfer the exclusive right to another person or does not inform the author of keeping the work secret within three years after the work was made available to the employer, the exclusive right to the work will be vested with the employee. Otherwise, the employee is entitled to remuneration, the amount and payment conditions of which are defined by an agreement between the employer and the employee.

32 Is there any legislation protecting trade secrets and other confidential business information?

Key statutes regulating protection of trade secrets and other confidential business information are the Federal Law on Trade Secrets and the provisions of the Civil Code. Russian law does not clearly define 'confidential information' or establish rules on the treatment and disclosure of confidential information. Commercially valuable information of any kind may be protected in Russia as a 'commercial secret' (or 'know-how'), or an intellectual property item.

Proprietary rights to commercial secrets are considered to be protected only if the general public does not have open access to the information and the owner of the commercial secret has introduced special protection measures (an 'internal regime of trade secrecy').

According to the recent amendments to the Civil Code, intellectual property rights to a commercial secret will be deemed valid if the

owner takes 'reasonable measures to protect the information, including by means of establishing the trade secrecy regime'. Arguably, these amendments may be interpreted in a way as to cover the exclusive rights of owners of foreign trade secrets, which are not covered by a trade secrecy regime under Russian law.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Protection of employee privacy and personal data are regulated by Chapter 14 of the Russian Labour Code and the Personal Data Law.

The employer is obliged to maintain confidentiality of employees' personal data. This includes the adoption of necessary personal data protection policies and procedures, as well as taking adequate technical measures to prevent unauthorised access to, or the disclosure of, personal data.

The employer is not allowed to transfer an employee's personal data to third parties without the employee's specific consent. The employer can obtain and process employees' personal data only to the extent that it is required for hiring, training, promotion, security, and work quality control and compliance purposes.

Generally, an employer is not allowed to request and process personal data related to employees' membership in non-commercial organisations or trade unions, their private lives, or their political, religious or other beliefs. An employer is also not allowed to obtain an employee's personal data from third parties without the employee's consent.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Unlike in other countries, Russian law does not have a formal concept of a 'business transfer'. However, Russian law is very pro-employee and it protects an employee from being dismissed due to a sale or acquisition of shares or assets or outsourcing without his or her consent (certain exceptions apply).

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Generally, an employer may dismiss an employee only on grounds and in compliance with the procedures specified by the Labour Code. There is no possibility of 'termination-at-will' under the Labour Code. The only exception applies to dismissal of a CEO, who is the only employee of a Russian company who can be dismissed without his or her consent at any time (subject to certain corporate formalities).

The Labour Code lists the following grounds that allow an employer to dismiss its employees at the employer's initiative:

- systematic failure to perform duties after written warnings without a valid reason;
- unexcused absence from work without a valid reason;
- disclosure of commercial secrets;
- being under the influence of alcohol or narcotics in the workplace;
- professional inaptitude due to poor qualifications confirmed by formal evaluation;
- staff redundancy or liquidation of the company; and
- other substantial reasons.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

An employer must give notice prior to dismissing an employee in certain cases that are provided for in the Labour Code. Such cases include dismissal due to staff redundancy (ie, if the number of personnel or job positions is being reduced) and dismissal due to the closure of a business (ie the liquidation of a company).

Russian law requires that specific procedural requirements, which are considered to be relatively complicated (including providing two months' prior notice to all employees who will be dismissed and notifying the state employment agency of the intended dismissals), must be carefully observed in order for a dismissal due to staff redundancy or the closure of a business to be valid. Additional rules apply to 'mass terminations'.

Under article 180 of the Labour Code, payment in lieu of the two-month notice period is permitted subject to the written consent of the employee.

Update and trends

Among the key developments in labour and employment regulation have been the amendments to the salary payment regime and employer liability for late salary payments. In October 2016, the new provisions of the Labour Code took effect that set the 15-day period for payment of salary, which is calculated from the date the salary has been calculated. This new rule caused uncertainty about bonus payment provisions, under which bonuses are paid after the expiry of a certain period, which often exceeds the 15-day threshold. The Russian Ministry of Labour issued a special clarification that the new rules for salary payments do not apply to bonuses. However, employers are still concerned about the formal risks of non-compliance with the salary payment rules.

As part of a larger administrative reform, the Russian Federal Migration Service has been merged into the Russian Ministry of Internal Affairs. Although this change did not significantly impact the rules on engaging foreign employees, it produced a period of turbulence for employers engaging foreign employees.

The Secondment Law also remains in the public limelight, as there is still a degree of uncertainty about intra-group secondments: the law aimed at regulation of this relationship is still being discussed between the Russian government and industry players.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee without notice, but only for the reasons set out in the Labour Code. In general, an employer can dismiss an employee for systematic failures in the performance of his or her employment duties without a valid reason after he or she has already received written warnings in relation to such failures. An employee may also be dismissed following a single violation of his or her employment duties, where such violation is deemed to be serious. Such instances may include those listed in question 35. In all cases, however, an employer must properly document each violation of an employee's duties and follow the termination rules and procedures.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The Labour Code entitles an employee to a severance payment upon termination of employment in limited cases. The amount to be paid depends on the reason for the termination.

A severance payment of an amount equal to an average monthly wage is paid following a dismissal due to an employer's liquidation, staff reduction or elimination of job positions. In addition to this severance payment an employee is also entitled to be paid an average monthly wage until he or she finds alternative employment, but this will only be paid for two months. In exceptional cases, this term may be extended up to three months by the state employment agency if the dismissed employee applies to the agency within two weeks from the day of dismissal and was not employed through the agency.

A severance payment equal to two weeks' average earnings is paid upon termination of employment for the following reasons:

- refusal of an employee to be transferred to an alternative role in accordance with a medical statement or if the employer does not have an appropriate position;
- call-up for military service or assignment to an alternative civilian service;
- reinstatement of the employee who previously held the employee's position;
- refusal of an employee to be transferred to another region together with the employer;

- recognition of an employee as fully incapable of working in accordance with a medical statement; and
- refusal of an employee to continue working owing to a change of certain terms and conditions of the employment agreement.

Individual employment contracts or collective bargaining agreements may provide for other reasons and higher amounts of severance payments.

39 Are there any procedural requirements for dismissing an employee?

The Labour Code requires that specific procedural requirements be complied with in the case of mass terminations or collective dismissals. The criteria for a collective dismissal are established by federal and regional laws, and generally are based on the number of employees dismissed and the period of redundancy (see questions 36 and 38 regarding the procedural requirements).

There are some additional procedures that may apply for dismissal of employees who are members of trade unions and/or members of management of bodies of trade unions.

40 In what circumstances are employees protected from dismissal?

The following categories of employees are protected from dismissal on all but a limited number of grounds, which are specified in the Labour Code:

- pregnant women;
- women with children under three years of age;
- single mothers raising children under 14 years of age;
- single mothers raising disabled children under 18 years of age;
- employees raising motherless children under 14 years of age;
- employees raising motherless disabled children under 18 years of age;
- employees being the sole wage earners of families with disabled children under 18 years of age; and
- employees being the sole wage earners of families with children under three years of age.

Employees under 18 years of age may be dismissed only with the prior approval of the State Labour Inspectorate and the Commission for the Affairs of Underage Children.

An employer is not permitted to dismiss an employee (except in the case of liquidation of the employer) during the period of the employee's temporary disability or paid annual leave.

41 Are there special rules for mass terminations or collective dismissals?

The Labour Code requires that additional specific procedural requirements be complied with in the case of collective (mass) dismissals. The criteria for a collective dismissal are established by territorial and industrial agreements, and generally are based on the number of employees dismissed and the period during which the dismissals occur.

When an employer proposes a collective dismissal, a consultation with the employee representative body or trade union may be required. An employer must also serve a notice with the state employment agency and trade union organisations no later than three months before the commencement of the dismissal. Collective bargaining agreements (which generally regulate social and employment relations between the employer and the employees, and provide for a higher level of protection of employees than applicable legislation) and territorial and industrial agreements (which generally regulate relations between employees and employers in certain regions or industries) may contain specific provisions relating to collective dismissals.

Further, certain categories of workers cannot generally be dismissed at the initiative of the employer – for example, pregnant women, single mothers and mothers with small children.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Generally, Russian law does not recognise a concept of 'class or collective' actions. However, the Labour Code provides for alternative ways to settle collective employment disputes – by commission of conciliation, mediation or labour arbitration. Commission of conciliation is formed on an equal basis and consists of representatives from both the employer and the employees. If the commission fails to settle the dispute, the parties may decide on another form of settlement, which can be through either mediation or labour arbitration, or both, if necessary.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The Federal Law on Labour Pension in Russia establishes the following general retirement ages: 55 for women and 60 for men. An employer cannot, however, dismiss an employee who has reached retirement age without his or her consent without following the dismissal procedure (see questions 35–41).

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Generally, the parties cannot agree to private arbitration; only state courts of general jurisdiction are the appropriate venue for employment dispute resolution. The Labour Code, however, provides for alternative ways to settle collective and individual employment disputes (see question 42).

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

No, employees cannot waive statutory and contractual rights to potential employment claims. Any such waivers are deemed null and void.

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46 What are the limitation periods for bringing employment claims?

In general, an employee can bring an employment claim within three months of the day the employee became aware of, or should have become aware of, a violation of his or her rights.

In the case of a dispute over an unfair dismissal, an employee can bring a claim within one month of the day the employee was handed a copy of the dismissal order, or from the day his or her work record book was released. With respect to disputes over salary payments, the limitation period has recently been extended to one year from the moment when the payments due should have been paid.

Singapore

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The Employment Act governs all employees apart from Singapore government (or statutory board) employees, seamen, domestic workers and persons employed in a managerial or executive position earning over S$4,500 in basic monthly salary. Part IV of the Employment Act (EA), which stipulates mandatory rest days, hours of work and other such conditions of service, only applies to workmen (manual labour employees) earning up to S$4,500 in basic monthly salary, and other employees earning up to S$2,500 in basic monthly salary.

Those employed in a managerial or executive position (PMEs, generally understood to include professionals) earning up to S$4,500 in basic monthly salary are covered by all the main provisions of the Employment Act aside from Part IV.

Apart from the Employment Act, there are other statutes that govern specific aspects of employment, such as the Personal Data Protection Act 2012 (PDPA), Protection from Harassment Act (POHA), Retirement and Re-Employment Act (RRA), Child Development Co-Savings Act (CDCA, concerning maternity and childcare leave), Employment of Foreign Manpower Act (EFMA) and Industrial Relations Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The POHA defines harassment effectively as the causing of harassment, alarm or distress, whether intentionally or unintentionally (provided the harasser should have reasonably known that the act would likely have caused harassment, alarm or distress). The POHA is meant to cover acts of harassment within and outside the workplace, stalking and cyberbullying, and abolishes the common law tort of harassment, establishing a statutory tort under Singapore law. Acts of harassment may constitute criminal offences under the POHA and may also form the basis of a civil action.

Apart from commencing civil claims for redress against acts of harassment, it is also possible for an individual to apply for various protection orders and expedited protection orders against such acts of harassment, as well as a court order that would compel offending third parties to make corrections to any false statements of fact that have been made against that particular individual. The Court of Appeal held in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 that only individuals (and not organisations or entities) will be able to seek correction of false statements under the POHA.

Insofar as the workplace is concerned, the Singapore courts have recognised over the last few years (see the Court of Appeal decision in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 and the High Court decision in *Brader Daniel John and others v Commerzbank AG* [2014] 2 SLR 81) that employers generally owe employees an implied duty not to undermine or destroy the mutual trust and confidence in the employer–employee relationship. This is discussed in greater detail in question 35. One aspect of this duty in the United Kingdom is that an employer may have a duty to enquire into an employee's complaints of sexual harassment in the workplace. It will be interesting to see if this aspect of the duty will come to be adopted by the Singapore courts and if it could also include other forms of harassment.

Article 12(2) of the Constitution of Singapore (the Constitution) protects individuals from discrimination on grounds of religion, race, descent or place of birth (among other things). Aside from this, Singapore has no specific laws protecting employees from discrimination based on gender, race or disability. There are general guidelines such as the Tripartite Guidelines on Fair Employment Practices issued by the Tripartite Alliance for Fair Employment Practices (TAFEP), but these are not statutorily binding, although the Ministry of Manpower (MOM) may refer to these when addressing complaints of unfair employment practices. Also relevant in this respect is the MOM's Fair Consideration Framework and Human Partnership Programme (see question 9).

Some statutes do specifically prohibit certain forms of discrimination. For example, employers cannot dismiss female employees under the CDCA or Employment Act (see question 25) during the period of their maternity leave. As for older employees, the RRA makes it mandatory for companies to offer eligible employees re-employment opportunities (for at least one year, unless otherwise stated) beyond the current statutory retirement age of 62, up to the age of 65, and with effect from 1 July 2017, employers will have to offer re-employment to eligible employees up to the age of 67 years. The RRA also makes it an offence for employers to dismiss or terminate employees for the sole reason of their age (although this does not affect the employer's right to terminate the employee for poor performance, ill health, or misconduct). However, the RRA does not address prospective discrimination against older employees in relation to either recruitment, selection, promotion or training opportunities. Some of these issues are addressed in TAFEP's Tripartite Guidelines for Re-employment of Older Workers. However, as with other TAFEP Guidelines, they are not legally binding and no express penalties are imposed on employers who do not comply with these.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary government agency responsible for the enforcement of employment statutes and regulations and the adjudication of employment issues related to Employment Act employees (see question 1) is the MOM, which does so primarily through its Labour Court. Parties are not allowed legal representation in Labour Court proceedings, but Labour Court decisions by the Commissioner for Labour are generally appealable to the Singapore High Court within 14 days of the decision. The MOM also regulates other employment-related areas such as workplace safety and employment of foreign manpower. Employees not covered under the Employment Act do not have access to the Labour Courts, but may seek redress through the State Courts or High Court.

With effect from 1 April 2017, the Employment Claims Tribunals (ECT) will be set up to provide employees and employers with a more economical and expeditious avenue to resolve their statutory and contractual salary-related disputes through adjudication. The ECT will be a division of the State Courts and will only hear salary-related claims of up to $20,000 (or S$30,000, if parties have attempted formal mediation with trade union involvement at the Tripartite Alliance for Dispute Management (TADM)), including claims for contractual

bonus payments, for all employees (including PMEs). No external legal representation will be allowed and parties must attend compulsory mediation before claims can be heard before the ECT. The ECT will also replace the role of the Commissioner for Labour in adjudicating statutory salary-related claims under the Employment Act, Retirement and Re-employment Act, and Child Development Co-Savings Act.

While not strictly an enforcement agency, the MOM, together with the Singapore National Employers Federation and the National Trades Union Congress, have also set up a tripartite mediation scheme with TADM as an alternative means of dispute resolution between employees and their employers. With effect from 1 April 2017, the enhanced tripartite mediation framework will be available to all PMEs (including those earning more than S$4,500), and will allow for an expanded scope of claims (including disputes relating to re-employment, parental leave and other employment-related statutory benefits) to be mediated.

The primary agency responsible for enforcing the PDPA is the Personal Data Protection Commission (PDPC) (see question 33), while the POHA is enforced through the courts.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Trade Unions Act allows employees to form or join trade unions to regulate their relations with their employers through collective agreements. Once formed and registered with the Registrar of Trade Unions, the trade union may approach an employer for statutory recognition under the Industrial Relations (Recognition of a Trade Union of Employees) Regulations. It is ultimately difficult for an employer to refuse to recognise a trade union at law. Where the employer so refuses, it must notify the MOM Commissioner for Labour. The Commissioner may then call for a secret ballot among the employees entitled to vote, and if a majority of those employees are members of that trade union, the employer must give it recognition. As secret ballots are logistically challenging (among other things), trade unions have in the past used memoranda of understanding (MOUs) with employers as an interim step instead (MOUs are contracts where, for example, the union agrees not to seek recognition for a certain number of years, and the employer in return agrees to sponsor or subsidise its employees' union fees and dues).

PMEs may be collectively represented as a group by trade unions, thus affording greater protection to PMEs by way of a wider set of union representation. PMEs are thus able to turn to unions for representation if they encounter re-employment issues.

That said, where a trade union's majority membership is made up of non-PMEs, that trade union will not be able to collectively represent PMEs where there is a real or potential conflict of interest if such PMEs are represented by the trade union, or where management effectiveness may be undermined. PMEs who are employed in a senior management position (or perform or exercise any similar function), who are involved in or are able to influence the decision-making on any industrial matter, who are involved in representing the employer in any negotiation relating to any industrial matter, or who have access to confidential information (relating to the employer's finances and budgets, any industrial relations matter or the salaries and personal records of other employees) would not be eligible for collective representation from such trade unions, but the trade union will still be able to represent these PMEs on an individual basis and for limited matters.

5 What are their powers?

Negotiating collective agreements and representing employees in trade disputes

Once recognised, a trade union can invite the employer to negotiate a collective agreement for the relevant employees. If the employer refuses to negotiate, a statutory 'trade dispute' will exist, which will have to be determined by the Industrial Arbitration Court (IAC), where, as with the Labour Court, legal representation is not allowed. Prior to that, the Commissioner may intervene to facilitate reconciliation between the parties.

In 2012, the IAC made a significant ruling in *United Workers of Electronic and Electrical Industries (UWEEI) v Sealing Technologies Pte Ltd*. In that case, the respondent company had granted statutory recognition to the claimant trade union, and was negotiating a collective agreement (which likely involved retrenchment benefits). However, before the collective agreement could be finalised and signed, the company laid off 98 of its workers. The trade union brought a claim on behalf of the workers, and significantly, the IAC ordered the company to increase the retrenchment benefits for those workers from the two weeks per year of service to the more customary one month, notwithstanding that the company was under no statutory or contractual obligation to do so. In the same vein, in 2013, the IAC made another significant ruling in *Singapore Industrial & Services Employees' Union (SISEU) v First Defense Services Pte Ltd*. In that case (where the company had also accorded statutory recognition to the trade union), the company still had not given its employees any pay increments after around two years from the time of recognition although it was financially healthy. The claimant trade union served a collective bargaining notice on the company and attempted to negotiate pay increments for the employees, but the company refused. The trade union then brought a claim on behalf of the employees, and the IAC ordered the company to grant certain pay increments, despite the fact that the company again had no contractual or statutory obligation to do so (as again, no collective agreement had been signed). These cases demonstrate the willingness of the IAC to resolve trade disputes on the basis of equity and fairness rather than strict contractual principles, as it is statutorily empowered to do. It also indicates that companies are obliged to negotiate with trade unions in good faith, and statutory recognition by the company of the trade union is a key milestone in the engagement process.

Strikes and other industrial actions

While a registered trade union is also able to commence, promote, organise and finance a strike or industrial action, it may only do so in limited circumstances. Restrictions in this respect are imposed upon both the trade union and its members by the Trade Unions Act and the Trade Disputes Act. For example, under the Trade Unions Act, a registered trade union is prohibited from commencing, promoting, organising or financing any strike or any form of industrial action affecting the whole or any section of its members without obtaining the consent, by secret ballot, of the majority of the members so affected. Further, under the Trade Disputes Act, strikes and industrial actions are illegal if they have any object other than the furtherance of a trade dispute within the trade or industry in which the persons taking part in the industrial action are engaged (eg, if it is designed or calculated to coerce the Singapore government either directly or by inflicting hardship on the community). It is an offence for any person to knowingly expend or apply any money in direct furtherance or support of, or instigate or incite others to take part in, or otherwise act in furtherance of, an illegal strike or industrial action.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

There are currently no restrictions on an employer (or third party) conducting a background check on a job applicant.

Under the PDPA, publicly available personal data, as well as credit reports from credit bureaus, can be obtained without the consent of applicants. Personal data can also be collected or used for employment evaluative purposes without informed consent. The collection of data from other sources will be subject to the provisions of the PDPA (see question 33).

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There are no such restrictions or prohibitions. An employer can refuse to hire an applicant who refuses to submit to such an examination or test.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

No. See question 7.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

See question 2. Aside from the Constitution, the TAFEP Guidelines caution against choosing job candidates based on race, religion, age or gender, marital status and disabilities, and encourage employers to recruit on the basis of merit.

Under MOM's Fair Consideration Framework, employers that wish to hire a foreign employee on an Employment Pass must (unless they fall within certain exceptions) advertise the particular job vacancy online on the national Jobs Bank administered by the Singapore Workforce Development Agency for at least 14 days before an application for an Employment Pass may be made (see question 17). This is aimed at preventing discrimination against Singaporeans by employers who prefer to hire foreigners. In November 2016, the MOM launched the Human Capital Partnership Programme. This programme recognises employers with good track record in their employment practices, and grants them certain benefits such as endorsements to recognise them as employers of choice, better access to government support and resources, and faster responses and higher service standards with the MOM.

On the other end of the spectrum, 250 companies that did not appear to be making reasonable efforts to provide fair employment opportunities or had substantiated complaints of discriminatory practices were being monitored by the MOM. In March 2017, the MOM took action against 50 companies which failed to give Singaporeans fair consideration when hiring, and this resulted in these companies' employment pass applications being rejected by the MOM.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Since April 2016, employers have been required to set out certain terms of employment known as Key Employment Terms (KETs) in writing, and to issue a copy of these written KETs to all employees covered by the Employment Act who are hired on or after 1 April 2016 and who are employed for a continuous period of 14 days or more. This is intended to assure employees of their basic rights to payment and other benefits, as well as to minimise dispute between employers and employees. The written KETs should include, among other things, provisions relating to the payment of salary, allowances and other salary-related components such as bonuses and incentives, leave entitlements and the notice period for the termination of employment (whether initiated by the employer or employee).

For employees not covered by the Employment Act (see question 1), there is no such requirement for contracts of employment to be in writing. For such employees, contracts of employment or service may be formed orally, by conduct or in writing, and an employment contract need not be written for its terms to be enforceable (although written terms are easier to prove and enforce).

In any event, employers should pay close attention in ensuring that any onerous financial terms are set out expressly and unambiguously in employment contacts (whether in relation to employees covered by the Employment Act or otherwise). This is due to a discernible shift in the approach by the Singapore courts in interpreting and construing onerous financial terms of employment agreements in favour of employees. In the 2015 Singapore High Court decision in *Corinna Chin Shi Hwa v Hewlett-Packard Singapore (Sales) Pte Ltd* [2015] SGHC 204 (*Corinna Chin*), the court observed that where an employer had used a standard form contract containing provisions that were obviously unfair (eg, ambiguous terms relating to the payment of various incentive compensations due to the employee which could lead to unreasonable results), the employer may risk finding itself unable to enforce those terms as regards the employee. (While this case went on appeal and the Court of Appeal eventually found in favour of the employer, this was on the basis that the provisions were not in fact ambiguous, and the High Court's observation above remained unaffected.) This would be especially so in an employment relationship where an implied duty of trust and confidence exists. As such, while a non-Employment Act employment contract still need not, strictly speaking, be in writing for its terms to be enforceable, employers should now ensure that any onerous financial terms are expressed clearly and unambiguously, and specifically brought to the employee's attention.

Further, since April 2016, employers have been required to issue itemised payslips to employees covered under the Employment Act. Itemised payslips must be given at least once a month at or around the time payment is made to the employee. In the case of termination or dismissal, employers must provide the payslip together with any outstanding salary. The itemised payslip should include information such as the date of payment, the basic salary, any additional payments (such as bonuses, pay for working on a rest day), and any deductions made for each salary period.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are not uncommon and are enforceable. There is no statutorily prescribed maximum duration for fixed-term contracts. That said, employers should, where possible, take care to provide for termination options prior to the expiry of the fixed term (see question 35 on constructive dismissal and its relevance to fixed term contracts). In the absence of such termination provisions, where the employer unlawfully terminates the employee during the fixed-term contract, the employer may be liable in damages to the employee for the remaining period of the fixed-term contract yet to be performed (as per the High Court decision in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577; see question 35).

12 What is the maximum probationary period permitted by law?

There is no maximum duration for probationary periods prescribed at law. Probation periods are generally around one to three months, but may extend beyond this. The contractual notice period for termination (see question 35) is normally shorter during probation periods (eg, one week as opposed to one month).

13 What are the primary factors that distinguish an independent contractor from an employee?

The fundamental test is whether the person in question performed the services on the employer's account, rather than on his or her own account. If it is the former, then the contract will be a contract of service. If not, then the individual will be considered to be working under a contract for service (ie, as an independent contractor). Other factors include the degree of control exercised by the alleged employer over the worker, the manner in which the worker is remunerated (eg, whether through a fixed monthly salary or based on commissions), and whether the alleged employer had provided statutory benefits such as sick leave and annual leave and had made CPF payments to the individual (see question 25). The Singapore Court will consider all relevant factors in order to distinguish an independent contractor from an employee. There is increasing attention now on the growing number of freelancers and gig economy workers, who are technically independent contractors even though they share many of the characteristics of (and indeed may be de facto) employees, but do not receive statutory or contractual employee benefits. The UK courts appear to now recognise an interim class of 'workers' in between employees and those who are self-employed. It remains to be seen if the Singapore courts can or will follow suit. In this respect, the Minister for Manpower has recently announced that a new tripartite workgroup will be formed to study freelance workers' issues, and it is expected to release its findings and recommendations in the course of 2017. This could result in changes to the legislative or regulatory framework to better protect freelancers.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Organisations and individuals who place job seekers with employers are governed by the Employment Agencies Act (EAA). Under the EAA, certain licences are required to be obtained before organisations and individuals may place jobseekers with employers.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Work passes, in principle, are available for employees transferring from one corporate entity to a related entity in another jurisdiction. A foreign national who seeks or is offered employment in Singapore will fall under the provisions of the EFMA. The EFMA requires that such a foreign employee must obtain a valid work pass (eg, employment pass, S-Pass or work permit). The issuing of a work pass to the foreign employee is at the discretion of the Controller of Work Passes (under the MOM).

One of the most common types of short-term visa is a miscellaneous work pass, which is similarly issued by the controller of work passes. These are suitable for foreigners on short-term assignments, and last up to 60 days. There are no published numerical limitations on such passes.

16 Are spouses of authorised workers entitled to work?

No foreign national can work in Singapore without a valid work pass or permission from the MOM. Spouses of certain pass holders can work in Singapore provided they obtain their own valid work pass. Alternatively, spouses on a dependant's pass may also work in Singapore if a letter of consent from the MOM is obtained.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

No employer can employ a foreign employee without a valid work pass. The work pass is valid only for the employer and type of employment expressly specified. Each work pass is issued to a foreign employee with mandatory conditions to be followed and is valid only for the period specified. All employers are required by the Employment Act and the EFMA to keep a register of foreign employees to whom work passes have been issued. It is an offence to employ an unauthorised foreign worker and the penalty on conviction is a fine between S$5,000 and S$30,000 or imprisonment for up to 12 months or both for the first offence, and fines of up to S$60,000 for corporate repeat offenders. It is also an offence to work without a valid work pass. The sanctions for the worker on conviction are a fine not exceeding S$20,000 or imprisonment for a term not exceeding 24 months, or both. An employer who employs a foreign worker who does not have the right to enter or remain in Singapore may also be guilty of an offence under the Immigration Act.

Pursuant to the Fair Consideration Framework (a government policy to encourage local companies to hire more local employees), firms submitting employment pass (EP) applications (including for existing EP holders who are changing employers) are required to first advertise their job vacancies on the national jobs bank to allow locals (Singapore citizens or permanent residents) to apply first, before being allowed to proceed with the EP applications. MOM has also directed that it will identify and engage firms that have comparatively disproportionate low concentrations of local employees at certain senior staff levels. Such firms may be required to propose and implement action plans to attract, develop and retain locals in their workforce over time. Firms that do not cooperate with MOM's directions may face greater scrutiny of their internal processes and protocols, and face curtailment of their work pass privileges.

18 Is a labour market test required as a precursor to a short or long-term visa?

No. There is, however, a limit on the number of foreign employees a firm may employ. Each industry is assigned a quota (a foreign employee entitlement), used to compute the number of foreign employees each firm can recruit. The entitlement is based on the size of the total workforce in the firm as well as its ratio of local to foreign employees. Each industry has unique eligibility criteria to determine the firm's foreign employee entitlement. The sector the firm falls under is based on the declaration of its business activity.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Part IV of the Employment Act stipulates mandatory rest days, hours of work and other conditions of service. Generally, employees covered under Part IV (see question 1) cannot be required to work for more than eight hours a day or 44 hours a week. By agreement though, and provided that such employees either work five days a week or less, or less than eight hours on one or more days of the week, such employees may work more than eight hours on some days. Even in such situations though, Part IV employees still cannot be required to work more than nine hours a day or 44 hours a week. However, under certain exceptional circumstances (eg, urgent work, or work essential for defence or security), Part IV employees may be permitted to exceed the eight or nine-hour limit, provided they still do not work more than 12 hours a day. Part IV employees are also prohibited from working more than six consecutive hours without a leisure period. The employee is allowed one whole day (or, for shift work employees, any continuous period of 30 hours) as a rest day each week without pay. The employer can determine which day of the week the rest day shall fall on. An employee may elect to work overtime at higher rates of pay (see question 20) for more than those numbers of hours or on a rest day, provided that no employee works overtime for more than 72 hours in a month or more than 12 hours a day. In the 2013 High Court decision in *Monteverde Darvin Cynthia v VGO Corp Ltd* [2014] 2 SLR 1 (*Monteverde Darvin*), it was held that any contractual term requiring an Employment Act employee covered by Part IV of the Employment Act to work for more than 44 hours without overtime payment was illegal (and therefore null and void), and the employee would be entitled to overtime payment for the extra hours worked.

No statutory restrictions as to working hours, days or periods apply to employees not covered by Part IV of the Employment Act, and any such terms would be a matter of contract between such employees and their employers.

20 What categories of workers are entitled to overtime pay and how is it calculated?

An employee covered by Part IV of the Employment Act must be paid for overtime (see question 19) at the rate of not less than 1.5 times the employee's basic hourly rate of pay (or two times, where the employee is requested to work on a rest day). Although the scope of employees covered includes workmen earning up to S$4,500 and non-workmen earning up to S$2,500 in basic monthly salary, the overtime rate payable for non-workmen is capped at the salary level of S$2,250 to help employers manage costs (ie, an employee earning a salary of between S$2,250 and S$2,500 will be entitled to overtime pay, but his or her overtime pay will be calculated from a base of S$2,250 (as opposed to his or her actual salary)). Overtime payment must be made to the employee within 14 days after the last day of the employee's salary period. In addition, an employee covered by the Employment Act who is required by his employer to work on any public holiday is also entitled to an extra day's salary. If the employee is a PME, he or she may also be given a day off in substitution for that holiday, or part of a day off depending on the number of hours spent working on that public holiday.

21 Can employees contractually waive the right to overtime pay?

An employee under Part IV of the Employment Act will be statutorily entitled to overtime pay in the manner prescribed by the Employment Act. Non-payment of overtime pay would result in the commission of an offence under the Employment Act and any clause in that employee's contract purporting to waive the right to overtime pay would be void and unenforceable. Also see the discussion on the 2013 High Court decision in *Monteverde Darvin* in question 19.

As for employees not covered by Part IV of the Employment Act, whether or not an employee has a right to overtime pay will be governed by the provisions of the employment contract. It is possible for the employer to expressly stipulate in the employment contract that it is contemplated that the employee will have to work outside the employer's ordinary working hours in order to complete all the tasks asked of that employee and in consideration for that employee's regular remuneration.

22 Is there any legislation establishing the right to annual vacation and holidays?

An employee covered under Part IV of the Employment Act will be entitled to annual leave that is in addition to the rest days, holidays and sick leave (see question 23) to which the employee is entitled. Such Employment Act employees who have worked for an employer for a period of not less than three months are entitled to paid annual leave of seven days for the first 12 months of service with that employer. The employee is statutorily entitled to an additional day's annual leave for every subsequent 12 months of continuous service with the same employer, up to a maximum of 14 days. The employer is free to contract on terms that are more (but not less) favourable to its employees.

Under Part X of the Employment Act, every Employment Act employee is entitled to a paid holiday at his or her gross rate of pay on a public holiday that falls during the time that he or she is employed, although this may be varied by mutual agreement between the employer and employee (also see question 20 on the employee's right to additional pay for work done on a public holiday).

23 Is there any legislation establishing the right to sick leave or sick pay?

Under Part X of the Employment Act, an Employment Act employee who has served an employer for a period of not less than six months is entitled to paid sick leave certified by a medical practitioner. The statutory entitlement to sick leave, where no hospitalisation is necessary, is capped at 14 days each year. Where hospitalisation is necessary, the employee is entitled to 14 days plus the number of days he or she is hospitalised, capped at an overall aggregate of 60 days. Employers are not required to grant paid sick leave or bear the medical examination expenses of employees for cosmetic consultations and procedures that are not medically necessary, but are free to contract on terms that are more (but not less) favourable to its employees.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Apart from maternity, paternity and childcare leave (see question 25), leave of absence is not covered under the Employment Act (or Singapore's other employment legislation). The prospective grant and duration of such leave, and payment thereunder, is a matter to be contractually determined and agreed between the employer and employee.

25 What employee benefits are prescribed by law?

The Central Provident Fund Act provides for the periodic contributions of monies into the Central Provident Fund (CPF, which is akin to a mutually funded state pension fund) by an employer in respect of each employee at specified rates. The employee may only withdraw the funds upon reaching the age of 65, although the employee may also choose to make a partial withdrawal at the age of 55. Meanwhile, the employee may apply the funds for certain purposes such as the purchase of property and certain securities, and towards certain insurance and medical protection schemes.

An eligible female employee under the CDCA is entitled to 16 weeks of government-paid maternity leave. The female employee may absent herself from work four weeks immediately before and 12 weeks immediately after delivery (ie, totalling 16 weeks). Amendments to the CDCA in January 2017 have extended such benefits to unwed mothers as well (whereas previously these were only applicable to mothers who were married). Where there is a mutual agreement with her employer, an employee can take the last eight weeks (9th to 16th week) of her maternity leave flexibly over a 12-month period from the child's birth. An eligible female employee who is covered under the Employment Act, but not under the CDCA, will be entitled to 12 weeks of maternity leave.

Under the Employment Act and the CDCA, it is not lawful for an employer to give a female employee notice of dismissal (or termination) while the female employee is on maternity leave or such that the notice period will expire while she is on maternity leave. While it is not entirely clear from the relevant statutes, this prohibition is likely to apply where the dismissal is done by payment in lieu of notice instead of allowing the employee to serve out the notice (if that notice period would expire while the employee is on maternity leave). Over and above this, if an employer gives a female employee notice of dismissal (or termination) without sufficient cause (or on the grounds of redundancy or reogranisation) while the female employee is pregnant, it cannot deprive the employee of any payments or entitlements which she would otherwise have received had she not been dismissed (provided the female employee has served the employer for at least three months). This is so even if the notice period would expire prior to the maternity leave. In other words, in that situation the employer will have to still pay the employee for her 16 (or 12) weeks of maternity leave. A contract which purports to deprive a female employee of her statutory maternity benefits or reduce an employer's obligations in this respect will be null and void.

With effect from 1 July 2017, eligible female employees under the CDCA who adopt (rather than deliver) a child will be entitled to 12 weeks of government-paid adoption leave (an increase from the four weeks government-paid adoption leave currently in force). As the EA does not provide for maternity leave for mothers who adopt children, it would appear that female employees who are under the EA but not the CDCA will not be entitled to any adoption leave.

Following amendments to the CDCA in January 2017, eligible male employees under the CDCA are now entitled to two weeks of government-paid paternity leave (whereas they were previously only entitled to one week). Under the CDCA, there is also a Shared Parental Leave scheme, where a working father is entitled to share one week out of the 16 weeks of the working mother's maternity leave if he meets certain eligibility criteria (this will be increased to up to four weeks from 1 July 2017). The female employee's maternity leave will then be reduced accordingly.

Where an insolvent corporate employer is placed in liquidation, the Singapore Companies Act expressly accords preferential status to claims by employees in respect of unpaid wages and salary, including wages or salary in lieu of notice, with priority over the employer's ordinary unsecured creditors. There is, however, a statutorily imposed limit on the sum that is payable as a preferred debt, equivalent to five months' salary or S$7,500, whichever is lower. Any balance claims by the employee do not enjoy preferential status and rank as ordinary unsecured debts in the employer's insolvency.

26 Are there any special rules relating to part-time or fixed-term employees?

Under the Employment Act, a part-time employee means an employee covered by the Act (see question 1) who is required to work for less than 35 hours a week. Every part-time employment contract must specify the employee's hourly basic rate of pay as well as the number of working hours in a day, week and month. Where a part-time employee works beyond his or her normal hours, but does not exceed the hours a full-time employee doing the same work would have worked, the part-time employee will be entitled to the normal hourly rate of pay for each hour worked up to what the full-time employee would have worked. However, every hour worked over what the full-time employee would have worked will then be considered overtime, and paid for at a rate of 1.5 times the employee's basic hourly rate. Payments for work on public holidays, annual leave and the number of sick days allowed are prorated according to statutory formulae.

Aside from what has already been stated in the other sections, there are no statutory rules specifically directed at fixed-term employees, and their employment relationship will generally be governed by their employment contracts and the Employment Act (and other relevant employment legislation), if applicable. However, Tripartite Guidelines on the employment of fixed-term employees released in 2016 encourage employers to treat contracts renewed within one month of the previous contract as continuous, and grant or accrue leave benefits based on the cumulative term of the contracts (as to leave benefits, see question 25). Employers are also encouraged to notify fixed-term employees in advance as to whether they wish to renew the contract, so as to allow sufficient time for either party to make alternative arrangements. In the absence of agreement, the notice period for termination of a fixed-term contract should be not less than the minimum notice periods prescribed by the Employment Act (see question 36). These guidelines are not legally binding and it remains to be seen whether these protections will be given statutory force.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Under Singapore law, restraints of trade are generally frowned upon on grounds of public policy. However, in the employment context, the Singapore Court of Appeal has held that a restrictive covenant in restraint of trade may be enforceable if it seeks to protect a legitimate proprietary interest, provided that the legitimate proprietary interest that is to be protected by the restrictive covenant is not already covered by another restrictive covenant. However, recent decisions by the Singapore High Court have suggested that it may be timely for the Singapore Court of Appeal to reconsider this principle (see the discussion under 'Non-compete clauses' below).

To date, the legitimate proprietary interests the courts have recognised are trade secrets (and confidential information), trade or business connections, and the maintenance of a stable, trained workforce. The courts will generally uphold such restraints provided they are reasonable in the interests of parties and the public, and go no further than necessary. The courts tend to construe restrictive covenants more strictly in the employment context than in other areas (eg, sale of businesses).

Trade secrets and confidential information

Protection is granted at common law over an employer's trade secrets or equivalent confidential information even without an express confidentiality provision (ie, as an implied term), provided the trade secrets can be particularised. However, an express confidentiality clause can potentially help to identify the trade secrets or equivalent information that the employees are precluded from using or disclosing during and after employment, and can also aid in enforcement. Care must also be taken to distinguish between trade secrets and confidential information on the one hand, and the skill and knowledge belonging to the ex-employee on the other. A restrictive covenant seeking to protect the former may be enforced whereas a restrictive covenant preventing an ex-employee from competing through the latter may be considered unreasonable and unenforceable (see the discussion under 'Trade and business connections' and 'Non-compete clauses' below).

Trade and business connections

Where an employee has personal knowledge and influence over an employer's customers or clients, the employee can be restrained from taking advantage of this after employment. This is usually done through a non-solicitation of customers or clients clause, which must be reasonable, taking into account factors like duration and the geographical area of restraint. Non-solicitation provisions can potentially extend to non-solicitation of suppliers as well. Periods of restraint of up to a year may potentially be enforced. Although there is no clear prohibition against longer periods, these are less likely to be enforced and may affect the overall enforceability of the clause. In the absence of an express clause, the courts may possibly be willing to imply a term to protect this proprietary interest, although unlike trade secrets, this has only been suggested (and not confirmed) by the courts. It is likely to be more difficult to enforce non-dealing (as opposed to non-solicitation) clauses, as these may be construed as unreasonable insofar as they do not just enjoin solicitation, but all forms of dealing.

Maintenance of a stable, trained workforce

An employer can protect its workforce by a non-solicitation of employees (also known as non-poaching) clause. Such clauses are again subject to the requirement of reasonableness, taking into account duration and the types of employees covered. The restraint should not be a blanket prohibition on the prospective solicitation of all employees of the ex-employer, but should be referable to the position, training or knowledge of the target employee, and should also be restricted to employees over whom the ex-employee had influence. Again, periods of restraint of up to a year may potentially be enforced (with longer periods again less likely to be enforced, and potentially affecting enforceability of the clause). There has been no indication that the Singapore courts will be willing to protect this interest without an express term.

Although the protection of an employer's workforce is usually enforced by way of a non-solicitation of employees clause, the 2012 High Court decision in *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 (*PH Hydraulics*) suggests that it might be possible to enforce this by non-compete clauses as well (see further discussion below).

Non-compete clauses

On current legal principles, non-compete clauses are difficult to uphold and enforce if the three recognised legitimate proprietary interests identified above are already protected by other clauses (unless a yet further legitimate proprietary interest can be shown, which has not been successfully done to date). The Singapore courts have however in recent years displayed an increased willingness to uphold non-compete clauses where not all of the three recognised legitimate proprietary interests are protected by other clauses.

In this respect, a few decisions may indicate winds of change in terms of how courts view non-compete clauses. In the above-mentioned case of *PH Hydraulics*, the High Court characterised the maintenance of a stable, trained workforce as a legitimate proprietary interest that could be protected by a non-compete clause (as opposed to a non-solicitation of employees clause), allowing an employee to thereby potentially be enjoined from working for a competitor (or to be sued for damages if he or she did so).

Subsequently in the 2013 High Court decision in *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter and others* [2013] 2 SLR 193 (*CCL*), the High Court, in considering whether a non-compete covenant was enforceable to protect confidential information and trade secrets (even though there was a separate clause protecting of such information), appositely commented that it did not seem logical that an employer which had both a non-compete covenant and a confidentiality clause had a lower chance of using the non-compete covenant to protect its confidential information than an employer which only had a non-compete covenant. However, the High Court noted that it was bound by the prior Court of Appeal decisions in *Man Financial (S) Ptd Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 (*Man Financial*) and *Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and others* [2005] 2 SLR(R) 579 (to hold that in a case where a confidentiality clause was already present, as was the case here, there needed to be a legitimate proprietary interest over and above the protection of confidential information and trade secrets for the non-compete covenant to protect). In *CCL*, the court did find that there was another legitimate interest (trade connections), but ultimately did not uphold the non-compete covenant as it was held to be unreasonable. The CCL decision was appealed to the Court of Appeal, but was ultimately settled before the Court of Appeal could hear and rule on the matter. Thereafter, in the April 2014 High Court decision in *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 (*Humming Flowers*), the High Court opined that the legitimate proprietary interest of trade connections could suffice to support both a non-compete and a non-solicitation clause. The Court ultimately did not grant the non-compete injunctions sought though, and in any event, the position that trade connections can support both a non-compete and a non-solicitation clause may be questionable on the present authority of Man Financial.

Springboard injunctions

Injunctive relief may also be granted to prevent a person who has obtained confidential information from using it as a 'springboard' for activities detrimental to the person to whom the confidential communication belongs, or to gain an unfair advantage or headstart over that person. Although similar in effect to a non-compete injunction based on restrictive covenants, such 'springboard' injunctions originate from cases involving a breach of the duty of confidence, and do not exclusively arise in employer-employee situations. Accordingly, a 'springboard' injunction may even be granted in the absence of any restrictive covenants, although the presence of restrictive covenants would at least be relevant.

In the Singapore High Court decision in *Jardine Lloyd Thompson Pte Ltd v Howden Insurance Brokers (S) Pte Ld & Ors* [2015] 5 SLR 258 (*Jardine Lloyd Thompson*), the ex-employer sought an injunction against its ex-employees to prevent the ex-employees from joining their new employer, and similarly sought an injunction against the new employer to prevent the new employer from hiring its ex-employees. This was done notwithstanding the absence of any non-compete clauses in the relevant employment agreements of the ex-employees. The basis of the ex-employer's claim for the injunction rested (among other things)

on the argument that its former employees had misused its confidential information and, accordingly, should be prevented (by way of an injunction) from taking unfair advantage of the 'springboard' that would otherwise be created from such misuse. While the Singapore High Court declined to grant the injunction sought on the grounds that there was no evidence of misuse of the confidential information (or risk thereof), the High Court appeared to suggest that in the appropriate case, a 'springboard' injunction could possibly be granted to prevent an employee from disclosing his or her employer's confidential information (even in the absence of a valid non-compete clause).

Thereafter, in the High Court decision in *Goh Seng Heng v RSP Investments and others and another matter* [2016] SGHC 275 (*Goh Seng Heng*), the High Court granted an interim 'springboard' injunction as it was found that (i) there was misuse of confidential information, or the risk of such misuse; (ii) such misuse of confidential information had given rise to an unfair competitive advantage to the party sought to be restrained; (iii) the unfair advantage was still being enjoyed by the party sought to be restrained at the time the injunction was sought; and (iv) damages would be inadequate. While there were non-solicitation and non-compete clauses in the relevant employment contracts and they were considered by the court, this was ultimately not the court's basis for the grant of the 'springboard' injunction. In *Goh Seng Heng*, the High Court found that the four requirements ((i) to (iv) above) were satisfied as the ex-employees had (among other things) taken and misused confidential information and trade secrets, in addition to poaching the company's doctors, entering into contracts unfavourable for the company, and inflating the salary of its ex-chief executive officer. The court found that these actions were intended to and did bleed the company financially, and the breaches of confidentiality gave an unfair competitive advantage towards the ex-employees' new company. There was a real likelihood that without a 'springboard' injunction, the company would be ruined before the matter reached trial, and damages in lieu of an injunction would be therefore insufficient. As such, the 'springboard' injunction was found to be necessary. The ex-employees and their new company have appealed against the High Court's decision, and the Court of Appeal's decision on this will certainly bear close watching.

A clause prohibiting the misuse of confidential information for a stipulated period of time may be a relevant consideration for the court in deciding how long the 'springboard' injunction should be in place (if granted at all). In *PH Hydraulics* the High Court stated that the 'springboard' doctrine did not apply as the two-year period in the relevant confidentiality clause had expired, and the information was no longer confidential. On the other hand, where a period of time was not expressly stipulated in a confidentiality clause (and the relevant clause did not indicate how long this obligation would last), the Court of Appeal in *Tang Siew Choy and others v Certact Pte Ltd* [1993] 1 SLR(R) 835 took the view that the period of time to restrain the ex-employees from using confidential information would have to be gathered mainly from the complexity of the information protected, with the injunction to continue for the period for which the unfair advantage may reasonably be expected to continue.

Deferred bonuses

It is quite possible that these cases may signal an impending paradigm shift in the law on non-compete clauses, though the law on this point will only be changed if and when the Court of Appeal rules accordingly in an appropriate case brought on appeal. That said, the Singapore courts have already been granting non-compete injunctions, though to date generally not in cases where all the other three restrictive covenants are found.

A potential way to achieve a similar result to a non-compete clause may be to expressly incentivise employees not to compete (or disincentivise employees from competing) for a specific period of time after employment. Care should be taken by the employer in doing so though.

In the Court of Appeal's 2012 decision in *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] 4 SLR 371 (overturning the High Court decision in that case), the court held that to financially disincentivise an employee from competing through a contractual clause that deprived the employee of a vested right (in that case, a declared and vested deferred bonus payment) effectively amounted to a restraint of trade, which would have to pass the test of reasonableness in order to be enforceable (the restriction was found to be unreasonable there as among other things, it had no geographical limit). This was notwithstanding the fact that the clause in question did not actually prohibit competition by the ex-employee, as his competition with the company was not in breach of his employment contract per se (and the company accordingly had no recourse to damages or an injunction). In light of this decision, while a financial disincentive to compete may still be a viable alternative means to effectively achieve non-competition, employers should be careful to ensure that the benefits sought to be withheld cannot be construed as having been vested, or otherwise encourage expectations that employees are entitled to such benefits.

Fiduciary obligations

Apart from the above, senior or management-level employees may, in certain situations, owe fiduciary obligations to their employer over and above the express restrictive covenants contained in the contract of employment (this was discussed in the High Court decision of *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163). Such fiduciary obligations may include the undivided duty of loyalty, the rule against self-dealing and the fiduciary's obligation not to usurp corporate opportunities belonging to the employer. This may be so even if the employee in question is not a director of the employer. In Singapore, the courts will generally consider the following three characteristics to determine, on a case-by-case basis, if it is appropriate to impose fiduciary obligations on an employee:

- whether the employee has scope for the exercise of some discretion or power;
- whether the employee can unilaterally exercise those powers or discretions so as to affect the employer's legal or practical interests; and
- whether the employer is peculiarly vulnerable to or at the mercy of the employee holding the discretion or power.

That said, even where a court is prepared to impose fiduciary obligations on the employee in question, the scope of the fiduciary duties imposed will depend largely on the terms of the employment contract and the relationship between the employer and employee.

Where an employee does owe his or her employer fiduciary duties, some of these fiduciary duties would survive termination of the employment. Much depends, however, on the specific facts of each case.

General

The courts may be more willing to uphold restrictive covenants agreed on in settlement (or possibly termination) agreements. This is particularly so where the agreement provides for new and substantial post-employment benefits, which have been freely negotiated between the employer and employee at that point.

In 2012, the Court of Appeal in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 (*Smile Inc*) significantly indicated that it was not in favour of the 'notional' severance approach in the construction of restrictive covenants (ie, the flexible 'reading down' of a clause by modifying, deleting or adding to the clause as appropriate, rather than applying the strict 'blue pencil' test which only allows for severance by actual deletion). This means a restrictive covenant with an unreasonably long period of restraint with no alternative periods provided may now be struck out in its entirety as unreasonable (because the period in question cannot be reduced by a 'blue pencil' deletion to make it more reasonable). The court stated that employers should draft reasonable (and therefore enforceable) restrictive covenants from the outset, instead of drafting unreasonably long periods of restraint in trying to obtain maximum protection, then subsequently relying on the courts to 'read down' the provision to make it enforceable. While the Court of Appeal in *Smile Inc* raised without apparent disapproval the use in other jurisdictions (eg, Australia) of 'cascading clauses' (which consist of multiple overlapping periods and areas of restraint, to specifically allow the offending ones to be 'blue pencilled' out), the High Court in *Humming Flowers* has since opined that cascading clauses offend against public policy, among other things as they increase rather than reduce uncertainty, and should accordingly not be upheld; this may now be taken as the correct view unless and until the Court of Appeal holds otherwise.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Barring express contractual requirements, an employer does not have an obligation at law to pay former employees while they are subject to post-employment restrictive covenants. That said, the fact that such payment was made may potentially result in the court finding the clause in question more reasonable on first principles, although this has not been judicially determined in Singapore to date.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer may be vicariously liable for a criminal act or tort committed by its employee, if committed in the course of his or her employment. However, for there to be potential vicarious liability, the employee must have incurred legal fault through the commission of some tort or civil wrong, and not merely acts of assistance. The question is whether the tortious conduct of the employee was so closely related to his or her employment that it would be fair and just to hold the employer vicariously liable for such conduct. The court will examine all the relevant circumstances, including policy considerations, in determining this. Most recently in March 2017, the High Court found that a real estate agency (HSR International Realtors) was not liable for its real estate agent's acts of embezzling funds from the bank account of one of its clients. The facts of the case were unusual though, as the level of trust the client had in the real estate agent was so high that she gave him signed blank cheques, trusting him to use them for her property deals. It remains to be seen if employers may be found vicariously liable for harassment under the POHA that occurs in the context of work.

An employer may also be liable under a transaction or bound by the acts of an employee under the principles of agency law. Where an employer confers on its employee the requisite authority to enter into the relevant transaction, the employer will be bound by the acts of the employee so authorised; this is the principle of actual authority. However, an employer may also be bound by the acts of an employee even if no such actual authority has been conferred in the event of the employee's ostensible or apparent authority to bind the employer.

Taxation of employees

30 What employment-related taxes are prescribed by law?

An employee's annual income is subject to income tax under the Income Tax Act.

A non-resident (a foreign national who is in Singapore for less than 183 days in a year or less than a continuous period of 183 days over two years) is still liable to pay income tax on Singapore-sourced income, unless the non-resident is employed for 60 days or less (save for certain exceptions). When an employer makes payment to a non-resident, it has to withhold a percentage of that payment and pay the amount to the Inland Revenue Authority of Singapore (IRAS) as withholding tax. (See also question 39.)

The Skills Development Levy Act also provides that a skills development levy will be imposed on the employer for all employees, up to the first S$4,500 of the employee's gross monthly pay. The levy is imposed at the rate of 0.25 per cent of the employee's monthly remuneration or S$2, whichever is greater.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Under the Copyright Act, the person who creates a work is the owner of the copyright in the work. However, the employer owns the copyright if the work was created in the course of an individual's employment unless there is an agreement to the contrary.

Under the Registered Designs Act, designs created by an employee in the course of employment likewise belong to the employer, unless there is an agreement to the contrary.

Under the Patents Act, the patent for an invention is normally granted to the actual deviser (inventor) unless, by virtue of any treaty, international convention or enforceable term of any agreement entered into with the inventor before the making of the invention, it is to be granted to any other person (such as the inventor's employer).

32 Is there any legislation protecting trade secrets and other confidential business information?

No, there is no legislation that expressly governs the protection of trade secrets and other confidential business information. Rather, protection in this respect is afforded through common law and equitable principles (see question 27).

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The PDPA, which governs data privacy, applies to all organisations except for those in the public sector. The PDPA generally protects 'personal data', which is broadly defined as data about an individual who can be identified from that data (or in conjunction with other likely accessible information), and governs its collection, use and disclosure.

In the employment context, the PDPA generally requires that an individual's consent be obtained before the organisation can collect, use or disclose personal data. However, the PDPA dispenses with the requirement for the individual's consent in certain situations, four of which are pertinent in the employment context. First, personal data produced for the purposes of an individual's employment, and personal data for the purposes of managing or terminating an employment relationship, may be collected, used and disclosed for those purposes (as long as notification of such purposes are given to the employee). This would potentially cover personal information such as biographical data, financial affairs, medical conditions, race, gender and religion (eg, employees' bank account details for payment of salaries). Such personal information collected should ideally (but not mandatorily) be relevant to the unique requirements of the position, and should not be obtained to exclude certain types of candidates.

Second, an employee's personal data can also be collected, used and disclosed without the need for the employee's consent and without the need to notify the employee, for 'evaluative purposes'. This includes determining suitability for employment, promotion, or removal from employment (eg, references from a former employer, employees' performance records).

Third, an employee's personal data can be used by the employer or disclosed to a party or prospective party (a third party) in a business asset transaction provided the personal data relates to the part of the employer's organisation or business assets with which the transaction is concerned (if the personal data is necessary for the third party to determine whether to proceed with the transaction), and the employer and the third party have entered into an agreement that requires the third party to use or disclose the personal data only for the purposes related to the transaction. In such a case, the employer must notify the employees that the transaction has taken place and that their personal data has been disclosed to the third party. If the business asset transaction fails to proceed or complete though, the third party to the transaction must return or destroy the personal data obtained.

Fourth, an employee's personal data may be collected, used or disclosed without notification or consent if it is 'necessary for any investigation or proceedings'. Such collection may only be done if it is reasonable to expect that seeking the consent of the individual would compromise the availability or the accuracy of the personal data. While the term 'proceedings' relates to civil, criminal or administrative proceedings by or before a court, tribunal or regulatory authority, it is likely that the term 'investigations' as distinguished from 'proceedings' would also encompass investigations within an organisation.

Organisations must designate at least one individual to be responsible for ensuring compliance with the PDPA. Organisations must also safeguard the personal data in their custody or control by making reasonable security arrangements to prevent unauthorised access, use, disclosure, copying, modification, disposal or other similar risks. They must also destroy or anonymise personal data once the purpose for its collection has expired. The PDPC is in charge of administering and enforcing the PDPA (the PDPA does not prescribe any registration requirements with a central agency as yet). The PDPC has also released substantive Advisory Guidelines (including guidelines for selected

topics such as employment, and sector-specific guidelines, eg, for telecommunications, healthcare, real estate, etc) on the PDPA regime.

To date, there have been prosecutions for breaches of the Do Not Call Registry under the PDPA (with fines ranging from S$500 to S$39,000). The PDPC has also issued warnings and financial penalties of up to S$50,000 against companies in breach of their obligations in respect of personal data under the PDPA. Most of these decisions, however, relate to breaches in respect of customers' personal data as opposed to employees' personal data.

Apart from the statutory obligations under the PDPA and contractual provisions, the employer also continues to be under a common law duty not to breach the confidence of the employee.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Under the Employment Act, when a business or business unit is transferred from one entity to another (as opposed to a pure asset transfer), the employment contracts of the employees of the transferred business are not terminated, but instead automatically transferred.

For transferred employees covered under the Employment Act (see question 1; this includes managers and executives earning up to S$4,500 a month), their employment contracts post-transfer will be regarded as if they had originally been made between the new owner of the business and the employee, and all the terms and conditions of service are preserved. However, the new employer, the employee and the trade union (if any) are not prevented from negotiating and entering into new contracts of service on different terms from those contained in the original employment contract. For transferred employees under pre-existing collective agreements, their employment terms under a pre-existing collective agreement will be protected for at least 18 months (even if the collective agreement would have expired before that).

The employer is required to notify its Employment Act employees and any relevant trade union of the fact that the transfer will take place, the approximate date, reasons for, and the implications of the transfer and the measures that will be put in place by both the transferring employer and the new employer in relation to the affected employees. The new employer is, however, only required to enter into consultations with the employees or the trade union concerning the transfer of the business when it is reasonable to do so before the anticipated transfer takes place.

Trade unions that had been recognised by the former employer will be deemed recognised by the new employer if the majority of the new employer's employees, after the transfer of the business, are members of that trade union. This will have repercussions for the new employer (see questions 4 and 5). If a dispute in this regard is referred to the Commissioner, the Commissioner has the power to delay or prohibit the transfer of employment from the transferring employer to the new employer, or order the transfer of the employee's employment on certain conditions.

Under the PDPA, employees' personal data can be disclosed to the new employer for the purposes of the transfer, but the new employer may only use or disclose that personal data for the same purposes for which the previous employer would have been permitted to use or disclose it. In addition, the relevant employees must be notified of the transfer and disclosure (see question 33).

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Provided the employment contract has an express termination clause, an employer may generally terminate an employee with notice or payment in lieu of notice for any reason (ie, without cause), and the employer is not generally obliged to justify the termination of employment where notice has been provided. 'Cause' is not defined in Singapore statutes or regulations.

In respect of terminations for cause though, following the 2016 Court of Appeal decision of *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 (*Phosagro Asia*), employers may now have to pay more attention to the grounds on which the employee may be terminated for cause, and which terms are expressed in this regard to be conditions of the employment contract. In *Phosagro Asia*, the employee was the managing director, and was entrusted with a significant degree of authority, responsibility and independence in the conduct of the employer's affairs, including having the sole authority to sign cheques, reimbursing himself for the expenses that he incurred on a monthly basis. His employment contract did not expressly set out conditions of his employment, the breach of which would allow for summary termination for cause. The employee was found to have reimbursed himself using the employer's funds for his personal expenses, and the issue before the court was whether the employee had thus been guilty of 'serious misconduct' or 'wilful breaches' of the employment contract so as to allow the employer to terminate him summarily for cause without payment in lieu of notice. The Court of Appeal found that despite the employee's breaches, he actually could not be said to have deprived the employer of substantially the whole benefit of the employment contract given his overall contributions to the employer. However, the court found that it was an express term in the employee's employment contract to well and faithfully serve the employer in all respects and use his best endeavours to promote the interests of the employer. As the court found that significant trust had been reposed in the employee such that parties must have intended the term to be of utmost importance, the term constituted a condition at law. It thus followed that the breach of such express term constituted 'serious misconduct' so as to entitle the employer to summarily terminate the contract for cause without payment in lieu of notice.

In the High Court decision of *Phosagro Asia*, it held that if an employer has elected to terminate the employment agreement pursuant to its contractual rights, the employer cannot later attempt to rely on its common law right of termination by alleging a repudiatory breach of the employment agreement by the employee. The Court of Appeal's decision in *Phosagro Asia* did not deal substantially with this point of law.

In light of this, it is all the more important for employers to expressly state that certain terms of an employment contract are conditions, and identify the occurrence of certain circumstances and situations in which an employer may summarily dismiss an employee for cause without notice. This would potentially allow an employer to avoid having to prove that he had been deprived of substantially the whole benefit of the employment contract in order to justify summarily terminating the employee for cause without notice (or payment in lieu of notice). Employers may also word their employment contracts such as to make it a condition of any payment (such as severance payments or payment in lieu of notice) that the employee has not been guilty of any serious misconduct (or other breach), and that if it transpires that the employee had in fact been guilty of such misconduct (or other breach), any such payment already made would be repayable on demand.

In the High Court decision of *Cheah Peng Hock v Luzhou Bio-Chem Technology Limited* [2013] 2 SLR 577 (later upheld by the Court of Appeal) which was concerned with the constructive dismissal of an employee with important observations in that respect, the court ruled that employers owed their employees an implied duty of mutual trust and confidence. The court elaborated, however, that such a duty would not have a bearing on the termination of an employee with notice or oblige the employer to show cause, provided that the relevant employment contract expressly allowed the employer to terminate the contract with notice. This position was subsequently confirmed by the High Court in its decision in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 1 SLR 1382 (later also upheld by the Court of Appeal). The upshot of this may be that in the absence of an express contractual right to terminate, the employer may no longer have an implicit right to terminate without cause (whereas the previous position had been that all employment contracts were terminable without cause upon the provision of reasonable notice). Cause will in any event have to be shown in cases of termination without notice, or summary dismissal (see question 37).

The recognition of the implied duty of mutual trust and confidence may also potentially affect how employees' claims for bonus payments would be dealt with by the Singapore courts, even where such bonus payments are contractually stipulated to be payable at the employer's discretion. In this regard, in the High Court decision in *Leong Hin Chuee v Citra Group Pte Ltd & Anor* [2015] 2 SLR 603, the court commented that the implied duty of mutual trust and confidence may oblige an

Update and trends

The recent legislative and regulatory changes continue the trend of greater protection and rights for employees, particularly rank and file workers. The increased statutory and administrative penalties provide employees with better protection from employers' breaches, and the Employment Claims Tribunals and enhanced tripartite mediation framework will provide employees with greater and swifter access to affordable dispute resolution mechanisms.

Recent court decisions are also enhancing employees' rights. In addition to the decisions mentioned above, the Court of Appeal in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 held that employers who write references for employees are obliged to exercise due care to ensure that the facts contained in the reference are accurate and not misleading, and that any opinions expressed in the reference are based on facts that are true. The Court of Appeal in *Schonk Antonius Martinus Mattheus & Anor v Enholco Pte Ltd and another appeal* [2016] 2 SLR 881 also held that employers are not entitled to forfeit employees' salary even if the employee had breached his fiduciary duties and duty of loyalty owed to the company.

Even where they might otherwise be within their legal rights, employers must now exercise greater care in their conduct and dealings with their employees. In 2017, government-linked Surbana Jurong came under heavy criticism for having conducted a major termination exercise where it sacked 54 of its employees and labelled them as poor performers in a company-wide email and in a statement to the media. This drew sharp responses from unions, members of parliament, and the Manpower Minister, who commented that terminations should be conducted in a responsible and sensitive manner. The Manpower Minister also stated that an employer's decision to terminate should be on the basis of documented poor performance measured against relevant and objective performance criteria known to the employee, and that performance management is the joint responsibility of employees and employers.

The Manpower Minister has also recently announced in March 2017 that a new tripartite working group will be formed to study freelance workers' issues, in light of the growing pool of freelancers and gig workers (ie, independent contractors under the law at present), and indicated that the first series of tripartite standards in respect of freelance workers could be launched by the end of 2017 and it is possible that strict binary divisions between employees and independent contractors may not remain inflexible moving forward.

In terms of foreign manpower, we also see the Ministry of Manpower taking a more proactive role in clamping down on employers who practice discriminatory hiring against Singaporeans and who have perpetuated breaches of the Employment of Foreign Manpower Act. Employers who are on the Ministry of Manpower's watch-list and who persist in their breaches may find their work pass privileges curtailed and applications rejected.

The one area where we do see greater legal rights for employers is in the sphere of non-competition and restrictive covenants, where we see the needle moving in the opposite direction with non-compete and springboard injunctions becoming easier for employers to obtain.

Overall, the second half of 2016 and first few months of 2017 have already seen significant changes to Singapore employment law. It bears close watching moving forward.

employer to exercise its discretion towards an employee in a bona fide and rational manner, including the discretion to award bonus payments to that employee. That said, the court noted that much will depend on the intention of the employer and employee, as reflected in the terms of the employment contract and the circumstances of the case.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

For Employment Act employees (see question 1), termination of the employment contract without cause and without notice is permitted under the Act, provided that payment of salary in lieu of notice is provided. Where the employment contract is silent as to the relevant notice period, the Employment Act prescribes minimum notice periods according to the employee's length of service.

As for Non-Employment Act employees, while it is ideal to expressly provide for payment of salary in lieu of notice in the employment contract, an employer can generally pay salary in lieu of notice in the absence of an express term, as long as the employee is not put in a worse-off position (eg, through lack of CPF payments for that period as a result (see question 25). The same is not automatically true for an employee, however, as different considerations will then apply (eg, issues of whether that employee has properly handed over his or her work before leaving). For the same reasons, while the employer can generally place the employee on gardening leave (ie, not requiring the employee to come to work for all or part of his or her notice period) in the absence of an express contractual term allowing this, an employee cannot insist on gardening leave in the absence of an express term.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Employment Act employees

The Employment Act allows for termination of the employment contract in the event of any wilful breach by the other party of a condition of the employment contract. An employer may also, after due inquiry, dismiss an Employment Act employee (see question 1) without notice on the grounds of misconduct inconsistent with the employee's obligations and conditions of service (ie, for cause). However, an Employment Act employee who feels that he or she has been dismissed without just cause or excuse may make representations within one month of dismissal to the Minister of Manpower (through the MOM). If the Minister finds for the employee, the employer may be directed to reinstate the employee to his or her former employment or compensate the employee his or her lost wages or both.

Non-Employment Act employees

Summary dismissal is potentially justifiable under the contract or if the employee has breached a fundamental term of his or her employment contract (eg, through dishonest misconduct or gross negligence) such that the contract is repudiated (see question 35). For clarity, it is preferable for the employment contract to expressly stipulate situations where an employee may be summarily dismissed (see also question 35).

Even where the employee has been wrongfully summarily dismissed, his or her recourse in damages will generally only be for a sum equivalent to his or her pay during the period of notice (unless it resulted in a loss of other benefits like deferred bonuses or vested share options, in which case the claim may include such other benefits). The position is different though in the case of termination of a fixed-term contract with no termination provisions (see question 35). There may also be future developments of the law in terms of allowing employees dismissed unfairly or in bad faith to claim more substantial damages in an appropriate case.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The right to severance pay is not statutorily provided for in Singapore. Any right to (and calculation of) severance pay will have to be provided for in the employment contract (or a collective agreement, in the case of unionised employees, see questions 4 and 5).

Part IV of the Employment Act presently provides that an employee covered under this part (see questions 1 and 18) is not entitled to retrenchment benefits unless the employee has been in continuous service with an employer for two years or more. However, this is a minimum requirement, and does not automatically entitle such an employee to any retrenchment benefit or severance payment in the absence of an express provision granting this in his or her employment contracts or collective agreement.

Notwithstanding the above, employers may still choose to pay severance even in the absence of contractual obligations for reasons of morale, reputation, industry norms or consistency with group offices in other jurisdictions. In such cases, the customary amount is one month per year of service (this has been recognised by the Industrial Arbitration Court; see questions 4 and 5), although this may vary in

cases of industry or global economic downturns such as that currently affecting the marine and offshore industries. Unionised employees are in a much stronger position to demand severance through their unions, even if this is not contractually provided for (see questions 4 and 5).

39 Are there any procedural requirements for dismissing an employee?

In the case of Employment Act employees (see question 1), the employer is obliged to conduct 'due inquiry' prior to dismissing without notice on grounds of misconduct. The employer should inform the employee of the misconduct and provide a reasonable chance for the employee to be heard (where appropriate).

Section 22 of the Employment Act provides that the total sum due to an employee who has been dismissed shall be paid on the day of dismissal or, if this is not possible, within three working days thereafter. However, section 24 provides that no payment of salary or any other sum due to a foreign employee on termination of service shall be made to the employee by the employer without the permission of the Comptroller of Income Tax. An employer shall immediately give notice of a termination of service to the Comptroller of Income Tax and the payment of the salary or other sum due to the employee shall be paid within 30 days after such notice has been given to and received by the Comptroller of Income Tax (after the employer deducts the necessary taxes payable to IRAS and pays these direct to IRAS).

There are no statutory procedural requirements for dismissing non-Employment Act employees. No prior notification or approval is therefore required, apart from what is contractually required. However, employers should take care as to how they characterise a termination (see question 35).

40 In what circumstances are employees protected from dismissal?

See question 2 in relation to female and elderly employees. There is no statutory prohibition against dismissal otherwise.

41 Are there special rules for mass terminations or collective dismissals?

From 1 January 2017, employers who employ at least 10 employees are required to notify the MOM if five or more employees are retrenched within any rolling six-month period beginning 1 January 2017. Retrenchments are defined as dismissal on the ground of redundancy or by reason of any reorganisation of the employer's profession, business, trade or work. This applies to permanent employees, as well as contract workers with full contract terms of at least six months. Failure to notify the MOM within the required timeline may cause an employer to be liable upon conviction to penalties, including a fine not exceeding $5,000. At the moment, there are no other special rules governing mass terminations or collective dismissals in Singapore. However, in the event of a corporate restructuring and consequent transfer of employees to a new corporate entity, the provisions set out in section 18A of the Employment Act should be followed in the case of Employment Act employees (see question 34).

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class action suits are not provided for under the Rules of Court per se, and every employee who wishes to assert a claim has to do so on an individual basis (ie, as an individual plaintiff to the suit). Employees may, however, bring a representative action, provided that the various parties have the same interests in the proceedings (in which case one or more of them may potentially represent the group in the proceedings).

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Under the RRA, the current statutory retirement age is 62. It is an offence to dismiss an employee on grounds of age alone (although this does not prevent an employer terminating an employee for poor performance, ill health or misconduct, and there have been no known prosecutions for a breach of this provision in any event). Further, under the RRA, it is mandatory for companies to offer re-employment opportunities to workers beyond the statutory retirement age of 62, up to the age of 65 (this will be increased to 67 with effect from 1 July 2017). The employer is only obliged to offer re-employment where the employee is medically fit and, upon the assessment of the employer, can deliver satisfactory job performance. In cases of re-employment, a new contract of service is to be entered into between the employer and the employee where the job scope and the terms and conditions may vary from the previous contract of service, as long as the variation from the original contract is based on reasonable factors such as the employer's requirements and the employee's productivity, performance, duties and responsibilities. The new employment contract cannot be for less than one year, unless otherwise agreed. If the employer is unable to re-employ an eligible employee because the employer is unable to find, after having made reasonable attempts to do so, a vacancy in the company that is suitable for the eligible employee, the employer is required to offer the employee an 'employee assistance payment' (EAP). This EAP is payable as a lump sum and is to be determined in accordance with TAFEP Guidelines (the rule of thumb is three months' salary, though a cap of S$10,000 is mentioned for the amount, suggesting the Guidelines are principally concerned with lower-income employees).

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Yes.

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45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee may agree to waive statutory or contractual rights to potential employment claims as a matter of contract or estoppel. The waiver may be express or implied from conduct. For estoppel, the waiver must amount to a clear and unambiguous representation. Further, the employer must act in reliance of the concession such that it would be inequitable to allow the employee to resile from his or her representation.

46 What are the limitation periods for bringing employment claims?

For Employment Act employees (see question 1), the Commissioner for Labour under the MOM is not permitted to inquire into any dispute between the employer and the employee where the matters arose earlier than one year from the date of lodging the claim, and the claim must also be lodged within six months of the termination of the contract. There are also certain limitation periods for bringing claims under the RRA in respect of retirement and re-employment disputes. Claims brought under the ECT must be filed within one year from the date of the dispute if the employee is still employed, and must be filed within six months after the last day of employment if the employment relationship has ended.

However, where an action is brought under contract or tort in the civil courts (eg, by a non-Employment Act employee, or by an Employment Act employee outside the time period stated above), the claimant employee has six years under the Limitation Act from the date on which the cause of action accrues to bring the action.

Slovakia

Pavol Rak and Petra Krajčík

Noerr s.r.o.

Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes and regulations affecting Slovak labour law are as follows:

- Act No. 83/1990 on People Assembly Prerogative;
- Act No. 2/1991 on Collective Bargaining;
- Act No. 311/2001 Labour Code;
- Act No. 461/2003 on Social Insurance;
- Act No. 462/2003 on Income Reimbursement of an Employee during Sickness;
- Act No. 5/2004 on Employment Services;
- Act No. 365/2004 Anti-Discrimination Law;
- Act No. 580/2004 on Health Insurance;
- Act No. 82/2005 on Illegal Work and Illegal Employment;
- Act No. 124/2006 on Safety and Health Protection at Work;
- Act No. 125/2006 on Labour Inspection;
- Act No. 355/2007 on Protection, Aid and Support of Public Health;
- Act No. 663/2007 on the Minimum Wage;
- Act No. 404/2011 on the Residence of Foreigners;
- Act No. 307/2014 on Whistle-blowing and Anticorruption;
- Act No. 160/2015 on Civil Dispute Order;
- Act No. 351/2015 on Cross-Border Work Assignment; and
- Regulation of the Government of the Slovak Republic No. 280/2016 on the Minimum Wage for 2017.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Anti-discrimination law is regulated by the Anti-Discrimination Act (section 2 defines the forms of discrimination), by the Labour Code (section 13), by the Act on Employment Services (section 62), and by the Act on Whistle-blowing and Anticorruption.

Slovak anti-discrimination law is in full compliance with the EU directives regarding anti-discrimination. An employer is obliged, in employment relationships, to treat its employees in accordance with the principle of equal treatment. It is prohibited to discriminate (directly or indirectly) against employees on the grounds of their gender, marital status and family status, sexual orientation, racial or ethnic origin, language, age, adverse health condition or disability, genetic characteristics, belief, religion, political or other views, trade union activity and any other reasons related to identity, integrity and dignity of any person with respect to hiring, working and employment conditions. Prohibited conduct of an employer also includes hostile environment, harassment and sexual harassment which are based on any discrimination factor and intended to adversely affect the dignity of an employee or to create a hostile, intimidating, humiliating or degrading environment for that person.

It is also prohibited to discriminate, persecute and sanction an employee for reporting criminal or other antisocial activity ('whistleblowing'). If reasonable doubts arise that an employment act was taken against the employee in retaliation for whistleblowing, the effect of such an act may be suspended by the labour inspectorate. If a whistleblower's employment is terminated and the labour inspectorate finds the termination invalid, the employer is obliged to pay the employee a wage compensation, possibly in excess of the statutory limit (36 months).

In the event of violation of the antidiscrimination rules, the employee may be awarded a substantial compensation payment.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The most important government agency responsible for the enforcement of employment statutes and regulations is the National Labour Inspectorate. It consists of nine local branches situated in every regional city. The National Labour Inspectorate and its branches are under the control of the Ministry of Labour, Social Affairs and Family. Another entity playing a significant role in enforcing employment statutes and regulations is the Central Office of Labour, Social Affairs and Family and its local offices, which primarily help people find a proper job or get a new professional qualification. There are also agencies of the Public Health Authority which monitor the working conditions regarding health and safety in the workplace. Enforcement of employment statutes may also be sought in labour court. Since 1 July 2016, when the new Civil Dispute Order came into effect, there have been only eight civil district courts which have jurisdiction in labour disputes.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Generally, there is no obligation in labour law to establish a representative body of employees at the workplace, irrespective of how many employees work for an employer. Establishment of a representative body of employees is a result of a free decision made by the employees.

The Labour Code recognises three forms of representative body: trade union, works council (works trustee) and employees' trustee.

There are also employees' representatives responsible for workplace safety rules, but they can operate exclusively in the area of work protection.

At the same workplace, and at the same time, one or multiple trade unions can exist in parallel with either a works council or employees' trustee. An employer is obliged to cooperate with all forms of employees' representatives. It is also possible that while no trade union exists, a works council or an employees' trustee can operate.

The trade union is the most important form of employee representative body, because of its exclusive right to negotiate a collective bargaining agreement with an employer. Multiple trade unions (if applicable) need to cooperate at the negotiations, because failure to do so will subject members to being bound by the agreement with the largest trade union.

The right to organise a trade union is a fundamental freedom, granted by the Slovak Constitution, to protect an employee's economic and social interests. It is formed outside of the workplace by registration with the Ministry of Interior. Its creation is regulated by the Act on Rights of Association. At least three employees are required to establish a trade union, and at least one of them must be 18 years of age or

over, and none younger than 15. After registration of a trade union, the employees have an obligation to inform the employer about its existence and about its registered members.

The trade union is a legal person and has its own capacity. Although each trade union has considerable autonomy and influence, there is a dominant trade union in Slovakia called KOZ, which is an association of 37 different employees' organisations, representing almost all areas of employment.

A works council may be elected in companies employing 50 or more employees, a single body representing all employees, regardless of their union membership. The number of representative works council members depends on the number of employees at the workplace, with a minimum of three for companies employing between 50 and 100 employees.

Employees at smaller companies can elect an employees' trustee to guard their interests.

An employer has not only the obligation to tolerate employee representatives at the workplace, but also must allow an election of a works council, if at least 10 per cent of employees so require it. The employer must pay the costs of election (eg, voting cards, envelopes).

5 What are their powers?

The main aim of the employees' representatives, per the Labour Code, is to agree on fair and satisfying work and employment conditions. Participation of employees is regulated by the Labour Code in Part Ten, 'Collective Labour Relations'. Through a collective bargaining agreement (CBA), employees may regulate their work and employment conditions more advantageously than the default conditions set by the labour law.

Among other things, a CBA can amend the maximum working time, vacation days, compensation terms (including overtime), fringe benefits and other areas not regulated by Slovak law.

There are three main rights granted to the employees' representatives:

Right to information

With respect to economic matters relating to the employer's economic and financial situation, and the projected development of its operations. Said information must be provided in a comprehensible manner and at a suitable time. Employees also have the right to provide their response to such information and to upcoming decisions, and may also submit their own suggestions.

Right to dialogue and codetermination

The employer is obliged to discuss and in certain cases obtain the consent of employees' representatives on major situations and changes. A description of such situations and changes is defined in the Labour Code and can be extended based on mutual agreement of both parties via CBA.

Right to oversight

Employees' representatives are entitled to check health and safety protection and working conditions, and oversee maintenance of legal provisions in the labour relationships including compensation payments, personal data protection and other obligations resulting from the CBA.

Even if both the trade union and the works council are present at the workplace, only the trade union has the right to collective bargaining. The works council and employees' trustee have, on the other hand, the rights to discuss, consent and oversee labour law provisions. In the absence of a works council, the trade union assumes those rights. The employees' trustee or the works council represent the interest of employees with almost all competences of a trade union except the right to collective bargaining.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

An employer is prohibited from requesting information of a personal nature, such as family or marital status, pregnancy, family planning, membership of political parties, trade union membership or religious affiliation. On the other hand, an applicant is free to present information about him or herself.

A background check is acceptable only if it is objectively linked to the vacant position. If an employer is a political or religious organisation, a question about affiliation with a political party or religion is allowed. A clear criminal record, a medical examination, or good financial standing may also be required only for those required to perform work where such conditions are reasonably related to the position, or the work falls under special regulation.

Generally, personal data of an applicant (and employee) is protected by the Data Protection Act, which allows only restricted use of personal data. The employer is not entitled to obtain information directly from registers such as a criminal record containing information regarding an applicant. These restrictions apply to employers and to any person acting on the employer's behalf.

Regarding feedback from previous employers on the applicant, the employer is allowed to contact them for references only.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

An employer is obliged to set a medical examination as a precondition of employment only for such jobs where a special legal regulation is required to meet medical and psychological requirements (medical fitness, psychological aptitude) or other prerequisites requiring such an examination for the work to be carried out. In such cases, the employer may enter into an employment contract only with an applicant who fulfils the medical or psychological requirements for the work, or who has met the other prerequisites.

An employer is also obliged to ask for a medical examination if the applicant is a juvenile.

In other cases, an employer is not prohibited from asking an applicant to submit to a medical examination; however, such information must not be used in any way that discriminates against the applicant.

Pursuant to the Act on Protection, Aid and Support of Public Health (section 30e, paragraph 14), if an employer has reasonable doubts regarding an employee's ability to perform assigned work tasks due to a medical condition, the employer can, after agreement with the employee's representative and physician, require the employee to undergo a medical exam related to the work performed. The employee is obliged to undergo such medical examination.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

The Labour Code does not recognise any restrictions against alcohol and drug testing of applicants. It is the right of an employer to refuse to hire an applicant who refuses to submit to such a test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Pursuant to the Labour Code (section 158) an employer is required to employ a certain number of disabled persons in suitable positions. The Act on Employment Services specifies that businesses with more than 20 employees are obliged to hire at least one disabled person (a reduction in work ability of at least 40 per cent) representing at least 3.2 per cent of the workforce (section 63). Failure to do so obliges the employer to pay a special charge (facultative compensation) to the Office of Labour, Social Affairs and Family. The Central Office of Labour, Social Affairs and Family provides financial incentives to employers who select an 'unfavoured applicant' (under 26 or over 50 years of age, long-term unemployed, insufficient qualifications, persons with disabilities, etc).

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Employment requires a written employment contract made between the employer and the employee.

The substantial terms of such an employment contract include: the type of work for which the employee is employed, its concise characteristics, the place of work (municipality or a place otherwise designated),

the commencement date of employment and wage terms, unless they are subject to a collective bargain. In addition to the information mentioned above, an employment contract must also contain additional working conditions, including specifying the payday, working hours, holiday entitlement, and length of notice period. If any of those conditions are subject to a collective agreement, it is sufficient to refer to the provisions of the collective agreement. It is also sufficient to refer to the appropriate provisions of the Labour Code.

When the place of work is abroad, and the period spent working abroad exceeds one month, an employment contract has to contain the period of work abroad, the currency in which the wage (whether in full or in part) will be paid, other benefits (whether in cash or in kind) connected with the work abroad, and conditions for the employee's return from abroad (if applicable).

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment, or employment for a definite period of time, can be agreed upon for no longer than two years. Fixed-term employment may be extended, or repeatedly agreed to for a maximum of two times within a period of two years.

An employment contract for fixed-term employment must explicitly state the fixed nature of the work, otherwise the law presumes that the employment was agreed to for an indefinite period of time.

According to section 48, paragraph 4 of the Labour Code, further extension or re-agreement of fixed-term employment beyond the two-year limitation is allowed only in the case of:

- substitution of an employee during maternity leave, parental leave, leave immediately following maternity or parental leave, temporary working incapacity or an employee who has been released long-term for the performance of public office or trade union office;
- execution of work that requires a material increase in the workforce for a temporary period of time not exceeding eight months within a calendar year;
- execution of work that is dependent on the alternation of seasons, recurs every year, and does not exceed eight months within a calendar year (seasonal work); or
- execution of work pursuant to a collective agreement.

It is necessary to specify the precise cause of prolongation of fixed-term employment. These restrictions on fixed-term employment do not apply to the employees of temporary work agencies.

12 What is the maximum probationary period permitted by law?

The maximum probationary period permitted by law is three months, but it must be specified in writing, in the employment contract, otherwise it is invalid. For a manager, under the direct managerial competence of a statutory body, or member of the statutory body, as well as any manager who is under direct managerial competence of such a manager, a probationary period can be up to six months.

A probationary period can be exceptionally extended in cases of the existence of obstacles at work caused by the employee. This is the only case where the Labour Code acknowledges an extension of the probationary period.

In cases of repeatedly commenced employment for fixed-term employment, no probationary period is permissible.

Within the probation period, the employment relationship may be terminated by either party without cause. Usually, the notice of termination should be delivered at least three days before the end of the probationary period.

13 What are the primary factors that distinguish an independent contractor from an employee?

The main distinguishing factor is that dependent work may only be performed under an employment contract. The definition of dependent work is stated in section 1, paragraph 2 of the Labour Code as work carried out personally by the employee, for the employer, within a relationship of employer as superior and employee as subordinate, in accordance with the employer's instructions, in the employer's name, during working time determined by the employer. An employee is thus effectively integrated into the employer's organisation.

An employment contract is more formal than a work contract between an employer and an independent contractor. The most important difference between those contracts is that the employment contract and its provisions are covered by the Labour Code, and the work contract is covered, in most cases, by the Commercial Code. With a work contract, the employer and the independent contractor can agree on a much more flexible relationship compared to an employment contract. The Commercial Code does not recognise a maximum length of working time, holiday and other employment benefits, and the termination of the work contract is much easier than termination of the employment contract, which the employer may terminate only based on expressly listed grounds in the Labour Code.

With an employment contract, the employer is obliged to take care of all kinds of payments for the employee (for example, income tax, social security fees, health insurance fees and travel allowances (in case of business trips)). An independent contractor is obliged to do this by himself or herself. The employee is subject to specific protection under the Labour Code and to social protection.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Temporary staffing through recruitment agencies is governed by section 58 of the Labour Code, which is based on the EU's Temporary Agency Work Directive (2008/104/EC). An employee employed by the recruitment agency may agree, in writing, to his or her temporary secondment to a 'user employer'. Temporary secondment may not be for more than 24 months. Temporary secondment of an employee to the same user employer may be extended or repeated no more than four times within this period. During the period of temporary secondment, the wage, wage compensation and travel expense refunds must be provided to the employee by the recruitment agency. The working conditions, including wage terms and employment terms, of temporarily seconded employees must be essentially the same as the user employer grants permanent employees. A user employer is obliged to inform temporarily seconded employees of any vacant permanent positions.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

The Slovak Republic does not have any numerical limitations (quotas) either on short-term (for maximum 90 days) or on long-term visas. Foreign nationals (non-EU citizens) who wish to work in Slovakia can be employed only with a work permit (generally limited to two years) and temporary stay permit for work purposes (Act on the Residence of Foreigners).

The Slovak government prepared in January 2017 an amendment of the Act on the Residence of Foreigners with the focus on implementing the implications from EU directives: 2014/36/EU Seasonal Workers and 2014/66/EU Intra-Corporate Transfer, simplifying the entry rules for foreigners to the labour market in special cases such as seasonal work, intra-corporate transfer, work for the Center of Strategic Services or if there is an intent to implement an innovative project in the Slovak Republic.

A seasonal foreign worker may be employed in two different regimes. They may get a work permit for only 90 days (based on a Schengen visa or no stay permit is required) or they may apply for a temporary stay permit and for a work permit for a period no longer than 180 days. In that case, the Office of Labour, Social Affairs and Family checks the situation on the labour market and decides if it will issue a permit for the foreign worker to staff a vacant position. It is also proposed to extend the validity of the EU Blue Card for highly qualified foreign employees from three to four years. The holder of an EU Blue Card need not apply for a work permit.

16 Are spouses of authorised workers entitled to work?

Spouses of authorised workers are entitled to work only with a work permit.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

An employment permit for a foreign worker is issued by the Office of Labour, Social Affairs and Family. If an employer would like to hire a foreign worker, the employer is obliged to report the job vacancy at least 30 calendar days (if the employee will be performing seasonal work or has been granted temporary residence, 15 calendar days are sufficient) prior to filing an application for an employment permit.

The application must include:

- an officially verified certificate of acquired education degree, translated into the Slovak language by an official translator;
- full power of attorney;
- a copy of the passport page containing the foreign worker's data;
- a copy of proof of residence within the Slovak Republic (residential lease) and a statement from the Slovak real property registry that the owner listed on the lease is the actual owner;
- an employment promise;
- a copy of the job report; and
- in the case of sending the employee to work, a verified copy of the contract in the Slovak language.

The Office of Labour, Social Affairs and Family will decide on the issuance of a work permit within 90 days from receipt of the application. The application filing is not subject to any administration fee. A work permit is issued for the duration of the labour contract, but may not exceed two years. According to the Act on Illegal Work and Illegal Employment, sanctions for employing a foreign worker without a permit are financial penalties up to €200,000. The competent controlling body is the Labour Inspektorate, which may impose such penalties.

18 Is a labour market test required as a precursor to a short or long-term visa?

Yes. An employment permit for a foreign worker issued by the Office of Labour, Social Affairs and Family is necessary for granting a short or long-term visa by a police department. In general, the Office of Labour, Social Affairs and Family will not issue an employment permit if there are applicants in Slovakia for the particular job position.

According to the prepared amendment of the Act on the Residence of Foreigners, based on the Intra-Corporate Transfer Directive (2014/66/EU), it is proposed to enable the access of foreign workers to the labour market for the purpose of intra-corporate transfer without a previous labour market test.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

According to the Labour Code (section 85), regular working time must not exceed 40 hours during a week, or eight hours per every 24 hours. The employee's average weekly working time, including any overtime work, must not exceed 48 hours.

The Labour Code states that overtime work must not exceed an average of eight hours per week within a period of not more than four consecutive months, unless the employer and employee's representatives agree on a longer period, which cannot exceed 12 consecutive months. The maximum overtime work that an employee may be ordered to carry out within one calendar year must not exceed 150 hours. Upon agreement with the employee, he or she may work up to 400 hours overtime in a calendar year.

The maximum permissible duration of overtime work in hours does not include overtime work for which extra leave was granted to the employee or which was undertaken in connection with:

- urgent repair work or work which, if not undertaken, might give rise to a hazard of occupational injury or extensive damage, as referred to in a special regulation; and
- emergencies, defined in a special regulation, involving danger to life or health, or a threat of extensive damage.

The Labour Code states specific conditions for employees who work in hazardous or dangerous environments, for juveniles, for employees in medical occupations, etc. Some of these employees may agree on longer working (overtime) hours, and for others any overtime is prohibited by law.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Generally, all workers working overtime are entitled to overtime pay or to compensatory time off, as long as the extra hours of work have been requested by the employer. However, the maximum overtime work that an employer can order cannot exceed 150 hours per year (section 97 of the Labour Code).

An employee is entitled to the wage earned and to a preferential wage rate in the sum of at least 25 per cent of his or her average earnings for overtime work. An employee who carries out hazardous work is entitled to the wage earned and to a preferential wage rate in the sum of at least 35 per cent of his or her average earnings (section 121 of the Labour Code).

Collective bargaining agreements often provide for a higher wage for overtime work and for work performed in certain periods (eg, nights and weekends).

21 Can employees contractually waive the right to overtime pay?

An employer and an employee may agree that wages will include possible overtime work, subject to a limit of 150 hours per calendar year, through a written agreement, provided that the employee is:

- a manager who is directly managed by the statutory body or a member of the statutory body;
- a manager who is directly managed by the aforesaid manager; or
- an employee who carries out conceptual, systemic, creative or methodological activities, or who manages, organises or coordinates complex processes or extensive sets of very complicated facilities.

In such cases, the employee will not be entitled to any wage or preferential wage rate, nor take extra leave in compensation for such overtime work.

All other employees cannot waive statutory and contractual rights to potential employment claims in advance. Such an agreement would be null and void.

22 Is there any legislation establishing the right to annual vacation and holidays?

Basic holiday entitlement is at least four weeks. The holiday entitlement of an employee who reaches the age of 33 years before the end of a given calendar year is at least five weeks (section 103 of the Labour Code). Employees having an employment agreement with a particular employer and conducting work thereunder for at least 60 calendar days within a calendar year gains the claim to vacation time proportionate to the time worked for that year. The holiday entitlement of a head teacher, head of a school or education facility, head of a special education facility and their deputies, a teacher, teaching assistant, master of vocational education and tutor is at least eight weeks in the calendar year.

The Labour Code also allows negotiation of additional paid holidays in an employment contract or through a CBA.

23 Is there any legislation establishing the right to sick leave or sick pay?

The right of an employee to sick leave or sick pay is established by the Act on Social Insurance and the Act on Income Reimbursement of an Employee during Sickness.

An employer is obliged to pay to the employee income reimbursement during the first 10 days of the sickness leave. After this period, the income reimbursement is paid by the Social Insurance Authority as a sickness leave, for a maximum period of one year (52 weeks). Sickness benefits (or income reimbursement) are provided per day. In the first three days, the benefit equals 25 per cent of the daily assessment basis, and from the fourth day of the temporary incapacity the cash sickness benefit is 55 per cent of the daily assessment basis.

The daily assessment basis is calculated from the base of assessment, which simply means that the employee should get 25 per cent (for the first three days) and 55 per cent of his or her daily earnings during

the sickness leave. The maximum amount of the daily assessment basis for 2017 is €58.06. It is possible to agree within a CBA to a higher rate, but not more than 80 per cent of the daily assessment basis.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The circumstances in which an employee may take a leave of absence are listed in sections 136 to 145 of the Labour Code; these include mandatory medical examinations, blood donation and apheresis, death of a family member, a wedding, performing duties with regard to a trade union body or as a member of the works council or the employee trust or being a witness in a court hearing. In general, the most common reason for a leave of absence is for mandatory medical examinations. The maximum duration of a leave of absence, in the case of a mandatory medical examination, is seven days in a year, provided the examination or treatment could not have been undertaken during non-working time.

25 What employee benefits are prescribed by law?

Basic employee benefits prescribed by the Labour Code:

- holiday entitlement – at least four weeks in a year. If the employee has reached the age of 33, he or she has the right to five weeks' holiday;
- leave of absence – seven days in a year for medical proceedings, etc;
- termination period – one to three months, depending on the duration of employment;
- termination freeze – an employee on maternity or parental leave, a pregnant employee, a single employee taking care of a child under three years of age, an employee on sickness leave, and in other specific circumstances;
- compensation in cases of employment termination or dismissal, severance payment upon employee retirement;
- the right to reasonable working conditions and a reasonable appearance and arrangement of the workplace, welfare facilities and personal hygiene facilities;
- the right to a lunch break and to an employer's financial contribution for meals. The employer is obliged to provide a warm meal for employees who have been working more than four hours in a working shift, or to contribute financially for a food voucher for those employees; and
- special rights for pregnant, breastfeeding, juvenile and disabled employees – those rights are based on the status of the employee. For example, a pregnant employee cannot be forced to carry heavy loads or work in a hazardous environment.

26 Are there any special rules relating to part-time or fixed-term employees?

According to the principle of equal treatment, an employee working part-time must not be preferred or restricted in comparison with a comparable full-time employee. The employer has to inform its employees and the employee representatives, in a suitable manner, of the availability of any vacant part-time work position and the designated working time. The employer cannot ask for, nor demand, overtime work from an employee working part-time. For fixed-term employment, see question 11.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

A post–termination covenant is regulated in section 83a of the Labour Code. Generally, the employer and the employee can agree on a non-competition clause in the employment contract only if the employee is able to acquire information or knowledge during employment that is not normally available, the use of which could cause substantial harm to the employer. The non-competition clause may state that, after termination of employment, the employee may not pursue, for a certain period (no longer than one year), any gainful activity that is competitive in character with the subject of the employer's activity. The employer is obliged to provide appropriate financial compensation to the employee in the amount of at least 50 per cent of the employee's average monthly earnings for each month of the duration of the non-competition clause. The ex-employee is entitled to reject the non-competition clause if the employer fails to pay the agreed financial compensation 15 calendar days or longer after the agreed date. The obligation ceases its validity with the date of delivery to the counterparty.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

The employer is obliged to provide appropriate financial compensation to the employee, in the amount of at least 50 per cent of the employee's average monthly earnings, for each month of the duration of the non-competition clause, assuming the employee complies therewith.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The employer is generally liable for damages caused by employees who were performing work related to a relevant employment contract, carried out in the name or benefit of the employer based upon the Slovak Civil Code. The only exception is when a third person knew, or should have known, that the employee was acting beyond his or her scope of authority. The same applies if the legal act was performed by an employee who was not authorised in his or her capacity or appointed to perform such an act.

The employer has a regress claim against the employee. The compensation for damages asked by the employer caused by negligence of an employee may not exceed an amount equal to four times the employee's average monthly salary. The employer may only recover the full amount of damage from the employee if the employee caused the damage under the influence of alcohol or drugs, or if an employee has special responsibility for a shortage in entrusted values (sections 182 to 185 of the Labour Code).

Taxation of employees

30 What employment-related taxes are prescribed by law?

The current employment-related tax is income tax, which is levied at two different rates of 19 per cent for an annual income amount up to €35,022.31 and 25 per cent for any income amount exceeding this treshhold.

The employer also has to participate in other obligatory payments such as social insurance and health insurance payments. The amount of those payments is as follows:

Payment	Employee	Employer	Maximum assessment base
Sickness insurance	1.4 per cent	1.4 per cent	€6,181.00
Disability insurance	3 per cent	3 per cent	€6,181.00
Retirement insurance	4 per cent	14 per cent	€6,181.00
Unemployment insurance	1 per cent	1 per cent	€6,181.00
Work injury insurance	–	0.8 per cent	no limit
Solidarity reserve fund (part of the retirement insurance)	–	4.75 per cent	€6,181.00
Guarantee fund	––	0.25 per cent	€6,181.00
Health insurance	4 per cent	10 per cent	no limit

The assessment base depends on the average monthly wage in the Slovak Republic and is subject to a change every year.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes, employee inventions are regulated under the Copyright Act (Act No. 185/2015), according to which, the material rights of an employee's invention, if it is a part of the employee's duties according to an employment contract, belong to the employer. In other words, the employer has the sole right of usage of the invention under his or her name, right to publish, to complete or to change the invention. The employee's consent is necessary only if the employer intends to cede his or her material right of invention to a third person.

On the other hand, if an employee creates an invention outside the scope of work, he or she retains all material rights even if the employee used the employer's tools (eg, software) to create the invention.

32 Is there any legislation protecting trade secrets and other confidential business information?

According to section 81 of the Labour Code, an employee is obliged to maintain confidentiality regarding any information learned on the job, which in the employer's interest must not be disclosed to third parties. If an employee breaches this obligation, the employer may, in addition to termination of the employment, claim damages for wilful breach of the job responsibilities.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Legislation protecting employee privacy is covered by the Labour Code itself, and personnel data protection by Act No. 122/2013 on Personal Data Protection.

According to the Labour Code, an employer cannot infringe an employee's privacy, in the workplace or in the employer's shared areas, by monitoring the employee, recording phone calls made by means of the employer's technical work devices or by checking electronic mail sent from or delivered to a work electronic address without notifying the employee beforehand. Even with such prior notification, the employer cannot infringe an employee's privacy without justified reasons based on the specific nature of the employer's activities. If the employer establishes a control mechanism, the employer is obliged to negotiate the scope of control, the manner of performing the control and its duration with the employee representatives. The employer is also obliged to inform employees of the scope of control, the manner of performing the control and its duration.

Currently an amendment of the Personal Data Protection Act is being prepared to harmonise the national law with Regulation 2016/679/EU and Directive 2016/680/EU on the protection of natural persons, regarding the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties, and on the free movement of such data.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

If an employer transfers part of itself to another employer, or transfers a task or activity, employees are transferred to the new employer as well. In such an instance, the employee's rights and obligations are unaffected. The employee may object to such a transfer only if, as a result of the transfer, the employee's working conditions will undergo fundamental change. Should the employee not agree to such change, the employment contract will be terminated.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer cannot dismiss an employee without cause.

The employer may dismiss an employee only on the following grounds:

- the employer, or its part, is being wound up or relocated, and the employee does not agree with the change of the agreed working conditions;
- the employee has become redundant because of a written decision of the employer, or a competent authority changes the employer's function or its technical equipment, or to reduce the number of employees in order to ensure labour efficiency, or other organisational changes;
- with regard to his or her medical fitness pursuant to medical opinion, the employee has lost, for an extended period, his or her capacity to carry out their current work, or cannot carry out such work because of an existing occupational disease, or a risk of such a disease, or if the employee has reached the maximum permissible exposure at the workplace, as determined by a competent public health authority;
- the employee does not satisfy the prerequisites for the agreed work provided in legal regulations, or has ceased to satisfy the requirements according to provisions of the Labour Code, or does not satisfy, without any fault of the employer, the requirements for properly carrying out the agreed work as determined by the employer in its internal regulation, or performs work tasks in a dissatisfactory manner and, during the last six months, the employer has provided the employee a written notice requesting remedy of such underperformance and the employee has failed to remedy it within a reasonable time; or
- reasons exist in relation to the employee for which the employer could have terminated the employment with immediate effect, or could have terminated it for a less serious breach of work discipline. Notice may be given to an employee on the grounds of a less serious breach of work discipline if the employee has been notified in writing during the previous six months of the possibility of termination of employment.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Unless the circumstances call for immediate dismissal of an employee, the employer is obliged to provide the employee with a notice of dismissal which must be made in written form and becomes valid when the employee receives it. No payment in lieu of notice is possible under Slovak law.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may terminate employment with immediate effect only in exceptional cases, such as if the employee has been lawfully convicted of an intentional criminal offence, or has seriously breached work discipline (eg, attacking a superior, being found to be drunk or under the influence of drugs at the workplace during working hours, etc). The employer may terminate employment with immediate effect only within two months from the date it learnt of cause for termination, but no later than one year after the date such reason arose.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The amount of severance pay is established in section 76 of the Labour Code. An employee, whose employment contract is terminated with notice because of redundancy, abolition or relocation of the employer, or with regard to his or her lack of medical fitness pursuant to medical opinion, is entitled to compensation of at least:

- one average monthly earning, if the employment lasted at least two years and less than five years;
- twice his or her average monthly earnings, if the employment lasted at least five years and less than 10 years;
- three times his or her average monthly earnings, if the employment lasted at least 10 years and less than 20 years; and
- four times his or her average monthly earnings, if the employment lasted at least 20 years.

In case the employment contract is terminated by mutual agreement between employer and employee, an employee is entitled to compensation of at least:

- one average monthly earning, if the employment lasted at least two years;
- twice his or her average monthly earnings, if the employment lasted at least two years and less than five years;
- three times his or her average monthly earnings, if the employment lasted at least five years and less than 10 years;
- four times his or her average monthly earnings, if the employment lasted at least 10 years and less than 20 years; and
- five times his or her average monthly earnings, if the employment lasted at least 20 years.

39 Are there any procedural requirements for dismissing an employee?

Termination of employment by the employer, with notice or immediate effect, must be pre-negotiated with the employee representatives. Failure to do so will make the termination invalid. The employee representatives are obliged to negotiate any termination with notice within seven working days from the day of delivery of the employer's written request, and to negotiate termination with immediate effect within two working days from the day of delivery of the employer's written request. If no negotiation occurs during the above time limits, negotiation is deemed to have occurred. In case of mass termination, see question 41.

40 In what circumstances are employees protected from dismissal?

An employer may not dismiss an employee during a protected period, which means a period of time during which an employee (section 64 of Labour Code):

- has been recognised as incapable of work due to illness or injury (unless such incapacity was induced intentionally or incurred under the influence of alcohol, narcotics or psychotropic substances); and during any period from the submission of a proposal for institutional care or the commencement of spa therapy to the end date thereof;
- was summoned to carry out an extraordinary duty during a crisis situation;
- is pregnant, or on maternity leave or parental leave, or when a single employee has been taking care of a child below three years of age;
- is released for execution of voluntary military training, for regular exercise or duties of the Armed Forces of the Slovak Republic pursuant to special regulation;
- has been released for an extended period to pursue public office; or
- after carrying out night work, has been recognised as being temporarily incapable of night work according to medical opinion.

In the case of a disabled employee, the employer can dismiss such an employee only with the prior consent of the competent Office of Labour, Social Affairs and Family. Consent is not required for an employee who has reached the determined age for retirement, or there is a reason for dismissal for a serious breach of the employee's duties, or the employer is being wound up or relocated.

41 Are there special rules for mass terminations or collective dismissals?

Mass termination is defined in section 73 of the Labour Code as termination for reasons not related to the employees themselves, within 30 days, when:

- there are at least 10 employees in a business where usually more than 20 and fewer than 100 employees are engaged;
- there are at least 10 per cent of the employees in a business where usually at least 100 and fewer than 300 employees are engaged; or
- there are at least 30 employees in a business where usually at least 300 employees are engaged.

In the case of mass termination or collective dismissals, an employer is obliged to negotiate with the employee representatives (or directly with the employees concerned, if there is no employee representative at the employer) and try to reach an agreement regarding measures to avoid or limit the collective redundancies, the possibility of placing the employees concerned in any of the employer's other locations, and measures to mitigate the adverse effects of collective redundancies. The employer has to provide the employee representatives with all necessary information and inform them in writing specifically of:

- the reasons behind the collective redundancies;
- the number and structure of employees whose employment is to be terminated;
- the total number and structure of employees employed by the employer;
- the period of time when the collective redundancies will be effected; and
- the criteria for the selection of employees whose employment is to be terminated.

The employer is also obliged to deliver a copy of the written information, together with the names, surnames and permanent residential addresses of employees whose employment is going to be terminated, to the Office of Labour, Social Affairs and Family in order to find solutions to issues associated with collective redundancies.

After negotiation of the collective redundancies with employee representatives, the employer has to inform the Office of Labour, Social Affairs and Family and the employee representatives in writing about the negotiation outcome. No sooner than one month after the delivery of the written information to the Office of Labour, Social Affairs and Family, the employer may give notice of termination or a proposal for termination to an employee.

If the employer breaches these obligations, an employee whose employment is terminated as a part of the collective redundancies is entitled to wage compensation amounting to at least double his or her average earnings.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Slovak legislation does not recognise a class action in employment matters in the meaning given by US law. Only a few attorneys would recommend commencing a collective action, and only in very specific cases. It is most common to submit employment and labour claims on an individual basis.

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43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

In the Slovak Republic, the law does not recognise a mandatory retirement age. The Act on Social Insurance states the age at which an employee may retire, but the employee is in no way obligated. Agreement on automatic termination of employment due to reaching the retirement age is, in general, not possible.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Pursuant to Labour Code (section 14) and the new Civil Dispute Order effective from 1 July 2016, the disputes between an employee and employer deriving from labour law relation shall be exclusively heard and decided by the competent regional civil courts which have the character of specialised courts. Arbitration clauses are not provided for by the labour law.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee cannot agree to waive statutory and contractual rights to potential employment claims in advance. Such an agreement would be null and void (section 17, paragraph 1 of the Labour Code).

46 What are the limitation periods for bringing employment claims?

The employee and the employer may seek to have any termination of employment ruled invalid by a court no later than two months after the intended date of termination of employment (section 77 of the Labour Code). In case of claims for damages, the limitation period is two years from the day when the aggrieved party became aware of the damage and found out who is responsible for it, although it cannot be more than three years from the day the damage was caused (in case of intentionally caused damage, the limitation period is 10 years).

Slovenia

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main act regulating employment relationships is the Employment Relationships Act (ERA), which provides a legal basis for concluding employment contracts, regulates most aspects of employment relationships and provides for the minimum labour rights. Several particular topics are regulated by other acts, namely the Collective Agreements Act, the Occupational Health and Safety Act, the Labour Market Regulation Act, the Vocational Rehabilitation and Employment of Disabled Persons Act, the Worker Participation in Management Act, the Strike Act, the Prevention of Undeclared Work and Employment Act, the Labour Inspection Act, the Protection Against Discrimination Act, the Employment, Self-employment and Work of Aliens Act and the Aliens Act. Sector-specific collective agreements are also important sources of law.

Employment of public sector employees is regulated in the Civil Servants Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

According to the ERA, employers must ensure that their employees, as well as those seeking employment, are treated equally, irrespective of their nationality, race or ethnic origin, national or social background, gender, skin colour, state of health, disability, faith or beliefs, age, sexual orientation, family status, trade union membership, financial standing or other personal circumstances. Equal treatment shall be ensured, especially in cases of access to employment, promotion, training, education, re-qualification, salaries and other benefits from the employment relationship, absence from work, working conditions, working hours and the termination of employment contracts. The ERA explicitly states that less favourable treatment of employees in connection with pregnancy or parental leave shall also be deemed discriminatory.

In 2016, the Protection Against Discrimination Act was adopted which implements several European directives protecting against discrimination, inter alia, Directive No. 200/78/EC, Directive No. 2006/54/EC and Directive No. 2014/54/EC. The Protection Against Discrimination Act is applicable in all phases of employment (from conditions for employment, employment itself and also during the employment relationship) and to all employees as well as jobseekers. It contains general definition of the discrimination as well as enlists certain specific situations and actions which are prohibited. According to the Protection Against Discrimination Act, in general, any unequal treatment based on personal circumstances which results in breach of human rights and fundamental freedoms is prohibited. Unequal treatment of disabled persons is prohibited by the Equalisation of Opportunities for Persons with Disabilities Act.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Labour Inspectorate of the Republic of Slovenia, an administrative body within the Ministry of Labour, Family and Social Affairs, supervises the implementation of laws, other regulations, collective agreements and general acts that govern employment relations, salaries and other remuneration from employment, the employment of employees at home and abroad, employees' participation in management, strikes and the safety of employees at work. Labour inspectors may order measures to remedy any irregularities, impose fines for minor offences, file charges for criminal offences or propose to a competent body the adoption of measures and to order other measures as prescribed by law.

The Financial Administration of the Republic of Slovenia (a body composed of the customs and tax administrations) is responsible for supervising the employment of foreigners and for supervising of undeclared work.

The Advocate of the Principle of the Equality as an independent public body was established on 1 January 2017 with the purpose of supervising compliance with the Protection Against Discrimination Act. The Advocate may issue non-binding opinions on whether a person is being discriminated against in a certain situation but may also decide in individual cases of complaints. In the latter case it may order measures to remedy any irregularities, adoption of measures to prevent discrimination or prohibit further discrimination. It may also propose to the competent inspection to decide in minor offence proceedings.

Finally, employment rights and obligations are judicially enforced through the system of labour courts.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Pursuant to the Worker Participation in Management Act, employees in companies employing fewer than 20 employees with active voting rights have a right to appoint a workers' representative, while employees in companies employing more than 20 employees with active voting rights have a right to elect a works council. A workers' representative has the same rights and duties as a works council. A works council shall be composed of three to 13 members, depending on the number of employees in the company. The establishment of the abovementioned employees' bodies is a right of employees. In companies where such workers' bodies are established, the employer has a duty to engage with such bodies when adopting decisions that could affect employees. Depending on the matter at hand, employers must inform the works council/workers' representative, engage with them in joint consultations or submit draft decisions to them for approval.

Trade unions and their status is regulated in the Representativeness of Trade Unions Act. According to the Representativeness of Trade Unions Act a trade union becomes a legal entity with the date of issuance of the decision on deposit of the statute or other basic act of the trade union. The Representativeness of Trade Unions Act does not determine any other conditions that have to be fulfilled in order to establish a trade union. The respective Act however determines conditions that a certain trade union has to fulfill in order to obtain a status of representative trade union. Representative trade unions may conclude collective agreements with general validity as well as have certain other competencies.

Trade union representatives are regulated in the ERA. Pursuant to the ERA a trade union, which has members with a certain employer,

may appoint or elect a trade union representative to represent it with the employer. If a trade union representative has not been appointed, the trade union shall be represented by its president. A trade union must inform the employer on appointment or election of a trade union representative. A trade union representative shall have the right to provide and protect the rights and interests of trade union members with the employer.

5 What are their powers?

The works council or workers' representative has in particular the following competencies:

- attend to the implementation of laws and regulations, adopted collective agreements and agreements reached between the works' council and the employer;
- propose measures which benefit the employees;
- receive proposals and initiatives from employees and, where justified, take them into consideration in negotiations with the employer; and
- assist the disabled, older and other employees entitled to special protection in their incorporation into work.

The employer shall be bound to inform the works council about and request joint consultations on the status of the company and personnel issues before taking decisions on these issues. In cases of adoption of decisions on the following, the employer shall be bound to submit to the works council a draft decision for approval:

- the bases for determining the use of paid leave and other instances of absence from work;
- criteria for the assessment of performance at work;
- criteria for the remuneration of innovative activity in the company;
- the management of the housing fund, company vacation homes and other employee welfare facilities; and
- employee promotion criteria.

In certain cases the works council may suspend an employer's decision until the employer complies with the law.

A trade union concludes collective agreements with the employer as well as protects the rights of its members with the employer. A trade union may further comment on draft general acts by which the employer determines organisation of work or obligations the employees have to know in order to fulfil their working obligations.

A trade union representative shall have the right to provide and protect the rights and interests of trade union members with the employer.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The employer may only demand that the candidate submit documents proving the fulfilment of the job requirements. The employer may test the knowledge or competences of candidates for carrying out work for which the employment contract is being concluded or, at its own cost, refer the applicant for a preliminary medical examination. The employer is explicitly prohibited from demanding that the candidates provide information on family or marital status, pregnancy, family planning or other information, unless it is directly related to the employment relationship. There is no prohibition regarding third parties conducting the employment process other than the abovementioned provisions.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Before an applicant's first employment, the employer shall refer the applicant for medical examination to a practitioner of occupational medicine. As it is the employee's duty to respect and implement the regulations and measures on health and safety, they may not reject such an examination. Consequently, the employer may refuse to hire an applicant who does not submit to such an examination. However, establishing an applicant's health condition should only be related to circumstances that are of direct relevance to the work for which the employment contract is being concluded.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no explicit restrictions or prohibitions against drug and alcohol testing of applicants with their explicit consent. However, an employer may only demand information from the applicant that is directly relevant for the work for which the employment contract is being concluded. For these reasons, candidates applying for work in some professions (eg, police and armed forces) may be rejected for failing to take drug and alcohol tests.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Employers employing more than 20 employees are obliged to employ a certain percentage of employees with disabilities (from 2 per cent to 6 per cent, depending on the activity of the employer) or fulfil this obligation in one of the alternative ways (such as paying certain contributions to the Public Guarantee, Alimony and Disability Fund). Non-fulfilment of this obligation may result in a monetary fine for the employer of between €400 and €41,700, and for the responsible individual within the company of between €400 and €2,000.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

An employment contract shall be concluded in written form. Each employment contract shall contain:

- data on the contracting parties;
- date of commencement of work;
- the title of the job or type of work, including a brief description of the work;
- location of the work;
- duration of the employment contract and, if a fixed-term employment contract is concluded, the reason for the conclusion of a fixed-term employment contract and a provision on the manner of using annual leave;
- a provision stating whether a part-time or full-time employment contract has been concluded;
- daily or weekly working time and the distribution of working time;
- amount of the basic salary and other possible remunerations;
- other components of the employee's salary, payment interval, payment day and manner of payment of the salary;
- annual leave or the manner of determining annual leave, or both;
- length of notice periods;
- a reference to collective agreements that bind the employer or the employer's general acts stipulating the employee's conditions of work, or both; and
- other rights and obligations in accordance with cases laid down in the ERA.

11 To what extent are fixed-term employment contracts permissible?

As a rule, employment contracts are concluded for an indefinite period of time, while fixed-term contracts are only allowed in cases explicitly stated in the ERA. As a rule, fixed term contracts (or successive fixed-term contracts) shall not be concluded for more than two years. The ERA provides certain exemptions in which the duration of a fixed-term contract can be longer (eg, replacement of a temporarily absent employee).

12 What is the maximum probationary period permitted by law?

The probation period may not be longer than six months, but may be extended in the case of an employee's temporary absence from work.

13 What are the primary factors that distinguish an independent contractor from an employee?

Pursuant to the ERA, an employment relationship is a relationship between an employee and an employer whereby the employee integrates voluntarily into the employer's organised working process and in which the employee, in return for remuneration, continuously carries

out work in person according to the instructions and under the supervision of the employer. Accordingly, an employee is defined as any natural person who has entered into an employment relationship on the basis of a concluded employment contract.

On the other hand, an economically dependent person is a self-employed person who, on the basis of a civil law contract, performs work in person, independently and for remuneration for a longer period of time in circumstances of economic dependency and does not employ other employees on his or her own.

Based on the above, one of the decisive factors distinguishing an independent contractor from an employee is independence. If, in a certain case, it is established that the economically dependent person is in a subordinated position as regards the employer, the economically dependent person may require the establishment of an employment relationship. If no such subordination is established, an economically dependent person has limited labour law protection, as determined in the ERA.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Temporary staffing is regulated in the Labour Market Regulation Act and in the Employment Relationships Act. In Slovenia, only companies having a permit (concession) issued by the ministry competent for labour can provide agency work (temporary staffing). Specifics of the employment contract concluded between the recruitment agency and the employees are regulated in the ERA. As a rule, the employment contract is concluded for an indefinite period of time and only in cases foreseen in the ERA can it be concluded for a fixed time. The ERA also provides circumstances in which the recruitment agency may not assign the employees to a user (eg, for replacement of employees on strike, etc) and determines a quota of employees the user may use (ie, not more than 25 per cent of all employees employed with the user). The assignment can only be temporary; during the assignment the employee has to perform work in accordance with the user's instructions.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Employees who are citizens of member states of the European Union (EU), European Economic Area (EEA) or Switzerland do not require a visa to enter Slovenia; however, third-state citizens do require a visa to enter Slovenia. Short-term visas, which enable their holders to reside (but not to work) on the territory of any EU member state for up to 90 days, are not subject to any numerical limitations.

Employees who are employed with a company registered in an EU or EEA member state or Switzerland, and who have been posted to Slovenia, do not require a visa or work permit for employment in Slovenia. However, their employer is required to notify the Employment Service of Slovenia.

Employees who are third-state citizens and who have been posted to Slovenia do need a valid work permit. Third-state citizens who have been appointed as legal representatives of a Slovenian company may obtain a special work permit for alien representatives.

16 Are spouses of authorised workers entitled to work?

Family members of citizens of EU and EEA member states or Switzerland, who are themselves third-state citizens, have free access to the labour market if they possess a valid permit for temporary residence for a family member or a long-stay visa, unless an international treaty binding Slovenia provides otherwise. Family members of third-state citizens require a valid working permit in order to be employed in Slovenia.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Citizens of member states of the EU, EEA or Switzerland do not need a work permit for employment in Slovenia. Third-state citizens are required to obtain a single permit for work and stay.

The single permit for work and stay may be obtained by the employer or by the foreigner. There are several conditions determined in the Aliens Act that need to be fulfilled for obtaining a single permit for work and stay, one of them being that there are no suitable candidates registered at the Employment Service of Slovenia and that the employment is not causing any disturbances in the Slovenian labour market. The first single permit for work and stay is usually issued for the time of duration of the employment contract or work contract but not more than for one year, with the possibility of extension for not more than two years.

An employer who employs foreign employees without proper work permits may be fined, in accordance with the Prevention of Undeclared Work and Employment Act, between €5,000 and €26,000, while the responsible individual within the company may be fined between €500 and €2,500. Moreover, employing a large number of foreign employees without suitable work permits is considered a criminal offence and is punishable by a fine or imprisonment for up to one year.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test shall be performed before granting certain single permits for work and stay, but not in the case of short-term visas (see question 17).

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Full working time shall not exceed 40 hours per week. An act or collective agreement, or both, may determine a full working time that is shorter than 40 hours per week, but not shorter than 36 hours per week (this option normally applies to jobs with higher risks of work-related injuries or damage to health). As a rule, an employee shall have the right to a rest period of at least 12 uninterrupted hours within a period of 24 hours. The law does not specifically determine how many days per week employees may work. Working time is limited by the limit of working hours per week (ie, as a rule, 40 hours per week) and by the provisions dealing with rest. More specifically, an employee has the right to a rest period of at least 24 uninterrupted hours within a period of seven successive days. Provisions regarding working hours are mandatory – neither employer nor employee may opt out.

20 What categories of workers are entitled to overtime pay and how is it calculated?

In general, all employees are entitled to overtime pay. The only exception is managers or procurators, whose employment contracts may lay down different provisions regarding working time and remuneration of work than those prescribed by the ERA. The amount of additional payments is usually laid down in a sector-specific collective agreement.

21 Can employees contractually waive the right to overtime pay?

Except for managers and procurators, employees may not waive their right to overtime pay.

22 Is there any legislation establishing the right to annual vacation and holidays?

Every employee is entitled to paid annual leave. Employees accrue this right by entering into an employment relationship.

As a rule, annual leave in an individual calendar year may not be shorter than four weeks, regardless of whether the employee is employed full time or part time. The minimum number of days of annual leave depends on the distribution of working days within the week of an individual employee (ie, if the employee works for five days a week, they are entitled to 20 days of annual leave, if they work for six days, they are entitled to 24 days of annual leave). Employees with special characteristics (eg, disabled employees and parents with children under 15 years of age) are entitled to additional days of annual leave. Employment contract or collective agreement may determine other additional days of annual leave. An employee who concludes an employment contract or whose employment contract is terminated during the calendar year is entitled to one-twelfth of his or her annual leave for each month of employment. An employee who, in the first

year of employment, obtains a right to a proportional part of his or her annual leave, obtains the right to use the annual leave for the following calendar year with the commencement of the following calendar year.

Annual leave shall be determined in full working days and used during working days. Public holidays and work-free days, absence from work due to illness or injury, and other cases of justified absence from work shall not be counted as days of annual leave.

23 Is there any legislation establishing the right to sick leave or sick pay?

Employees are entitled to paid sick leave. For each period of sick leave that is shorter than 30 consecutive working days, an employer must pay the employee salary compensation in the amount of:

- 80 per cent of the salary in the case of sickness or injury not related to work; or
- 100 per cent of the salary in the case of work-related sickness or injury.

For periods of absence of more than 30 consecutive working days, salary compensation will be paid to the debit of the Health Insurance Institute of Slovenia. In the case of sick leave due to sickness or injury not related to work, the employer's obligation to pay the salary compensation from its own funds is limited to a maximum of 120 working days in one calendar year. In the case of work-related sickness or injury, no such yearly limitation exists.

Salary compensation shall be calculated in relation to the amount of the employee's average monthly salary for full-time work during the past three months or during the period the employee worked in the three months prior to the start of the absence.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Besides annual leave and sick leave, employees are entitled to several other periods of paid leave.

All female employees are entitled to 105 calendar days of paid maternity leave. The mother is obliged to take at least 15 days of maternity leave. Maternity leave is followed by 260 calendar days of paid parental leave. Each of the parents is entitled to 130 days of parental leave, of which the mother may transfer 100 days to the father – at least 30 days must be taken by the mother.

Fathers are entitled to one day's leave for the birth of their child and to 50 calendar days of fathers' leave. The first 15 calendar days of paid fathers' leave must be used before the child is six months old. As of 1 January 2017, the father has a right to another 10 calendar days of paid father's leave which have to be used uninterruptedly following the completion of the parental leave but at the latest until the child finishes the first year of primary school. The remaining 25 days are unpaid, but the state pays social contributions. Fathers can use these 25 days until the child is three years old.

Employees are further entitled to paid leave of absence in the case of:

- absence from work on public holidays, specified as work-free days, and on other work-free days defined as such by the law;
- absence from work in cases of a temporary incapacity to work due to a disease or injury and in other cases in accordance with the regulations on health insurance (such as taking care of a sick family member);
- absence from work due to blood donation on the day when the employee voluntarily donates blood. In such a case, the employer shall pay the employee a salary compensation to the debit of the health insurance; and
- absence from work due to performance of a function or obligations according to special statutes (such as performance of a non-professional function, to which they have been elected at direct national elections).

Additionally, all employees are entitled to additional days of paid leave due to personal circumstances. Employees are, therefore, entitled to one day of paid absence in the case of:

- their marriage;
- the death of the employee's spouse or cohabitant or the death of a child, adopted child or child of the spouse or the cohabitant;
- the death of the employee's parents; and
- a serious accident suffered by the employee.

Collective agreements may grant additional days of leave of absence to employees.

The ERA also regulates the suspension of employment contracts. During the suspension (the ERA has provided circumstances in which suspension is applicable) the rights and obligations deriving from the employment relationship are suspended.

25 What employee benefits are prescribed by law?

Employers and employees are obliged to pay social contributions (ie, contributions towards pension and disability insurance, towards compulsory health insurance, for parental protection, for employment and for insurance against the risk of accident and occupational disease).

Insured persons are paid their benefits (eg, maternity allowance and unemployment allowance) by the competent state institution after the fulfilment of the necessary conditions.

Some employers offer their employees the possibility of additional benefits, such as additional pension and health insurance.

26 Are there any special rules relating to part-time or fixed-term employees?

An employment contract may be concluded as a part-time contract. Part-time shall be deemed to be working time shorter than the full working time in force with the employer. Part-time employees shall have the same contractual and other rights and obligations arising from the employment relationship as full-time employees, and shall exercise these rights and obligations proportionally to the time for which the employment relationship was concluded, with the exception of those rights and obligations that are otherwise stipulated by the ERA. As a rule, part-time employees are entitled to the same number of days of annual leave as full-time employees, but shall receive pay for annual leave in proportion to the working time for which they have concluded the employment contract. Additionally, unless otherwise stipulated in the employment contract or in cases provided in the ERA, the employer may not impose work exceeding the agreed working hours on a part-time employee.

As described in question 11, employers are prohibited from concluding one or more successive fixed-term employment contracts for the same work for more than two years. The same work is considered to be work in the same workplace or the type of work actually carried out under a certain fixed-term employment contract. If a fixed-term employment contract is concluded contrary to the ERA or a collective agreement, or if the employee continues to work after the fixed-term employment contract expires, it shall be assumed that the employee has concluded an employment contract for an indefinite duration. Fixed-term employees are entitled to severance pay after their term of employment expires. The amount of the severance pay is determined in the ERA.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The employer and employee may agree in the employment contract on the prohibition of performance of a competitive activity after the termination of the employment relationship (a competition clause). A competition clause may be agreed for a maximum of two years after the termination of the employment contract, and only in cases where the employment contract was terminated by an agreement between the parties, due to ordinary termination by the employee, due to ordinary termination by the employer owing to a fault of the employee or due to extraordinary termination by the employer (except in the case where the employment contract is extraordinarily terminated due to the employee's refusal to transfer to a different employer).

The competition clause must be agreed in writing in the employment contract with a reasonable time limit of prohibition of competition, and may not exclude the possibility of suitable employment of the employee.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

If respecting a competition clause prevents the employee from gaining earnings that are comparable to their previous salary, the employer must pay the employee a monthly compensation during the entire period for which he or she respects the clause (such monthly compensation cannot be less than one-third of the average salary received by the employee in the last three months prior to termination of the employment contract). If the monthly compensation is not agreed in the employment contract, the competition clause is invalid.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

In accordance with the Code of Obligations, employers shall be held liable for any damage caused by their employees during work or in connection with work, unless it proves that the employees acted as was necessary under the given circumstances. Nevertheless, the injured party may demand the compensation of damage directly from the respective employee, if the employee caused damage wilfully.

An employer (or any other person) that reimburses an injured party for damage caused wilfully or out of gross negligence by the employee shall have the right to demand compensation of the sum paid out from the employee him or herself. Such compensation for damage may be reduced or an employee may be exempt from its payment due to the employee's efforts to remedy the damage, their attitude to work or their financial situation. If the damage is caused by several employees, each of them shall be liable for the part of the damage caused by them. If the assessment of the actual damage would incur disproportionate costs, the damage may be calculated as a lump sum amount, as laid down in the applicable collective agreement.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Every employee is subject to income tax, which is withheld by the employer and paid to the tax authorities. Income is taxed in accordance with progressive tax rates. Furthermore, employees and employers are subject to the payment of social contributions (see question 25).

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Employee inventions are regulated under the Employment-Related Industrial Property Rights Act, which distinguishes between job-related inventions and independent inventions. Job-related inventions are either direct inventions (ie, an invention made in the course of implementing the employment contract, at the employer's explicit request) or indirect inventions (ie, an invention made in the course of exercising an occupation if the invention is mainly the result of the experience gained by the employee at his or her workplace, or of the assets made available to him or her by the employer). The Employment-Related Industrial Property Rights Act regulates proceedings with respect to job-related inventions as well as the rights and obligations of employees and employers with respect to such inventions. As a rule, the employer may, under certain conditions, assert a (limited or unlimited) claim over the job-related invention provided that it pays certain compensation to the employee.

In the case of independent inventions, the employer may, under certain conditions, obtain a right to use such invention.

32 Is there any legislation protecting trade secrets and other confidential business information?

The employee may not exploit for his or her personal use nor disclose to a third person the employer's business secrets, defined as such by the employer, which were entrusted to the employee or which he or she has learnt about in any other way. Data which would obviously cause substantial damage if disclosed to an unauthorised person shall also be deemed to be a business secret. The employee shall be liable for the violation if he or she was familiar with or should have been familiar with the nature of such data.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Employees' right to privacy is a constitutionally and statutorily guaranteed right. In this regard, the personal data of employees may only be collected, processed, used and submitted to third persons for the purpose of exercising rights and obligations arising from the employment relationship or in connection with the employment relationship.

The employer may keep the following information on employees: certain personal information about the employee, information regarding the work permit in the case of foreign employees, details regarding the employment contract and information on the termination of the employment contract. The employer is obliged to collect and process personal data as determined in the Labour and Social Registers Act.

Personal data of employees for which a legal basis no longer exists for its collection must be immediately deleted and no longer used.

Other personal data of employees may only be collected with the consent of the employees and only in exceptional cases.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

As a rule, in the case of a business transfer, all contractual and other rights and obligations of transferred employees arising from the employment relationships with the transferor existing on the day of transfer shall be automatically transferred to the transferee. The transferee shall be obliged to comply with the collective agreement that bound the transferor for a period of one year after the transfer. Furthermore, if the rights under the employment contract with the transferee deteriorate for objective reasons within a period of two years from the date of transfer, and the employee terminates the employment contract due to such deterioration, the employee shall have the same rights as if the employment contract were terminated by the employer for business reasons. Finally, the transferor and the transferee shall be jointly and severally liable for claims of employees arising up to the date of transfer and to the claims arising from termination owing to the objective deterioration of working conditions. Trade unions should also be involved in the transfer process.

Slovenian labour and social courts have developed a substantial amount of court practice on the question of the transfer of employees, such as conditions for transfer and the objective deterioration of rights under the transferor, etc.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer may unilaterally terminate an employment contract with an employee by an ordinary or extraordinary termination. For each type of termination, the ERA lists specific reasons for terminating the contract.

An employment contract may be ordinarily terminated due to business reasons (ie, cessation of the need to carry out certain work for economic, organisational, technological, structural or similar reasons on the employer's side), reasons of incapability (ie, non-achievement of expected work results or non-fulfilment of conditions for work), fault reasons (ie, violation of obligations arising from the employment relationship) and the reason of incapability due to disability (ie, inability to perform work due to the disability). In the case of ordinary termination, an employee is entitled to benefits such as a notice period and severance pay.

An employment contract may also be terminated due to narrowly specified extraordinary reasons. These reasons include, among others, intentional or grossly negligent violation of employment obligations, failure to turn up for work for at least five days in succession without informing the employer of the reasons for absence, submission of false information or evidence regarding job requirements as a candidate in a selection procedure, etc. In the case of extraordinary termination, an employee is not entitled to severance pay or a notice period.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Employees are entitled to a notice period in the case of ordinary termination either by the employer or by the employee. Generally, the notice period shall commence on the day following the service of the termination letter. In the case of collective dismissals, the notice period shall commence on the day determined by the employer in the termination letter in accordance with the dismissal programme for redundant employees. The length of the notice period depends on whether the employment contract is terminated by the employer or by the employee, on years of service with the employer and on the reason for the termination of the employment contract. However, the employee and employer may agree in writing on adequate compensation instead of enforcing a part of or the entire notice period.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

As described in question 35, an employee is not entitled to a notice period in the case of the extraordinary termination of the employment contract.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Pursuant to the ERA, an employer who terminates an employment contract for a business reason or for a reason of incapability is obliged to pay the employee severance pay. The employee is also entitled to severance pay if he or she terminates the employment contract due to extraordinary reasons on the part of the employer and after the expiry of the term of the contract in the case of fixed-term employment contracts. Employees who have been employed with the employer for a period of at least five years and are about to retire are also entitled to severance pay.

The amount of severance pay depends on the average salary of the employee in the last three months prior to termination and the length of service with the employer. In this regard, the employee may receive from one-fifth to one-third of the average salary for each year of employment with the employer, depending on the length of employment, unless a higher amount is set in a collective agreement. The ERA also provides a maximum amount of severance pay (10 times the average salary), which can be set at a higher amount with a collective agreement.

39 Are there any procedural requirements for dismissing an employee?

Before the ordinary termination of an employment contract owing to a fault, the employer is obliged to remind the employee in writing about the fulfilment of obligations and the possibility of termination of his or her employment contract if he or she repeats the violation within one year of the receipt of the written warning. Furthermore, before the ordinary termination of the employment contract for reasons of incapability or fault, and prior to the extraordinary termination of the employment contract, the employer must inform the employee in writing of the alleged violations or the alleged incapability and give him or her the opportunity to defend him or herself within a reasonable time period. A trade union representative may participate in the defence.

Trade unions, works councils or workers' representatives, if applicable, may give their opinion on each termination if so required by the employee; however, the employer is not bound to such opinion.

In the case of the dismissal of larger numbers of employees, the employer must inform trade unions as well as the Employment Service of Slovenia. Furthermore, an employment contract with a disabled employee may only be terminated with the consent of the special commission of the Pension and Disability Insurance Institute of Slovenia, while employment contracts with pregnant employees and employees on parental leave may only be terminated with the approval of the labour inspector and only in limited cases (in the case of extraordinary termination or in the case of the winding up of the employer).

Update and trends

As of 1 January 2017 the minimum salary has been increased from €790.73 (which had been applicable since 1 January 2015) to €804.96.

In February 2017 the Posting of Workers Act was adopted. It entered into force in mid-March 2017 but shall be applicable as of 1 January 2018. The Posting of Workers Act determines conditions under which legal and physical persons registered for carrying out activity and having a registered seat in the Republic of Slovenia can temporarily perform activities in another EU member state as well as conditions under which legal and physical persons registered for carrying out activity and having a registered seat in another EU member state can temporarily perform activities in the Republic of Slovenia.

In November 2016, the Ministry of Labour, Family, Social Affairs and Equal Opportunities published for public debate three pieces of legislation: the proposal of an amendment to the Employment Relationships Act, the proposal of an amendment to the Labour Inspection Act and the proposal of an amendment to the Labour Market Regulation Act. The Ministry accepted comments on the legislation until the beginning of December 2016. Currently no information is available on the status of the proposed amendments but it is likely that the next steps in the adoption of the respective amendments shall take place later in 2017.

40 In what circumstances are employees protected from dismissal?

Slovenian law grants special protection from dismissal to employees' representatives (members of works councils or trade union representatives), employees before retirement, parents and pregnant women, disabled persons and persons absent from work due to illness.

41 Are there special rules for mass terminations or collective dismissals?

An employer who establishes that, due to business reasons, larger number of employees will become redundant within a period of 30 days is obliged to draw up a dismissal programme for redundant employees (which also includes criteria for choosing the employees whose employment contracts shall be terminated) as well as informing the works council, trade union and Employment Service of Slovenia, which all have the right to actively participate in the dismissal proceedings. The employer also has to comply with other requirements set out in the ERA, whereby certain additional obligations may be imposed on the employers in the applicable collective agreements.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Slovenian law does not provide for class or collective actions in the case of labour law violations. Every employee may request judicial protection before the competent labour court on an individual basis.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Private-sector employers may not impose a mandatory requirement age. However, in accordance with the Fiscal Balance Act, employment contracts with public-sector employees are automatically terminated when the employees meet the conditions for retirement (these depend upon age and years of service). Such arrangement was contested in front of the Constitutional Court of Slovenia, which in turn confirmed that such mandatory retirement is not in conflict with the Constitution.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

A collective agreement may stipulate arbitration as a means for the settlement of individual labour disputes. In such cases, the collective

agreement must lay down the composition, procedure and other issues relevant to the work of the arbitration board. If the arbitration board does not reach a decision within the time limit stipulated in the collective agreement, the employee may still request judicial protection before the labour court.

If the arbitration is not foreseen in the collective agreement, the parties may not agree to arbitration.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

In general, an employee may not waive his or her statutory or contractual rights in advance. However, after termination of the employment, the employee is free to enforce his or her claims judicially, if desired.

46 What are the limitation periods for bringing employment claims?

If the employee believes that the employer has failed to fulfil its obligations arising from the employment relationship, or that it has violated any of his or her rights arising from the employment relationship, the employee may request in writing that the employer eliminate the violation or fulfil the obligations, or both. If the employer fails to fulfil the obligations arising from the employment relationship, or fails to eliminate the violation within eight working days after being served with the employee's written request, the employee may request judicial protection before the competent labour court within 30 days from the expiry of the time limit stipulated for the fulfilment of obligations or the elimination of the violation by the employer, or both. However, the employee may enforce monetary claims arising from the employment relationship directly before the competent labour court. Monetary claims deriving from the employment relationship shall be statute barred for a period of five years.

The employee may file a lawsuit before the competent labour court contesting the legality of the termination of the employment contract, of other manners of termination of the employment contract, and of decisions on disciplinary responsibility, within 30 days following the receipt of the respective decision or following the day when the employee learnt about the violation of the right.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The basic employment legislation is contained in the following legal provisions:

- the Workers' Statute;
- the General Social Security Act;
- the Health and Safety Act;
- the Organic Act for Union Freedom;
- the Labour Procedure Law;
- the Act for Violations and Sanctions regarding Social Order; and
- the applicable collective bargaining agreement.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Article 14 of the Spanish Constitution prohibits any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance.

Article 4.2 of the Workers' Statute also grants equal rights in employment; article 24.2 provides equal treatment for men and women regarding promotion; and article 28 grants equal salary for equal work, irrespective of the sex of the employee.

Direct or indirect discrimination on the grounds of sex, race, age, religion, etc, is classed as very serious misconduct and may incur fines of between €6,251 and €187,515.

The Organic Act for Equal Treatment between Men and Women modified a large number of articles of the most important laws in the employment and social security field, implementing new duties and measures to prevent sexual harassment and improve equal treatment between men and women.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The main agency protecting the rights and obligations in a labour relationship is the Employment and Social Security Inspectorate.

The Inspectorate oversees compliance with employment rules regarding social security and the prevention of risks, and has the competence to enforce the resulting liabilities.

The labour courts are the ones in charge of applying the labour law, social security, and health and safety at work regulations.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Yes. Title II of the Workers' Statute, article 28 of the Spanish Constitution and the Organic Act for Union Freedom protect the right of union representation. Royal Decree 1844/1994 of 9 September 1994 concerns the appointment of workers' delegates and members of works councils. The implementation of a works council or workers' committee is a right of the employees. That is, only if the employees want representation will an election process begin, and the company will have to allow the same.

5 What are their powers?

The workers' representative (works council or staff delegates) is entitled to look out for the employees' interest in the company. Their powers are mainly detailed in article 64 of the Workers' Statute:

- The right to be informed and consulted by the employer on any issues that could affect the employees, as well as information on the general situation of the company and any changes to employment conditions within the company. The company must grant this information with enough time and with sufficient content to allow the employees' representatives to examine the information and, if necessary, consult with the employees and prepare any relevant report.
- The works council has the right to be informed every three months on the following issues:
  - The general evolution of the economic sector to which the company belongs.
  - The economic situation of the company and any recent change in activities that it has undertaken or that it is likely to undertake in the future, including any environmental actions that could have an impact on employment conditions within the company. They must also be informed about production and sales, including the production programme.
  - The forecasts of the employer on new employment contracts, with an indication of the likely number that will be offered and the type of employment contracts that will be used, including part-time contracts. They must also be informed of any overtime that could be offered to part-time employees and, where applicable, any services that might be subcontracted.
  - Any statistics relating to employee absenteeism and its causes, accidents in the work place, occupational diseases and their consequences, accident rates and any periodic or special reports on the labour climate.
- Moreover, in accordance with articles 95 and 112 of the Public Companies Act, the works council must receive copies of the company's balance sheet, details on the company's profit and loss account, the annual company report, as well as any other documents that would be provided to the shareholders of the company and in the same conditions as them.
- The works council will also have the right to receive information, at least annually, relating to the application of non-discrimination and equal opportunity rights between men and women within the company. Among this information, the company must include details on the proportion of men to women in each of the different professional categories of the company and, where applicable, the measures that have been adopted to promote equal opportunities between men and women. Furthermore, if an equal opportunities plan exists, the company must outline how this has been implemented within the company.
- The works council must also be made aware of the model of employment contracts that have been entered into in writing (for example, fixed-term contracts, seasonal contracts, formation contracts, etc) being used in the company and any documents relating

to the termination of employment relations. The problem with this is that this article refers to the 'employment contract' in the wider sense, but the Spanish Workers' Statute in its article 8.4 establishes that the employment contracts entered into in writing have to be delivered to the employees' representatives and these would be the only contracts that the company should provide.
- The works council must also be informed about all sanctions that shall be imposed as a result of very serious infringements.
- Likewise, the works council will have the right to receive a copy of the employment contract and any notifications of contract renewals or terminations within 10 days of them being issued.
- The works council must be informed and consulted about the situation and structure of employment in the workplace and it must be informed every three months on the likely evolution of the same, and with a consultation process when changes are planned. Likewise, it must be informed about all company decisions that could bring about relevant changes in the organisation of the company and the employment contracts. Moreover, it has the right to be informed and consulted about the adoption of any special preventative measures that could put jobs at risk.

For its part, the works council will issue a report prior to the company adopting any decisions, on the following matters:
- staff restructuring and any total or partial collective dismissal procedures, either permanent or temporary;
- any reduction of working hours;
- total or partial transfer of offices;
- merger, takeovers or any modification of the legal status of the company that could imply a change in employment relations in the company;
- any professional training for the employees; and
- implementation and review of the organisation and control systems within the company, overtime, new variable remuneration systems and an evaluation of each position.

The reports issued by the works council must be made within 15 days of having requested and received all relevant information.

Other rights

Likewise, the employees' representatives are granted with the following duties:
- to preside and call the general meetings of the employees' representatives and of the employees;
- to carry out the legal and administrative actions that could be considered proper in the exercise of their duties by a majority decision of its members;
- to raise at its own will or as a consequence of the will of its employees a collective conflict; and
- to call a strike by a majority agreement of the personnel delegates or the members of the works council.

On the other hand, and in order to improve the good running of the duties of the employees' representatives, Spanish legislation allows them to express their opinion freely under the scope of exercise of their post as employees' representatives.

This right is compatible with the right of the representatives and the employees to give and receive all the information that would be needed about any matter that could affect or have a direct or indirect affect on employment relationships. These rights come to life through the rights recognised as reunion, publishing, etc.

Moreover, it is expressly prohibited to use, outside this field, the documents and information provided.

It has to be taken into account that, in some exceptional occasions that are legally foreseen, the company can deny the delivery of the same because it could hinder the normal running of the company or damage its economic situation.

In relation to the above and without taking into account the possible sanctions derived from a non-justified delivery of the documentation described above (articles 7.7 and 9.2.c of the Royal Decree 5/2000 governing the infringements and sanctions in labour matters), any potential differences that could be raised between the company and the employees' representatives will be submitted to the special labour procedure contained in the Labour Procedural Act. This special procedure should be followed in the following situations:
- the company's decision to attribute as confidential, or to not provide certain information to the employees' representatives; or
- the compliance by the employees' representatives or their legal adviser of the confidential obligation.

In this case the labour court will have to adopt the necessary measures in order to protect the confidential nature of the requested information.

Additionally, the publication and distribution of any material that would be related to the labour or social interests of the employees is allowed, with the only limit being that this activity does not interfere with the normal development of the employment and with a prior written communication to the company (Judgment of the Constitutional Court No. 120/1983).

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The only restriction in selection processes is respecting privacy, honour and image, granted by article 18 of the Spanish Constitution. As a general rule, the only information that can be requested of an employee by the employer is related to training and his or her professional profile. What is more, the employer should avoid personal questions.

On the other hand, in Spain it is not permissible to have a background check made by an external service provider. To this effect, as an example, it must be taken into consideration that, in accordance with section 136.4 of the Criminal Code, criminal records registered with the different sections of the Central Register of Convicted Offenders and Fugitives of Spain are not public.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Employers must respect the right of privacy of candidates and must not ask questions about a job applicant's health before making a job offer. However, there are certain circumstances where medical checks may be made before recruitment, such as where employers are recruiting for jobs with risks of occupational diseases. In such cases, the employer must arrange for the employee to undergo a medical examination before the hiring process begins. The medical examination is free for the candidate.

The employer will only be told whether the candidate is fit to do the job, but will not have access to the medical examination details. In these cases, the employer may reject a candidate who does not wish to submit to a medical examination.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

As with the case of medical examinations, examinations to detect consumption of addictive substances are only permitted when the job so requires, which is when consumption endangers the life or health of third parties. In this case, the candidate may not refuse the test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Employers are generally free to hire whomever they please unless any discrimination based on age, religion, ideology, union membership, language, sex and race is practised by the employer. However, there are some particularities. The law requires reservation of a specified number of jobs for the disabled in companies that have a given number of employees (2 per cent per 50 employees).

Likewise, employers should be given incentives to hire long-term unemployed and to promote youth entrepreneurship, among others.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No, inasmuch as, in Spanish employment law, the principle of oral contract governs. Nevertheless, work contracts must be reflected in writing whenever the law so demands and, in any event, in the case of apprenticeships and training contracts, part-time contracts, fixed discontinuous contracts, fixed-term contracts, replacement contracts, teleworking contracts and the contracts of workers hired in Spain to perform their services abroad.

In addition, whether an employment relationship lasts more than four weeks, the employer must provide the employee-specific information in writing such as commencement date, type of contract, professional group, wage, working time, applicable collective bargaining agreements, among others stated by law.

11 To what extent are fixed-term employment contracts permissible?

The cases in which fixed-term hiring is allowed are as follows:

- When the employee is hired to perform a specific independent work or service with its own substance within the activity of the company, the execution of which – limited by time – is of uncertain duration. The legal duration of this type of contract is determined by the time required for the completion of the corresponding work or services.
- Where the market circumstances, the accumulation of tasks or the excess of orders thus require, even where this concerns the normal activity of the company. Unless the applicable collective bargaining agreement stipulates a different duration, the maximum legal duration for this contract is six months of work within a 12-month period.
- When dealing with the substitution or replacement of employees with a right to the reservation of their work posts, provided that, inter alia, the name of the substituted employee and the reason for substitution are specified in the work contract. This will also include the possibility to hire people to render services during the recruitment process. The legal duration of this contract is determined by the time required for the substitution or replacement.

12 What is the maximum probationary period permitted by law?

The maximum probationary period is two months for unqualified employees and six months for university graduates. However, in companies with fewer than 25 employees the probationary period can be three months for unqualified employees. Since the publication of Decree-Law 16/2013, if a fixed-term contract under article 15 of the Workers' Statute is concluded for a period of less than six months, the probationary period may not exceed one month unless otherwise provided in the collective agreement. Every applicable collective bargaining agreement can establish different probationary periods without exceeding the maximum legal limit.

13 What are the primary factors that distinguish an independent contractor from an employee?

In Spain, an employee is a worker who renders their services for compensation on behalf of another party, within the scope of the organisation and management of another, physical or legal, person.

By contrast, an independent contractor is an individual or a business entity that is not required to perform work under the control of an employer and that takes profits and bears losses on his or her own.

So the main differences between the two concern subordination, control and risk of loss.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Yes, in Spain these types of agencies (temporary employment agencies) are regulated by Law 14/1994, of 1 June, governing temporary employment agencies.

The types of temporary contracts that can be submitted through these agencies are the same as the ones detailed in question 11.

This notwithstanding, companies will not be able to use temporary employment agencies in the following situations:

- to substitute employees who are in a legal strike situation in the user company;
- to perform work that is particularly dangerous for the safety or the health of employees; and
- when in the previous 12 months the user company has made redundant or made an unfair dismissal in the same position as the one contracted through the temporary employment agencies.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There are no applicable quotas on short-term visas (neither for long-term visas) under which the foreign national is allowed to work in Spain. For short-term visas as a visitor, Spain abides by the common applicable EU framework.

There are permits allowing work under intra-company transfers, based on services agreements or between companies belonging to the same group. Note that within the EU, third-country nationals are able to provide services without a prior work permit based on the Vander Elst doctrine (as per the Directive 96/71). Nevertheless, they will need to comply with entry, stay and residence requirements according to internal law.

It is important to distinguish between the following two types of transfer of third-country nationals: those undertaken within the EU and those undertaken from a non-EU company to Spain.

Transfers undertaken within the European Union

A third national holding a valid EU work and residence permit and posted in another EU country for a temporary period, to work on assignment in Spain is not required to obtain a work permit to perform labour activities in Spain, although it will be necessary to comply with entry, stay and residence requirements, along with social security and labour law requirements.

The transfer of the assignee can take place at a work centre:

- of the same company or companies belonging to the same group;
- of a company established in Spain that has a services agreement with the sending company; or
- from an employment agency to a company established and operating in Spain.

The duration of transfer can vary depending on the length of the secondment.

Transfer for a period of up to 90 days

A work permit is not required but an authorisation or visa to stay up to 90 days as a visitor in Spain may be applicable.

If the assignee is transferred from an EU country, part of the Schengen area, and is a holder of a valid local hire work and residence permit in the EU sending country, he or she will be entitled to stay up to 90 days in Spain as a visitor without the need to apply for a stay visa.

If the assignee is transferred from an EU country, not part of the Schengen area, and if because of his or her nationality a visa is required to enter Spain, an application for a stay visa shall be submitted by the assignee at the Spanish consulate having jurisdiction over the place of residence in the EU.

Transfer over 90 days

The assignee has to apply for the corresponding residence visa or authorisation prior to undertaking work activities in Spain.

Transfers undertaken from a non-EU company to Spain

There are two applicable schemes in Spain covering permits allowing work: the general immigration framework regulated under the Organic Act 4/2000-Royal Decree 557/11: work and residence authorisation within the framework of transnational services.

Entrepreneurs's Act 14/13

Residence permit for intracompany transfer – EU ICT

Residence permit for intracompany transfer – National ICT

A residence permit allowing work shall be applied for in case the transfer to Spain is carried out from a non-EU company to a company established in Spain, regardless of the length of the transfer. The transfer can be achieved either between companies of the same group or on the basis of a service agreement contract signed between the sending and host companies and in the case of highly qualified employees transferred to supervise and assess in public works and services to be carried out overseas for Spanish companies.

During the transfer, the transferees will be maintained in the sending company employment contract, economic compensation and sending country social security system.

Citizens of the EU, the European Economic Area and Switzerland have the right to enter Spain and work under the same conditions as Spanish citizens.

16 Are spouses of authorised workers entitled to work?

In general terms, spouses are allowed to work in Spain if they hold a residence permit as a dependant of a holder of a permit processed through the Entrepreneurs' Act or a reunification residence permit.

Also in some cases, a civil partner will enjoy the same rights.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

An employer wishing to hire a foreign employee must start an administrative procedure to obtain the corresponding authorisation allowing the future employee to work. The employer must submit an application to the competent immigration authorities and provide the required documentation, depending on the type of authorisation that is required.

The public authorities must issue a resolution granting or refusing authorisation for residence and work. If the resolution is favourable, the employee shall apply in his or her country for the corresponding visa when applicable. The sanctions an employer may face if it hires an employee with no authorisation for residence and work include:

- the employer may be liable for very serious misconduct and may be fined between €6,251 and €187,515 pursuant to articles 37 and 40 of the Administrative Fines for Labour Actions Act;
- the Immigration Act regards hiring foreign workers with no authorisation for residence and work as very serious misconduct. The fine in this case varies between €10,001 and €100,000; and
- the fine may be increased as a result of the social security contributions the employer did not pay for the employees who were working with no authorisation for residence and work.

18 Is a labour market test required as a precursor to a short or long-term visa?

In general terms, the Spanish general immigration framework requires that a labour market test is applied in order to obtain a work permit. Exceptions to this rule are set forth in section 40 of the Act 4/2000.

The Entrepreneurs' Act framework however includes the labour market test exception for all its residence permits.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

As a general rule, article 34 of the Workers' Statute provides for 40 hours per week. In the course of one year, a maximum of 80 hours of overtime may be worked, except overtime hours used to anticipate or repair accidents and other extra damages.

Rules regarding working hours are mandatory unless provided for in the law.

Article 35 states that the rate of pay for overtime shall be set by collective agreement or individual contract at not less than the ordinary hourly rate if overtime is not compensated with an equivalent time of paid rest.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime may be performed by all workers, except for those under the age of 18, night workers, and those hired on a part-time basis with fixed-term (unless the overtime is to prevent or to repair any urgent or extraordinary damages, without prejudice of its compensation as overtime), apprenticeship or traineeship contracts.

Unless there is an agreement to the contrary, overtime is compensated by time off, but the typical practice is to agree to financial compensation that is higher than the typical hourly wage. In addition, generally, collective bargaining agreements or individual contracts provide for a higher amount for overtime performed on Sundays or public holidays, or between 10pm and 6am.

To calculate the rate, the whole remuneration is taken as a basis, but not productivity bonuses. Depending on the individual case, the basic rates can change, but frequently, to avoid this problem, collective agreements establish the rate of overtime as a fixed amount in euros for every category and type of work.

21 Can employees contractually waive the right to overtime pay?

No, in Spain the right to overtime pay is unwaivable. In fact, the Spanish Constitution ensures that all types of work should be paid.

However, employees have the choice between remuneration and compensation with equivalent paid rest time.

22 Is there any legislation establishing the right to annual vacation and holidays?

Yes. Article 38 of the Workers' Statute provides that annual holiday entitlement is a minimum of 30 calendar days. Furthermore, article 40.2 of the Spanish Constitution guarantees the right to annual paid holidays.

Unless the number is increased owing to a collective agreement, every employee is entitled to at least 30 days of paid vacation every year. There are 14 days of public holiday not included in the minimum holiday entitlement.

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes. The General Social Security Law establishes the right of workers to suspend their employment agreements for temporary disability, whether it is owing to common illnesses or a work-related issue, for up to 12 months (and can be extended to 18 months).

During this time, if the suspension is due to common illness, the employee is paid at least 60 per cent of his or her salary, and from the 20th day, 75 per cent of the normal salary.

If the sickness or injuries are due to an accident at work, the employee is paid 75 per cent of the normal salary from the day following the suspension.

Furthermore, in the event of occupational disease, social security will pay from the first day, but for common illness or an accident the employer can only recover payments from Spanish social security after the 16th day of absence.

This notwithstanding, the applicable collective bargaining agreement can improve this system (eg, compensating 100 per cent of the salary while the employee is on sick leave).

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

A worker is entitled to be absent from work, with pay, as follows:

- 15 calendar days for marriage;
- two days for the birth of a child, or the death, accident, serious illness or hospitalisation of a relative;
- one day for changing residence;
- the necessary amount of time for performing mandatory obligations of a public or personal nature;
- time for participating in union functions; and
- the necessary amount of time for prenatal examinations and preparations for childbirth that must be undertaken during the working day.

The applicable collective bargaining can improve this paid leave of absence and include additional situations.

25 What employee benefits are prescribed by law?

The law does not go into great detail regarding employment benefits, leaving a broad scope for collective negotiations.

26 Are there any special rules relating to part-time or fixed-term employees?

Initially, part-time agreements must be made in writing. Since the publication of Decree-Law 16/2013 it is not necessary to include the agreed number of ordinary hours of work per day, week, month or year, and the distribution thereof, if the collective bargaining agreement so permits. In this kind of agreement, as Decree-Law 16/2013 establishes, overtime hours are not permitted except those provided for under article 35.3 of the Workers' Statute, which covers accident prevention and other extraordinary and urgent damage. The employee and employer can agree additional hours or these can be proposed by the employer as long as they equal less than 30 per cent or 60 per cent (established by collective bargaining) of the total number of worked hours.

A fundamental characteristic of temporary agreements is that they must be entered into in writing. A trial period may be agreed upon, and the agreement will terminate on the initiative of one of the parties, provided that the agreement is for more than one year, the advance notice period being required to be equal to, or greater than, 15 days. If the agreement lasts for more than one year, termination of the agreement entails compensation in the amount of eight days' salary per year worked.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

According to article 21.2 of the Workers' Statute, any non-compete clause after the termination of the employment contract must fulfil certain requirements:

- the employer must pay special compensation to the employee, which must be 'adequate' (according to case law, this means 40 to 50 per cent of the employee's salary that can be paid as a lump sum at the end of the employment relationship, at the end of the post-contractual non-compete period, while the employment relationship is alive, etc); and
- the agreement will apply for no more than two years after termination of the employment for qualified personnel and six months for non-qualified personnel (common practice is one year).

The duty of good faith consists of not competing with the employer and is the second limit to the freedom to 'moonlight'. An employee cannot work for another employer that competes directly in the market with his or her first employer because, even though the employee must show loyalty to his or her employer, it may be very difficult for the other employer not to take advantage of any sensitive data or exclusive knowledge obtained by the worker from the first employer.

Labour law does allow for a non-compete agreement to prohibit a former employee from working in a different organisation once the contract has expired with the first employer. However, this can only be done by agreement.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Labour law does allow non-compete agreements to prohibit former employees from working in different organisations once their contracts have expired with their first employers. However, this can be achieved by specific agreement.

An employee's dismissal will not affect the validity of the non-compete agreement unless the parties have agreed that it will terminate because of the dismissal.

The maximum length of a non-compete agreement is two years for 'technical' employees and six months for others. For high-ranking managers and commercial agents, the maximum length is two years.

As with any agreement that limits the freedom of one of the parties, the company is obliged to provide the employee with financial compensation. What is 'adequate' will depend on the circumstances, but the following principles are followed:

- the shorter the duration of the non-compete agreement, the less compensation is required; and
- if the agreement is signed at the time the employment contract terminates, the amount of compensation should increase.

If the employer fails to pay the agreed compensation, the employee may terminate the non-compete agreement or require the employer to pay what was agreed (conversely, it is lawful for the employer not to pay compensation if industrial or commercial interests have been lost for reasons beyond the employer's control, such as the incapacity of the worker).

If there is a breach of a non-compete agreement, the employer is entitled to request a refund of any compensation paid to the employee and to request damages. Of course, allegations must be proved in court if damages are to be awarded. The employee may also be required to carry out his or her non-compete obligations. Although the courts tend not to make rulings requiring compliance with non-compete obligations, some courts have done so in the past.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer may be held liable for the acts of its employees as a result of its contractual and dependent relationship. However, an employer may only be liable for those acts within the limits of the powers expressly conferred to employees. Outside of these functions, employees will be held directly liable for damages.

Taxation of employees

30 What employment-related taxes are prescribed by law?

The employer is required to withhold from the salary of workers the amount corresponding to individual income tax.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes, the Patents Act 11/1986 expressly protects employment-related inventions. Three kinds of work-related inventions are distinguished, as follows:

Service inventions

These are inventions that are the subject of the employment agreement and belong to the employer. The worker only has a right to supplementary compensation when his or her personal contribution to the invention and its importance to the company evidently exceed the requirements of the employment agreement.

Use or mixed inventions

These occur when a worker, not hired to engage in research activities, makes an invention related to his or her work for the company. The employer has the right to assume ownership or reserve a right of use. The worker is entitled to just economic compensation.

Other inventions

These are not truly work-related inventions, but are rather free from the terms of employment because the personal participation of the worker predominates. This means that the invention belongs to the worker, who may patent and use it.

Data protection

The duty of secrecy or confidentiality is imposed either legally or contractually on the occasion a person has access to confidential information. Every contract of employment can include an implied 'duty of fidelity' on the part of the employee, no matter how

senior that employee is. This imposes an obligation on the employee to provide loyal and faithful service. As a result, an employee must not disclose the employer's trade secrets or confidential information during employment.

However, information that amounts to skill and knowledge of the employee or information that is in the public domain cannot be protected.

Employers who wish to protect confidential information that does not amount to a trade secret once employment has ended may include an express contractual term to that effect, but this will not provide significantly greater protection than the implied duty of fidelity.

32 Is there any legislation protecting trade secrets and other confidential business information?

The same legal regime as detailed above will apply. This notwithstanding, it is common practice to include in the employment contracts a 'confidential clause' that would cover any breach of said duties, allowing the company to start any legal action against the employee to cover potential damages suffered by the breach.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Yes. In fact, the right to privacy is recognised by the Spanish Constitution in article 18. Furthermore, there are two specific regulations on this matter:

- the Spanish Data Protection Act 15/1999 (LOPD); and
- Royal Decree 1720/2077, ancillary to the LOPD, which sets out security measures for personal data and further regulation.

However, there is other general legislation that affects these fields of data protection, namely:

- article 18 of the Workers' Statute, which establishes a specific procedure for cases in which it is necessary to make a record of personal circumstances to protect the right to privacy of the employee; and
- article 197.2 of the Criminal Code, which prosecutes gross privacy violations under criminal charges.

In relation to the above-mentioned applicable regulations, employers must give employees a prior, express, clear and unequivocal warning that personal data may be obtained and used in disciplinary proceedings.

Furthermore, the Spanish courts have stressed that any collection and use of data must be necessary, appropriate and proportional in all the circumstances. Likewise, the courts have also emphasised that the fact that cameras are visible does not make any difference to the employer's obligations or the illegality of the employer's actions.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Article 44 of the Workers' Statute establishes that a change in the ownership of a company, workplace or autonomous productive unit thereof will not itself terminate the employment contract, and the new employer must assume the employment rights and obligations of the former, including pension commitments. In these cases, certain information or consultation rights regarding the affected employees are provided for in the law.

When there is a change of employer deriving from a transfer of a company or of an economic entity, the affected employees maintain their employment conditions, the employees should be notified in advance of the transfer and the new employer assumes the contractual and legal position of the former. Therefore, the relevant employment contracts do not vary because of the change to the employing party (by means of a 'transfer of undertaking').

If the transaction is carried out as a transfer of shares, which does not change the legal identity of the employer, it would not imply a transfer of undertaking.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

In Spain there is no termination without cause, so the employer must always properly justify the reasons for terminating an employment agreement.

The only exception to this rule is when termination of the agreement occurs during a trial period, at which time the employer is entitled to dismiss the worker without providing any reason whatsoever.

In this regard, dismissal cause is defined through the following situations:

Objective grounds

- Incompetence of the worker that becomes known or occurs after he or she joins the company.
- Failure of the worker to adapt to technical modifications affecting his or her job.
- Where there is a demonstrated objective need to decrease the number of jobs for economic, technical, organisational or production reasons.
- Absences from work, even if justified, but intermittent, that reach 20 per cent of working days for two consecutive months, provided that the total absences in the previous 12 months exceed 5 per cent of the working days, or 25 per cent for four non-consecutive months within a period of 12 months. There are some absences that are expressly excluded from the above calculations, for example: all absences of more than 15 days.

Disciplinary grounds

- repeated and unjustified absence from work or tardiness;
- lack of discipline or disobedience at work;
- verbal or physical offences to the employer or those working for the company or family members living with them;
- violation of contractual good faith, as well as abuse of confidence;
- continuing and voluntary decrease in the output of normal or agreed work;
- habitual drunkenness or drug addiction if it negatively affects work; and
- harassment based on race, ethnic origin, religion or convictions, disability, age or sexual orientation, and sexual harassment directed against the employer or persons working for the company.

The disciplinary grounds are also detailed in the applicable collective bargaining agreement.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

The notice that the employer must give in the event of termination of the agreement depends on the grounds for termination.

If the grounds are objective, the required notice is 15 calendar days. With respect to disciplinary dismissal, however, notice is not required because of the nature of the dismissal.

During the notice period the employee must work, but the employer usually makes a payment in lieu of notice in order to end the employment relationship. Hence, if the employer, being obligated to do so, does not give the required notice, it must compensate the worker in an amount equivalent to the days with respect to which notice was not given.

In the case of an 'objective' dismissal, the employee is entitled to paid leave of six hours per week during the notice period in order to look for alternative employment.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

As noted above, dismissals for gross misconduct do not require the employer to give notice or to pay compensation.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Two kinds of compensation must be distinguished, which vary in amount. For objective dismissals, in addition to giving 15 days' notice, the employer must pay the worker compensation of 20 days per year of service, periods of work less than one year being prorated by months, with a maximum of 12 monthly payments.

For disciplinary dismissals, the law does not require the employer to pay any compensation whatsoever.

If a court holds a dismissal to be unfair, the employer must choose between reinstating the employee (and pay the 'interim' salaries – salaries accrued between the dismissal date and the reinstatement date) or paying him or her the compensation of 33 days of salary per year of service, periods of work less than one year being prorated by months, with a maximum of 24 monthly payments.

Compensation may vary in cases of special employment relationships, such as those of upper management, professional athletes or artists in public shows.

39 Are there any procedural requirements for dismissing an employee?

In cases of objective dismissal, the employee must be notified in writing, stating the facts underlying the dismissal and the date the dismissal takes effect. At the same time as the delivery of the written notice, the compensation of 20 days' salary per year of service must be made available to the worker.

In cases of disciplinary dismissal, the worker must be notified in writing, stating the facts underlying the dismissal and the effective date. In some collective bargaining agreements for disciplinary dismissals a contradictory procedure must be followed, otherwise the dismissal could be considered as unfair.

In cases of collective dismissal, additional notification requirements are required. The notification on the opening of a consultation period will be made by a written statement to representatives of workers, the content of which should include:

- specification of causes – number and job classification of workers affected;
- number and job classification of workers employed during the past year;
- time period for proceeding with dismissals; and
- selection criteria regarding the workers affected by the measure.

In addition, an explanatory report concerning the reasons for collective dismissal and issues related to them must be provided. In general terms, the written notification will be accompanied by all information required to justify the collective dismissal.

40 In what circumstances are employees protected from dismissal?

The following categories of employees are protected from dismissals (in this case, the consequence would be the null and void declaration of the dismissal):

- workers' legal representatives;
- workers who have requested or are currently benefiting from specific legal rights (such as childcare leave; or have requested legal reduction of working hours); and
- workers who are victims of domestic violence exercising the rights to reduction or reorganisation of their working time, geographical mobility, or change of work centre or suspension of labour relations.

Workers after reinstatement at work at the end of the periods of contract suspension for adoption, fostering or paternity, provided that more than nine months have not elapsed from the date of birth, adoption or fostering of the child.

The dismissal of employees who have already initiated proceedings against the company, protected by the indemnity guarantee. This guarantees that the exercise of an action at law, or of preparatory acts prior to such an action, does not carry damaging consequences for the claimant in his public or private relations. In the field of labour relations, the indemnity guarantee protects employees from reprisals relating in any way to the exercise of their legal rights.

Update and trends

There has been a recent judgment issued by the European Court of Justice ruling that all the terminations of fixed-term contracts would be entitled to receive a severance payment amounting to 20 days' salary per year of service. This nothwithstanding, this new criteria has not been confirmed by the Supreme Court in Spain and, therefore, this is not confirmed in Spain.

41 Are there special rules for mass terminations or collective dismissals?

This procedure must be used when, in any 90-day period, the number of employees to be dismissed for economic, technical, productive or organisation reasons, equals or exceeds the following:

- 10 workers, in companies employing fewer than 100 workers;
- 10 per cent of the workers of a company employing between 100 and 300 workers; or
- 30 workers, in companies employing 300 or more workers.

Collective dismissal also includes the situation when the company has more than five employees and all of them are dismissed.

The procedure commences with the opening of a period for consultation with the legal representatives of the workers. The company has to communicate the opening of the period for consultation to the labour authority.

The notice to the legal representatives of the workers must be accompanied by all documentation necessary to show the grounds for the proceedings and the justification for the measures to be adopted. The notice of the opening of the consultation period is made in writing, addressed by the employer to the legal representatives of the workers, a copy of which is to be provided to the labour authority together with the communication.

Once the period for consultation has finished, the employer will notify the labour authority of the decision. If an agreement is reached, a copy of that agreement has to be sent to the labour authority, and in the case of no agreement the employer has to submit the final decision to the worker representatives and the labour authority.

Once the worker representatives have been notified of the final decision, the company has to notify those to be dismissed individually, and the period from the initial consultation to notification to individual employees must be at least 30 days.

The company's final decision can be challenged by the regular action provided for this kind of dismissal.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

The employees can claim on a collective or individual basis through the regular actions provided for this kind of dismissal. However, should the worker's representatives sue the company for the mass dismissals, all the individual claims presented will be put on hold.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The general rule is that employees retire when they are 65 (to be increased to 67), but this is only theoretically speaking because retirement in Spain is not compulsory.

The Royal Decree Act 5/2013 of 15 March 2013 amends legal reforms introduced by the 27/2011 Act, which contains measures to promote the continuity of the working life of older workers and to promote active ageing. The newest version of the Act increases the restrictions introduced in 2011 to prevent partial and early retirement from generating excessive burdens on the social security system. Furthermore, it allows for work and retirement benefits to be combined once the worker reaches the standard retirement age.

Early retirement is permitted on a voluntary basis up to two years before normal retirement age. Currently, this is 63, but as the normal retirement age increases gradually to 67 by 2027, the earliest voluntary retirement age will also increase gradually to 65.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Spanish legislation encourages parties not to apply to the courts with respect to agreements between the parties, using various institutions, such as the obligation to engage in conciliation before judicial proceedings.

It is also possible to apply to arbitrators, to whom the parties must expressly submit after the dispute arises. It is important to note that in an individual employment agreement it cannot be agreed that judicial proceedings will be excluded.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

Article 3.5 of the Workers' Statute expressly prohibits waiver by workers, before or after their acquisition of the rights recognised by mandatory legal provisions. Nor may they validly waive rights deemed to be mandatory in collective agreements. Therefore, the waiver of rights not deemed to be mandatory may be agreed upon on an individual basis in an employment agreement, or a collective agreement, by so stipulating.

46 What are the limitation periods for bringing employment claims?

Article 59.1 of the Workers' Statute generally provides that actions arising from an employment agreement, to which a special term is not applicable, will have a limitation period of one year after termination. This is the case for claims for monetary amounts and the enforcement of rights.

Exercise of an action against dismissal or termination of a temporary agreement is limited to 20 working days after the date of dismissal or termination.

For general claims (eg, salary claims) the limitation period is one year after the economical claim is accrued.

Violations committed by the employer have a limitation period of three years, except with regard to social security, for which the prescription period is four years. With respect to workers, minor violations have a limitation period of 10 days, serious violations are limited to 20 days, and very serious violations are limited to 60 days after the date the company had knowledge of the violations being committed, and in any event six months after the violation.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Swedish employment law is regulated by statutes and case law, as well as by collective agreements concluded with trade unions. Collective agreements are of great importance and they often contain regulations deviating from statutory provisions.

Regulations regarding employment protection are found in the Employment Protection Act. Employees whose duties and conditions of employment are such that they may be deemed to occupy a managerial or comparable position are excluded from the Employment Protection Act.

The Codetermination Act contains the general provisions governing the relationship between employers and trade unions in such areas as association, information, negotiations and labour stability obligations.

Other essential statutes are the Discrimination Act, the Annual Leave Act, the Personal Data Act, the Parental Leave Act, the Working Hours Act, the Working Environment Act and the Sick Pay Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The anti-discrimination legislation consists of the Discrimination Act, which prohibits both direct and indirect discrimination as well as harassment in working life based on sex, ethnicity, religion or other belief, disability, sexual orientation, transgender identity or expression, and age.

Under Swedish law, employers may neither discriminate against part-time nor fixed-term employees, nor treat an applicant or an employee unfairly on grounds related to parental leave. Trade union representatives are also protected from discrimination based on their union activities.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Employment is responsible for labour market policy and working life policy. All issues concerning labour legislation, work environment, working hours, salary formation, discrimination and equality fall within the scope of the Ministry.

The economic and legal treatment of employees is supervised by the labour market parties. The Labour Court is the final court for settling labour disputes.

The Equality Ombudsman monitors compliance with the Discrimination Act.

The Working Environment Authority's task is to supervise employers' compliance with the Working Environment Act and the Working Hours Act. It is also the authority responsible for matters regarding foreign workers posted in Sweden.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Normally, the local trade unions elect one or more representatives to represent the employees at a workplace, under the provisions of the Trade Union Representatives Act. Employees who are trade union representatives may not be prevented from carrying out union work during working hours, may not be discriminated against due to their union activities and are entitled to a reasonable leave of absence to carry out their union activities.

The Board Representation Act entitles employees of private companies bound by collective agreements employing at least 25 workers to appoint two ordinary and two deputy employee representatives to the board of directors. Employees of companies that have at least 1,000 employees and are engaged in different industries are entitled to appoint three ordinary and three deputy employee representatives to the board of directors. This entitlement to board representation may not result in the number of employee representatives exceeding the number of board members.

Sweden has implemented the Works Council Directive and the Directive establishing a general framework for informing and consulting employees in the European Community.

5 What are their powers?

Elected local trade union representatives represent the union members in, for example, negotiations, wage revision and information briefings at the workplace. There is no statutory time limit regulating the amount of leave a representative is entitled to for union work, as long as the leave is reasonable in relation to the extent of the activities. However, collective agreements may contain restrictions and specific information regarding leave. Union representatives have a reinforced statutory employment protection set out in the Trade Union Representatives Act. The representatives are given priority in a redundancy situation, notwithstanding the rules of seniority ('last in, first out') that normally apply. The priority rules only apply if the representative is of particular importance for the union activity at the workplace. Elected union representatives are, if needed in order to carry out their union activities, entitled to a room or space at the workplace.

Representatives who are appointed to the board of directors have the same powers and liabilities, such as voting rights, as the other board members. However, employee representatives are not allowed to participate in questions regarding collective bargaining agreements, industrial actions etc.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

An applicant's personal data is protected by Swedish law. Employers have limited possibilities of obtaining information from registers

containing information regarding applicants, such as medical information and criminal records. Hiring a third party to do the background check does not change the restrictions.

An applicant can on the other hand present information about themselves, if the employer should request it. An applicant is not obliged to comply with such a request. Applicants to positions such as teachers and day-care teachers, however, may be obliged to provide an extract from their criminal records before an employment agreement is entered into.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There is no comprehensive regulation under Swedish law regarding an applicant's obligation to undergo medical tests. Apart from the prohibition of discrimination and that an applicant may never be required to take a genetic test as a condition of employment, there are no other legal limitations to requiring an applicant to undergo a medical examination. An employer may refuse to hire an applicant who does not submit to such an examination. However, an employer must act in accordance with good labour market practice and may not select applicants who shall undergo medical examinations on grounds that could constitute discrimination.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no legal limitations to require an applicant to undergo a drug or alcohol test, and an employer can refuse to hire an applicant who does not submit to such a test. An employer must, however, act in accordance with good labour market practice. Furthermore, the employer may not select applicants who shall undergo a drug or alcohol test on grounds that could constitute discrimination.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Employers are generally free to hire whomever they please provided that they do not discriminate on grounds stipulated in the Discrimination Act or on grounds related to parental leave. However, affirmative discrimination may be legitimate when the aim is to improve equality between the sexes.

Employees whose employment has been terminated as a consequence of shortage of work shall have rights of priority for re-employment in the business in which they were previously employed, according to the Employment Protection Act. An employer who wishes to recruit within the operating unit may therewith be obliged to offer the position to a person with a right to priority. The priority is contingent upon the employee having been employed by the employer for a total of more than 12 months during the past three years. The right to priority applies during the notice period and thereafter until nine months from the date that the employment ceased.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

An employment agreement does not have to take any specific form. However, Sweden has implemented the directive on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. The employer must provide certain information in writing concerning the principal terms of the employment. This information must be provided to the employee within one month of the commencement of the employment.

The information should include the following:

- name and address of the employer and the employee;
- commencement date;
- place of work;
- duties and title;
- whether employment is fixed or for an indefinite term;
- the length of the probationary period;
- periods of notice;
- payment and other employment benefits;
- length of paid annual leave;
- length of normal work day or work week; and
- applicable collective agreements.

11 To what extent are fixed-term employment contracts permissible?

The general rule is that an employment agreement is for an indefinite period, unless otherwise agreed. The Employment Protection Act allows a general fixed-term employment when the employer is in need of fixed-term employees. A fixed-term employment agreement may also be concluded for a temporary substitute employment, for a seasonal employment and after the employee has reached the age of 67.

If, during the past five years, an employee has been employed either for a general fixed-term employment for in aggregate more than two years or as a substitute for in aggregate more than two years, the employment is transformed into indefinite-term employment.

Note that collective agreements may contain regulations deviating from the statutory rules governing fixed-term employment.

12 What is the maximum probationary period permitted by law?

The Employment Protection Act permits probationary employment for a period of no more than six months. The probationary period may not be extended at the discretion of the employer, nor with the consent of the employee. If the employment is not terminated at the expiry of the probationary period, the employment will automatically become employment for an indefinite term.

13 What are the primary factors that distinguish an independent contractor from an employee?

Under Swedish law, there are no explicit definitions of independent contractors or employees. An assessment must be made in each individual case by taking all relevant circumstances into consideration. In general, an independent contractor is economically independent. In contrast to an employee, the independent contractor is, inter alia, often responsible for materials and equipment, free to determine working hours, place of work, may have more than one principal and the remuneration is performance-related.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Sweden has implemented the Temporary Agency Work Directive through the Agency Work Act. The Act applies to workers who are employed by temporary-work agencies for the purpose of being temporarily assigned to work for a customer under the latter's supervision and direction. A temporary-work agency shall, for the duration of the worker's assignment, guarantee the worker at least the same basic working and employment conditions as would apply if they had been employed directly by that customer to carry out the same job. Deviations from this equal treatment provision may be made through a collective agreement concluded or approved by a central employee organisation.

A temporary-work agency is further prohibited from preventing a worker from accepting employment with a customer for which he or she is working or has worked as well as receiving remuneration from a worker in exchange for arranging for them to be placed at a customer or because a worker concludes a contract of employment with a customer.

A customer engaging temporary staff is obligated to give a worker access to collective facilities and amenities under the same conditions as workers employed directly by the customer and also to inform temporary workers of any vacant permanent positions and probationary employment available. A temporary-work agency and a customer shall pay damages for the loss and violation occurred by breaches of the Agency Work Act.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

EU and EEA citizens do not need a visa and they have the right to work in Sweden without work and residence permits. People who have a

residence permit in an EU country, but are not EU citizens, can apply to obtain the status of long-term resident in that country. They thereby enjoy certain rights that are similar to those of EU citizens.

If a citizen from a country that is not part of the EU wants to work in Sweden, he or she will need a work permit. If the employment is for a period longer than three months, he or she will also need a residence permit. If the employment is for a period shorter than three months, he or she may need a visa in addition to the work permit, depending on the employee's country of residence. There are, however, some exemptions from the requirement to hold a work permit for employees within certain professional categories who only plan to work for a short time in Sweden. The requirement for a work permit also applies to employees posted from another country as well as those who move within a company group to work. However, if the employee is resident in another EU or EEA member state and has been posted from there, no work permit is required.

The Posting of Workers Act applies to posted workers in Sweden.

16 Are spouses of authorised workers entitled to work?

Family members may be granted residence permits for the same period that the employee has been granted residence and work permits. If the employment is to be for more than six months, family members can also be granted work permits. Family members include husband or wife, or common law spouse and unmarried children that have not attained the age of 21.

Family members of EU or EEA citizens are entitled to begin working immediately.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Generally, citizens of countries outside the EU must have a work permit to work in Sweden. In order for a person to get such a permit the employer must have prepared an offer of employment and advertised the job in Sweden and the EU for 10 days (this applies to new recruitments). It is also required that the terms of employment are equal to or better than those provided under a Swedish collective agreement or customary for the occupation or sector. The employee must also earn enough from the employment to be able to support himself or herself, the gross salary should be at least 13,000 Swedish kronor per month and the relevant trade union must have been given the opportunity to express an opinion on the terms of employment.

Employers who intentionally or negligently employ foreign workers without work permits may be sentenced to a fine or to imprisonment for a maximum period of one year according to the Foreigners Act. Such an employer will also have to pay a special charge.

18 Is a labour market test required as a precursor to a short or long-term visa?

No, it is up to the employers to decide whether there is a need to employ a foreign worker.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

According to the Working Hours Act, regular working hours may not exceed 40 hours per week. Where the nature of work or working conditions generally so demand, working hours may amount to an average of 40 hours per week for a period of no more than four weeks. Where an employee is demanded to be at the employer's disposal at the workplace in order to carry out work if necessary, on-call hours may not be more than 48 hours over a four-week period or 50 hours over a calendar month.

Overtime comprises working hours in excess of regular working hours and on-call hours. Where additional working hours are required, overtime hours may not exceed 48 hours over a period of four weeks or 50 hours over a calendar month, subject to a maximum of 200 hours per calendar year. Deviations from certain regulations in the Working Hours Act can be made by collective agreement, but not in individual employment agreements.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Statutory law does not contain regulations regarding overtime pay. Overtime pay is normally provided for in collective agreements. In general, employees may choose to receive overtime pay in terms of money or compensatory leave. If no collective agreement exists, the employee is not entitled to overtime pay unless agreed upon.

21 Can employees contractually waive the right to overtime pay?

The right to overtime pay is not regulated in statutory law. If no collective agreement exists, the employee is not entitled to overtime pay unless agreed upon. If a collective agreement exists and provides a right to overtime pay, it may contain provisions making it possible for the employee to waive the right to overtime pay and instead get compensation in the form of compensatory leave. However, such waiver usually only applies to employees who have flexible working hours or if special reasons are at hand. Thus, unless otherwise provided for in collective agreement, employees can contractually waive the right to overtime pay.

22 Is there any legislation establishing the right to annual vacation and holidays?

Vacation entitlement is regulated by the Annual Leave Act, which distinguishes between unpaid and paid vacation, and between a 'vacation year' (1 April to 31 March) and a 'qualifying year' (the 12-month period prior to the vacation year). An employee earns his or her entitlement to paid vacation during the 'qualifying year' and is entitled to use his or her paid vacation during the 'vacation year'. The basic vacation entitlement is 25 paid days per year. Collective agreements or employment agreements normally contain rules entitling employees to a longer period of annual leave, in particular for white-collar employees not entitled to overtime pay.

Employees are entitled to take a continuous four-week vacation during June to August, unless there are circumstances justifying other arrangements. Employees who have been given a period of notice of termination of less than six months cannot be required to take their vacation entitlement during the notice period, unless they agree to do so. Under certain conditions, employees are entitled to exchange annual leave that has already been scheduled to, for example, sick leave or parental leave. It is possible for employees to carry over their entitlement to paid, but not unpaid, vacation days to the next vacation year, but only if the employee has earned more than 20 days of paid vacation, and only for those days that exceed 20 days.

Deviations from certain regulations in the Annual Leave Act can be made by collective agreement.

23 Is there any legislation establishing the right to sick leave or sick pay?

According to the Sick Pay Act, an employee is entitled to sick pay from the employer during the first 14 calendar days of each period of absence due to sickness. No sick pay shall be made for the first day, namely, the qualifying day. Thereafter, the employee is entitled to 80 per cent of his or her employment benefits in the form of sick pay.

In order to receive sick pay, the employee must notify the employer of the sickness immediately, and in order for the employer to be liable to pay sick pay from the eighth calendar day of the period of sickness, the employee must present a doctor's certificate. The employee may, in exceptional cases, be obliged to produce a doctor's certificate on the first day of sickness. Upon returning to work, the employee must confirm in writing that he or she has been absent due to sickness.

After the initial 14 days of sickness, statutory sickness benefits are paid by the Social Insurance Office. Employees are entitled to 364 days of statutory sickness benefits during a period of 15 months including the 13 days of sick pay from the employer. In certain situations, prolonged sickness benefits may be granted for a total of 550 days. Sickness benefits are primarily paid under the condition that the ability to work is at least reduced partly by sickness.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The provisions for parental leave and parental benefit are laid down in the Parental Leave Act and the Social Insurance Code. A parent is entitled to full leave for the care of a child until the child reaches 18 months, irrespective of whether the parent receives parental benefit. In addition, a parent is entitled to full leave during the period when the parent receives full parental benefit from the Social Insurance Office. Parental benefit is paid to parents for a total of 480 days, with an additional 180 days for the birth of more than one child. If both the parents have custody, each of them is entitled to 240 days with parental benefit. A parent may transfer the right to parental benefit to the other parent except for 90 days. In addition, fathers are entitled to 10 days of paternity leave in connection with the birth. Furthermore, a parent is entitled to parental leave and temporary parental benefit if their child is sick.

Employees who have been employed during the preceding six months, or for a total of at least 12 months during the preceding two years, have the right to educational leave in accordance with the Employee's Right to Educational Leave Act.

The Right to Leave to Conduct a Business Operation Act entitles an employee to full leave from his or her work for at most six months in order to conduct himself or herself, or through a legal entity, a business operation. However, the operation of the employee may not compete with the employer's operation, nor may the leave involve significant inconvenience for the operation of the employer. An employee is entitled to leave only during one period with one employer.

Several other statutes under Swedish law entitle employees to leave in special situations. Employees are, for example, entitled to leave for taking care of closely related persons and also for urgent family reasons, and immigrants have the right to leave for Swedish-language education. Finally, it is to be noted that collective agreements may contain regulations that entitle the employees to leave in special situations, with or without payment.

25 What employee benefits are prescribed by law?

There is no overall legislation regarding employee benefits, but there are some statutory provisions that give the right to payment in certain specific areas. For example, the Annual Leave Act entitles employees to vacation pay, the Sick Pay Act prescribes the right to sick pay during periods of sickness and the Employment Protection Act entitles employees to salary and other employment benefits during the notice period. Furthermore, employers are obliged to pay social security tax on the employee's salary and other employment benefits that, inter alia, include statutory pension contributions.

26 Are there any special rules relating to part-time or fixed-term employees?

According to the Prohibition of Discrimination of Employees Working Part-time and Employees with Fixed-term Employment Act, an employer may not disfavour part-time or fixed-term employees by applying less beneficial salary or other terms and conditions of employment than the employer applies or should have applied for employees in a similar situation who work full-time or have an indefinite term employment respectively, unless the employer demonstrates that the disfavour is not related to the part-time work or indefinite-term employment of the person disfavoured. This prohibition does not apply if the application of the conditions is justified on reasonable grounds.

A part-time employee who has notified his or her employer that he or she desires to have employment at a higher level of occupation, though at most full-time, has a priority right to such employment. This right is contingent upon the employer's need of labour being satisfied by the part-time employee being employed at a higher level of occupation and that the part-time employee is adequately qualified for the new work tasks. If these conditions are fulfilled, the employer must offer the employee a higher level of occupation before employing a new employee.

Fixed-term employment may not be terminated prior to the end of the period of the employment, unless this option is stated in the employment agreement and the termination is based on objective grounds.

Sweden has implemented the Fixed-term Work Directive and the Part-time Work Directive.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants are valid under certain conditions. In principle, such covenants should be used only for employees whose position in the company makes such restrictions necessary. The period of a non-compete covenant should not exceed 18 months. There is no such limitation in time for non-solicitation covenants, but in general they adhere to the time limitations set forth in non-compete covenants. A non-compete covenant may be deemed unfair if the employee does not receive compensation for the inconvenience that the covenant causes.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

The main rule is that post-employment restrictive covenants are valid only if they are reasonable. When determining whether restrictive covenants are reasonable, many different factors have to be taken into account, for example, if employees receive some kind of compensation for the restriction in the professional freedom that the covenants entail. According to collective agreements and market practice, employers are obliged to pay the difference between the employees' salary by the expiry of employment, and the lowest income that they may earn from new gainful activity. The compensation may not, however, exceed 60 per cent of the monthly income from the employer. A general assessment of a post-employment restrictive covenant's reasonableness must be made in each individual case.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The main principle is that the employer is responsible for all damage caused by the employee in the employment. For damage that an employee causes through fault or negligence in his or her employment, the employee is responsible only to the extent that there are exceptional circumstances with regard to the nature of the act, the employee's position, the interest of the injured party and other circumstances, according to the Tort Liability Act.

Taxation of employees

30 What employment-related taxes are prescribed by law?

The employee's obligation to pay preliminary income tax is prescribed in the Income Tax Act. The standard procedure is that the employer deducts the preliminary income tax from the employee's salary and pays the tax to the Swedish tax authority. Employers are obliged to pay social security tax on the employee's gross salary and other gross employment benefits. For 2017 the social security tax amounts to 31.42 per cent.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

The Right to Employee Inventions Act regulates the employee's and the employer's right to employee inventions. As a main rule, the employee has the same right to the invention as other inventors, unless otherwise stated. The employer may obtain the right to employee-created inventions, provided that the invention is created in connection with the employment and the employee's main work tasks, and that the utilisation of the invention falls within the employer's area of activity. Within the private sector there is a collective agreement regulating, inter alia, the employee's right to compensation when the employer obtains the right to employee-created inventions.

32 Is there any legislation protecting trade secrets and other confidential business information?

The Act on the Protection of Trade Secrets defines a trade secret as information concerning the business or industrial relations of a person conducting business or industrial activities which that person wants to keep secret and the divulgation of which would be likely to cause a damage from the point of view of competition.

Anyone who wilfully or through negligence exploits or reveals a trade secret of an employer of which he or she has been informed in the course of the employment under such circumstances that he or she understood, or ought to have understood, that he or she was not allowed to reveal it, shall compensate the damage caused by the action. Where the action took place after the termination of the employment, this shall apply only if special reasons are at hand (eg, if the employee immediately starts working for a competitor and uses trade secrets belonging to the former employee in the new employment).

The Act on the Protection of Trade Secrets also contains provisions on penalties for trade espionage and unauthorised tampering with a trade secret. Further, anyone who has violated a trade secret may be prohibited by the courts, under penalty of a fine, to exploit or reveal the trade secret. The courts may also order that documents or objects which he or she has in possession and which contains the secret shall be surrendered to the person who has been the subject of the unlawful violation.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There is no specific legislation regarding the employer's responsibility to protect employee privacy, but the Personal Data Act is intended to protect individuals against violation of their personal integrity by processing of personal data. Accordingly, there are restrictions on employers' use of data regarding employees, former employees and applicants.

According to the Personal Data Act, there are certain basic requirements for any form of processing of personal data that is fully or partly computerised. Personal data may only be processed if it is lawful and if the data is collected for specific, explicitly stated and justified purposes. The processing must be relevant and necessary for the purpose stipulated and personal data may not be stored for longer than necessary with reference to the specified purposes. The Personal Data Act also stipulates situations in which personal data may be processed in cases where the individual has not given his or her consent to the processing. For example, personal data may be processed in order to satisfy a purpose that concerns a legitimate interest of the employer, provided that this interest outweighs the interest of the registered person in protection against violation of personal integrity.

Sensitive personal data – for example, information about employees' or applicants' race or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade union or personal data concerning health or sexual preference – may only be processed in special circumstances.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

In conjunction with the transfer of a business from one employer to another, the rights and obligations under employment agreements and employment relationships that existed at the time of the transfer to the new employer shall also be transferred. Notwithstanding the above, employment agreements and employment relationships shall not be transferred to a new employer if the employee opposes such a transfer. The transfer of a business shall not, per se, constitute objective grounds for giving notice of termination of employment.

Under certain circumstances the transferor's collective agreement may be transferred to the transferee.

Before a decision regarding a transfer is taken, the employer may be obliged to negotiate with the concerned trade unions. The rules relating to the transfer of a business are not applicable to share transfers.

Sweden has implemented the Transfer of Undertakings Directive.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Employers may dismiss employees either with or without notice. As regards dismissals without notice, see question 37. A dismissal with notice must be based on objective grounds. Objective grounds are not defined by statute or case law, but can be either for objective reasons or subjective personal reasons. Objective reasons are dismissals based on redundancy, shortage of work or the economic situation of the employer, while subjective personal reasons are all dismissals that are not based on redundancy, shortage of work or the economic situation of the employer, such as the employee's conduct or performance.

An overall assessment of all the factors involved must be made when determining whether objective grounds for dismissal exist. A dismissal with notice will never be considered as based on objective grounds if there were other alternatives available to the employer, such as relocating the employee elsewhere within the business.

When the labour force has to be made redundant owing to objective reasons, the basic principle to be applied is that the employee with the longest aggregate period of employment with the company should be entitled to stay the longest. The employer must select those to be dismissed on a 'last in, first out' basis. One condition for continued employment is that the employee has sufficient qualifications for one of the available positions that may be offered.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

An employer must provide a prior notice of termination before dismissing an employee. The employer must observe certain formal rules set out in the Employment Protection Act when serving a notice of termination to an employee. Notices shall always be made in writing and must state the procedure to be followed by the employee in the event the employee wishes to claim that the notice of termination is invalid or to claim damages as a consequence of the termination. The notice shall also state whether or not the employee enjoys rights of priority for re-employment.

The provisions in the Employment Protection Act regarding termination of employment are mandatory; however, the employer and the employee may agree to terminate the employment. Accordingly, it may be possible to reach an exit agreement stipulating payment in lieu of notice.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Dismissal without notice is lawful only where the employee has committed a fundamental breach of the employment agreement, such as gross misconduct by disloyalty in working for competitors, and should be implemented only in exceptional cases.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

There are no statutory provisions regarding severance pay. However, an employee may be entitled to severance pay in accordance with an employment agreement, a collective agreement or an exit agreement.

39 Are there any procedural requirements for dismissing an employee?

The procedure for dismissing employees is laid down in the Employment Protection Act and varies to some extent depending on whether the termination is due to objective reasons or subjective personal reasons.

Prior to terminating an employment agreement owing to objective reasons, the employer may be obliged to conduct negotiations under the Codetermination Act. If an employer is bound by a collective agreement, the Codetermination Act limits the scope of mandatory negotiations in advance to matters involving 'significant changes in the employer's activities' or 'significant changes in working or employment conditions for employees'. A cutback in operations due to redundancy is considered as such a matter.

An employer who is not bound by a collective agreement is obliged to negotiate with a trade union where a matter specifically relates to the working or employment conditions of an employee who is also a member of the union in question. Hence, if the employer means to dismiss such an employee he or she shall request negotiations. Furthermore, the employer shall be obliged to negotiate with all affected employee organisations in all matters relating to dismissals based on redundancy.

Update and trends

As of 1 January 2017, new requirements apply for employers regarding compensation surveys. All employers shall conduct compensation surveys every year in in order to discover, rectify and prevent unfair differences as regards wages. For employers with 10 or more employees the survey shall be documented in writing. The employer shall, inter alia, analyse wage differences between women and men who perform work that is deemed equal or equally valuable. The employer shall evaluate whether existing wage differences directly or indirectly are related to gender. The evaluation shall specifically consider differences between:

- women and men performing work that is regarded as equivalent;
- groups of employees performing work that is, or is usually regarded as, female-dominated, and groups of employees performing work that is deemed to be of equal value to such work but that is not, or not usually regarded as, female-dominated; and
- groups of employees performing work that is, or is usually regarded as, female-dominated, and groups of employees performing work that is not, or is usually not regarded as, female-dominated but has higher wages despite the qualifications of the work is evaluated as lower.

In short, the new requirements mean that compensation surveys need to be conducted more frequently and with a wider scope of the analysis. Further, the scope of employers that need to conduct compensation surveys has been broadened.

The provisions and standard practices regarding wages and other employment terms and conditions that are applied by the employer are also a part of the general provisions regarding proactive measures, thus the employer must investigate, analyse and take measures in this area for all grounds of discrimination.

The new requirements have resulted in many employers reviewing their procedures for conducting compensation surveys and also taking the compensation surveys more seriously and including them in the systematic work to prevent discrimination in the workplace.

Prior to terminating an employment agreement for subjective personal reasons, the employer must notify the concerned employee in writing and, if the employee is a union member, the trade union, two weeks in advance. If an employer wants to dismiss an employee without notice, the information must be given one week before the dismissal. The employee or the trade union may, within one week from receiving the information, request consultation with the employer concerning the dismissal.

According to Swedish law, no prior approval from a government agency is required for dismissing employees.

40 In what circumstances are employees protected from dismissal?

According to the Employment Protection Act, employees are protected from dismissals when there are no objective grounds for a dismissal. A dismissal with notice will never be considered based on objective grounds if there were other alternatives available to the employer, such as redeploying the employee elsewhere within the business. Thus, before notice of termination is given, the employer must investigate whether there are any vacant positions within the employer's business that the employee can be relocated to.

Dismissals that are considered discriminating according to the Discrimination Act are prohibited. Furthermore, several other regulations protect employees from unfair dismissals. For instance, an employee may not be dismissed on grounds related to parental leave or leave of absence for educational purposes.

41 Are there special rules for mass terminations or collective dismissals?

The Codetermination Act does not recognise the term 'collective redundancies'. In contrast to many other European countries where the obligation to consult collectively is triggered only if there are several redundancies, the provisions on obligations to consult according to the Co-Determination Act are applicable even if the redundancy concerns only one employee (see questions 35 and 39).

A notification to the Swedish Public Employment Service shall be made if at least five employees are affected by a decision on terminations due to shortage of work. This also applies if the total number of notices of termination is expected to be 20 or more during a 90-day period.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

The right to resort to industrial actions is a constitutional right and laid down in the Instrument of Government. This right only applies to trade unions, employers or employer's organisations. Restrictions of this right are set forth in the Codetermination Act. The Codetermination Act stipulates that an employer and an employee who are bound by a collective bargaining agreement may not initiate or participate in an industrial action, where an organisation is party to that agreement and that organisation has not duly sanctioned the action. Furthermore, the action may not be in breach of a provision regarding a labour-stability obligation in a collective bargaining agreement or aim to:

- exert pressure in a dispute over the validity of a collective bargaining agreement, its existence, or its correct interpretation, or in a dispute as to whether a particular action is contrary to the agreement or to the Codetermination Act;
- bring about an amendment to the agreement;
- effect a provision that is intended to enter into force upon termination of the agreement; or
- aid someone else who is not permitted to implement an industrial action. Industrial actions that have been taken contrary to the above are unlawful.

The above does not prevent employees from participating in a blockade duly ordered by a trade union for the purpose of exacting payment of pay or any other remuneration for work that has been performed that is clearly due.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

An employee has a statutory right to work until the age of 67. However, according to several collective pension systems, an employee may choose to retire and receive pension benefits at the age of 65. If the employee has chosen to work until the age of 67, the employer may terminate the employment at the end of the month in which the employee reaches 67 by observing a notice period of at least one month. Notice of termination must be made in writing. It is also possible for an employer and an employee who has reached the age of 67 to enter into an employment agreement for a fixed term. If an employee continues to work after the age of 67 and no fixed-term employment agreement is concluded, the employer must prove that it has objective grounds to terminate the employment. The notice period in such cases is only one month.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

The employer and the employee may agree in an employment agreement that any future disputes shall be settled by arbitration. Such a clause may be deemed unreasonably burdensome for the employee and set aside by the courts, in particular if the employee does not occupy a managerial or comparable position.

Dispute resolution regulations may also be specified in collective agreements.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee may waive his or her contractual rights. As a general rule, an employee cannot waive rights laid down in mandatory law. An employee may, however, under certain circumstances waive mandatory rights, for example, where a dispute has arisen regarding the mandatory right.

46 What are the limitation periods for bringing employment claims?

Several statutes contain limitation periods for bringing employment claims. Limitation periods are set forth, for example, in the Codetermination Act, the Annual Leave Act and the Employment Protection Act. Furthermore, the Limitations Act stipulates limitation periods for salary and pension claims.

As stated above, limitation periods are stipulated in the Employment Protection Act. An employee who intends to initiate proceedings to have a dismissal, with or without notice, declared invalid shall notify the employer of such intention no later than two weeks after notice of termination was given or dismissal without notice occurred. Where negotiations have been demanded within the notification period in respect of a matter governed by the Codetermination Act, or by a collective bargaining agreement, proceedings must be commenced no more than two weeks after the conclusion of the negotiations. In circumstances other than those referred to above, proceedings shall be commenced within two weeks of the expiry of the notification period.

If an employee wants to claim damages based on the provisions in the Employment Protection Act, the opposite party must be notified within four months from the time of the tortious act or from the time the claim became payable. Where negotiations have been demanded within the notification period in respect of a matter governed by the Codetermination Act or by a collective bargaining agreement, proceedings must be commenced no more than four months after the conclusion of the negotiations. In circumstances other than those referred to above, proceedings shall be commenced within four months of the expiry of the notification period.

In a dispute regarding a dismissal, an employee may remain in his or her employment during the judicial procedure.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

Employment law in Switzerland is regulated on a federal (not cantonal) level. There are a number of statutes and regulations under both private and public law, the interdependence of which is rather complex.

The most important private law statute is the Swiss Code of Obligations (SR 220) which regulates, inter alia, individual employment contracts and collective labour agreements. It contains a variety of mandatory provisions from which the parties are not permitted to deviate at all or, as the case may be, only in favour of the employee.

The main public employment law statute is the Swiss Federal Act on Employment in Trade and Industry (SR 822.11) and its implementing ordinances (SR 822.111–822.117). They contain provisions on a number of issues such as the maximum number of working hours, night and Sunday work, rest periods and occupational health. Employees under 18 years of age and women during pregnancy and after childbirth are entitled to special protection.

Other important statutes relating to employment are:

- the Swiss Federal Constitution (SR 101), which provides, inter alia, for the principle of equal pay for equal work regardless of gender, and for the freedom to strike under certain conditions;
- the Swiss Federal Act on Gender Equality (SR 151.1);
- the Swiss Federal Act on Data Protection (SR 235.1);
- the Swiss Federal Act on Employment Exchange and Personnel Leasing (SR 823.11);
- the Swiss Federal Act on Employees sent to Switzerland (SR 823.20);
- the Swiss Federal Act on Employee Information and Participation in Operations (SR 822.14);
- the Swiss Federal Merger Act (SR 221.301);
- the Swiss Federal Act on Private International Law (SR 291); and
- the Swiss Ordinance Against Excessive Compensation in Listed Stock Corporations (SR 221.331).

The main statutes for resolving employment disputes are:

- the Swiss Code of Civil Procedure (SR 272);
- the Revised Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention, SR 0.275.11); and
- the Swiss Federal Act on Private International Law (SR 291).

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Any discrimination based on gender is strictly forbidden. The Swiss Federal Act on Gender Equality namely prohibits any unjustified discrimination in the hiring procedures, work assignments, working conditions, remuneration, continuing education, the promotion and dismissal of employees owing to gender, as well as any form of sexual harassment. The principle of 'equal pay for equal work' relating to men and women even has constitutional status.

Discriminating against an employee based on age, religion, race or sexual orientation by the employer may be considered a breach of contract (violation of the employee's personality) and makes the employer liable for damages (including for pain and suffering). The same holds true in cases of emotional abuse (mobbing). Employers are also liable if they do not reasonably protect an employee who is a victim of harassment or mobbing by other employees or superiors.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Employment disputes between employers and employees are heard by labour courts or the ordinary civil courts.

Cantonal labour offices (and other offices within cantonal administrations) are involved in the following areas or circumstances:

- issuing permits for temporary night and Sunday work;
- issuing work and residence permits for foreign employees;
- collective dismissals;
- issuing permits for professional personnel leasing;
- approving and supervising apprenticeship contracts;
- monitoring the labour market and initiating protective measures in the event of wage dumping; and
- enforcing compulsory minimal employment conditions with respect to employees posted to Switzerland.

At national level, the State Secretariat for Economic Affairs (SECO) plays an important role in employment matters. SECO is part of the Swiss federal administration and responsible for supervising the cantonal offices in their employment-related activities and in the application of the Swiss Federal Labour Act on Employment in Trade and Industry. Furthermore, it issues guidelines and directives on the interpretation and application of various statutes and regulations. SECO is also authorised to issue permits for permanent night and Sunday work.

Also active on the national level is the Swiss Accident Insurance Fund (SUVA). SUVA is responsible for approving working, health and safety conditions on industrial premises.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Swiss Federal Act on Employee Information and Participation in Operations provides that in enterprises with at least 50 employees, the employees are entitled to request the election of a workers' committee. In the absence of such request, employers are not obliged to establish a workers' representative body on their own initiative. As Swiss legislation keeps workers' representation at a rather basic level, this topic is typically addressed in more detail in collective labour agreements.

5 What are their powers?

Workers' committees have statutory information and consultation rights. The employer must provide the workers' committee in a timely manner with all information necessary for the fulfilment of its tasks. Furthermore, at least once a year the workers' committee must be informed about any impacts of the business development on the employees.

The workers' committee must be consulted in the event of a collective dismissal, if measures affecting the employees are planned in

the context of a transfer of business, in matters concerning job safety and health, in the organisation of work time and work schedules, and in the event of regular night work. Consultation means that before the employer takes a decision, the workers' committee must be appropriately informed, be granted reasonable time to consider the matter and to submit comments and proposals, and that the employer must provide a reasoning if the workers' committee's proposals are not followed.

If the employer wants to join or leave a pension fund, it can only do so in agreement with the workers' committee.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Background checks on applicants are only permitted with the applicant's explicit consent, and are strictly limited to information that relates to the applicant's suitability for the job (see question 32), irrespective of whether they are carried out by the prospective employer or by a third party.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

The prospective employer may request a medical examination only with the applicant's consent, and only to the extent that the examination is limited to identifying the applicant's mental and physical ability to perform the job. Confirmation or denial of the applicant's ability for the job (but no detailed diagnosis) is the only information the prospective employer is allowed to receive from the medical examiner. The prospective employer may decline an applicant who does not submit to an examination.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Drug and alcohol testing on applicants is only permitted with the applicant's consent, and only if justified by the job (ie, if there is a risk that the life or health of other employees or third parties could be endangered). The prospective employer may decline an applicant who does not submit to a test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

There are no requirements under Swiss law to give preference in hiring to particular people or groups of people. However, the prospective employer must not discriminate against any applicant based on gender, age, religion, race or sexual orientation (see question 2).

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Under Swiss law, the employment contract does not need to be in writing in order to be valid (exceptions: apprenticeship contracts, contracts for personnel leasing). However, if the parties wish to deviate from certain provisions of the Swiss Code of Obligations (eg, probationary period, notice period, remuneration of overtime work, sick pay) or agree on certain covenants (eg, post-termination non-compete covenants), they must do so in writing.

If no written employment contract has been signed, the employer must inform the employee in writing of the main terms of employment within one month from the beginning of the employment relationship. Non-compliance with this duty has no impact whatsoever on the validity of the employment contract.

11 To what extent are fixed-term employment contracts permissible?

In principle, fixed-term employment contracts are permissible under Swiss law. If the fixed term exceeds 10 years, however, each party is entitled to terminate the contract after 10 years by giving six months' prior notice as per the end of a month. For members of the board of directors, the executive board or the board of advisers of Swiss companies listed on a stock exchange, the employment contract must not exceed a fixed term of one year.

If more than two fixed-term employment contracts are concluded consecutively with the same employee for no justifiable reason, the employment relationship is usually deemed permanent. In such cases, in order to terminate the employment contract the statutory notice period must be observed, and the employee's legal protection against dismissal applies (see question 40).

12 What is the maximum probationary period permitted by law?

The first month of the employment relationship is deemed to be the probationary period. By written agreement, the parties may extend the probationary period up to a maximum of three months (in exceptional cases six months for apprenticeships), shorten it or waive entirely. The employer is not permitted to extend the probationary period unilaterally.

If the employee is absent from work during the probationary period due to sickness, accident or the performance of a legal duty that is not voluntarily assumed, the probationary period is prolonged accordingly.

13 What are the primary factors that distinguish an independent contractor from an employee?

The main distinctive factor is the employee's subordination: the employee is integrated into the employer's work organisation and is in personal, time and organisational aspects subordinated to the employer's directives. Conversely, an independent contractor lacks this element of subordination.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Swiss Federal Act on Employment Exchange and Personnel Leasing (SR 231.11) requires a permit for any person or company that supplies temporary workers. It further imposes certain obligations on such person or company, and regulates the employment contracts of the temporary workers as well as the lease agreements.

Furthermore, there is a collective labour agreement on staff leasing that is generally applicable in Switzerland and sets forth the employment conditions that must be granted to temporary workers as a minimum standard.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Based on the Swiss Federal Act on Foreigners (SR 142.20) and its implementing ordinances, there are numerical limitations on long-term and short-term visas for non-EU and non-EFTA nationals. Furthermore, in cases of non-EU or non-EFTA nationals a visa is, as a rule, only granted to highly qualified specialists or top officers. Also, it must be demonstrated that no suitable employee could be recruited on the Swiss, EU or EFTA labour markets (see question 18). These qualification restrictions are eased in cases of inter-company transfers. In contrast, EU-27 and EFTA nationals benefit from the bilateral treaties between Switzerland and the EU or EFTA member states. They are, in principle, entitled to obtain permission to take up employment in Switzerland. Special rules apply to the youngest EU member, Croatia.

On 9 February 2014, a majority of Swiss voters accepted the public initiative 'against mass immigration', which will lead to the implementation of new rules in the near future (see 'Update and trends').

16 Are spouses of authorised workers entitled to work?

Residence permits are generally granted to spouses of authorised workers if they live together. According to the Swiss Federal Act on Foreign Nationals, spouses of authorised workers with a long-term visa are basically entitled to work. Spouses of EU or EFTA nationals benefiting from the bilateral treaties between Switzerland and the EU or EFTA member states (see question 15) who have valid employment agreements are entitled to obtain a residence and work permit.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

It is the employer's responsibility to ensure that the employees are permitted to work in Switzerland. If the foreign employee has not been granted a work permit, the employer can face criminal charges. In addition, the employer is liable for the employee's costs of living, for costs due to the employee's illness or accident and for the costs of the employee's return journey. Furthermore, in the event of repeated violations, the employer risks not being granted work permits for future employees and to be excluded from public procurement.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test is required if an employer intends to employ non-EU or non-EFTA nationals (see question 15). This means that the employer has to demonstrate that no suitable employee could be recruited in the Swiss, EU or EFTA labour markets.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The Swiss Federal Act on Employment in Trade and Industry provides for various restrictions and limitations on working hours. The main restrictions concern night and Sunday work, which are subject to official permission. Furthermore, the daily and weekly working hours are limited as follows: 14 hours per day, and a maximum of 45 hours per week for employees in industrial enterprises and white-collar workers (office and technical staff and other salaried employees as well as sales staff in large retail enterprises), or a maximum of 50 hours per week for all other employees. These restrictions and limitations are mandatory for all employees to which the restrictions and limitations on working hours of the Swiss Federal Act on Employment in Trade and Industry apply (top executive staff are excluded, among others).

20 What categories of workers are entitled to overtime pay and how is it calculated?

Swiss employment law differentiates between work exceeding the contractually agreed hours and work above the maximum weekly working hours (see question 19). The former is governed by the Swiss Code of Obligations while the latter is governed by the Swiss Federal Act on Employment in Trade and Industry.

The Swiss Code of Obligations provides for a general obligation of the employer to remunerate work exceeding the contractually agreed hours. Such work must either be paid at the regular wage supplemented by at least 25 per cent or, with the employer's and the employee's consent, be compensated by granting the employee equal extra time off. This rule applies to all categories of employees (including top executive staff), unless otherwise agreed in writing or under a standard employment contract or collective labour agreement (see question 21).

Work above the maximum weekly working hours entitles the employee to overtime pay corresponding to the regular wage supplemented by at least 25 per cent or, with the employer's and employee's consent, to equal extra time off, provided, however, that the employee falls within the scope of the limitations on working hours of the Swiss Federal Act on Employment in Trade and Industry (see question 21).

21 Can employees contractually waive the right to overtime pay?

Employees can contractually waive the right to overtime pay and compensation by time off for work exceeding the contractually agreed hours (see question 20). In order to be valid, such waiver must be in written form and is only effective ex ante (ie, for overtime pay not yet earned).

For work above the maximum weekly working hours, the employee's entitlements to overtime pay (see question 20) are mandatory. For certain categories of employees to which the maximum of 45 hours per week applies, the mandatory entitlement does not include the first 60 hours worked above the maximum weekly working hours in a calendar year. These first 60 hours are treated the same as work exceeding the contractually agreed hours.

22 Is there any legislation establishing the right to annual vacation and holidays?

According to the Swiss Code of Obligations, the employee is entitled to a minimum of four weeks of paid vacation per year, except for employees under 20 years of age who are entitled to five weeks of paid vacation. The entitlement accrues pro rata temporis.

Employees are also entitled to paid leave on the Swiss national holiday (1 August). There are other public holidays whose number varies among cantons; the employer must give these holidays off but is not obliged to pay for them.

23 Is there any legislation establishing the right to sick leave or sick pay?

Based on the Swiss Code of Obligations, employees are entitled to full salary payment during a certain period of time if, for no fault of their own, they are incapable of performing work due to reasons inherent to their person (in particular, sickness, accident, performance of a legal duty), provided that the employment relationship has lasted, or has been entered into, for more than three months.

In the first year of service, the entitlement to sick pay is limited to three weeks. Thereafter, it is longer depending on the years of service. It varies among cantons; in the canton of Zurich, for instance, sick pay is due for eight weeks in the second year of service and one additional week for each additional year of service.

By written agreement, the employer's statutory obligation to sick pay can be replaced by an insurance that issues daily allowances, provided, however, that the employee is granted protection at equivalent level compared to the employer's statutory sick pay.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Apart from the annual vacation, and incapacity to work and public holidays (see questions 22 and 23), an employee is entitled to take a leave of absence in the following circumstances:

- maternity leave of 14 weeks; the employee receives daily allowances from a public insurance scheme;
- leave for non-scholastic youth work of up to one week per year of service (only for employees of up to 30 years of age), unpaid;
- short-term leave to attend to important personal or family matters (medical consultations, weddings, funerals, etc), normally paid except for employees paid per hour; and
- up to half a day per week to find new employment once notice of termination has been given, normally paid, except for employees paid per hour.

25 What employee benefits are prescribed by law?

Swiss employment law provides for the following statutory employee benefits:

- severance pay for employees of at least 50 years of age with at least 20 years of service. In practice, however, this is not of much practical relevance (see question 38);
- the employee may at any time request an employment certificate or a letter of confirmation; and
- the employer must provide the employee with sufficient food, suitable accommodation and aid in cases of illness if the employee lives in a common household with the employer.

Important employee benefits are structured through social security institutions, for instance accident insurance and family wage supplement insurance. Employers are obliged to pay their share to social security (see question 30). Furthermore, the employer must provide the employee with a pension scheme and pay employer contributions to such scheme.

26 Are there any special rules relating to part-time or fixed-term employees?

As a matter of principle, the general rules governing full-time and permanent employment apply to part-time or fixed-term employment as well. For fixed-term employment, see question 11.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination non-compete and non-solicitation covenants are only valid if agreed in writing and provided that the employment relationship gives the employee insight into the clientele or into manufacturing or business secrets, and the use of such knowledge could significantly damage the employer. The scope of such covenants must be reasonably restricted and must not, as a rule, exceed a term of three years. In order to be enforceable, non-compete and non-solicitation covenants require specific wording.

Swiss doctrine argues that post-termination covenants not to solicit employees or suppliers of the employer are invalid.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Under Swiss law, it is not a requirement for the validity of a restrictive covenant that the employer pays the former employee during the restricted period. However, when assessing whether the restrictive covenant is excessive, the court takes into consideration whether compensation for the restrictive covenant is provided. Therefore, depending on the circumstances, such compensation may increase the enforceability of the restrictive covenant.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

According to the general principles of Swiss tort law, employers are held liable for unlawful acts and omissions of their employees if the following conditions are met:

- the unlawful act or omission has a functional connection with the employee's performance of his or her work;
- the unlawful act or omission caused damage to a third party; and
- the employer fails to prove that it took all reasonable precautions in order to prevent damage of that kind (ie, that the employee was chosen with due care, and trained and supervised adequately), or that the damage would have occurred in spite of such precautions.

Employers are liable towards their contracting partners for unlawful acts and omissions conducted by their employees in the course of the performance of the contract, unless the employers would be deemed not at fault had they acted themselves. This liability may be limited or excluded by agreement, but only for slight negligence. These principles may also apply if an employee unlawfully damages another employee (in cases of sexual harassment, mobbing, etc).

Taxation of employees

30 What employment-related taxes are prescribed by law?

As a rule, the employees' remuneration is subject to income tax and social security and pension charges.

The income of employees who are foreign nationals without a permanent residence permit for Switzerland is subject to withholding tax, which means that the employer is responsible for deducting the tax from the employees' salaries and forwarding it to the tax authorities.

The employer also has to deduct the employees' contributions to social security and pension charges from their gross salaries and forward it, together with the employer's contributions, to the relevant social security and pension institutions.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

According to the Swiss Code of Obligations, inventions and industrial designs created by the employee, or to which the employee contributed, while performing his or her employment activity and contractual duties, belong to the employer. By written agreement, the employer may reserve the right to acquire any inventions or industrial designs created by the employee while performing the employment activity but not his or her contractual duties against appropriate compensation. Such an agreement obliges the employee to notify the employer in writing once a relevant invention or industrial design has been created. The employer must then inform the employee within six months from receipt of the employee's notification whether the invention or industrial design will be acquired, and if so, pay appropriate compensation.

The Swiss Federal Act on Copyright (SR 231.1) gives the employer the exclusive right to use any computer programs created by the employee while performing his or her employment activity and contractual duties.

32 Is there any legislation protecting trade secrets and other confidential business information?

According to the Swiss Code of Obligations, the employee must not reveal or exploit confidential information, such as manufacturing or trade secrets, obtained while in the employer's service during the employment relationship. After the end of the employment relationship, the employee remains bound to the obligation not to reveal confidential information to the extent necessary to safeguard the employer's legitimate interests.

Trade secrets and other confidential business information are further protected by the Swiss Criminal Act (SR 311.0). Any person who betrays a manufacturing or trade secret that he or she is under a statutory or contractual duty not to reveal, and any person who exploits for him or herself or another such a betrayal, is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Employee privacy and personal data are protected by the Swiss Code of Obligations and the Swiss Federal Act on Data Protection. The employer is generally obliged to respect and protect the employee's individuality and privacy. The employer is only allowed to process the employee's data to the extent they relate to the employee's suitability for the employment relationship or are necessary to fulfil the employment contract. In addition, such data must be collected lawfully and in good faith, be processed only for the purpose for which it was collected and be secured against unauthorised access and processing. Furthermore, the employee must be informed of the data collection and its purpose. The employee may request information from the employer regarding what personal data are in the employer's data collection, and demand the correction of any inaccurate data.

The employer is not permitted to permanently monitor the employee's behaviour at the workplace by using technical installations (eg, video cameras, keylogging software).

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Since Switzerland has autonomously reproduced Directive 77/187/EC in its Code of Obligations and takes the relevant case law of the European Court of Justice into consideration, the protection of employees in Switzerland in the event of business transfers matches EC standards. This protection is based on the following five principles:

- transfer of employment – if the employer transfers the enterprise or a part thereof to a third party, the employment relationship, including all rights and obligations, is transferred to the acquiring party as of the date of transfer;
- continued validity of a collective labour agreement – if a collective employment agreement applies to the employment relationship, the acquiring party must comply with it for one year unless it expires earlier or is terminated by notice;
- right of the employee to decline the transfer;
- joint and several liability of the seller and the acquirer for certain claims by the employee; and
- information and consultation duties of the employer towards the workers' committee or, if there is none, the employees.

These rules apply not only in cases of a transfer of business in the strict sense (asset deal), but also in cases of mergers and demergers (where the additional rules set forth in the Swiss Federal Merger Act apply).

Update and trends

The Swiss Labour Act and its implementing Ordinance 1 oblige employers to record the staff's working time in detail (on a daily basis: start of work, breaks, end of work). The employer must keep the records for five years and present them to the labour inspectorate upon request. Exceptions apply for a few categories of employees only (eg, commercial travellers, top executives). On 1 January 2016, new provisions in the Ordinance 1 entered into force providing for the possibility, under narrowly defined conditions, to renounce working time recording at all or to use a simplified working time recording. The matter is still highly debated in Switzerland and there are political drives aiming at more flexible rules in this respect.

On 9 February 2014, a majority of Swiss voters accepted the public initiative 'against mass immigration'. It obliges the government to enact a new immigration system based on quotas within three years. The implementation of the initiative was highly debated in Switzerland. Swiss parliament has now opted for a system of preferred treatment for registered unemployed people. Vacancies will have to be notified to the authorities and will be, in a first step, communicated to registered unemployed people only. The employer will be obliged to invite suitable applicants to a job interview or job assessment. It is still unclear when the new rules will enter into force. Other aspects of the initiative are still being debated.

Depending on the circumstances, the principles outlined above may also apply to outsourcing.

Business transfers related to restructurings under insolvency laws are subject to special rules.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Swiss employment law upholds the liberal principle that an employee may be dismissed with notice for any reason except for reasons that are considered abusive (see question 40). Dismissal without notice requires valid reasons (see question 37).

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Swiss employment law differentiates between ordinary termination and termination with immediate effect for valid reasons (for the latter, see question 37). Ordinary termination means notice of termination must be given. The statutory notice period is one month in the first year of service, two months from the second through the ninth year and three months from the 10th year of service. The parties may agree on a different notice period; however, such agreement must be in writing and the agreed notice period must not be less than one month, and if it is for a member of the board of directors, the executive board or the board of advisers of Swiss companies listed on a stock exchange, must not exceed one year.

Payment in lieu of notice is not possible; the notice period must be observed. The employer may release the employee from the obligation to work during the notice period, but remains obliged to pay the salary and to grant other contractual benefits throughout the notice period.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

The employer may terminate the employment relationship without notice for valid reasons only. In particular, a valid reason is considered to be any circumstance under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship. Swiss courts set very high standards for valid reasons. Usually, serious misconduct of the employee is required.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Swiss law does not provide for any right to severance pay upon termination of employment. There is a rule that prescribes severance pay in the amount of a minimum of two and a maximum of eight monthly salaries for employees of at least 50 years of age and with at least 20 years of service. However, it hardly ever applies in practice because the employer's pension contributions, which accumulated over 20 years are usually higher, can be deducted from it.

If the termination of employment is related to a mass dismissal triggering the obligation to establish a social plan (see question 41), severance payments may be provided under the social plan.

39 Are there any procedural requirements for dismissing an employee?

Unless otherwise agreed in the individual employment contract or in collective labour agreements, notice of termination is not required to be issued in written form (although written notice is, of course, recommended in practice for evidentiary reasons). With the exception of mass dismissals (see question 41), federal and cantonal authorities or workers' committees are not involved in the termination process.

The employer must give notice of termination in a way that is fair and does not offend the employee's personality. Otherwise, notice bears the risk of being considered abusive (see question 40).

40 In what circumstances are employees protected from dismissal?

Employees are under statutory protection against abusive dismissal, dismissal during 'prohibited periods' and under the Swiss Federal Act on Gender Equality as explained hereinafter:

Abusive dismissal

Dismissal is considered to be abusive namely if it occurs for reasons such as:

- characteristics inherent in the employee's personality, such as age, race, sex or origin, unless such characteristics relate to the employment or significantly prejudice collaboration within the enterprise;
- the employee exercises a constitutional right, such as political activity or religious liberty, unless such exercise of right is in breach of the employment contract or significantly prejudices collaboration within the enterprise;
- the employer aims to frustrate claims arising out of the employment relationship;
- the employee asserts in good faith claims based on the employment contract (notice of termination as an act of revenge);
- the employee performs compulsory military or civil defence service;
- the employee's membership or non-membership in an employees' association or the employee lawfully exercises a union activity;
- during the period the employee is elected as an employee representative unless the employer can prove valid grounds for the notice; or
- in connection with mass dismissals, if the employer does not observe the consultation procedure (see question 41).

This list is not conclusive. Swiss courts defined further types of cases of abusive dismissal, for instance if the duty of care requires the employer to wait with or refrain from a dismissal under the given circumstances.

Abusive dismissal is valid (ie, the employee does not have to be reinstated). However, the employer must pay an indemnity to the employee. The indemnity is determined by the judge but cannot exceed an amount equalling the employee's salary for six months (two months if the consultation procedure for mass dismissal is not observed). Employees who want to claim indemnity must object to the dismissal in writing within the notice period and file a court action against the employer within 180 days from the termination date.

Dismissal during prohibited periods

The employer cannot give valid notice during prohibited periods:

- during the employee's performance of compulsory military or civil defence service and, if the service lasts more than 11 days, for four weeks prior to and following the service;
- if the employee is fully or partially incapable of performing work due to illness or accident; the employee is protected during a period of 30 days in the first year of service, 90 days in the second year up to and including the fifth year of service and 180 days as of the sixth year of service; and
- for the duration of the employee's pregnancy and the 16 weeks following childbirth.

Notice given by the employer during a prohibited period is null and void. If notice has been given prior to the beginning of a prohibited period and the notice period is still running, that notice period is suspended for the time of the prohibited period and continues thereafter. Should the notice period then not end on the last day of a month, the employment relationship is normally extended to the end of the respective calendar month.

Special protection under the Swiss Federal Act on Gender Equality

Under the Swiss Federal Act on Gender Equality, employees affected by gender discrimination or sexual harassment may file an internal complaint, refer to a conciliation authority or file a court action. During these proceedings and for six months thereafter, the employee is protected against dismissal unless the employer can prove valid grounds for the dismissal. If the notice of termination is challenged before a court within the notice period, the employee may request provisional re-employment for the duration of the proceedings. Instead of provisional re-employment, the employee may decide to claim indemnity for abusive dismissal (see above).

41 Are there special rules for mass terminations or collective dismissals?

Under Swiss law, mass dismissals are deemed to be notices of termination given by the employer within a period of 30 days for economic reasons (reasons unrelated to the person of the employee) and affect:

- at least 10 employees in enterprises usually employing more than 20 and less than 100 persons;
- at least 10 per cent of all employees in enterprises usually employing more than 100 and less than 300 persons; or
- at least 30 employees in enterprises usually employing at least 300 persons.

As a principle, if mass dismissal is envisaged, the employer has to consult with the workers' committee or, if there is none, with all employees. Consultation means that the employer must inform the workers' committee or the employees about the reasons for the mass dismissal, the number of employees to be dismissed, the number of persons usually employed and the specific period over which the dismissals are planned to be carried out, and give the workers' committee or the employees the opportunity to suggest how to avoid such dismissals, to limit their number or to alleviate their consequences.

After expiry of the consultation period, the employer must notify the competent labour office in writing of any planned mass dismissal. This notification must contain the results of the consultation and all appropriate information regarding the planned mass dismissals. It is also a condition precedent for any dismissals to become effective.

The employer is obliged to negotiate and establish a social plan if it normally employs at least 250 employees and intends to terminate at least 30 employees within 30 days for reasons not related to their person. If the employer is party to a collective labour agreement, it has to negotiate the social plan with the contracting trade unions or trade unions. Otherwise, it has to negotiate with the workers' committee or, if there is none, with the employees.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class actions are generally not permitted in Switzerland. In principle, employees may assert labour and employment claims only on an individual basis. If the matter concerns rights and obligations that are based on similar facts or similar legal grounds, several employees can file an action together (permissive joinder), provided that the same mode of proceedings applies to all individual actions. Every joined employee remains individually responsible for conducting his or her proceedings and cannot draw any advantages or disadvantages from the conduct of another joined party. The main benefit of filing an action together is to save costs. If there are a number of parallel cases, the court may choose one case as a pilot case and suspend the other cases for the time being.

Under particular circumstances, trade unions that are parties to a collective labour agreement are permitted to file an action for a declaratory judgment against an employer for claims arising out of this collective labour agreement. With such an action, the trade unions could assert for instance that the employer breached the collective labour agreement towards several employees.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Employment contracts can specify that employment is terminated automatically upon reaching the statutory retirement age (currently 64 for women and 65 for men). If the employer's pension scheme provides for a lower retirement age, reaching that age can be chosen as the fixed termination date of the employment contract.

Likewise, it is possible for the employer to give notice of termination, observing the applicable notice period, valid as at the time the retirement age is reached.

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Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Pursuant to the Swiss Code of Civil Procedure, private arbitration is permissible for domestic employment disputes if they concern claims of which the employee can dispose freely. This means that private arbitration is not permitted for claims arising out of mandatory provisions of law or out of mandatory provisions of a collective labour agreement, unless the parties agree on arbitration later than one month after termination of the employment relationship (see question 45).

In cross-border employment disputes, private arbitration of employment disputes is generally permissible.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

During the employment relationship and for one month after its termination, the employee cannot validly waive claims arising out of mandatory provisions of law or out of mandatory provisions of a collective labour agreement (eg, a claim for compensation for overtime performed in the past, right to minimal legal notice). However, the employee may renounce such claims in a settlement agreement provided that the employer makes sufficient concessions.

46 What are the limitation periods for bringing employment claims?

The limitation period applicable to employee claims for salary is five years; other employee claims and all employer's claims are subject to a limitation period of 10 years.

It has to be noted, though, that claims for indemnity following abusive termination in general or following discriminatory termination under the Swiss Federal Act on Gender Equality must be submitted to a court within 180 days from the termination of the employment contract, and are only permissible if the employee objected in writing to the termination within the notice period (see question 40).

Thailand

Pisut Rakwong and Nalanta Tonghorm
Pisut and Partners

Legislation and agencies

1 What are the main statutes and regulations relating to employment?

In Thailand, the main statutes and regulations related to employment are as follows:

- the Civil Commercial Code;
- the Labour Relations Act 1975;
- the Act on Establishment of the Labour Court and Labour Dispute Procedure 1979;
- the Social Security Act 1990;
- the Workmen Compensation Act 1994;
- the Labour Protection Act 1998;
- the Occupational Safety, Health and Environment Act 2011;
- the Provident Fund Act 1987;
- the Alien Employment Act 1978; and
- the Skill Development Promotion Act 2002.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Constitution of Thailand restricts discrimination based on nationality, age, gender, language, physical or social status, religion, education and political affiliation. The Labour Protection Act (LPA) prohibits discrimination in employment based on gender, except where equal treatment is impossible because of the nature of certain work. The LPA also limits the type of work which an employer can compel women and child employees to do. Per the ministerial regulation issued by virtue of the LPA, an employer is not allowed:

- to employ female workers in work in various types of unsafe underground construction;
- to employ female workers in work on scaffolding above a certain height;
- to employ female workers in work involving production and transportation of explosives;
- to employ pregnant women to work between 10pm and 6am, work on a holiday, work overtime, or perform work with vibrating machinery or engines, that requires driving and conveyance, carrying objects weighing more than 15 kg or vessel work; or
- to terminate pregnant employees on the grounds of pregnancy.

The LPA prohibits an employer or any of the higher officers or positions occupied by the company from sexual harassment of any employee. The subject of harassment does not necessarily have to be a woman or child, or have a lower ranking or be among the same ranking. The violating party may face criminal penalties and a fine not exceeding 20,000 baht.

Additionally, children under 15 years old are restricted to undertake only employment as set out by the LPA. However, if children under 18 years old are employed, the LPA imposes restrictions and special requirements to protect the child's well-being. There are some jobs in particular that do not allow an employer to compel the minor to work (ie, smelting, working with hazardous materials, bacteria, micro-organisms, explosives, radiation, cranes, forklifts, cleaning of machinery or engines while in operation or running, electric or motorised saws, etc).

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Department of Labour Protection and Welfare under the Ministry of Labour is tasked with the administration of the rights of both employer and employee as well as the enforcement of statutory employment. The Department and Ministry issue regulations if there are issues or concerns that need clarification and in some cases, require modification of the prescribed rights under the LPA.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

In terms of the establishment of employee representation, the employees can form a representative body by way of an employees' committee, labour union, labour federation or employee organisation council, subject to the conditions set out by law.

5 What are their powers?

In cases where there are more than 50 employees in the workplace, an employees' committee can be formed to represent the employees in relation to the employment and maintain a good relationship between employer and employee.

The main goal for a labour union is to acquire and protect interests in association with the conditions of employment and to promote better relationships between employers and employees, and among employees themselves.

As a labour federation is set up by more than two labour unions, the key objectives would be to promote a better relationship between labour unions and to protect the labour unions' and employees' interests.

In addition, the labour union and labour federation may jointly establish an employees' organisation council for promoting study and labour relations.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

At present, Thailand does not have any law specifically restricting the conduct of background checks. Thus, the employer is entitled to do so providing that it is not contrary to other applicable laws.

While searching for or obtaining information, publicly available information is permitted, and certain information such as education, financial status, health record, criminal record or employment record, which contain the name of the employee or contain a numeric reference, are restricted per the Official Information Act 1997. These types of information cannot be obtained unless a written consent is given by the person who is the subject of such information.

In addition, the employer must impose the same standard to all applicants' background checks, and it must not be a random check. Otherwise, it shall be considered as discrimination.

There is no difference whether the employer conducts its own checks or hires a third party, but it must clearly specify in the applicant's written consent letter who is the person that the applicants give consent to, in order to prevent any disputes in the future.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

In Thailand, there are no specific regulations on the requiring of applicants to undergo medical examination. Therefore, the employer can request a medical examination as one of the terms and conditions of employment. However, the National Human Rights Commission of Thailand has forbidden employers from specifing HIV as an employment condition; such violation will be considered as a violation of human rights.

If the applicant refuses to submit to a medical examination, the employer has a right to refuse to hire such applicants only if there is a regulation specifying the requirement of medical examination in the company's work rules, for the employer to have legal ground in refusing to hire such applicants.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no restriction against drug and alcohol testing.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

As previously explained in question 2, there are some restrictions on the type of work that women and children can be requested to undertake by their employer.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

According to section 575 of the Thai Civil and Commercial Code, it is not compulsory that the employment agreement must be in writing. This means that the employment agreement can be executed by any form, regardless of a written or oral, expressed or implied agreement. Most employment agreements are not required to be in writing to be legally valid, but it is better if they are in writing to avoid any misinterpretation or challenges in the future.

11 To what extent are fixed-term employment contracts permissible?

The fixed-term agreements are subject to certain restrictions under Thai law. The principal statute regulates the fixed-term employment agreement under the LPA. A fixed-term agreement must be in writing and must explicitly identify that such agreement is fixed by specifying the predetermined period of employment. Also, a fixed-term employment agreement must not have a probation period. Such agreement must clearly state that the employment will terminate at the end of the period.

In case the employee continues to work for the employer after the end of the agreed period, and the employer does not challenge the 'de facto extension', it shall be presumed that an employee is working on a non-fixed term agreement. A fixed-term employment agreement shall expire at the time that the specified period in the agreement ends without any requirement of giving prior notice to the employees.

The Thai Supreme Court also set out the criteria of the fixed-term employment agreement such that the agreement must not contain a clause entitling either party to terminate the employment contract before its term without any party being in default, nor renew the term of the agreement at the end of its term. Otherwise, such agreement shall be deemed as a non-fixed term agreement, with reference to the Thai Supreme Court Judgment Nos. 5180/2542, 6767-6769/2542 and 10432/2546.

Apart from the above, there are also certain types of work for which a fixed-term employment agreement can be used, and it must be completed within two years. For example, a special project that is out of the normal sphere for the business or trade of the employer, whereby the schedule for commencement and completion of work is fixed, temporary work that has a fixed schedule for its commencement and completion or seasonal work.

12 What is the maximum probationary period permitted by law?

There is no mandatory minimum probation period in Thailand. Most employers tend to set the probation period to be 119 days or less, because the probationary employee can be terminated within the probation period of 119 days without any severance pay under Thai law. However, one month's written prior notice must be given to the employee as the probationary employment is considered as a non-fixed term hire agreement.

The probation period cannot legally be extended. The employer may choose to extend the period for some reason. However, the employer shall be liable to pay severance and serve the employee an advance notice after the 119 days expires.

13 What are the primary factors that distinguish an independent contractor from an employee?

The determination of a contractor and an employee is reliant on the nature and substance of the work arrangement. The Thai court will take into consideration on a case-by-case basis to determine whether an employment relationship has actually been created, regardless of what the agreement is called. Normally, the court will place emphasis on the two features that are the manner of the wages or remuneration payment and the scope and nature of the employer's authority to supervise that contractor.

If the wages or remuneration are paid on a regular hourly, daily, weekly or monthly basis, regardless of whether the work has been completed, the court will take this into account as the creation of an employment relationship. On the other hand, if wages or remunerations are paid in a lump sum upon completion of a certain job or project, this arrangement is more likely considered as a contractor. However, the method of wages or remuneration itself cannot exactly determine the difference between a contractor and an employee, the company or the employer's authority to supervise the workers must be kept in mind as well.

In case the company or employer grants more authority or right to orders, controls or directs the contractor in carrying out the assigned work, and the degree of independence and flexibility by way of work hours and work performance, this arrangement would be deemed as an employment agreement that is subject to statutory obligations under the LPA.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Temporary workers are considered as employees under the LPA and entitled to the same rights and benefits as permanent employees as set out by law.

Per section 11/1 of the LPA, the outsourced or agency workers are granted protection under this Act. The business operator who uses an outsourcing service for its personnel is considered as an employer of the outsourced workers. Such operator must arrange for the outsourced worker performing work in the same description as a direct employee to receive fair benefits and welfare without any discrimination.

Practically, the business operator and the outsourcing company may come to an agreement regarding which party is responsible for the benefits and welfare to the outsourced worker and to what extent they must be arranged.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

No. There is no numerical limitation or quota on short-term visas. It is under the Royal Thai Embassies' discretion to grant visas to eligible applicants.

The employee is required to obtain a non-immigrant visa at the Royal Thai Embassies or Consulates-General abroad before their work

in Thailand. As it is a different jurisdiction, the visa in one jurisdiction cannot be used in another jurisdiction.

16 Are spouses of authorised workers entitled to work?

A spouse is entitled to work in Thailand subject to the Thai work permit and the proper visa type granted (non-immigrant visa).

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

In addition to the compliance of Thai Immigration Law, all foreigners are required to obtain a work permit from the Department of Employment, Ministry of Labour before commencing work in Thailand. However, there are certain positions which are exclusively reserved for Thais; a work permit cannot be granted for these.

The granting of a work permit is usually subject to the authorities' discretion. The authorities mostly take into consideration the personal requirements such as holding a non-immigrant visa, being free from certain diseases, never having been imprisoned for violation of immigration laws or the Foreign Working Act at least one year prior to the date of application, the ratio of Thai to foreign workers, the paid-up share capital and other criteria set out by law.

It is a criminal offence for a foreigner to be working in Thailand without a valid work permit, resulting in imprisonment of up to five years or a fine from 20,000 to 100,000 bhat, or both.

18 Is a labour market test required as a precursor to a short or long-term visa?

In Thailand, the labour market test is not compulsory for obtaining a short-term or long-term visa for working in Thailand. However, the applicant wishing to apply for a long-term business visa is required to submit any proof of the need to employ the foreigner; this can be in the form of an affirmation letter that there is no suitably qualified and experienced Thai citizen readily available to fill that position.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Yes. The maximum working hours are fixed at eight hours per day and 48 hours per week or seven hours per day and 42 hours per week for jobs considered hazardous to health. There are exceptions for certain occupations. The employee and employer may agree to an arrangement of working hours as long as they do not exceed 48 hours a week.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Apparently, the LPA prescribed that an employer may not compel an employee to work overtime and an employee's consent to work overtime is required. However, if the nature of the description of the work requires that is continuous and a stoppage would damage the work, or the work is of an emergency nature, the employer may instruct the employee to work overtime on regular days or holidays to the extent that it is necessary.

The maximum number of overtime working hours is limited to not more than 36 hours a week.

The computation of the overtime payment for working on a working day must not be less than one-and-a-half times the hourly wage rate of a working day for the number of hours of work done. If an employee receives wages on a piece rate basis, not less than one and a half times the piece rate of wages of a working day must be paid for work done.

21 Can employees contractually waive the right to overtime pay?

No. The LPA is a strict law, which means that the parties (the employer and employee) cannot agree to waive the right and duties under this act or treat the other in aless favourable way than is stipulated in the act.

22 Is there any legislation establishing the right to annual vacation and holidays?

Yes. An employee who works continuously for one year is entitled to six days' paid annual leave. It can be postponed or accumulated depending upon the agreement made between the employer and employee.

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes. An employee is entitled to 30 days sick leave per annum with pay. If sick leave is taken on three or more consecutive days, a medical certificate is required. A sickness from a work-related injury does not count as absent through illness.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

An employee shall be entitled to leave for necessary business with pay (in any circumstance) subject to the work rule. Normally, prior notification must be provided to the employer. However, an unauthorised absence (without any reasonable reason) for three consecutive working days may be considered as 'job abandon' causing the non-payment of the severance pay to such employee.

25 What employee benefits are prescribed by law?

Apart from the benefits as agreed in the employment agreement or offered by the employer, the employer must compel to provide other benefits and facilities to its employees such as drinking water, restrooms, medical first aid (per the Ministerial Regulation on Labour Welfare dated 8 March 2005, issued by virtue of sections 6 and 95 of the LPA), or any safety appliances for certain occupations per the relevant Ministerial Regulations.

26 Are there any special rules relating to part-time or fixed-term employees?

Under the LPA, the employee is defined as a person who agrees to do the work for an employer in return for wages, regardless of the description of his or her status. This means that the part-time, fixed-term or probationary employee is considered as the employee by law, which is subject to the right and duties under this act.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

There is no specific provision referring to post-termination non-competitive agreements. Such agreements can be considered as a restrictive covenant which prohibits an employee from performing any work in addition to the work so assigned by the employer during the period of employment, and which prohibits an employee who no longer works for the employer from working with any competitors for a specific period of limitation.

In principle, any work performance outside the scope of work as agreed, especially working with another person or entity without the prior consent of the existing employer, would be deemed a violation of the employment agreement, entitling the employer's right to terminate such employment. On the other hand, if an employee no longer works for an employer, the non-competition clause will be enforced after termination of employment is subject to the interpretation of the enforceability of such clause.

The maximum period for a post-termination non-competition clause is two to five years after the termination of the employment agreement. The enforceability of this post-termination non-competition clause is usually determined by the Thai courts on a case-by-case basis with the following criteria:

- whether the employer has a proprietary interest it is entitled to protect;
- whether such non-competition clause is contrary to public interest; and
- whether the terms of such a clause are reasonable.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No.

Update and trends

The amendment of the Labour Court Establishment and Procedure Act (1979) was enacted in 2015. This amended act has defined the terminology of the Appeal Court for Specialised Cases and its procedures to be consistent with the amended civil procedure act and the specific appeal court for the specialised act.

In addition, the Thai Cabinet has subsequently endorsed the proposal to amend the Labour Protection Act, entitling retirees to a statutory severance pay and setting the statutory retirement age. This proposal is now under the National Legislative Assembly's consideration and approval.

Under the amended Labour Protection Act, the issue of retirement was raised to fulfil the divergence between the interpretation of the Thai courts and the current Labour Protection Act. This amended act intended to expressly confirm that retiring employees, who do not have a prescribed retirement age, are entitled to severance pay and other termination payments. As the court has interpreted that retirement is regarded as a case of termination of employees due to old age, thus entitling a severance payment.

Furthurmore, the amended act also sets the statutory retirement age at 60 in cases where the employer has not prescribed a retirement age in their internal rules and policies, and includes liabilities of employers who fail to pay a severance pay to retirees – a maximum of six months' imprisonment or a maximum fine of 100,000 baht.

Beyond the scenario of retirement, this amended act also revokes the employers' administrative burden on submitting a work regulation to the authorities in such cases where as employer has 10 or more employees.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

In the case where the employee commits a wrongful act in the course of his or her employment, the employer is jointly liable with the employee for the consequences of such action. The employer is entitled to reimburse the payment paid to the injured person from such employee.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employees are subject to Thai taxation for their personal income tax filing and the withholding tax filing, as every resident and non-resident is taxable on their assessable income derived from employment or business carried out in Thailand, whether such income is paid in or outside Thailand. Some exemptions are granted to persons (ie, UN officer, diplomats etc) under the terms of the international and bilateral agreement. Personal income tax paid and absorbed by an employer (in effect giving the employee a net salary) is also considered as taxable income to the employee. The taxable income shall be calculated by deduction of limited allowances and expenses and the progressive rate before the tax filing.

Additionally, at the time of payment of the wage, income tax must be withheld by the employer from the assessable income paid to non-residents. Such withholding tax can be credited against year-end taxes.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes. The employee's invention is protected by the Copyright Act 1994 and the Patent Act 1979.

The Copyrights Act grants copyright protection on the scope of the creative works in the way of literature, drama, music, visual arts and works, cinema, audio, broadcasting and other categories set out by this act.

The author of the work holds the copyright to such work unless there is a written agreement between the employer and the author to waive the copyright. The employer is only entitled to publicise in compliance with the terms and conditions of employment. The author shall grant the protection against infringement by reproducing, adaption, publishing or renting a copyrighted work. Copyrights are automatically owned by the person who creates the works of expression and there is no need to be registered.

For patents, an invention can be patented providing that such invention must be novel, involve an inventive step and be capable for appliance in industry. The patent grants the holder the exclusive right to produce, import and sell products using the patented invention.

32 Is there any legislation protecting trade secrets and other confidential business information?

The Trade Secrets Act 2002 is the principle legislation governing trade secrets in Thailand, providing protection against misappropriation of confidential information such as formulas, programs, practices, processes, designs, instruments, patterns or compilations of information. Trade secrets are not required to be registered, unlike patents, but certain criteria must be satisfied in order to be eligible for trade secret protection. The trade secret's owners are exclusively entitled to disclose, deprive of, or use the trade secrets, or license someone else to disclose, deprive of, or use the trade secrets. Trade secret owners can also stipulate any terms and conditions for the maintenance of the secret.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

In Thailand, there is no specific statutory law governing data protection or privacy. Generally, a general personnel data protection is bodied in the Constitution (recognition of the right of privacy), the Thai Civil and Commercial Code (personal data protection under the wrongful act) and various statutory laws in particular fields (ie, telecommunications, banking and financial businesses (specific businesses)).

Additionally, there is a draft version of the Personal Information Protection Act considered and approved by the Thai Cabinet. Under the draft, personal data is protected by restricting the gathering, using, disclosing and transferring of any personal data without the consent of the data owner. Criminal penalties and civil liability are imposed for any violation of the draft. At present, this draft has not been finalised nor approved by the National Legislative Assembly.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Typically, the employment issue would appear in connection with the amalgamation and asset acquisition rather than for share acquisition. The target company is still the employer and is continuously engaging in its business. It only results in the change of the shareholding structure of the target company without generating any impact on the company's employment.

In principle, asset acquisition does not affect the employment relationship between the transferor and its employees because the transferor remains the employer regardless of whether or not it will continue its business operation. In case the transferee intends to hire any employee of the transferor, the transferor's employees will need to be transferred to the transferee. The employees must consent to the transfer of their employments, and they must be entitled to the same rights and benefits they previously enjoyed when working with the transferor. Otherwise, their employment will be deemed terminated and such terminated employees will be entitled to statutory severance pay.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

The employer may terminate an employee for cause and without cause, which will lead to different obligations of the employer by giving an advance notice and severance pay.

Termination with cause

The employer can terminate the employee for cause. The cause has a very restricted definition under the law such as dishonest performance of professional duties, intentional acts against an employer,

intentionally causing damage to an employer, gross negligence, violation of the company's work rules, absence for three consecutive days without sufficient reason or imprisonment.

If the employer bases the dismissal on one of those grounds, the reason must be stated clearly in the dismissal letter. The balance of the salary should be paid within three days, but no further formalities should be taken into account.

The termination with cause is more favourable as the employer is not liable to either pay the severance pay or give prior notice to the terminated employee.

Termination without cause

An employer who wishes to terminate an employee with no cause must pay severance pay to an employee per the requirement as provided by the LPA. However, in case the employment agreement has an indefinite period, the prior written notice must be given to the employee at or before any time of payment, and it will be effective on the following time of payment, although not more than three months' notice is required. Payment for an equivalent length of time can be given in lieu of such notice.

In cases where the employer terminates the employee, all the employer is required to pay is the balance of compensation within three days after the effective termination date.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

The termination notice must be provided only for termination without cause. Such notice must be given in writing to an employee at or before the date of payment but not more than three months, otherwise the payment in lieu of notice shall be paid to the employee.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may terminate an employee with immediate effect without giving advance notice or payment in lieu of notice for the termination with cause (ie, dishonest performance of professional duties, intentional acts against an employer, intentionally causing damage to an employer, gross negligence, violation the company's work rules, absence for three consecutive days without sufficient reason or imprisonment).

Additionally, if the employee is hired for an indefinite period, the LPA and the Civil and Commercial Code require the employer to provide the employee with notice of termination.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes. Termination with severance pay was prescribed under section 118 of the LPA. All employees who have worked for 120 consecutive days or more are entitled to severance pay if their employment is terminated without cause. Severance pay is based on the duration of employment as follows:

- 30 days where the employee worked for more than 120 days but less than one year;
- 90 days where the employee worked for more than one year but less than three years;
- 180 days where the employee worked for more than three years but less than six years;
- 240 days where the employee worked for more than six years but less than 10 years; and
- 300 days where the employee worked for the company for more than 10 years.

39 Are there any procedural requirements for dismissing an employee?

In general, in a case where the employee is hired for a definite period, an employer shall terminate an employee without any requirements. Conversely, if the employee is hired for an indefinite period, the notice of termination must be provided to an employee at or before the date of payment, but not more than three months' notice is mandatory.

There are some circumstances that require government approval or notification to the authority prior to the termination. For instance, a member of an employees' committee can be dismissed subject to the court's permission or in cases where termination is a result of the reorganisation of an undertaking, production line, sale or service due to the adoption of machinery or the change of machinery or technology causing a reduction of employees.

40 In what circumstances are employees protected from dismissal?

The employee shall not be dismissed for reasons of pregnancy or labour union activities.

41 Are there special rules for mass terminations or collective dismissals?

In principle, there are no special provisions for mass terminations under Thai laws. The liabilities of an employer shall be determined on a case-by-case basis for each employee. Thus, each employee might not receive the equivalent severance pay, pay in lieu of notice and other compensations from an employer.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

A class action lawsuit is available in Thailand. A group of employees having the same interests and rights related to labour can file a petition as a class action. Class members may opt out of the class action and pursue individual claims.

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43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

At present, there is no provision specifying a mandatory retirement age. In practice, the employer can prescribe the retirement age in the employment contract, work rules or internal policies.

In general, the employer usually sets out retirement age at 55 to 60 years old. Even though there is no specific limitation, the retirement age must not be prohibited by any laws or be contrary to public order and good morals.

However, earlier in 2017 the Thai Cabinet endorsed a proposal to amend the Labour Protection Act, entitling the setting of a statutory retirement age for the first time. The amended act sets the statutory retirement age at 60 in such case that a retirement age is not stipulated in the employment contract, work rules or internal policies. However, it is still vague as to when a retirement is considered to take effect. That is, whether it be upon the employee's 60th birthday, at the end of the month in which the employee has reached the age of 60, or many other possibilities. The draft amendment to the Labour Protection Act is expected to be enforceable by May 2017.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

The parties may agree to resolve a dispute in reletion to the rights or duties from an employment contract by a private arbitration. The dispute relating to the rights and duties set out by the laws cannot be settled by a private arbitration (ie, severance pay, pay in lieu of notice, etc).

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

In Thailand, a person can file a lawsuit to the court when his or her rights or duties were challenged. In this case, the rights or duties can be both statutory rights or contractual rights. Therefore, if an employee agrees to waive statutory and contractual rights after the termination date, there will be no legal ground to pursue the lawsuit and the case will be dismissed.

46 What are the limitation periods for bringing employment claims?

Per the Civil and Commercial Code, each employment claim has different limitation periods, as follows:

- claims for wages, overtime pay, holiday pay, and holiday overtime pay are two years;
- claims for severance pay, special severance pay, pay in lieu of notice, bonus and compensation for an unfair termination are 10 years; and
- claims for the interest and surcharge of wages, overtime pay, holiday pay and holiday overtime pay, in cases where an employer fails to pay such money, are five years.

Turkey

Rıza Gümbüşoğlu, Pelin Baysal and Beril Yayla Sapan

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main sources of employment law are as follows:

- the Constitution;
- the Turkish Labour Act No. 4857 (the TLA);
- the Law on Trade Unions and Collective Bargaining Agreements No. 6356 (the Union Law);
- the Law on Civil Service Trade Unions and Collective Bargaining Agreements No. 4688;
- the Maritime Labour Law No. 854;
- the Press and Media Labour Law No. 5953;
- the Turkish Code of Obligations No. 6098 (the TCO);
- the Occupational Health and Safety Law No. 6331;
- the secondary laws and regulations including annual leave, working hours, overtime work, minimum wage and female and child employees;
- communiqués and circulars published by the Ministry of Labour and Social Security (the Ministry) with regard to the application and recommendation of the labour legislation;
- the Court of Appeal's Assembly of Civil Chambers' decisions on the unification of the conflicting judgments; and
- employment contracts, collective bargaining agreements, internal regulations and personnel regulations, workplace practices.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes, the principle of equal treatment is regulated by article 5 of the TLA and it is not lawful to discriminate against employees based on their language, race, sex, political opinions, philosophical beliefs, religion, sex or similar reasons.

Also, the Law on Human Rights and Equality Institution of Turkey No. 6701 dated 6 April 2016 prohibits the employer from discriminating in terms of determination of the criteria or conditions of job application and recruitment.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry is entitled to inspect the employers and issue administrative fines but their decisions are subject to judicial review. Both employers and employees can always refer the matter to the courts or the execution offices.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Establishing works councils is not regulated under Turkish law. However, trade unions can be established with at least seven employees and upon providing the procedure and principles regulated by the Unions and Collective Employment Agreements Law No. 6356; they can be established without prior authorisation and can have legal entity. Trade unions are authorised to assign a workplace union representative from among the employees.

5 What are their powers?

Trade unions should conduct their activities in compliance with the main business activity conducted in the workplace. Trade unions are entitled to:

- enter into collective bargaining with the employer union or employer and negotiate the terms and conditions of collective employment agreements;
- act on behalf of the employees and represent them;
- take collective actions in order to enforce the terms and conditions of a collective bargaining agreement; and
- file actions and represent the employees or their successors during the proceedings in order to protect their rights arisen from the employment relationship.

Workplace union representatives are under the obligation of providing corporation, peace and harmonisation in the workplace between employees and employer, listening to the requests of the employees and solving their complaints, protecting employees' rights and assisting the practice of working terms and conditions regulated under the TLA and collective bargaining agreements.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

There is no specific regulation regarding background checks on applicants. The employer can conduct its own checks or hire a third party. Requesting criminal records is a particularly common practice in Turkey, but the employee's consent is required in such a case.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

The employer can require a medical examination as a condition of employment but the applicant's consent is required for such a medical examination. The employer may refuse to hire an applicant who does not submit to an examination. However, the employer should not have an intention of discrimination by doing so.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

The applicant's consent is required for drug and alcohol tests. The employer may refuse to hire an applicant who does not submit to a test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

According to the TLA, employers who employ at least 50 employees are required to employ disabled persons. Otherwise the employers would be subject to administrative fines.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Under Turkish law, it is not mandatory to conclude employment contracts in writing. The written form is only mandatory for fixed-term employment contracts. However, if the contract is not to be concluded in writing, then it is necessary to provide the employee with a written document, within two months at the latest, showing the general and special conditions of work, the daily or weekly working time, the basic salary and any salary supplements, the time intervals for remuneration and conditions concerning the termination of the contract.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts must be in written form. There must be an objective reason such as completion of a specific job to conclude a fixed-term employment contract. A fixed-term employment contract cannot be renewed unless there is an objection reason.

12 What is the maximum probationary period permitted by law?

The probationary period can be a maximum of two months and its duration should be indicated in an employment contract. The probationary period can be extended up to four months by collective labour agreements.

13 What are the primary factors that distinguish an independent contractor from an employee?

Employees are dependent; they do work in line with the instructions of the employer in return for a salary.

Independent contractors work independently, can determine their own service hours, can issue invoices in their own name.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Omnibus Law No. 6715, published on 20 May 2016, has amended the TLA and introduced temporary staffing through recruitment agencies. Also, the Regulation regarding private employment agencies (the Regulation) was published on 11 October 2016. The agencies must be authorised by the Turkish Labour Institution. The TLA defines limits on the use of agency workers.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

The Law No. 6458 Concerning Foreigners and International Protection regulates foreign workers. As a rule, all foreign nationals must obtain a visa. However, there are some exceptions such as, citizens of countries which are exempt from visa procedure under international agreements and Council of Ministers decisions and foreign nationals having obtained residence or work permits.

The types of short-term visas are enumerated in a non-exhaustive way. According to the Regulation on the Application of the Law No. 6458, foreigners who enter Turkey for professional purposes, official visits, business meetings etc, can obtain a tourist visa or business visa. Those who remain in Turkey for more than 90 days should obtain a work permit.

There is no exceptional visa concerning the employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction.

16 Are spouses of authorised workers entitled to work?

The Law No. 6735 Concerning International Workforce does not provide any general provision with regard to the accompanying family members with one exception. Accordingly, spouses and dependent children of Turquoise Card owners will benefit from a long-term residence permit which allows one to stay in Turkey for an unlimited period of time.

Turquoise Cards are given if the applicant meets certain criteria with respect to their education level, professional experience, contribution to science and technology and other factors set by the administration. It gives the same rights as a permanent work permit.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The ministry prepares and issues the evaluation criteria. Accordingly, employers and foreign nationals must fulfil the requirements specified as evaluation criteria, some of which are listed as follows:

- at least five Turkish nationals shall be employed at the workplace for which the work permit application has been filed;
- the foreign partner of the company requesting a work permit shall have at least 20 per cent of the shares in the company provided that their share equals to or exceeds 40,000 Turkish lira; and
- the paid capital of the workplace shall be at least 100,000 Turkish lira or its minimum gross sales shall be 800,000 Turkish lira or the export amount in the last year shall be at least US$250,000.

The salary to be paid to the foreign national shall be compatible with his or her duty and competence at the workplace. In this regard, the minimum levels of the salary to be granted to the foreign national are determined by the ministry considering the characteristics of the job and the minimum wage in force as of the application date.

However, foreign direct investment regulations provide simplified conditions for the key personnel to be employed under these investments and liaison offices. Accordingly such companies are entitled to hire key personnel without being subject to the evaluation criteria explained above.

Administrative fines are as follows:

- 6,229 Turkish lira for employers employing foreign personnel without a work permit (for each foreign personnel);
- 2,491 Turkish lira for foreign nationals working dependently without a work permit;
- 4,983 Turkish lira for foreign nationals working independently without a work permit; and
- 415 Turkish lira for foreign nationals working independently and employers employing foreign personnel who do not fulfil their obligation to notify the Ministry.

18 Is a labour market test required as a precursor to a short or long-term visa?

In evaluating an application for a work permit, the Ministry requires the applicant to complete a resident labour market test to demonstrate that the role cannot be filled with a resident worker. For this purpose, certain factors such as specific details of the job, education of the foreign national, previous employment in the relevant market and whether there are any resident employees with similar capabilities must be taken into account when justifying the employment of a foreign national instead of a Turkish citizen.

This evaluation is made by the Ministry by taking into consideration the decisions of the International Workforce Policy Advisory Board which will be established according to the Law on International Workforce and the opinion of administrative bodies and professional associations in the relevant field, if necessary.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Employees can work a maximum 45 hours per week. Working hours can be distributed over the working days on the condition that the daily working hours do not exceed 11 hours on any one working day. The maximum night working hours are 7.5 hours. Overtime work cannot exceed 270 hours per year. Employees cannot opt out of such restrictions.

20 What categories of workers are entitled to overtime pay and how is it calculated?

In principle, all employees are entitled to receive overtime payment. Employees are entitled to overtime payment for all overtime exceeding 45 hours per week at 1.5 times their hourly rate. However, if the weekly working hours are less than 45 hours, a 1:1.25 ratio will be applied up to the 45 hours.

21 Can employees contractually waive the right to overtime pay?

It is possible to provide in the employment contract that the salary of an employee includes overtime of up to 270 hours per year without additional pay provided that the salary of the employee is higher than the minimum wage.

22 Is there any legislation establishing the right to annual vacation and holidays?

Employees shall be granted paid annual vacation provided that they have worked for at least one year, including the probationary period. If the term of the employee's service is one to five years (inclusive), the holiday period must be at least 14 working days. If the term of the employee's service is five to 15 years, the holiday period must be at least 20 working days. If the term of the employee's service is 15 years and over, the holiday period must be at least 26 working days. However, these periods can be increased through the employment contracts.

Paid annual vacation may not be less than 20 days for employees aged 18 years or less and those aged 50 years or older.

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes, Social Security and General Health Insurance Law No. 5510 regulates sick pay.

If the sick employee has not been working for three or more days, he or she should submit a medical report and the employer is obliged to notify the Social Security Institution. In such a case, the employer is not required to pay salary to the employee who has a medical report. Instead, the Social Security Institution makes the payment to the employee.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

There are several types of leaves of absence, such as marriage, maternity, breastfeeding and paternity leaves.

Female employees are entitled to take paid maternity leave for a period of 16 weeks (ie, eight weeks before and eight weeks after confinement). In case of multiple pregnancy, an extra two-week period shall be added to the eight weeks before confinement.

Until the child reaches the age of one, the female employee is also entitled to one-and-a-half hours a day for breastfeeding. The father is entitled to take five days of paid paternity leave.

In case of a marriage, the employees are entitled to three days of paid leave. The employees are entitled to three days of paid leave following the death of the employee's mother, father, spouse, brother, sister or child.

25 What employee benefits are prescribed by law?

Salary, social security contributions, paid annual leave, paid sick leave, general health insurance contribution, weekend, public holiday, official holiday salaries, overtime payments, maternity leave or paternity leave pays are main mandatory benefits. The employer may also provide to employees additional voluntary benefits.

26 Are there any special rules relating to part-time or fixed-term employees?

A part-time employee's weekly work time is determined as less than an equivalent worker working on a full-time basis. According to the relevant regulation, a 2:3 ratio must be applied for part-time work. That means if the working time is 45 hours, the part-time employee should work less than 30 hours.

There must be an objective reason to conclude a fixed-term employment contract. Otherwise it will be deemed as an indefinite-term agreement.

Provided that there is no essential reason, the employer cannot make discrimination between full-time and part-time employees or between an employee who works with a fixed-term agreement and one who works under an open-ended employment contract.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Non-competition, non-solicitation clauses are generally included in employment agreements as post-employment restrictive covenants.

Non-competition obligations are regulated under the TCO. According to the TCO, the non-competition obligation must not jeopardise the employee's economic future and not be opposite to the equity principle. Therefore, it should be reasonably limited with regard to place, time and subject. The clause should be in writing and applicable for the employees who are in contact with customers and have access to the customers' trade secrets. Employees' usage of such knowledge must cause a significant damage to the employer. The restricted period should be limited to two years. It can exceed two years only in specific circumstances.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No, the employer does not need to continue to pay the former employee while they are subject to post-employment restrictive covenants.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The employer may be held liable for the acts or conduct of its employees either by tort liability given as objective liability of the employer under the article 66 of the TCO or contractual liability given under article 116 as the liability arising out of the actions of the employer during the execution of the contract.

Article 66 of the TCO sets forth that: an employer is liable for the loss or damage caused by his or her employees or ancillary staff in the performance of their work unless the employer proves that he or she took all due care to avoid a loss or damage of this type; or the loss or damage would have occurred even if all due care had been taken. The employer has a right of recourse against the person who caused the loss or damage to the extent that such person is liable for damages.

As for the contractual liability, article 166 of TCO states that a person who delegates the performance of an obligation or the exercise of a right arising from a contractual obligation to an associate, such as a member of his or her household or an employee, is liable to the other party for any loss or damage the associate causes in carrying out such tasks, even if their delegation was entirely authorised.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Salary and other benefits provided to the employees are subject to income tax and stamp tax.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Employee inventions are regulated as per the IP Law No. 6769. As per IP Law, service inventions are those that are made by the employee in the course of his or her employment, by virtue of his or her obligations, the tasks assigned to him or her, or those that are based to a large extent on the experience and work of the employer.

32 Is there any legislation protecting trade secrets and other confidential business information?

As per the TCO, the employee is under the confidentiality obligation during the employment and post-employment period, as long as it is required for the protection of the employer's rightful interest.

Also, the Turkish Criminal Code regulates criminal sanctions for those who illegally obtain and disclose trade secrets and confidential information.

Update and trends

A new Draft Law on Labour Courts (Draft Law) has been prepared and shared by the Ministry of Justice with relevant public institutions and organisations. The most important amendment stipulated under the Draft Law is the introduction of a new mandatory mediation phase. Accordingly, if the Draft Law is adopted by the legislator, it will be mandatory for employees to apply for mediation prior to initiating the below-listed type of lawsuits:

- employee receivables;
- reinstatement claims arising from the TLA; and
- employment agreements and collective bargaining agreements.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

According to the TLA, employers are obliged to process an employee's data lawfully and in good faith, therefore, they cannot disclose an employee's personal data which the employee has a legitimate interest to keep confidential.

As per the TCO, employers can use an employee's personal data only if it is related to the employee's tendency to work or execution of the employment agreement is required to do so.

On 7 April 2016, a new law on the protection of personal data came into force in Turkey. The Data Protection Law is mostly in line with the EU Directive 95/46/EC on Data Protection. The Data Protection Law does not have any specific provision regarding the personal data of employees, however it regulates the protection of personal data generally.

Pursuant to the Data Protection Law, the employer is qualified as a data controller and is obliged to take all necessary technical and administrative measures that are necessary to ensure an appropriate level of security, in order to:

- prevent unlawful processing of the personal data;
- prevent unlawful access to the personal data; and
- ensure protection of the personal data.

The employer, as the data controller, is jointly liable with any third party who processes the personal data on its behalf. Furthermore, the employer must conduct necessary audits to ensure implementation of provisions of the Data Protection Law.

In addition to the above, the employer shall comply with the below principles while processing the personal data:

- being in line with the law and good faith;
- being accurate and up to date;
- processing the data for specific, clear and legitimate purposes;
- data process is related to, limited with and proportionate to the purpose for which the personal data is processed; and
- the personal data is stored for the time specified in the relevant legislation or the time required for the purpose for which the personal data is processed.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Yes, according to TLA, in case of transfer of an establishment or one of its sections to another person due to a legal transaction, the employment contracts existing in the establishment or in the transferred section on the date of the transfer shall automatically pass on to the transferee with all the rights and obligations involved. TLA also sets forth that the transferor and transferee shall be jointly liable for the obligations which have materialised before the transfer and which must be defrayed on the date of the transfer. The time limit for the liability of the transferor is two years following the date of the transfer.

According to TCC, in case of business transfers made by way of merger, demerger or the conversion of company type, the employment contract and the rights and obligations arising out of it can only be transferred to the new employer if the transferring employee does not object to such transfer of the employment relationship.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Under Turkish Labour Law, an employment contract can be terminated by an employer either by serving the employee with notice; or terminating with immediate effect by relying on a just cause.

The TLA provides job protection to employees in particular cases. If an employee has been working for at least six months at a workplace which has 30 or more employees, the employer can only terminate the employment contract by relying on a valid reason or cause. An employer's representative and his or her deputies who are entitled to manage the entire enterprise with authorisation to hire and terminate employees cannot benefit from job protection provisions.

Valid reasons can be related with capability or behaviour of the employee, or the requirements of the enterprise, workplace or the work.

With regard to just causes, they are classified under three categories as follows: reasons of health; cases that are incompatible with morals, goodwill and similar circumstances; and force majeure. In case of just cause, the employment will be terminated with immediate effect.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Yes, if there is not just cause, notice of termination should be given prior to dismissal. However, instead of providing the employee with a notice period, the employer may choose to terminate the employment contract by providing pay in lieu of notice.

The TLA sets forth the minimum notice periods. If the length of the employee's service is less than six months, notice period must be at least two weeks; if it is six to 18 months, it must be at least four weeks; if it is 18 months to three years, the notice period is six weeks and if it is more than three years, the notice period must be at least eight weeks. The parties can increase those periods through employment contracts.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

If there is a just cause, the employer can dismiss an employee without notice or payment in lieu of notice. Also, during the probation period the employment can be terminated without notice or payment in lieu of notice.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

If the employee has worked for the employer for at least one year, the employer must pay a severance payment at the rate of thirty days' gross salary for each full year as of the date on which the employment relationship between the parties commenced. Payment must be made pro rata to the service period of the employee within a year. Calculation of severance payment must be made based on the latest gross salary. However, in any case, the maximum amount to be paid to an employee as severance payment for the time being is 4,426.60 Turkish lira for each year. If the employment is terminated based on just cause for cases which are incompatible with morals and goodwill, the employer would not pay a severance payment.

39 Are there any procedural requirements for dismissing an employee?

If the employer terminates the employment contract relying on a just cause for cases that are incompatible with morals, goodwill and similar circumstances, the employer must use his or her right within six working days as of the date when it learns the employee's act.

For the employees who are subject to job security provisions, the employer must inform the employee of his or her low performance or misbehavior and obtain his or her written statements regarding the reasons for his or her low performance or behavior before terminating the employment. If the termination is arising from the requirements of the

business, workplace or the work, the employer should take an operational decision before terminating the employment.

The employer should state the termination reasons in writing in the termination letter.

Prior approval from a government agency is not required by law.

40 In what circumstances are employees protected from dismissal?

The TLA provides job protection to employees in particular cases. If an employee has been working for at least six months at a workplace which has 30 or more employees, the employer can only terminate the employment contract by relying on a valid reason cause.

41 Are there special rules for mass terminations or collective dismissals?

In case the employer terminates the employment contracts of at least 10 employees out of a total workforce of between 20 and 100 employees, or at least 10 per cent of the employees out of a total workforce or between 101 and 300 employees, or at least 30 employees out of a total workforce of 301 or more employees, within one month on the same date or different dates as a result of economic, technological, structural or similar enterprise, business or work requirements, it constitutes a collective dismissal.

As a first step the employer should take an operational decision. Then the employer should notify the trade union representative (if any), the Provincial Directorate of the Social Security Institution and the Turkish Employment Agency at least 30 days in advance. This notification must be in writing and include reasons for the termination, the number and group of employees to be dismissed and the time frame for redundancy proceedings. Consulting with the trade union representative is also one of the procedural steps of the collective dismissal. Once the employer decides for collective dismissal, after informing official authorities, it is obliged to consult with the trade union representative.

According to the TLA, the termination notice will be deemed effective after 30 days of the employer's notification to the said official authorities.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

In principle, employees can assert labour and employment claims on an individual basis. However, trade unions can also file cases.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Retirement of an employee is not sufficient to terminate the employment contract by the employer. However, according to the precedents of the court of appeals, if the employer determines a reasonable certain age limit for its employees and this limit is used in a general and objective manner to all employees, then mandatory retirement age will be deemed lawful.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

In principle employment disputes are not deemed arbitrable. However, only reinstatement cases can be arbitrable provided that parties agree to settle the reinstatement dispute after the termination of the employment.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

No, under Turkish law, it is not possible to waive statutory and contractual rights to potential employment claims. If the parties settle before a court, there will be a valid waiver.

46 What are the limitation periods for bringing employment claims?

There are several limitation periods for bringing employment claims. For instance the employee can file a re-employment action within one month as of the termination notice. The statute of limitation is five years for salary. For compensation claims, the general statute of limitation is 10 years.

United Arab Emirates

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes and regulations relating to employment are the Federal Law No. 8 of 1980 Regulating Labour Relations, as amended by Federal Laws No. 24 of 1981, No. 15 of 1985, No. 12 of 1986, No. 14 of 1999 and No. 8 of 2007 (the Labour Law), and applicable ministerial orders implementing its provisions. These statutes and regulations apply to all employees working in the UAE, including foreign nationals apart from:

- members of the following categories of worker:
  - officials, employees and workers in federal and local government departments, or appointed for federal and local government projects;
  - members of the armed forces, police and security officers;
  - domestic servants working in private residences; and
  - workers employed in agriculture (apart from employees of agricultural companies engaged in processing products, or operating or repairing machinery required for agriculture); and
- employees working for a company with a place of business in the Dubai International Financial Centre (DIFC) and who are based in, or ordinarily work in, the DIFC (these employees are subject to the DIFC Employment Law No. 4 of 2005 and No. 3 of 2012 (DIFC Employment Law)).

Employees working in one of the many free zones in the UAE, including foreign nationals, are subject to the Labour Law in addition to employment regulations introduced in the relevant free zone. Where the free zone regulations are not consistent with the Labour Law, the Labour Law provisions take precedence unless they are less favourable than the relevant free zone regulations.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Discrimination

There are limited anti-discrimination protections for employees under the Labour Law and in the free zones. In the event of an employee suffering a partial disability, the Labour Law stipulates that the employer must allow the employee to perform another role if he or she is capable of doing so, and wants to undertake that other role. Such employee must be paid the same salary as a non-disabled employee performing the same role. In addition, the Labour Law provides that women must be paid the same as men, if they are performing the same role.

The DIFC Employment Law states that employers must not discriminate (that is, withhold or limit access to opportunities, benefits and advantages that are available to other persons) against any person on the basis of their sex, marital status, race, nationality, religion or mental or physical disability. Under the DIFC Employment Law, any programme or activity can be undertaken that is intended to benefit disadvantaged individuals or groups, including those with a mental or physical disability.

The Employment and Sponsorship Regulations 2016 of the Abu Dhabi Media Free Zone Authority contain anti-discrimination provisions. These regulations state that the aim of the authority is to 'create an environment where employment and advancement is based on merit and an employee is not treated less favourably by reason of gender, marital status, religion or disability'. These regulations further state that employers in the free zone must consider this non-discrimination principle during the recruitment process.

In addition, Federal Decree-Law No. 2 of 2015 introduced general prohibitions on discrimination and crimes of hate. It specifically prohibits discrimination on the basis of religion, creed, doctrine, sect, caste, race, colour or ethnic origin.

Moreover, the Cabinet of the UAE may promulgate rules favourable to national employees based upon a request for the same from the Minister of Human Resources and Emiratisation.

Harassment

There are no specific rules under the Labour Law protecting employees from harassment, but assaulting another employee is grounds for summary dismissal. In addition, there are UAE ministerial resolutions imposing sanctions on certain behaviour, including harassment.

Under DIFC Employment Law, employers must provide and maintain a workplace that is free from harassment, safe and without risk to employees' health. In addition, an employer must not threaten, intimidate or coerce an employee because of a complaint or investigation.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Human Resources and Emiratisation is primarily responsible for the enforcement of the Labour Law. The Ministry issues work permits, levies fines and bans on non-conforming employers or employees, and forms and implements labour policies supporting the Labour Law.

The DIFC Authority is responsible for the administration of the DIFC Employment Law.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

There is currently no legislation mandating or allowing the establishment of a workers' council or committee in the workplace. There are no trade unions in the UAE and employee representatives are not common.

5 What are their powers?

Not applicable.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The Labour Law imposes no restrictions on background checks on applicants. Checks can be conducted by a third party or by the

employer. The DIFC Employment Law similarly imposes no such restrictions on background checks.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There are no restrictions on employer-imposed medical examinations. An employer can refuse to hire an applicant who does not submit to a medical examination.

Moreover, because foreign nationals are a majority of the workforce in the UAE, medical examinations are a routine part of the hiring process. One of the requirements for obtaining a residence visa in the UAE is to pass a medical examination at a government-approved hospital or clinic. A prospective employee is screened for HIV, hepatitis B and C, leprosy and tuberculosis before being granted a residence visa. A positive result in any of these tests will result in the prospective employee being rejected for a residence visa and deported to his or her home country.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions on employer-imposed drug and alcohol testing. An employer can refuse to hire an applicant who does not submit to such testing.

Moreover, the prohibitions in the UAE on the possession and use of drugs are very strict. The purchase or consumption of alcohol by a person who does not hold a liquor licence is illegal in the UAE. A non-Muslim foreign national may obtain a liquor licence only after issue of a residence visa. Therefore, a positive test result before hiring would indicate criminal activity, which would be another reason to refuse to hire the applicant.

The DIFC Employment Law similarly does not provide any restrictions or prohibitions against drug and alcohol testing.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

The Labour Law and various ministerial decisions contain the following provisions that are favourable to the hiring of UAE nationals:

- UAE nationals have priority to work in the UAE. Persons of other nationalities can only be employed in the private sector if there are no unemployed nationals that are capable of undertaking the role and if there is appropriate approval from the authorities and they obtain a residence visa and labour (or ID) card. The foreign employee must also have the professional competence or educational qualification that the state requires.
- If no UAE national is available to take up a position, preference must first be given to persons who are nationals of an Arab country, and then to persons of other nationalities.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

As part of the residence visa and labour card application process, an employee must receive a written offer letter from the prospective employer. Thereafter, the parties must enter into a standard-template dual-language contract provided by the Ministry of Human Resources and Emiratisation, the terms of which must comply with the terms of the offer letter. Under the Labour Law, the contract must specify the:

- start date and duration of the employment (which may be for an unspecified period);
- nature (ie, job title);
- place of employment; and
- the salary.

Some free zones require the parties to enter into employment contracts using a template specific to the relevant free zone. Subject to the provisions of the Labour Law, the information that must be included in employment contracts varies among the free zones.

The DIFC Employment Law requires employers to provide their employees with a written contract of employment. The contract of employment must specify:

- the names of the employer and employee;
- the start date;
- the employee's wages;
- the applicable pay period;
- the terms and conditions relating to hours of work;
- the terms and conditions relating to:
  - vacation leave and vacation pay;
  - national holidays and pay for national holidays; and
  - sick leave and sick pay;
- the length of notice that the employee and employer must give and receive to terminate the employment;
- the employee's job title or a brief description of his or her work;
- the period for which the employment is expected to continue or, if it is for a fixed term, the date when it is to end (where the employment is temporary);
- the place of work;
- the applicable disciplinary rules and grievances procedures; and
- any other matter that may be prescribed in any regulations issued under the DIFC Employment Law.

The DIFC Employment Law requires that if an employer intends any employment term to be subject to its policies and so can be changed at the employer's discretion, then that must be expressly provided for in the employment contract.

11 To what extent are fixed-term employment contracts permissible?

The Labour Law permits fixed-term employment contracts; however, many employers prefer not to use them because such contracts are difficult to terminate. The Labour Law limits the duration of a fixed-term contract to four years. However, this type of contract can be renewed if both parties agree for one or more similar or shorter periods.

The DIFC Employment Law permits fixed-term contracts; however, there is no specification as to the maximum duration of such contracts.

12 What is the maximum probationary period permitted by law?

The Labour Law allows a maximum of six months' probationary period. This maximum period may not be extended. If the employee is successful in completing the probation period, then the probation period will be considered to be part of the employee's period of continuous service.

The DIFC Employment Law does not address probationary periods.

13 What are the primary factors that distinguish an independent contractor from an employee?

Pursuant to the Labour Law, an employee is any person who receives remuneration of any kind for legitimate work performed in the service of an employer and under its supervision or control. The definition of 'employee' also includes officers and staff who are in the employer's service and subject to the provisions of the Labour Law. In the UAE, an employer is required to obtain a labour permit for an employee who is not a UAE national.

In contrast, an independent contractor is an individual or corporate entity that provides services, but without the element of supervision or control which characterises the employment relationship. The employer of an independent contractor does not typically obtain a labour permit for the independent contractor, and the relationship is generally viewed as outside the scope of the Labour Law.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The employer of a proposed non-UAE national employee must obtain a UAE residence visa for the employee (except for an employee whose UAE residence visa is sponsored by the head of household, as discussed in question 16) and a UAE labour permit. In the case of a recruitment agency, the agency may employ the employee directly by sponsoring the employee's residence visa and labour permit. In such case, the employee would be deployed to the workplace of the recruitment agency's client, pursuant to a personal secondment agreement. Such personal secondment agreement must be approved by and filed with

the UAE Federal Ministry of Human Resources and Emiratisation. The recruitment agency would be primarily responsible to the employee for all of the employee's employment entitlements.

In some cases, the recruitment agency instead recruits an employee for its client, but then requires the client to sponsor the prospective employee's UAE residence visa and labour permit. In this case, the employer would be responsible to the employee for all employment entitlements.

In either case, as noted in question 10, the terms of the employment contract must comply with the terms of the offer letter.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Most employer-sponsored UAE residence visas are valid for a two-year term, after which they must be renewed in order for the employee to stay in the country. Employers are subject to numerical limitations, but the limitations depend on the employer's business activities. Some of the free zones follow an express visa quota that depends on the size of an employer's business premises.

Visa transfers within the UAE are generally possible for employees who hold bachelor's degrees or higher educational qualifications. The specific requirements on transfers vary somewhat from time to time and from place to place. The transfer of an employee from outside the UAE requires the employer to seek a new UAE residence visa and labour permit for the transferring employee.

16 Are spouses of authorised workers entitled to work?

A spouse is authorised to work if his or her employer obtains a labour permit.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Under the Labour Law, an employee must submit an application for approval to the Ministry of Human Resources and Emiratisation and obtain a work permit from their employer subject to the processes specified by the Ministry of Human Resources and Emiratisation. The employee must then apply for an employment visa from the Immigration Authority. Once this visa is obtained and the employee has entered the UAE, the sponsor is responsible for arranging a residence permit for the employee.

Employees employed in the DIFC and other free zones must obtain similar permits using the forms pertinent to their free zones.

Knowingly employing a worker who does not have the right to work in the jurisdiction is punishable by a fine or a prison term.

18 Is a labour market test required as a precursor to a short or long-term visa?

Under the Labour Law, UAE nationals are given top priority to fill employee positions. The Ministry of Human Resources and Emiratisation is required to certify a need for non-nationals in the event of non-availability of national workers. This is generally, however, a pro forma exercise.

The DIFC Employment Law does not give priority to UAE nationals, and therefore no labour market tests are required in the DIFC.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The Labour Law applies the following restrictions on working hours:

- Working hours must not exceed eight hours per day, or 48 hours per week, over a six-day week.
- Employees cannot work more than five consecutive hours without receiving break times of at least one hour in total for rest, food and prayer. This break time does not constitute a working hour.
- The normal weekly holiday is Friday, unless the employee works on a daily wage basis.

An employee may not opt out of such a restriction or limitation.

These provisions do not apply to certain employees working in a senior or managerial capacity, or ship crews and seamen who work under special service conditions due to the nature of their work.

The position differs in the DIFC, where the following provisions apply:

- Weekly working hours must not exceed, on average, 48 hours over a seven-day period, unless the employer first obtains the employee's consent, in writing, to a greater number of hours.
- An employer cannot require, or directly or indirectly allow, an employee to work excessive hours detrimental to the employee's health and safety.
- An employee who works more than six hours per day is entitled to rest and prayer breaks of at least one hour on aggregate during that period.
- An employee is entitled to a rest break of at least 11 consecutive hours in each 24-hour period.
- An employee is entitled to an uninterrupted rest period of at least 24 hours in each seven-day week.

An employee may not waive these restrictions.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime must not exceed two hours per day, unless the work is necessary to prevent substantial or serious accident (or to eliminate or alleviate its effects). Overtime pay amounts to 125 per cent of an employee's remuneration for the period of overtime worked (unless the employee is required to work overtime between the hours of 9pm and 4am, in which case this rises to 150 per cent). Where an employee is required to work on a Friday, he or she is granted one day leave in lieu, or paid 150 per cent of his or her basic wage for the Friday worked. Other than labourers on daily wage, no employee can work more than two consecutive Fridays.

These provisions do not apply to certain employees working in a senior or managerial capacity, or ship crews and seamen who work under special service conditions due to the nature of their work.

The DIFC Employment Law references but does not specifically define 'overtime'.

21 Can employees contractually waive the right to overtime pay?

No; such a waiver by an employee would be unenforceable.

22 Is there any legislation establishing the right to annual vacation and holidays?

The Labour Law requires that for each year of service, employees are entitled to paid leave of not less than:

- two calendar days per month, for employees who have more than six months' service but less than one year's service; or
- 30 calendar days per annum, for employees with more than one year's service.

Leave is in addition to the seven national holidays. The Ministry of Human Resources and Emiratisation declares the length of each national holiday (which can fall on any day of the week each year) before the holiday takes place. The lunar calendar determines the dates of some national holidays.

The minimum pay for annual leave and national holidays is the employee's basic pay plus housing allowance (if applicable). However, if a public holiday falls on a weekend, an employer is not obliged to provide payment to an employee in place of the public holiday.

The DIFC Employment Law requires an employee to be entitled to paid annual leave of 20 working days, in addition to national holidays, if he or she has at least 90 days service. This is accrued pro rata in the first year, calculated at a rate of 1:12 of the employee's leave entitlement on the first day of each month of service. There is no minimum pay for annual leave, but pay for national holidays is calculated at the employee's daily wage.

23 Is there any legislation establishing the right to sick leave or sick pay?

Under the Labour Law, an employee is not entitled to paid sick leave during his or her probationary period. If an employee has worked continuously for an employer for three months, after the end of his or her probationary period he or she is entitled to 90 days' sick leave per year (either continuously or on aggregate) of which:

- the first 15 days are with full pay;
- the next 30 days are with half pay; and
- the remaining 45 days are not paid.

Under the DIFC Employment Law, an employee is entitled to 60 working days paid sick leave per year, which cannot be carried forward into the next 12-month period.

There is no state sick pay (either in the UAE or the DIFC).

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

There is no entitlement to a leave of absence other than for the reasons set out in the Labour Law (such as annual leave and sick leave). Employers and employees are free to reach agreement on leaves of absence on a case-by-case basis.

The DIFC Employment Law accounts for special leave of absence but does not specify the circumstances under which it may be taken, or the corresponding pay scale for such leave.

25 What employee benefits are prescribed by law?

The Labour Law provides many benefits to employees that cannot be waived by contract. Among these benefits are:

- protection from arbitrary termination (see questions 35 to 40);
- an assurance via the Wage Protection System that salaries will be paid on a monthly basis;
- entitlement to overtime compensation;
- termination benefits;
- repatriation benefits; and
- an administrative and judicial grievance procedure where fees are waived for employees.

Employers in the Emirates of Abu Dhabi and Dubai must provide health insurance to their employees.

26 Are there any special rules relating to part-time or fixed-term employees?

Under the Labour Law, part-time employees have the same rights as other employees, although they work shorter hours. The same is true for short-term employees. Employers are still required to obtain labour permits for part-time and short-term employees.

The position is the same in the DIFC except that short-term employees are not entitled to a written contract or an itemised pay statement if the employment is for less than 30 days.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

It is not possible to obtain injunctive relief from the UAE courts so contractual restraint of trade clauses are of limited use. However, it is possible to prevent an employee from working in the UAE through Ministry of Human Resources and Emiratisation administrative processes. If an employee resigns before completing one year of service with an employer, the Ministry of Human Resources and Emiratisation enforces an automatic six-month employment ban on the employee. The Ministry of Human Resources and Emiratisation can also impose a ban on employees with more than one year's service and less than three years' service, but this can be lifted on payment of a fee or if the former employer confirms that it does not object.

Free zone authorities can enforce post-termination restrictions if they are included in an employment contract, but only within the relevant free zone.

In the DIFC, restraint of trade clauses can be included in an employment contract. Injunctive relief is available from the DIFC courts, but an injunction order is only enforceable within the DIFC.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Employers do not have to pay former employees any remuneration while they are subject to post-employment restrictive covenants.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The Labour Law states that an employer can be vicariously liable for the acts of its employees carried out in the course of their employment.

The DIFC Employment Law provides that an employer is liable for acts of its employees carried out in the course of employment. An employer is not liable if it proves that it took reasonable steps to prevent the employee from carrying out the act, or similar acts, in the course of employment.

Taxation of employees

30 What employment-related taxes are prescribed by law?

There is no payment or withholding of employment-related taxes.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Federal Law No. 7 of 2002 for Copyright and Neighbouring Rights (Copyright Law) is the governing legislation addressing employee inventions. The Copyright Law provides that the author of a work is its owner. An employer and employee can agree to the contrary in the employment contract, but there are limitations on the disposal of future copyright works. Specifically, purported disposals of more than five future works are void. The author's moral rights to a work are non-transferable. If a work is a collective work, created by co-authors under the direction of the employer and for publications in the employer's own name, then the employer owns the copyright. However, this can be varied by agreement.

Unless the parties have agreed otherwise, an employer has the right to apply to patent any invention created during the course of an employee's employment (Federal Law No. 17 of 2002 Regulation and Protection of Patent and Property Rights in the Industrial Designs and Models (Patents and Designs Law)). However, the employee has rights to compensation if the economic value of the invention was not anticipated when the employment contract was entered into.

The employee may be entitled to the invention if both:

- this inventive activity is outside the scope of the employee's duties; and
- he or she uses the employer's resources to make an invention relevant to the employer's business.

In these circumstances, the employee must give the employer notice of the invention, and if the employer fails to confirm interest in owning the invention, the employee is entitled to fair compensation, taking into account the significance and economic value of the invention to the employer.

32 Is there any legislation protecting trade secrets and other confidential business information?

Protection is available under local law in respect of confidential business information that would qualify for protection under the Copyright Law or the Patents and Designs Law (see question 31).

The Labour Law itself does not expressly protect confidential business information. However, it does provide for the enforceability of the post-employment restrictive covenants that are referenced in question 27.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There are no specific data protection rights for employees under the Labour Law or in the free zones, but general protection exists in the Civil Code. There are general data protection laws that apply in the financial free zones (the DIFC and the Abu Dhabi Global Market), which protect employees' right to privacy and their personal information.

DIFC Law No. 1 of 2007 (DIFC Data Protection Law) imposes a number of obligations on anyone who processes personal data. Employees have a number of rights concerning their personal data, including the right to have their information processed fairly, securely and in accordance with necessary and legitimate purposes. There must also be adequate protection when data is transferred to a jurisdiction outside the DIFC.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Employees are not automatically transferred with the business or given protection against dismissal in the event of a business transfer. The termination provisions under the Labour Law apply. There are no regulations relating to harmonising the terms of transferred employees with other (existing) employees of the buyer.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An unspecified term contract may be terminated for a legitimate reason with notice given at least 30 days prior to termination. Termination is considered arbitrary and can be adjudicated if the cause for such termination is not related to the employee's work, or is a result of a justifiable action brought by the employee against the employer. A contract may be terminated without notice in limited circumstances (see question 37).

The DIFC Employment Law requires that an employee be terminated for cause in circumstances where the conduct of the employee warrants termination, and where a reasonable employer would have terminated the employment.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

The minimum notice period under the Labour Law is 30 days. An employer and employee can mutually agree to a longer notice period, but they cannot shorten notice to less than the statutory minimum period. If either party defaults on the agreed notice period, he or she must pay compensation in lieu of notice based on the employee's current pay (in proportion to the number of days in default).

In the DIFC, the minimum notice period is:

- seven days, if the period of continuous employment is less than three months;
- 30 days, if the period of continuous employment is at least three months but less than five years; and
- 90 days, if the period of continuous employment is five years or more.

However, an employer and employee can agree to:

- a longer or shorter period of notice;
- waive notice entirely; and
- a payment in lieu of notice.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer can dismiss an employee without notice if the employee commits an act of gross misconduct or is on probation. Under the Labour Law, the offences that constitute gross misconduct are limited to the following:

- adopting a false identity or nationality or submitting forged certificates or documents;
- making a mistake resulting in substantial material loss for the employer, and the employer notified the Ministry of Human Resources and Emiratisation of the incident within 48 hours of becoming aware of its occurrence;
- disobeying instructions concerning industrial safety or the safety of the workplace, if the instructions are in writing and displayed clearly; if the employee is illiterate, the employer should have read the instructions to him or her;
- failing to perform basic duties under the contract of employment and persisting in violating them despite the fact that he or she has been both the subject of a written investigation and warned that he or she will be dismissed if the behaviour continues;
- revealing company secrets;
- a competent court has sentenced him or her for an offence involving honour, honesty or public morals;
- being found drunk or under the influence of a drug during working hours;
- assaulting an employer, a responsible manager or a colleague during working hours;
- being absent without a valid reason for more than 20 non-consecutive days, or more than seven consecutive days; and
- if the employee works for another employer during his or her annual or sick leave.

An employer can dismiss an employee without notice where the employee's conduct constitutes misbehaviour. Misbehaviour is not defined in the DIFC Employment Law, but it is described in general terms in the DIFC Employment Law as to where an employee's conduct warrants termination and a reasonable employer would have terminated his or her employment.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

To be entitled to a gratuity or severance payment on termination of employment, the Labour Law requires an employee to have accrued one year's continuous service and the dismissal not to be for gross misconduct. An end-of-service gratuity is calculated with reference to the employee's last basic pay at the time of termination at the rate of:

- 21 days' basic pay for each of the first five years of service; and
- 30 days' basic pay for each year of service in excess of five years of service.

The position is the same under the DIFC Employment Law and there is no reduction in the end-of-service gratuity when an employee resigns.

An employee with an unlimited contract who resigns from his or her employment with less than five years' service is entitled to a reduced gratuity payment, calculated by reference to length of service, as follows:

- an employee who has more than one year but less than three years' service is entitled to one-third of the total gratuity entitlement;
- an employee who has more than three years' but less than five years' service is entitled to two-thirds of the total gratuity entitlement; and
- an employee who has more than five years' service is entitled to the full gratuity entitlement.

An employee is not entitled to an end-of-service gratuity payment in either of the following circumstances:

- he or she is entitled to a company pension that complies with the provisions of the Labour Law or DIFC laws (as appropriate); or
- pension contributions are made on his or her behalf to the General Pension and Social Security Authority.

39 Are there any procedural requirements for dismissing an employee?

The Labour Law requires that employees be granted 30 days' notice prior to dismissal. Employees can avail themselves of the grievance procedure if they believe that the employer's action was wrongful.

Employers must cancel or transfer sponsorship of an employee's residence visa and labour card (or ID card if the employee is working in the DIFC or in the free zones) within 30 days of termination of employment. Employees must sign a final settlement form confirming that they have received all of their legal entitlements before the authorities will cancel their residence visa and labour card (or ID card, if applicable).

Approval from or notification to a government agency is not required, apart from the procedures involved in cancelling the employee's labour permit and residence visa after an employee's contract is terminated.

40 In what circumstances are employees protected from dismissal?

Employees on specified-term contracts may be terminated only for one of the specified acts of misconduct that are set out in the Labour Law. Employees under unspecified-term contracts can be terminated only for a legitimate reason and with a minimum notice of 30 days.

A 2009 Ministerial Resolution prohibits the dismissal of UAE nationals without the Minister of Human Resources and Emiratisation's approval. This measure applies throughout the UAE, including the free zones other than the DIFC.

Employees in the DIFC must be terminated for cause and given a minimum notice period determined by their length of continuous employment with the employer. An employee may request a written statement of reasons for his or her dismissal if he or she has been continuously employed for at least one year.

41 Are there special rules for mass terminations or collective dismissals?

There are no special rules for mass termination or collective dismissals. Employee contracts must be individually terminated.

The position is the same in the DIFC.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class actions are not permitted under UAE law. The Dubai Court does not have a mechanism for class actions so each claim must be filed separately. The Labour Law, however, permits collective work disputes to allow for quick and amicable resolution of disputes. The aggrieved employees must submit their complaints in writing to their employers and send copies of the complaints to the Ministry of Human Resources and Emiratisation. Employees must reply to the complaint within seven working days of date of receipt with a copy submitted to the Ministry of Human Resources and Emiratisation. If the employers fail to respond or their replies do not resolve the disputes, the Ministry of Human Resources and Emiratisation will mediate to settle the disputes. Failure to settle will result in the referral of the disputes to a conciliation board that is responsible for awarding a decision.

The DIFC Employment Law permits class action suits that are brought before the DIFC courts.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The Labour Law imposes a mandatory retirement age of 65 years on foreign nationals. To work beyond the mandatory age of retirement, the approval of the Minister of Human Resources and Emiratisation or undersecretary must be given. Approval is often granted if the employee is an expert or consultant with expertise in a rare speciality.

There is no mandatory retirement age in the DIFC.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Under the Labour Law, employment disputes cannot be settled in private arbitration and a claim must be brought in the civil courts.

The DIFC Employment Law similarly does not permit private arbitration of employment disputes.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

The Labour Law does not permit an employee to waive their statutory and contractual rights to potential employment claims.

The position is the same in the DIFC.

46 What are the limitation periods for bringing employment claims?

Under the Labour Law, the time limitation for bringing employment claims is one year.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes relating to employment are the Employment Rights Act 1996, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Equality Act 2010. There are a number of other employment laws and regulations in the United Kingdom, the most important of which are referred to below. Please also note that while employment law in Scotland and Northern Ireland is very similar to that which applies in England and Wales, there are some differences – particularly in Northern Ireland with regard to discrimination law.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

In the United Kingdom, anti-discrimination legislation in the form of the Equality Act 2010 prohibits discrimination across nine 'protected characteristics': age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (which includes colour, nationality and ethnic or national origin), religion or belief, sex, and sexual orientation.

The term 'discrimination' encompasses a number of concepts and causes of action:

- direct discrimination – someone is treated less favourably than another person because of a protected characteristic he or she has (direct discrimination), or is thought to have (perception discrimination), or because he or she associates with someone who has a protected characteristic (discrimination by association) (age discrimination is the only type of direct discrimination which can be objectively justified by showing that it is a proportionate means of achieving a legitimate aim);
- indirect discrimination – applying a provision, criterion or practice that puts those with a protected characteristic at a disadvantage which cannot be objectively justified by showing that it is a proportionate way of achieving a legitimate aim;
- discrimination arising from disability – unfavourable treatment towards a disabled person because of something arising in consequence of his or her disability that cannot be objectively justified by showing the treatment is a proportionate means of achieving a legitimate aim;
- reasonable adjustment (applying only in disability discrimination) – a duty to make a reasonable adjustment to the working environment to ensure that a disabled person is not placed at a substantial disadvantage;
- equal pay – paying one gender less than the other where his or her work is the same work or equally valuable work, or has been rated as equivalent in a professional study and where such disparity in pay is not justified by a material difference;
- victimisation – subjecting someone to a disadvantage in retaliation for that person having availed himself or herself of, or supported, any protections under any discrimination statute;
- harassment – unwanted conduct related to any protected characteristic having the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive working environment (with specific provisions for sexual harassment); and
- third-party harassment – liability of the employer for persistent harassment of an employee by a third party, provided it has happened on at least two previous occasions, the employer is aware that it has taken place and the employer has not taken reasonable steps to prevent it from happening again.

Individuals are also protected from harassment by the Protection from Harassment Act 1997, provided there are at least two incidents of harassment and the harasser must know or ought to know that his or her actions amount to harassment.

Employees will be permitted to ask questions of their employers and it will remain open to a tribunal to consider how an employer has responded to such questions as a contributory factor in deciding a discrimination claim.

In addition, seeking, making or receiving a 'relevant pay disclosure' (aimed at discovering whether discrimination in pay is occurring) is 'protected' under the Equality Act. Clauses in employment contracts that are aimed at ensuring pay confidentiality are unenforceable insofar as they prevent disclosure for this purpose.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The enforcement of most employment rights is through individual claims and actions to and in the UK employment tribunals and civil courts. Some collective matters (eg, trade union recognition under a statutory scheme) are dealt with by the Central Arbitration Committee.

The Equality and Human Rights Commission is a public body that has a statutory duty to promote and monitor human rights and protect, enforce and promote equality across the nine 'protected characteristics' (see question 2).

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Transnational Information and Consultation of Employees Regulations 1999 (and the 2010 amending Regulations) apply with regard to European works councils, and the Information and Consultation of Employees Regulations 2004 apply to domestic works councils.

Works councils are not mandatory and require an 'employee request' or employer initiative for establishment. The Regulations set out thresholds for size and geographical spread of the relevant workforce for the provisions to apply.

5 What are their powers?

There are a number of circumstances in which an employer must inform and consult with employee representatives or recognised trade unions which include but are not limited to:

- business transfers and service provision changes (see question 34);
- collective redundancies (see questions 39 and 41);
- European works council agreements;
- health and safety issues;

- changes to pensions; and
- domestic works council agreements.

Consultation must be undertaken with the aim of reaching an agreement with the employee representatives. There is no requirement to reach an agreement.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The Rehabilitation of Offenders Act 1974 applies, save in respect of certain exceptions (eg, working with children or vulnerable people and certain other occupations, including professions (such as the medical and legal professions) and particular financial sector occupations). The act prevents certain other employers from refusing to employ someone in a situation in which an employee or candidate has disclosed or has failed to disclose an offence that is 'spent' under the act. The check can be carried out by the employer or a third party. Criminal Records Bureau checks are required before an applicant can work with young children or vulnerable adults, and may be desirable in other circumstances (for example, for those professions and occupations covered by the Rehabilitation of Offenders Exceptions Order – as set out above in this paragraph).

The Asylum and Immigration Act 1996 and the Immigration, Asylum and Nationality Act 2006 require that certain prescribed background checks be conducted and information be kept prior to employment commencing (and thereafter on the expiry of an employee's limited leave to remain) to ensure that the employee may lawfully work in the United Kingdom (see questions 15 to 18 for further information on immigration matters).

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Pre-employment health checks or questions are specifically regulated under the Equality Act 2010. Save in prescribed limited circumstances, 'pre-employment questions' of or about an applicant for work are prohibited prior to an offer of work to the applicant being made, or prior to his or her inclusion in a pool from which candidates for work will be selected.

Individual offers of employment can be made conditional upon satisfactory health checks, but a recruiting employer may then render itself liable to discrimination claims if it appears that an offer is not confirmed on the basis of information disclosed by the health checks.

Medical reports given by a medical practitioner responsible for an individual's care (rather than by an independent doctor appointed by the employer) are subject to the Access to Medical Reports Act 1988, which essentially allows the patient the right of prior sight and comment on the report.

Medical information about an individual also constitutes 'sensitive personal data' for the purposes of the Data Protection Act 1998's regime of protections.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

General principles derived from the Data Protection Act 1998 and the Human Rights Act 1998 suggest that any such checks should be 'justified, necessary and proportionate'. Such checks tend, therefore, to be found in the context of particular roles within the transport and manufacturing sectors (justified by health and safety considerations) and sometimes also for particular roles within the financial and other professional sectors.

During employment, even where such checks are appropriately 'justified', it is recommended that their use also be reflected in an appropriate provision in relevant employment contracts.

It is rarely appropriate for such checks to be undertaken by the individual's doctor as, additionally, the Access to Medical Reports Act rights would apply to the resulting report. Issues can arise, particularly where the requirement to submit such checks appears unjustified or unjustifiably targeted at particular groups.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

No; 'positive discrimination' is generally unlawful in the United Kingdom, save that there are certain additional positive requirements imposed on public bodies, and 'reasonable adjustment' in disability discrimination (see question 2) is regarded as a form of partial positive discrimination.

Under the Equality Act 2010, employers in the United Kingdom may (although they are not required to) take under-representation of those with 'protected characteristics' into account when selecting between two equally qualified candidates for recruitment or promotion, provided that there is no automatic selection of under-represented groups, and decisions are not made irrespective of merit (ie, by the use of mandatory quotas, which is an increasingly common phenomenon in mainland Europe). Regardless of the new provisions, the selection of a less-qualified candidate on the grounds that he or she is in a protected category remains unlawful.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No, there is no statutory requirement for a written employment contract. There must, however, be a statutory statement of particulars incorporating the following:

- names and addresses (employee and employer);
- start date and continuous employment commencement date;
- job title;
- place of work;
- additional details for work outside the United Kingdom;
- remuneration details;
- hours of work;
- holidays and holiday pay;
- sickness and sick pay;
- pension;
- notice period;
- temporary or permanent work;
- collective agreements; and
- disciplinary and grievance procedures.

Therefore, it is common practice in the United Kingdom for all employees to have a written employment contract with their employers that contains at least the terms set out above.

It should be noted that certain types of clauses are unlikely to be enforceable unless they are in a written employment contract, for example, post-termination covenants not to compete, post-termination confidentiality and intellectual property protection (see also questions 27 and 31).

11 To what extent are fixed-term employment contracts permissible?

They are permissible; however, certain rights and protections are given by the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. There is no maximum duration of contracts, but successive fixed-term contracts of four or more years will be automatically deemed to be permanent contracts with the employer, unless objectively justified by the employer.

12 What is the maximum probationary period permitted by law?

There is no maximum. Customarily, employers will impose a period of six months or less. This probationary period may be extended at the discretion of the employer if stated in the employment contract.

13 What are the primary factors that distinguish an independent contractor from an employee?

An employee is someone required to perform work under the control of an employer and the employee has no power to substitute his or her labour. An employment relationship is also characterised by the fundamental mutual obligations to personally perform work (employee) and to provide and pay for it (employer). It is important to be aware that

there is no single determining test of employment. All relevant factors will be considered.

An independent contractor is in business on his or her own account, takes profits and bears losses and risks, and controls his or her own work product. He or she normally (subject to limited exception) has the power to substitute labour. Determination of employee or independent contractor status is a question of substance over form.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Agency Workers Regulations 2010 implements EU law to guarantee that basic employment conditions are no less favourable for temporary agency workers, and that they have equal access to facilities and opportunities as permanent staff. The regulations provide two different classes of rights: those which are provided as soon as the agency worker starts at the company (day-one rights), and those that are granted after 12 weeks' continuous work.

Day-one rights include access to the hirer's collective facilities and amenities and information about vacancies with the hirer. This means that the agency worker must be provided with the same access to collective facilities and amenities that the hirer would offer to its own employees. Agency workers are also protected from less favourable treatment (unless this can be objectively justified) and must be provided with information about job vacancies.

Once a temporary agency worker has completed 12 weeks' continuous work at the hirer, he or she is entitled to the same basic working and employment conditions as a comparable worker employed by the company. This means that he or she is entitled to the same pay, duration of working time, conditions in relation to night work, rest periods and annual leave as a comparable worker employed by the company.

Any breaches of the Agency Workers Regulations will be enforceable against the recruitment agency in the first instance, unless it can demonstrate that it has satisfied conditions in respect of taking reasonable steps to ensure that the hirer complies with the regulations. If this can be shown, then liability will pass to the hirer.

The Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 also regulate staffing through recruitment agencies. In particular, the law:

- prohibits an employment agency or employment business from charging agency workers a fee for finding them work;
- prescribes the terms which must be agreed upon by agency workers;
- prescribes the terms which must be agreed upon by hirers;
- prohibits the use of agency workers to replace individuals taking part in industrial action; and
- limits the transfer fees that may be charged to a hirer if the agency worker becomes directly engaged by the hirer.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Yes. With effect from 6 April 2011, the number of visas available for non-European Economic Area (EEA) nationals wishing to come to the United Kingdom to work was severely restricted. Briefly, unless an individual satisfies personal criteria to qualify as being 'exceptionally talented', an 'entrepreneur' or an 'investor' in the United Kingdom, employees must be sponsored by an employer before they can obtain entry clearance and authority to work in the United Kingdom. An employer must have obtained a sponsorship licence from the Home Office before it can sponsor employees to work for it in the United Kingdom. The two principal visas available for non-EEA nationals coming to the United Kingdom, which are issued under a points-based system, are known as Tier 2 (general) and Tier 2 (intra-company transfer). Roles for which a Tier 2 (general) visa is being sought with a salary of less than £155,300 are currently subject to an annual limit (during the period of 6 April to 5 April). The limit for 2016/2017 will be 20,700 visas across the United Kingdom.

Tier 2 (intra-company transfer) certificates of sponsorship are available for employees of multinational companies who are transferring from one overseas corporate entity to a skilled job in the United Kingdom for a related entity. The employees must satisfy the points criteria and will be required to demonstrate this as part of the entry clearance process.

Certain Tier 2 (general) migrants are permitted to remain in the United Kingdom for up to six years, following which they must either apply for indefinite leave to remain in the United Kingdom (known as 'settlement') or leave the United Kingdom. A 'cooling-off' period has been introduced to prevent certain Tier 2 migrants from reapplying to return to the United Kingdom under Tier 2 (general) or Tier 2 (intra-company transfer) for 12 months following the date that they permanently left the United Kingdom (sufficient evidence (specified by the Home Office) must be maintained to evidence the date that they permanently left the United Kingdom) or the expiry of their visas, whichever is the sooner.

16 Are spouses of authorised workers entitled to work?

A dependent spouse or partner of a Tier 2 worker is permitted to work in the United Kingdom (except as a doctor or dentist in training), provided that he or she makes an entry clearance application and that the authorised worker can support the spouse without recourse to public funds.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

There are laws in place that prevent illegal working in the United Kingdom. An employer can face penalties if it employs a person aged 16 or over who does not have permission to be in, or work in, the United Kingdom. An employer found guilty of an offence could face a civil penalty of up to £20,000 for each employee who has been employed illegally. There are defences against these penalties if original documents evidencing an individual's right to work in the United Kingdom (such as a passport or biometric residence permit) are checked, verified and copied by the employer before the employee commences work (see question 6). In the case of employees who have only a limited right to remain in the United Kingdom, such checks must be repeated on the expiry of their further leave to remain.

Where, however, an employer is found to have knowingly hired illegal workers, the maximum penalty is a five-year prison sentence or an unlimited fine, or both.

A Tier 1 visa, if granted, is personal to the applicant, meaning that he or she can then work for any employer or work on a self-employed basis for the duration of the visa (two or three-year initial period) (although a Tier 1 Entrepreneur visa only permits an individual to work for the company in which he or she has invested). Tier 2 (intra-company transfer or general) visas are employer-sponsored immigration categories. Permission under Tier 2 only allows the individual to work for the employer entity that sponsors him or her and up to an additional 20 hours a week in a similar role for another employer (provided the additional work is not in place of the original sponsored employment). It is a precondition to Tier 2 that the UK entity has a sponsorship licence (granted by the Home Office).

18 Is a labour market test required as a precursor to a short or long-term visa?

Where a company is issuing a Tier 2 (intra-company transfer) certificate of sponsorship, there is no requirement to carry out a test of the resident labour force. However, in most other cases, in particular for restricted Tier 2 (general) applications, such a test is required before issuing a certificate of sponsorship to a foreign national (limited exemptions exist, for example, where the role on offer will attract a salary of more than £155,300). The UK employer must be able to demonstrate that it has tried and failed to recruit from the resident labour force and that the migrant was selected as the only suitable candidate for the role. To do this, the employer must follow the recruitment guidelines set out in the Tier 2 sponsor guidance. Recruitment must also include advertising on two recruitment platforms for a period of not less than 28 days (if the salary offered is less than £72,500, it is mandatory to place advertisements in Jobcentre Plus offices (and online using Universal Jobmatch)) before it can be offered to workers from outside the EEA or Switzerland (special rules apply for Croatian nationals).

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The Working Time Regulations 1998 limit working hours as follows:

- a 48-hour maximum working week calculated as an average over a 17-week period (the maximum working week is reduced for under-18s); and
- an individual 'opt-out' by written agreement (under-18s cannot opt out).

The regulations also govern shift work, night work and paid annual leave (see question 24).

20 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime pay is not governed by specific legislation but is generally a matter of individual or collective agreement. The National Minimum Wage Act 1998 governs an employer's obligation to pay a certain minimum amount per hour, which may render unpaid overtime unlawful in certain circumstances.

21 Can employees contractually waive the right to overtime pay?

Yes. There is no statutory right to overtime pay – it is a matter for contract so an employment contract will commonly confirm that no overtime pay is payable. It is possible to include a clause within an employment contract to confirm that an employee is not entitled to receive overtime payments in respect of any additional hours that are worked.

22 Is there any legislation establishing the right to annual vacation and holidays?

The Working Time Regulations 1998 establish a statutory entitlement to 5.6 weeks' (or 28 days') leave per annum (inclusive of bank and public holidays), which is paid. Accrual is monthly and is paid in lieu only on termination. Special provision is made for part-time workers.

23 Is there any legislation establishing the right to sick leave or sick pay?

The Social Security Contributions and Benefits Act 1992 governs the UK statutory sick pay scheme. The Act entitles qualifying employees who are absent for four or more consecutive days (including weekends) to receive a statutory minimum weekly payment.

Employees do not receive any payment for the first three days on which they are absent. Statutory sick pay is paid for up to 28 weeks in any period of incapacity or in any series of linked periods of incapacity (any periods which are not more than eight weeks apart). Statutory sick pay stops at three years even if an employee has not yet been paid for 28 weeks of absence.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The principal statutory leaves of absence are as follows:

- maternity leave – up to 52 weeks; up to 39 weeks 'paid' at the statutory rate;
- adoption leave – same as maternity;
- paternity leave – two weeks 'paid' at the statutory rate;
- shared parental leave – eligible employees are entitled to take up to 50 weeks' leave; up to 37 weeks' 'paid' at the statutory rate (this accounts for the two-week period of compulsory maternity leave and an equivalent two-week period of adoption leave). This leave can only be taken when a mother or adopter has given the requisite notice to end her maternity or adoption leave and the remainder of her leave will be available as shared parental leave. Shared parental leave will enable parents or adopters to take leave together or to split the leave period between them. It is also possible for parents or adopters to determine how the shared parental pay will be divided between them;
- parental leave – 18 weeks for each child (which is available to each parent), unpaid;
- dependant leave – 'reasonable' unpaid time off to deal with emergencies; and
- jury service – length of jury service, unpaid.

'Paid' above does not mean full contractual pay. It is an amount set by the government but paid by the employer. Employers should be able to recover a large percentage of this amount from the government. In addition, some employers may choose to pay enhanced maternity pay, paternity pay, adoption pay, shared parental pay, benefits, etc. Leave may also be provided for by contract or as otherwise agreed.

25 What employee benefits are prescribed by law?

Legislation came into force in October 2012 that requires employers to automatically enrol eligible jobholders into a qualifying workplace pension scheme. The obligations on employers will be brought into force in stages over a four-year period depending on the size of the employer.

Eligible job holders must be between the age of 22 and state pension age and must earn a statutory minimum amount. Employers will need to determine whether existing pension schemes will comply with the requirements to be qualifying pension schemes. Alternatively, the government is setting up the National Employment Savings Trust, which will be available for employers to use to comply with the duty of auto-enrolment.

From October 2017, overall employee and employer contributions to the qualifying pension scheme will have to total 8 per cent with a minimum of 3 per cent being paid by the employer and the remainder being made up of employee contributions and tax relief. From October 2012 to September 2017, reduced contributions will be required. Contributions by the employer and employee are limited to 'qualifying earnings' (earnings between two specific bands, which for the 2015–2016 tax year were £5,824 and £42,385). The earnings thresholds are reviewed each tax year and the Department of Work and Pensions announced on 6 April 2016 that the annual earnings thresholds for the 2016–2017 tax year are £5,824 and £43,000. The proposed annual earnings thresholds for the 2017–2018 tax year are £5,876 and £45,000.

26 Are there any special rules relating to part-time or fixed-term employees?

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 grant employees (unless objectively justified):

- the right to the same terms and conditions as comparable permanent employees; and
- the right not to suffer a detriment or unfair dismissal by reason of their fixed-term status.

Successive fixed-term contracts of four or more years will be automatically deemed to be permanent contracts with the employer, unless objectively justified by the employer.

The rules relating to part-time workers are governed by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which grant such workers (unless objectively justified):

- the right to the same terms and conditions as comparable full-time workers; and
- the right not to suffer a detriment or unfair dismissal by reason of their part-time status.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants are assumed unenforceable as a restraint of trade as a matter of UK public policy unless:

- they go no further than is reasonably necessary in scope, duration and geographical extent to protect an employer's legitimate business interests from the employee in question; and
- they do not otherwise offend public policy.

There is no maximum period for a post-termination covenant. However, restrictions lasting more than 12 months are unlikely to be enforceable in the United Kingdom, except for in exceptional circumstances. Even a full 12 months will only be justified for the most senior employees or

in special circumstances, for example, where an employee may do a great deal of damage to an employer's business because of his or her knowledge of the employer's confidential or proprietary information.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

There is no requirement for an employer to continue to pay a former employee while he or she is subject to post-employment restrictive covenants.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

At common law, employers are vicariously liable to third parties for acts and omissions of employees 'in the course of' their employment. Employers are vicariously liable for the discriminatory acts and omissions (including harassment) by their employees 'in the course of employment' (where 'course of' has a broader meaning than at common law) and where an employer has failed to take reasonable practicable preventive steps.

Taxation of employees

30 What employment-related taxes are prescribed by law?

The deduction at source of income tax and employer and employee national insurance contributions (social security) under the UK 'Pay As You Earn' system is mandated by the Income Tax (Earnings and Pensions) Act 2003.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Employee 'inventions' are addressed by the Patents Act 1977 and the Copyright, Designs and Patents Act 1988. Generally, any intellectual property that is created by an employee in the course of his or her employment in the United Kingdom will belong to the employer. However, it is common for there to be an express provision in the employment contract to ensure that this is the case.

32 Is there any legislation protecting trade secrets and other confidential business information?

No, confidential information and trade secrets are not governed by statute in the UK.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Data Protection Act 1998 ensures the fair and lawful processing of individuals' personal data in accordance with the eight 'principles of fair processing', which are that personal data are:

- to be processed fairly and lawfully;
- to be processed for specified and lawful purposes and not beyond;
- to be adequate, relevant and not excessive;
- to be accurate and up to date;
- not to be kept longer than necessary;
- to be processed in accordance with the rights of the subject of the personal data;
- to be protected with appropriate security measures; and
- not to be transferred outside the EEA, unless the recipient ensures adequate data protection.

Employers are obliged to notify the UK Information Commissioner of the data being processed and the purposes for which processing of data is being carried out. Employers must comply with 'data subject access requests' by individuals for their data, which are requests by employees of their employers for personal information that is held about them.

The new General Data Protection Regulation (GDPR) was adopted on 24 May 2016 and will come into effect on 25 May 2018. The GDPR will supersede the Data Protection Act by harmonising data protection legislation across Europe. The GDPR will provide enhanced data protection rights and protections for employees.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Where there is no change in the identity of the employer, for example, on a share disposal, the employees' contracts of employment continue. All rights, duties and liabilities owed by, or to, the employees continue, and the buyer of the employer's shares inherits all those rights, duties and liabilities by virtue of being the new owner of the employer.

By contrast, the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (together, TUPE) give special protection for the rights of employees on the transfer of an undertaking (where there is a 'relevant transfer'), which includes a sale of assets or a business activity, or on a change of service provider (outsourcing).

TUPE creates:

- particular unfair dismissal rights in the context of a TUPE transfer;
- the automatic transfer principle whereby (subject to a few exceptions) the buyer inherits all rights, liabilities and obligations in relation to the 'assigned' employees; and
- the obligation to inform and consult with representatives of the affected employees, and liabilities for failure to do so by way of a penal award of up to 13 weeks' actual pay for each affected employee.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Contractually, at common law an employer can dismiss an employee for any reason, provided appropriate notice is given.

Statutorily, if the employee has the relevant qualifying length of service (if applicable), he or she may be dismissed only for a potentially 'fair reason', that is:

- capability;
- conduct;
- redundancy;
- breach of a statutory enactment by the employee; or
- some other substantial reason.

See question 39 regarding additional procedural requirements.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Notice of at least the statutorily prescribed minimum must be given prior to dismissal, as follows:

Length of service	Notice period
Up to one month	Nil
One month to two years	One week
Two years to 12 years	One week for each year of completed employment
12 years +	12 weeks

UK employers provide additional notice as a matter of custom in the employment contract. Where this is the case, the contractual notice must be given by the employer. Payment in lieu of notice can be given if set out in the employment contract.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

This may occur only in cases of 'gross misconduct' (ie, misconduct of a very serious nature including that which the employer is justified in treating as very serious in the context of its business). It is important that a non-exhaustive list of examples of gross misconduct be set out

Update and trends

Gender pay gap reporting

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (GPG Regulations) came into force on 6 April 2017. The GPG Regulations will introduce mandatory gender pay gap reporting for private and voluntary-sector employers with more than 250 employees in the UK on the 'snapshot date' of 5 April in the relevant year.

Employers will be required to publish six calculations showing their:

- average gender pay gap as a mean average;
- average gender pay gap as a median average;
- average bonus gender pay gap as a mean average;
- average bonus gender pay gap as a median average;
- proportion of males receiving a bonus payment and proportion of females receiving a bonus payment; and
- proportion of males and females when divided into quartiles ordered from lowest to highest pay.

'Relevant employees' for the purposes of the GPG Regulations will not include partners but will include casual workers or those engaged under a zero hours contract. It is also possible that some self-employed contractors should be included in the calculations.

In addition to the gender pay gap figures that will be prepared in respect of pay and bonuses, employers will have the opportunity to provide a narrative explaining their results. This will provide an opportunity for employers to give details about what steps they are taking to reduce their gender pay gaps and to explain any challenges that the results show. For example, an employer may wish to provide details about what steps it has taken to increase recruitment of experienced senior female hires into parts of its business which are typically male-dominated. Or it might choose to provide details on any changes it has made to its bonus policy. Should further data or analysis be helpful to assist employers in explaining their gender pay and bonus gap figures, they are able to publish more detail; for example, some employers may wish to show data comparing the numbers of male and female employees in different roles or at different grades, or data on numbers of part-time employees.

The gender pay gap report must be published on the employer's website and a government website within 12 months of the snapshot date and will remain accessible for three years. This will not only allow comparisons to be drawn annually to see if employers are managing to reduce the gender pay gaps within their organisations, but will also allow for comparisons to be drawn across industry sectors. This will likely result in retention and recruitment challenges for employers and will need to be monitored carefully.

Employers need to be prepared to collate and manage the data required to produce the report and will need to have communication plans in place to inform employees of the results and also to prepare for press and media enquiries and commentary.

Although the gender pay gap will show the difference in average pay between all men and women and equal pay deals with the difference in pay between men and women who carry out the same jobs, similar jobs or work of equal value, it is inevitable that there will be some confusion between the two when the gender pay gap reports are published. In order to avoid an increase in grievances, subject access requests and possible claims, employers will need to be proactive in addressing this by training human resources staff and managers in these areas to deal with queries from employees and also to ensure that they are mindful of both issues when making pay, bonus, and recruitment and retention decisions for their workforces. In addition, the more transparent employers can be with their employees in respect of their pay review and bonus awards (and how these are calculated), the less concerns employees are likely to raise.

It is expected that the government's next step will be to consult on extending the mandatory reporting obligation to public-sector employers. Accordingly, it would be advisable for any public-sector employer with 250 or more employees to consider preparing a gender pay report to analyse its gender pay and bonus gaps and to consider how it could seek to reduce these gaps, prior to this becoming a mandatory requirement.

by the employer and relayed to each employee; the list is usually contained in the employment contract.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Under the Employment Rights Act 1996, statutory redundancy pay exists for employees with two or more years' service. The exact amount is linked to the length of service, age of the employee and statutory cap on 'weekly pay'.

Redundancy pay may be enhanced by the employer, including by custom and practice.

39 Are there any procedural requirements for dismissing an employee?

Yes, there is a duty for employers to act 'reasonably' pursuant to the Employment Rights Act 1996. Employers carrying out dismissals (except for dismissals on the grounds of redundancy or the non-renewal of a fixed-term contract) must also follow the principles set out in the Advisory, Conciliation and Arbitration Service (ACAS) (a governmental public body) Code of Practice. A failure to follow the ACAS Code does not in itself make an employer liable to a claim; however, employment tribunals will take the ACAS Code into account when considering relevant cases and can adjust any awards they make by up to 25 per cent for unreasonable failure by an employer to follow the ACAS Code.

Prior approval by the UK government is not required by law, but if the employer proposes to make redundancies affecting 20 or more employees within a particular time frame, it must notify the UK Department for Business, Innovation and Skills (BIS). Collective consultation with representatives of affected employees is also required.

40 In what circumstances are employees protected from dismissal?

Ordinarily, employees with two years' service have general statutory protection from unfair dismissal.

The following categories have 'automatic' unfair dismissal protection but require two years' service:

- dismissal due to a 'spent' conviction (see question 6); and
- dismissal in the context of a TUPE transfer (see question 33).

Dismissals in the following contexts have 'automatic' unfair dismissal protection and do not require any qualifying length of service:

- jury service;
- leave for family reasons and related leave for time off for dependants;
- health and safety activities;
- Sunday working;
- asserting certain statutory rights;
- asserting rights under the Working Time Regulations (see the responses to questions 22 and 24);
- employee trustees of occupational pension schemes;
- employee consultation representatives or candidates (including European and domestic works councils);
- whistle-blowers;
- flexible working requests;
- certain discrimination-related dismissals;
- exercising the right to be accompanied at disciplinary or grievance hearings;
- the rights of part-time workers;
- the rights of fixed-term employees;
- in connection with entitlement to a national minimum wage;
- in connection with entitlement to working tax credits;
- in connection with the right to request study and training; and
- trade union membership or activities or official industrial action.

Please note that dismissal is 'automatically' unfair if it is by reason of a protected activity, that is, it is causally connected.

Dismissals can also attract protection under anti-discrimination legislation.

41 Are there special rules for mass terminations or collective dismissals?

Yes, a special information and consultation regime applies where there are 20 or more affected employees who are proposed to be dismissed for a 'non-fault' reason within a particular time frame. 'Protective awards' exist of up to 90 days' pay per affected employee for the employer's failure to consult. This is governed by the Trade Union and Labour Relations (Consolidation) Act 1992, section 188. Also, note the BIS notification set out in question 39.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

There is no direct equivalent to the US class action in the United Kingdom. However, there are procedural means of dealing with group actions of multiparty claims that allow groups of claimants to link the claims to proceed against a single defendant:

- where more than one person has the 'same interest' in a claim, the claim may be begun or the court may order that one or more claimants, or one or more defendants, may bring or defend the claim representing others who have the same interest in the claim. Any judgment will be binding on all individuals represented unless the court directs otherwise; and
- where claims by a number of individuals give rise to common or related issues of fact or law, a court may make a 'group litigation order' to manage the claims. Judgments, orders and directions of the court will be binding on all claims within the group litigation order.

In the context of collective consultation and TUPE (see questions 33 and 41), an employee representative brings the claim for a failure to inform and consult and failure to consult on a collective basis on behalf of the affected employees. If successful, compensation is awarded to each affected employee.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Any age-related compulsory retirement has to be 'justified' under anti-age discrimination legislation (the Equality Act 2010) and must be 'fair' under unfair-dismissal legislation (the Employment Rights Act 1996). Compulsory retirement on medical grounds also has the potential to raise discrimination (principally disability and age discrimination) and unfair-dismissal issues.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

In contractual disputes, yes, so long as they do not involve statutory employment protection rights.

Where statutory employment protection rights are affected, an employee cannot validly agree, in advance, to give up his or her right to litigate those rights. So, for example, the employee cannot agree in his or her employment contract, entered into before the dispute arose, not to sue his or her employer for unfair dismissal.

Once a dispute has arisen, private mediation agreed to between the parties is relatively common. Any settlement of a dispute about statutory employment protection rights (including one agreed to during mediation) must satisfy the statutory 'contracting out' requirements referred to in question 45 if the relevant statutory right is to be validly compromised.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee can agree to waive his or her contractual rights. An employee may only waive statutory rights with a valid 'statutory settlement agreement' or through an officer of ACAS (a governmental public body) on form COT3 (an official form used by ACAS to evidence a binding legal settlement between employers and employees).

The requirements for a valid waiver are as follows, with regards to a statutory settlement agreement:

- it must be in writing;
- it must relate to specific proceedings;
- independent legal advice must have been given to the employee;
- the independent adviser must have insurance for negligence;
- the agreement must identify the adviser; and
- the agreement must state that the conditions regulating settlement agreements are satisfied.

46 What are the limitation periods for bringing employment claims?

Employment claim	Limitation period
Ordinary unfair dismissal and automatic unfair dismissal	Within three months from date of termination
Discrimination	Within three months from start of act complained of
Equal pay	Six months from date of termination of relevant contract (note: tribunals can make awards to cover pay disparity going back six years)
Redundancy pay	Six months from date of redundancy
Unlawful deduction of wages	Within three months beginning with date of deduction

There are specific provisions dealing with discrimination by omission and for continuing acts extending over a period of time.

The standard limitation period for a breach-of-contract claim is six years (although some such claims can be litigated in an employment tribunal, but subject to a much shorter limitation period).

The primary limitation period applicable to the various statutory employment protection rights may be extended in appropriate circumstances by an employment tribunal. The tribunal's jurisdiction to extend the time limit applicable to discrimination rights provides the tribunal with a wider jurisdiction to do so than in the context of other statutory employment protection rights.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

In the United States, the employment relationship is governed by federal and state laws and, sometimes, by the laws of local government within states (counties, boroughs, cities and towns).

The primary federal laws that regulate various aspects of employment include the following:

- the National Labor Relations Act (NLRA), establishing the right of employees to form, join and assist labour unions, and the right to bargain collectively with the employer;
- the Fair Labor Standards Act (FLSA), establishing minimum wages and the right to a premium wage rate for time worked in excess of 40 hours in a working week, as well as exemptions from those wage-rate obligations;
- the Occupational Safety and Health Act (OSHA), establishing minimum standards for safety and health in the work environment generally and for specific industries;
- the Employee Retirement Income Security Act (ERISA), regulating the field of employee benefits such as pension and welfare plans;
- the Family and Medical Leave Act (FMLA), establishing the right of eligible employees to take time off from work due to medical disability, in order to bond with a newborn, adopted or foster care-placed child, or to care for a family member who has a serious health condition or who is an ill or injured serviceman or servicewoman;
- the Immigration Reform and Control Act (IRCA), regulating immigration into the United States and providing that employers may only employ persons who can establish their identities and lawful rights to work in the United States; and
- the Sarbanes-Oxley Act and the Dodd-Frank Act, establishing whistle-blowing protection for employees of publicly held companies (and any subsidiaries or affiliates whose financial information is included in consolidated financial statements) who make complaints or assist in investigations regarding shareholder fraud, accounting, internal accounting controls or auditing matters.

See question 2 for a discussion of the main federal anti-discrimination and anti-harassment laws. See question 41 for a discussion of the federal Worker Adjustment and Retraining Notification (WARN) Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes, in the United States, federal and state laws and, sometimes, the laws of local governments within states (counties, boroughs, cities and towns) prohibit discrimination or harassment in employment as a result of certain characteristics of the applicant or employee. The main federal laws are:

- Title VII of the Civil Rights Act (Title VII), prohibiting discrimination against and harassment of an individual on the basis of race, colour, gender, national origin, religion or pregnancy;
- the Age Discrimination in Employment Act (ADEA), prohibiting discrimination against and harassment of persons who are 40 years of age or older;
- the Americans with Disabilities Act (ADA), prohibiting discrimination against qualified individuals with a physical or mental disability, those with a history or record of a disability and persons associated with individuals who have a disability. The ADA also requires employers to provide reasonable accommodation to an individual with a disability that would enable the individual to overcome the limitations created by the disability so as to enable him or her to apply for a position or perform the essential functions of a position, if such accommodation does not result in undue hardship to the employer's operations;
- the Genetic Information Nondiscrimination Act (GINA), prohibiting employers from using genetic information for decisions on hiring, firing, promotions, or job assignments, and prohibiting group health plans and health insurers from basing eligibility or premium determinations on genetic information;
- the Equal Pay Act (EPA), prohibiting sex discrimination in pay; and
- other federal statutes prohibiting discrimination based on citizenship and veteran status.

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) went into effect on 1 January 2009. The ADAAA makes important changes to the definition of the term 'disability', which has the impact of broadening the coverage for individuals who seek to establish that they have disabilities within the meaning of the ADA.

On 29 January 2009, the Lilly Ledbetter Fair Pay Act of 2009 (FPA) was signed into law, eliminating many statute of limitations defences to pay discrimination claims under federal employment laws such as Title VII, the ADEA and the ADA. The FPA amends Title VII by providing that an unlawful employment practice occurs each time an employer issues a pay cheque that has been affected by a prior discriminatory pay decision, regardless of when that initial alleged discriminatory pay decision was made. The FPA applies retroactively to all claims pending on or after 28 May 2007.

Also, virtually all 50 states have their own anti-discrimination and anti-harassment laws. Some state and local laws prohibit discrimination or harassment on the same bases covered by federal laws. Others prohibit discrimination or harassment on additional bases such as marital status, sexual orientation, gender identity, transgender status, domestic or civil union partner status, family status and appearance. All anti-discrimination and anti-harassment laws – federal, state and local – prohibit retaliation against employees for exercising their rights under such statutes by opposing or making complaints of discrimination or harassment, or participating in legal proceedings regarding discrimination or harassment.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Federal government agencies enforce federal employment laws. State government agencies enforce state employment laws. Most employment-related laws allow individuals to bring lawsuits in federal or state court to enforce the law at issue or to recover monetary damages for violation of that law. Some federal and state laws require individuals to pursue and exhaust their remedies with the specified government agency before filing lawsuits in a federal or state court.

The following federal government agencies enforce the corresponding federal employment laws:

- the United States Department of Labor, through its various divisions, enforces the FLSA, the FMLA, the OSHA and ERISA;
- the United States Equal Employment Opportunity Commission (EEOC) enforces Title VII, the ADEA, the ADA, the ADAAA, GINA and the EPA;
- the National Labor Relations Board administers the NLRA; and
- the United States Department of Justice enforces the non-discrimination requirements of the IRCA.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

No.

5 What are their powers?

Not applicable.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Federal law does not restrict background checks of applicants and employees as long as the employer conducts the check directly rather than through a third party. When an employer uses a third-party vendor to conduct the background check, however, the process is governed by the Fair Credit Reporting Act (FCRA). The FCRA does not prohibit an employer from hiring a vendor to conduct background checks or from taking employment action based upon the results of such investigations, but it does require the employer to first provide notice and obtain permission from the applicant or employee. The FCRA also requires that notice be provided to applicants and employees before any adverse employment action can be taken based upon background check information, and the FCRA requires that applicants or employees be given the opportunity to correct or explain any negative information. The FCRA further requires employers to maintain the confidentiality of background check information, and places some limits on how this information can be used. It is also important to note that a number of states, including California and New York, have their own laws governing the use of background checks and impose additional requirements and restrictions on an employer's ability to obtain and use this information.

In April 2012, the EEOC issued guidance regarding when it is appropriate for an employer to use background check information relating to an applicant's criminal history. The EEOC's guidelines state that employers should exercise caution before excluding individuals from employment on the basis of a criminal history, and asks employers to avoid blanket exclusions unless there is a close link between the requirements of the job and the type of crime committed. Similarly, certain states and municipalities across the country have enacted legislation limiting the ability to inquire as to criminal records and the use of this information during the application process and in other employment decisions.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Yes, the ADA prohibits employers from conducting medical examinations or making pre-employment inquiries to determine whether an applicant has a disability or the nature or severity of the disability. Under the ADA, however, employers may require applicants to submit to post-offer medical examinations, which may be administered after the applicant has received a conditional offer of employment but before the applicant has commenced employment. Moreover, employers may condition offers of employment on the results of the post-offer medical examination if the following conditions are met:

- all entering employees in the same position are subjected to such examinations whether or not they have a disability;
- information obtained regarding an employee's medical condition or history is collected and maintained on separate forms and in separate medical files that are treated as confidential medical records; and
- the results of the examinations are used only in accordance with the provisions of the ADA, and if people with disabilities are excluded from the position on the basis of the examination, the examination must be job related and consistent with business necessity.

State laws may also provide restrictions on pre-employment medical and physical examinations of applicants.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Generally, pre-employment drug and alcohol testing is lawful under federal and state law where:

- the testing is required by law (eg, United States Department of Transportation drug and alcohol testing requirements) or is part of a lawful pre-employment medical examination required of every applicant for the same position;
- an applicant has notice of and consents to the testing requirement;
- the testing is conducted under conditions designed to minimise the intrusiveness of the procedure (eg, an applicant is not observed while furnishing the sample); and
- no specific medical information is reported to the employer; rather, the employer is only informed of a pass or no-pass result.

Drug and alcohol testing of applicants and employees is predominantly a subject of state law, which can vary widely from state to state.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

There is no legal requirement to give preference in hiring to particular people or groups of people. The anti-discrimination laws that are discussed in question 2 prohibit discrimination against job applicants who are in protected categories.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No.

11 To what extent are fixed-term employment contracts permissible?

State, not federal, law would govern the maximum duration of any fixed-term employment contract. Although generally there is no limitation on the duration of a fixed-term employment contract, such contracts in the United States are typically for a term of one to three years.

12 What is the maximum probationary period permitted by law?

There is no law (federal, state or local) that requires any probationary period at the beginning of the employment relationship. Unless the employer agrees to a probationary period – with an individual employee or with a representative of employees such as a union – it would be the employer's choice whether to establish a probationary period and, if so, whether such probationary period would be extended in the employer's discretion or only under certain circumstances. Most states, except Montana, do not require a probationary period.

See question 35 for a discussion of Montana's probationary period.

13 What are the primary factors that distinguish an independent contractor from an employee?

Control, dependence and risk of loss are among the primary factors used to distinguish between an independent contractor and an employee. An employee is generally an individual whose time, place and manner of providing services or results are controlled by or subject to the control of the employer. Generally, the employer provides the employee with the tools and means necessary for the work to be performed, the employee is economically dependent upon the employer,

and the employer bears the risk of loss if the work performed or results achieved by the employee are not satisfactory to the employer (eg, the employer must still pay the employee, and can only discipline or terminate the employee if the work or result is not satisfactory).

By contrast, an independent contractor is an individual or business entity that is generally retained to deliver a specific result and, except for deadline and security of intellectual property reasons, has the right to control the time, place and manner of performing the work necessary to provide the agreed-upon result. Independent contractors typically market their services to more than one entity, provide the tools and other means necessary to produce the result, and bear some risk of loss in the event they fail to deliver the result in a timely manner, or deliver results that are unsatisfactory in quality or quantity to the contracting business (eg, the contractor will not be paid).

In July 2015, the United States Department of Labor issued Administrator's Interpretation No. 2015-1 concerning the misclassification of employees as independent contractors. The Administrator's Interpretation states that whenever a worker is 'economically dependent' on an employer, the worker is an employee. In contrast, when a 'worker is in business for him or herself (ie, economically independent from the employer), then the worker is an independent contractor'.

14 Is there any legislation governing temporary staffing through recruitment agencies?

No.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

In the United States, there are numerical limitations on two significant temporary visa categories: H-1B and H-2B. H-1B visas are for professional workers coming into the United States to work temporarily for a US employer in a specialty occupation. A specialty occupation is one requiring, at a minimum, a baccalaureate degree in a specific academic discipline (or the equivalent in work experience), and the foreign national worker must have that educational background or the equivalent in work experience. Under current law, there are only 65,000 H-1B visas available each fiscal year. There is a separate allotment of 20,000 H-1B visas available to foreign workers who have obtained an advanced degree from a US institution of higher education, such as a US master's degree, PhD, juris doctor or other professional degree. Employers may apply for these H-1B visas beginning 1 April, six months before the start of the fiscal year in which the H-1B visa will become active.

US institutions of higher education and affiliated not-for-profit organisations, not-for-profit research organisations and US government research institutions are not subject to the H-1B cap. This means they may apply for H-1B visas for professional workers at any time. In addition, H-1B workers extending their stay or transferring from one cap-subject employer to another are not subject to the numerical limitation.

H-2B visas are for temporary workers who will work for US employers on temporary projects with a finite end, for seasonal workers and for workers who will fill a peak-load need. For example, many hospitality companies use the H-2B category to bring to the United States seasonal resort workers, ski instructors, etc. There is a numerical limitation of 66,000 H-2B visas available each fiscal year. Half of the allotment is made available for the first half of the fiscal year, and the second half is opened up in the second half of the fiscal year.

There are also work visas based on special legislation or trade treaties. The E-3 is a work visa available to nationals of Australia, and the H-1B1 is available to nationals of Chile and Singapore. These visas have requirements that are very similar to the H-1B in terms of the type of occupation and educational background required.

The L visa is available for employees transferring from a corporate entity abroad to a US parent, subsidiary, affiliate or branch of the foreign employer. In order to qualify for the L visa, the foreign worker must have worked for the related entity abroad for one of the prior three years in a managerial, executive or specialised knowledge capacity. The foreign national must be offered a position in the related US entity in a similar capacity. The L-1A visa, for managers and executives, is valid for a total of seven years. The L-1B visa, for individuals with specialised company knowledge, is valid for a total of five years.

Sometimes a company may transfer a worker to the United States on an E visa. E visas are available to nationals of countries with which the United States has certain treaties of trade, investment, navigation, friendship or commerce. The company that will employ the foreign national in the United States must be majority owned by nationals of the treaty country or publicly traded on the stock exchange of the treaty country. The employing company must represent a substantial investment in the United States, or must conduct trade, at least 50 per cent of which must be between the United States and the treaty country. The foreign national must be a citizen of the same treaty country and must be entering the United States to assume a managerial, executive or essential function. There is no requirement that the E visa applicant work with a related entity abroad for a period of time before applying for the visa. E visas are typically granted for five years at a time and are renewable in most circumstances.

There are no numerical limitations on the number of L or E visas that may be issued each year.

16 Are spouses of authorised workers entitled to work?

Work authorisation is available to spouses of L and E visa holders. The work authorisation is unrestricted as to employers but is time-limited, and may be valid for one or two years. It is renewable for as long as the principal visa holder remains in L or E status. The couple must be legally married. Work authorisation is not available to non-spouse partners. The spouse of the L or E visa holder may apply for a work authorisation card (employment authorisation document) upon entry into the United States in L-2 or E-2 status. The processing time for these cards is usually 90 days.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Every US employer must verify the identity and work eligibility of every worker hired to perform services in the United States since 6 November 1986. The verification must be completed on Form I-9 within three business days of hire and maintained during the employment of the worker and for a period of time after separation or termination. Employers who fail to undertake verification of workers' identity and employment authorisation may face serious civil fines and, increasingly, criminal penalties. The Immigration and Customs Enforcement agency of the Department of Homeland Security may conduct audits and raids of employers to determine whether verification is taking place. Foreign nationals who work without appropriate authorisation in the United States may face difficulty receiving future immigration benefits, such as permanent residence, or, in egregious cases, may be removed from the United States and barred from returning for a certain period of time. In addition, the US government offers employers the use of an electronic verification database known as E-Verify. Use of E-Verify is currently optional for most US employers except for certain federal government contractors and companies doing business in certain states.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test is required as a precursor for two temporary visas. It is required for the H-2B visa discussed above for seasonal or peak-load workers, as well as for the H-2A visa for seasonal agricultural workers.

In addition, a labour market test is required as a first step for most employment-sponsored permanent residence applications. The process involves a highly structured recruitment campaign that complies with Department of Labor rules and an online attestation of recruitment activities. Employers are required by law to cover all fees and costs for such labour market tests.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Generally, the FLSA does not limit or restrict the number of hours adult employees may work in a single working day or working week if

the employees agree to work those hours. However, depending upon an employee's job classification, if the employee works in excess of a certain number of hours per working day, or per working week, the employer may be required to pay the employee at premium wage rates for the excess hours under either the FLSA or applicable state laws. In addition, some state laws prohibit employers from requiring employees to work more than a certain number of hours per working day or per working week, and protect employees against retaliation by employers if the employees refuse to work in excess of such hours. Further, some states require employers to provide their employees with meal breaks and rest breaks after working a certain number of hours in a day or during certain times of the day. There may be other regulatory limitations on working hours for minors or adults in certain specific industries or positions (eg, commercial truck drivers, airline pilots).

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employment positions are presumed to be subject to the minimum and overtime wage requirements of federal and state wage and hour laws, unless the employer can prove that the employee's compensation and job duties and responsibilities qualify the employee for one of the exemptions of the FLSA or applicable state wage-and-hour laws. If the employee is not exempt (ie, non-exempt), the employee is eligible for premium pay for overtime worked.

Under the FLSA, non-exempt employees are entitled to 1.5 times their regular rates of pay for all time worked in excess of 40 hours in one working week (defined as a recurring period of seven 24-hour periods). Regular rate of pay is calculated by taking into account the employee's hourly rate as well as any additional cash compensation entitlements, such as sales commissions, performance bonuses and certain other forms of compensation, such as meals and housing, provided by the employer.

Under some states' wage-and-hour laws, such as California law, a non-exempt employee's entitlement to overtime compensation is greater than that provided by the FLSA. For instance, while the FLSA requires that overtime compensation be paid at 1.5 times the employee's regular rate of pay for all time worked in excess of 40 hours in one working week, California law requires that overtime compensation be paid at 1.5 times the employee's regular rate of pay for all time worked in excess of eight hours, up to and including 12 hours, in one working day (defined as a recurring 24-hour period) or for all time worked in excess of 40 hours in one working week, and for the first eight hours worked on the seventh day the employee works in a working week. California law also provides for an overtime compensation rate equal to two times the employee's regular rate of pay for time worked in excess of 12 hours in one working day, and for time worked in excess of eight hours on the seventh day the employee works in a working week.

21 Can employees contractually waive the right to overtime pay?

In the United States, employees cannot waive their right to receive overtime payments and generally cannot agree to settle claims arising from an employer's failure to provide such payments, absent approval by a court or the United States Department of Labor (see *Boaz v FedEx Customer Information Servs, Inc*, 725 F.3d 603, 606 (6th Cir 2013) recognising that 'employees may not, either prospectively or retrospectively, waive their FLSA rights to minimum wages, overtime, or liquidated damages'; and *Lynn's Food Stores, Inc v United States*, 679 F.2d 1350, 1352-53 (11th Cir 1982) establishing the long-recognised exception for settlement agreements approved by a court or the Department of Labor). However, one federal circuit court of appeals has held that a union-negotiated settlement agreement may be enforceable without court or Department of Labor approval, where the agreement resolves 'claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves' (*Martin v Spring Break '83 Prods*, LLC, 688 F.3d 247, 255 (5th Cir 2012)).

22 Is there any legislation establishing the right to annual vacation and holidays?

No law (federal, state, or local) requires employers to provide employees with paid vacation or paid holidays. However, if an employer elects to provide its employees with such paid-time-off benefits, some states' laws regulate how an employer administers such benefits.

23 Is there any legislation establishing the right to sick leave or sick pay?

Medical leave

Federal law and some states' laws provide certain employees with unpaid medical leave. In particular, the federal FMLA provides that eligible employees may take leave for up to 12 weeks during a 12-month period if:

- the employee works for an employer that has at least 50 employees in the United States;
- the employee works at a location where the employer employs at least 50 employees within a 75-mile radius;
- the employee has been employed by the employer for at least 12 months;
- the employee has provided at least 1,250 hours of service to the employer during the past 12 months;
- the employee has not already used all of his or her 12 weeks of FMLA leave during the relevant 12-month period; and
- the employee is medically certified by a healthcare provider as being disabled due to a serious health condition as defined by the FMLA.

A number of states and localities have their own laws that parallel the FMLA. Some states have laws that provide greater rights to a medical leave than that provided by the FMLA.

Paid sick leave

Although there is no federal statute establishing the right of any employee to paid medical leave, in September 2015 President Obama issued an Executive Order requiring federal contractors to provide employees working on government contracts with seven days or more of paid sick time per year.

In the last few years, there has been an explosion of paid sick time laws enacted by states and municipalities. For example, in January 2012, Connecticut became the first state to require employers with 50 or more employees to provide up to five days of paid sick leave to their 'service worker' employees. Other states have since followed suit, passing laws that require employers to provide paid sick leave. This trend has grown among municipalities as well. Municipalities, such as San Francisco, California; New York, New York; the District of Columbia; Jersey City, New Jersey; Philadelphia, Pennsylvania; Seattle, Washington; and Portland, Oregon have enacted similar paid sick leave laws.

For example, San Francisco requires all employers to provide paid sick leave to employees (including temporary and part-time employees) who perform work in the city. Under the San Francisco Paid Sick Leave Ordinance, paid sick leave begins to accrue 90 calendar days after the commencement of employment, at an accrual rate of one hour of paid sick leave for every 30 hours worked. There is a cap of 40 hours of accrued paid sick leave for employees of employers for which fewer than 10 persons (including full-time, part-time and temporary employees) work for compensation during a given week. For employees of other employers, there is a cap of 72 hours of accrued paid sick leave. An employee's accrued paid sick leave carries over from year to year. Employees are entitled to paid sick leave for their own medical care and also to aid or care for a family member or designated person. Similar laws have been adopted in other California municipalities.

New York City has also passed its own paid sick leave act. Under the New York City Earned Sick Time Act (the Act), which took effect on 1 April 2014, employers with at least 20 employees 'within the City of New York' are required to provide their employees with paid sick leave. Only employees who work more than 80 hours per year, including full-time, part-time, and temporary or seasonal employees, are covered by the Act. These covered employees must accrue at least one hour of sick leave for every 30 hours worked, and are entitled to 40 hours of sick leave per calendar year. While the law states that accrued but unused sick leave shall carry over from year to year, employers may limit employee usage to a maximum of 40 hours per year. The Act provides that paid sick leave may be used for absences due to an employee's own medical care or the care of a family member in connection with a physical or mental illness, injury or health condition, and for closures of an employee's place of business or an employee's child's school or child-care provider due to a public health emergency.

Similarly, the District of Columbia requires employers to provide paid sick time. Under the Accrued Sick and Safe Leave Act, the amount of leave employers are obligated to provide varies depending on the size of the company – three to seven days per calendar year. Unused leave carries over annually, but an employer is never obligated to provide more leave than the required statutory maximum. Employees may use paid leave for absences resulting from their own medical care and the care of a family member in connection with a physical or mental illness, injury or mental condition, and for absences related to obtaining social, legal or medical services for the employee or a family member who was the victim of stalking, domestic violence or sexual abuse. These permissible uses are commonly found in paid sick time ordinances and laws enacted by other jurisdictions nationwide.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Various federal and state laws establish the right of employees to take a leave of absence in certain circumstances.

As discussed in question 23, the FMLA establishes a right for an eligible employee to take medical leave of up to 12 weeks during a 12-month period if the employee cannot work due to a serious health condition, including temporary disability caused by pregnancy, childbirth or a related condition. Other qualifying reasons for leave under the FMLA are:

- child-bonding leave, for the employee to bond with a child under the age of 18 within one year of the child's birth, adoption, or foster-care placement with the employee;
- family care leave, for the employee to care for a parent, spouse, or child who has a serious health condition and who needs or could benefit from the employee's care;
- exigency leave, for the employee to tend to any qualifying exigency arising from a family member's (eg, spouse's, son's, daughter's or parent's) active-duty military service or call to active duty; and
- military caregiver leave of up to 26 weeks in a single 12-month period, for the employee to care for a family member (eg, spouse, son, daughter, parent or next of kin) who is an injured serviceman or servicewoman.

Passed on 28 October 2009, amendments to the FMLA expanded the coverage of exigency leave to include family members of the regular armed forces and of military caregiver leave to include family members of veterans. The employer is not required to pay employees during FMLA leave, although employees generally can use their accrued paid-time-off benefits (voluntarily provided by the employer) to continue pay during such leave, and in some cases employers can require employees to use their accrued paid-time-off benefits during FMLA leave.

The United States Department of Labor published final FMLA regulations in 2009 and additional regulations relating to military family leave in early 2013. Combined, these two sets of regulations mark the first major regulatory changes to the FMLA since its enactment in 1993. Among other things, the regulations have altered the notice and certification requirements of the FMLA. They have also provided clarification as to when an employee can take FMLA leave to care for a family member, and as to the documentation that an employer can require in connection with such leave requests. Furthermore, the new regulations provide substantial guidance as to employer and employee rights and responsibilities associated with exigency leave and military caregiver leave.

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) establishes the right of employees to leaves of absence due to military service. USERRA also establishes reemployment and other benefits protections for employees returning from cumulative periods of military leave of five years or less. USERRA does not require employers to provide employees with pay during military leave, but does require that employees on military leave be permitted to use their paid-time-off benefits (voluntarily provided by the employer) and to continue participating in certain of the employer's benefit plans during the military leave. Several states have enacted family military leave laws. For example, California requires employers with 25 or more employees to provide up to 10 days of unpaid leave to eligible employees who are spouses of deployed military servicemen and servicewomen, to be taken when a military spouse is on leave from deployment during a time of military conflict.

Further, under the ADA and its state or local equivalents, or both, a leave of absence may be considered a reasonable accommodation for covered qualified employees with disabilities. The reasonableness of such an accommodation, including the duration of such leave, is determined on a case-by-case basis.

In addition, some states have laws that establish the right of employees to take unpaid time off from work for certain reasons such as to vote, to serve on a jury or to appear as witnesses in legal proceedings, to perform services as volunteer firefighters or emergency responders, to participate in school or day-care activities, or to seek medical services and legal recourse as victims of domestic abuse or violent crime.

25 What employee benefits are prescribed by law?

The only benefit that employers are mandated by law to provide to their employees is workers' compensation insurance. In general, workers' compensation insurance provides partial wage replacement payments and, if needed, medical services and treatment and vocational rehabilitation services to an employee who sustains a work-related illness or injury. Workers' compensation is a subject of state, not federal, law. Most states also require employers to contribute to state-administered unemployment and disability insurance funds for which employees may be eligible for benefits upon termination of employment or becoming disabled.

26 Are there any special rules relating to part-time or fixed-term employees?

No.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The validity and enforceability of employee covenants not to compete, solicit or deal are a matter of state, not federal, law. Under some states' laws, such as California law, covenants not to compete, solicit customers or deal are void as being against public policy and are unlawful except in very limited circumstances, such as when given in connection with the sale of a business entity or sale of all or substantially all of the assets of a business entity.

However, most of the 50 states recognise as valid, and will enforce, a covenant not to compete, solicit or deal as long as:

- the covenant is supported by adequate consideration;
- the covenant is necessary to protect a legitimate business interest of the employer; and
- the covenant is reasonable in time, subject matter and geographical reach consistent with the employer's legitimate business interest.

Some states, such as New York, consider whether the former employee's services are unique or extraordinary. In California, covenants not to solicit employees are valid and enforceable if they are not deemed an unreasonable restraint on competition.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Generally, there is no requirement that an employer continue to pay a former employee while he or she is subject to post-employment restrictive covenants, in the absence of a contractual agreement between the employer and employee to do so. In some states, however, payment during the restricted period will increase the likelihood that a court will find the covenant reasonable and enforceable.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Generally, employees are agents of the employer and act on behalf and for the benefit of the employer when performing their jobs. Accordingly, employers can be held liable for the harm resulting from acts and omissions of their employees occurring in the scope and course of the employees' employment.

However, a 2013 United States Supreme Court decision, *Vance v Ball State University* (133 S Ct 2434), limited the scope of employees who are considered 'supervisors' such that employers can be held liable for their conduct. In *Vance*, the Supreme Court ruled that an employee is only a supervisor for purposes of imposing liability on an employer if the supervisor has the power to take 'tangible employment actions against the victim', which include such actions as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. If a supervisor does not meet these standards, the employer cannot be held vicariously liable for the supervisor's actions.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Employers are required by federal, state and local tax laws to withhold from employee wages the following as taxes: US Social Security tax, US Medicare tax, US income tax and, if applicable, state income tax and local income tax. In addition, some states also require employers to withhold additional taxes from employee wages to fund certain government-sponsored and government-administered unemployment programmes, such as a state disability insurance benefit programme.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes, most states have laws allowing an employer to require its employees, as a condition of employment, to assign all inventions to the employer except if an invention:

- is not developed by an employee using any of the employee's working time for the employer; and
- is not developed by use of any employer equipment, supplies, facilities or trade-secret information.

However, even if these two requirements are met, the employer can still require the employee to assign an invention to the employer if the invention:

- at the time of conception or reduction to practice by the employee, relates to the employer's business or to the employer's actual anticipated research or development; or
- results from any work performed by the employee for the employer.

32 Is there any legislation protecting trade secrets and other confidential business information?

Various federal and state laws protect trade secrets and confidential business information. Under federal law, the Computer Fraud and Abuse Act (CFAA) prohibits accessing a protected computer without authorisation or exceeding authorisation for the purposes of obtaining information, causing damages or perpetrating a fraud. The CFAA is primarily a criminal statute, but it also provides for civil liability and has been used by employers against former employees who unlawfully accessed computer systems. Many states also have legislation to protect trade secrets and confidential business information, such as the New Jersey Computer Related Offenses Act and the Massachusetts Taking of Trade Secrets law. Many states also have common law causes of action that can be used by employers when employees or former employees misappropriate confidential and proprietary business information.

See also the 'Update and trends' section for a discussion of the new federal Defend Trade Secrets Act.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There is no federal legislation that protects employee privacy or personal data per se. Privacy protection is primarily a function of state law; however, certain provisions of some federal laws aim to protect employee privacy and personal data. The ADA requires employers to maintain the confidentiality of information and records on an employee's health and medical condition. The FCRA permits an employer to obtain background information on an applicant or employee through a third party, but only if the applicant or employee authorises the background investigation and delivery of results to the employer. The FCRA also limits employers' use of background check information, requires employers to maintain the confidentiality of background check information, and requires destruction of records containing such information by means that prevent the reconstruction of such information.

Many of the 50 states have either a state constitutional provision or statutes that protect the privacy of certain information, including medical, personal, financial and background check information. To the extent an employer collects and maintains records of such information on applicants and employees, the employer also must comply with those laws.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

There is no law (federal, state or local) that protects employees in the event of a business transfer. However, if an employer must lay off employees in connection with the business transfer and such layoff is covered by the WARN Act, the affected employees are entitled to receive 60 days' advance notice of termination.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Unless the employer contractually agrees otherwise (either in an individual employment or a collectively bargained agreement), most employment in the United States is 'at will', meaning that it is not for any specific period of time, and the employer and employee each have the legal right to terminate the employment relationship at any time, with or without advance notice or procedures and with or without any particular cause or reason. However, employers cannot terminate even at will employees for a reason that is unlawful under federal, state or local law. The state of Montana does not recognise at-will employment after a six-month probationary period. In that state, after the probationary period has elapsed, an employer may only terminate an employee for 'good cause', which is defined as 'reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of operations, or other legitimate business reason'.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Advance notice of dismissal or pay in lieu of such notice is not required by any federal, state or local law, unless the termination of employment is due to a mass layoff or plant closing as those terms are specifically defined under the WARN Act or any counterpart state law applicable to the employer. However, an employer may contractually agree to provide employees with advance notice of dismissal or pay in lieu of advance notice.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Unless the employer has contractually agreed to provide its employees with advance notice of dismissal or pay in lieu of advance notice (either in an individual employment or a collectively bargained agreement), or the termination of employment is due to a mass layoff or a plant closing under the WARN Act or any applicable state law counterpart, advance notice or pay in lieu of such notice is not required.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

No federal, state or local law establishes a right to severance pay upon termination of employment. Whether to provide severance pay and, if so, in what form or amount, are determinations made by the employer or may be required in an individual employment or a collectively bargained agreement.

39 Are there any procedural requirements for dismissing an employee?

No, unless the employer has contractually agreed to such procedures in an individual employment or a collectively bargained agreement. Many states do require, however, that terminated employees be provided information relating to their medical insurance benefits and eligibility for unemployment compensation insurance benefits.

40 In what circumstances are employees protected from dismissal?

An employee may be protected from dismissal if the employer has entered into an individual employment or a collectively bargained agreement that requires that certain reasons exist or certain procedures be followed, including due process procedures, before terminating the employment relationship. Even if an employee is employed at will and typically is not protected from dismissal, various federal and state laws provide the employee with the right to file a claim for damages with a government agency or a federal or state court if the reason for the dismissal is an unlawful reason. When such a claim is filed, the employee sues the former employer for the economic damages resulting from the unlawful termination (typically, past and future earnings and value of lost benefits). Depending on the type of claim, a former employee may also sue the former employer for additional monetary damages:

- to compensate the former employee for emotional pain and suffering caused by the unlawful termination;
- to recover the attorneys' fees and costs of suit the employee incurred in prosecuting his or her claim;
- to punish the employer for its conduct; or
- to recover penalties that may be authorised by a specific statute under which a claim is brought.

Under certain claims, the former employee may request reinstatement of employment.

41 Are there special rules for mass terminations or collective dismissals?

Yes. The WARN Act generally requires an employer with 100 or more employees in the United States to provide its employees, and others, with 60 days' advance notice if the employer will conduct a mass layoff or a plant closing, as those terms are specifically defined in the WARN Act. In addition to employees, others who are entitled to such advance notice are the employees' union, the state government, and certain local government officials. If the employer fails to provide the required notice, employees may file a lawsuit against the employer for the pay and value of certain ERISA-governed benefits the employees would have received during the period, up to 60 days, for the number of days that advance notice should have been given. In addition, the local government may also recover a penalty of US$500 per day for up to 60 days for the number of days that advance notice should have been, but was not, given to the local government official.

Some states, such as California and New York, also have their own laws that impose similar advance notice requirements as well as other requirements on employers in connection with layoffs and closures affecting a certain number of employees. These state laws typically cover smaller layoffs and closures than the WARN Act.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Yes, individual employees may assert claims on behalf of other individuals through class or collective actions, and such claims have become extremely prevalent over the past decade. In a class action, all individuals who fall within the class definition will be deemed to be part of the class unless they affirmatively 'opt out' of the class. In a collective action, on the other hand, only those individuals who affirmatively 'opt in' will be deemed to be part of the class. In class or collective actions, employers may be required to disclose to opposing counsel the names and addresses of all employees, current and former, who may be part of the class so that opposing counsel may contact them.

Update and trends

In May 2016, the Defend Trade Secrets Act of 2016 (DTSA) was signed into law. The DTSA created a new federal cause of action allowing employers to pursue injunctive relief, damages and exemplary damages (up to two times the amount of damages) for trade secrets misappropriation. The prevailing party in a DTSA action may also recover attorney fees in certain circumstances.

In addition, the DTSA contains a provision designed to protect whistleblowers. Specifically, it provides that an individual shall not be held criminally or civilly liable under any federal or state trade secret law for a trade secret disclosure made in confidence to a government official or to an attorney so long as the information is disclosed for the purpose of reporting or investigating an alleged violation of law or the disclosure is made in a court document filed in a lawsuit under seal and not disclosed to the public.

Further, the DTSA requires that employers provide employees with notice of the whistle-blower protection in certain contracts. In particular, employers must add an explicit, written disclosure concerning the whistle-blower protections to every contract, including, for example, an employment or separation agreement, with an employee, contractor or consultant that governs the use of trade secrets or other confidential information. An employer that fails to comply with the new disclosure requirement will forfeit the ability to recover exemplary damages or attorney fees under the DTSA.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Generally, the imposition of a mandatory retirement age is not allowed, though there may be exceptions in certain specific industries.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Generally, yes. However, whether a court will enforce an employment arbitration agreement when the dispute to be arbitrated arises under a federal statute, a state statute, or state common law is an issue that continues to be extensively litigated. Moreover, litigation is often initiated over the circumstances of entering into the arbitration agreement and its terms.

In addition, because arbitration agreements constitute a waiver of the right to a jury trial, arbitration agreements are subject to state contract law as well as state statutory law. Some states, such as California, have developed specific standards that must be met if an employment arbitration agreement is to be enforced. Because state laws can differ in these respects, agreements to arbitrate employment disputes must be carefully drafted.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

Generally, yes. However, an employee cannot waive claims based on acts or omissions that have not yet occurred. Moreover, a waiver of minimum wage, overtime and certain other wage claims generally requires court or Department of Labor approval to be enforceable. Some states' laws prohibit waivers of workers' compensation insurance benefits and waivers of unemployment insurance benefits; rights under certain federal laws such as the NLRA also cannot be waived.

Under contract law of most states, a waiver is valid and enforceable if it is given knowingly and voluntarily, and in exchange for something of value to which the individual giving the waiver is not already entitled. Some statutes establish additional substantive and procedural requirements for a valid waiver of claims. For example, the ADEA requires that a waiver of age claims under the ADEA meet certain requirements based on the context in which the waiver is being given, including but not limited to a minimum period of time for the individual to consider and sign the waiver and a seven-day period after signing within which to revoke the waiver. Under California law, a waiver of unknown claims

arising from past acts or omissions is not valid unless the waiver also includes an express waiver of rights under the California Civil Code, section 1542.

On 15 July 2009, the EEOC issued new guidance (EEOC Guidance) on discrimination waivers and releases contained in employee severance agreements. The EEOC Guidance addresses all types of discrimination waiver and release requirements, and contains specific examples and numerous questions and answers that should be taken into account by employers when dealing with waiver and release issues in severance agreements.

46 What are the limitation periods for bringing employment claims?

The limitation periods vary based on the statutory or common law basis for employment-related claims. In general, however, the limitation periods for most employment-related claims range from one to three years. Claims under some state laws typically can be brought as late as four to five years, and under other states' laws as late as 10 years, in limited circumstances, after the alleged wrongful act, omission or resulting harm.

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The Venezuelan Constitution sets forth the main guidelines and principles regarding employment in Venezuela. These are developed and regulated by the Organic Labour and Workers Law (LOTTT) and its Regulations (RLOT). Venezuela's legislation then provides a series of laws regulating other more specific aspects of employment, including but not limited to social security, health and safety in the workplace, housing policy and food programmes.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Constitution forbids any type of discrimination in employment. The LOTTT also forbids discrimination in the workplace. More specifically:

- the Law on Violence Against Women in the Workplace applies;
- the Law on Occupational Safety and Health (LOPCYMAT in Spanish) also provides specific rules prohibiting any type of harassment;
- the Anti-Drug Law prohibits discrimination against reformed drug and alcohol addicts; and
- the Anti-Discrimination Act prohibits any type of discrimination and sets out applicable fines for acts of discrimination.

Furthermore, the Law for the Promotion and Protection of Equality for Persons with HIV or AIDS and their Families (2014) provides the employer's obligation to guarantee equality and non-discrimination conditions for persons with HIV, and any action or agreement seeking dismissal of the employee or that is detrimental to labour and social security rights is invalid.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary government agencies responsible for the enforcement of employment statutes and regulations are the labour inspector's office, the labour courts, and the National Institute of Prevention and Labour Health and Safety.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Yes, in fact, Venezuelan legislation establishes at least three consultative bodies of employee representation:

- trade unions, which are regulated in title VIII of the Venezuelan Organic Labour Law;
- the risk prevention delegates that comprise the Health and Safety Committee provided for in article 46 of the LOPCYMAT, which states that this special consultative body should be actively involved in the organisation of programmes and policies regarding health and safety in the workplace; and
- recently, the Workers' Productive Council was created by the Executive branch. This new consultative body seeks to encourage the working class to participate in the managerial activities of companies, both public and private. It is comprised of company employees, Venezuelan Youth Representatives, the Women´s National Board and the Bolivarian Militia.

5 What are their powers?

With regard to trade unions, they represent employees' rights and interests in general, even though Venezuelan legislation empowers them to participate in the managerial activities of the profits earned by the company, so that the prices of the goods and services they provide are viewed as 'fair'.

The risk prevention delegates that comprise the Health and Safety Committee must ensure the compliance of the safety standards and environment in the workplace, for this they can request information from the employer. The risk prevention delegates are required by law to make monthly reports to the National Institute of Prevention and Labour Health and Safety.

Finally, as far as the Workers' Productive Council is concerned, they are required to periodically report to a military entity about the company's production processes and any kind of situation that affects or hinders them.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

No, there are no restrictions or prohibitions against background checks of applicants and, therefore, it does not make a difference whether the employer conducts its own background checks or hires a third party. However, the employer must not use the information uncovered through the check to discriminate against the applicant based on sex, race, religion or social conditions.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

The only restriction or prohibition to pre-hiring examinations is the use of the examination to find out if the employee is pregnant or using said examination to discriminate against the employee. However, the Law for the Promotion and Protection of Equality for Persons with HIV or AIDS and their Families establishes that employers cannot test candidates to detect if they have HIV or AIDS.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions against drug and alcohol testing of applicants. However, article 90 of the Anti-Drug Law prohibits discrimination against reformed drug or alcohol addicts.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Yes. The LOTTT states that at least 90 per cent of the payroll (when the payroll has more than 10 employees) must be Venezuelan citizens. If, for the reasons stated in article 27 of the LOTTT, an employer needs to hire more than 10 per cent of foreign personnel, the labour inspector may approve a temporary exception to this legal requirement. Employers shall also give preference to those applicants who are family providers. In addition to the above, the Chief of Personnel or of Industrial Relations, foremen and the captains of ships or aircraft must have Venezuelan nationality. Finally, the Law for Disabled Individuals requires that at least 5 per cent of an employer's payroll must be disabled individuals.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No, a written contract is not always necessary. However, a written agreement is required for fixed-term employment contracts and for hiring employees to work abroad. If a written employment contract is used, it must contain the following information:

- the parties to the contract;
- the employee's duties and responsibilities;
- any specific projects;
- the work schedule;
- the salary and form of payment; and
- the location of employment.

Notwithstanding the fact that the LOTTT does not require written contracts for indefinite-term employment contracts, the LOTTT provides that when an employment relationship is proven, and there is no written contract, all of the employee's allegations regarding the terms and conditions of employment shall be deemed true unless proven otherwise. Additionally, an employee must record, in a book kept for this purpose, the date and time that he or she received a copy of the employment contract.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible as long as these contracts are required because of the nature of the work (eg, to temporarily substitute another employee, for employment abroad, or when the work for which an employee was hired has not yet concluded and the employee's services are still required). The maximum duration for fixed-term contracts is one year. Should a fixed-term contract extend beyond this term, or should the contract be renewed more than once, the employment will then be for an indefinite term.

12 What is the maximum probationary period permitted by law?

The maximum probationary period permitted is 30 days (article 30 of the RLOT). The probationary period may not be extended at the discretion of the employer.

13 What are the primary factors that distinguish an independent contractor from an employee?

The main difference between an employee and an independent contractor is that the independent contractor works with his or her own tools and resources and assumes certain risks, while the employee works with the employer's tools and resources, apart from being subject to the employer´s directions or orders. Another important factor is whether the independent contractor has a single client or a number of clients. Having a single client can be interpreted as meaning that the independent contractor is an employee of the principal. Independent contractors are not subject to the control and supervision of the employer.

14 Is there any legislation governing temporary staffing through recruitment agencies?

No, there is no legislation governing temporary staffing through recruitment agencies. Legislation governing temporary staffing was removed from the legislation to try to restrict these types of practices. It is still possible, however, to hire a contractor to provide temporary services, as long as this contractor is not deemed an intermediary nor deemed to be providing illegal outsourcing services. Fraud or simulation done with the purpose of not applying the LOTTT is considered as illegal outsourcing. The LOTTT includes the following actions as a form of illegal outsourcing:

- the hiring of a contractor to provide services that are permanent and part of the core business of the principal;
- the hiring of employees through intermediaries to avoid employment obligations;
- businesses created by the employer to avoid employment obligations; and
- fraudulent or illegal hiring with the purpose of disguising an employment contract by using other commercial forms.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There are no numerical limitations on short-term visas. Visas are available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction, as long as the receiving entity complies with the payroll limitations (please refer to question 9).

16 Are spouses of authorised workers entitled to work?

No, spouses of authorised workers are not entitled to work. They would need a special work permit to do so.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Employers with a workforce of 10 or more employees may hire a number of foreign authorised workers equivalent to up to 10 per cent of the employer's whole workforce. Furthermore, the total compensation of the authorised workforce may not be greater than 20 per cent of the employer's complete payroll. The Migration and Foreigners Law sanctions those employers that hire unauthorised foreign workers with a fine of 200 tax units. Moreover, an employer or its representative may be sent to prison if the employer facilitates the entry of an illegal immigrant to Venezuela or if the employer exploits migrant workers.

18 Is a labour market test required as a precursor to a short or long-term visa?

Generally, employers may hire foreign employees and a standard work visa will be issued for them (there is only one standard type of work visa), as long as the employer complies with the payroll limitations mentioned in question 9. However, in the event an employer needs to hire foreign employees in excess of the limitations above, it may do so by applying for an exception with the Ministry of Labour.

The Ministry of Labour may grant, on its own volition, an exception work permit in the following cases:

- when the activities for which the foreign employee is going to be hired require specialised technical knowledge not available in Venezuela;
- when the available workforce does not meet the demand and it is proved that, to satisfy this demand, foreign workers are required;
- when foreign nationals are hired directly by the Venezuelan government; and
- in the event of refugees.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Yes, the Constitution and the LOTTT establish that working hours should not exceed eight hours a day and 40 hours a week for the day shift; night-shift hours shall not exceed seven hours a day and 35 hours a week; and mixed shifts should not exceed seven and a half hours a day and 37.5 hours a week. Employees may opt to work more hours

during a day in order to limit the number of days worked in a week. The following employees are not tied to the aforementioned rules:

- employees of direction (executive management);
- employees whose work does not require a continuous effort (inspection and security);
- employees whose work is not tied to regular working hours; and
- weekly schedules set out in collective bargaining agreements.

These employees should not stay in the workplace for more than 11 hours a day and, during a period of eight weeks, employees should work an average of 40 hours per week and enjoy at least two consecutive days off.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Every employee is entitled to overtime pay if he or she works beyond the ordinary work hours. The overtime pay is calculated by adding a 50 per cent surcharge to the ordinary hourly salary.

21 Can employees contractually waive the right to overtime pay?

Employees cannot contractually waive the right to overtime pay.

22 Is there any legislation establishing the right to annual vacation and holidays?

Yes, article 190 of the LOTTT establishes the right to annual holidays. Article 184 of the LOTTT establishes which days are holidays and states that the employees should not work those days. Every employee is entitled by law to 15 workdays of vacation after completion of his or her first year of employment. Following their first year, an employee is also entitled to an additional day of vacation each year up to a maximum of 30 workdays of total vacation time.

23 Is there any legislation establishing the right to sick leave or sick pay?

Yes, there is legislation establishing the right to sick leave or sick pay. This legislation is provided in the LOTTT and grants employees time off to recover from sickness or accidents. If employees are enrolled in social security they would be entitled to two-thirds of their usual salary during the leave. This payment is made by the National Institute of Social Security. In the event that an employee is suspended due to a work accident or disease, or even in cases where an employee is absent due to an ordinary sickness or accident, duly advised by a physician, the employer must pay the remaining one-third of the employee's salary as an additional indemnity. There is no fixed annual entitlement. An employee may take sick leave as long as a physician duly prescribes it. Sick leave may be as long as one year (52 weeks). If the leave extends beyond that point, employment may be terminated. The termination of employment due to extended sick leave does not entitle an employee to a severance compensation.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Article 72, paragraphs g and h, state the possibility to take some special leave to attend family issues, for future studies and for several grounds of employee concerns. The conditions and effects under this special leave or employment suspension must be expressly agreed by the parties (employer and employee). However, this employment suspension will be taken into account for the employee´s seniority labour time.

25 What employee benefits are prescribed by law?

Prescribed employee benefits are as follows:

- seniority benefit – a bonus equivalent to 15 days' salary accrued every quarter by employees, and paid out to them at the end of their employment;
- additional days to the seniority benefit – obtained after the second year of employment and equivalent to two days' salary for each year of employment, with an additional two days' salary for each completed year of employment for up to 30 days;
- profit-sharing benefits – a distribution of 15 per cent of the employer's net profits to its employees. This bonus has a maximum limit of four months of salary and a minimum of 30 days' salary per employee. Every employee receives the same bonus that is calculated based on their own salary;
- vacations – every employee is entitled to a minimum of 15 workdays' paid leave after the completion of the first year of employment and to an additional day's leave each year after;
- vacation bonus – additional bonus to complement the leave. This bonus is equivalent to 15 days of salary for the first complete year of employment and one additional day each year after for up to a maximum of 30 days; and
- nutrition benefits, such as the socialist food tickets.

Other benefits apply depending on the employee's salary and status, daycare assistance and additional time off to feed children under 12 months of age.

26 Are there any special rules relating to part-time or fixed-term employees?

There are no special rules regarding part-time employees. Their employment conditions are proportional to the time effectively spent by the employee in his or her employment. Fixed-term employees do not have special rules either; their employment is subject to an employment agreement limited in time. Therefore, fixed-term employees are not entitled to compensation for dismissal without cause after expiry of their employment contract.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants not to compete are valid and enforceable as long as they are required in light of an employee's relationship with clients, an employee's condition as an executive manager, or his or her knowledge of trade secrets and confidential information. Such covenants need to be stipulated in writing and consideration is required in exchange. The maximum period for covenants not to compete is six months following the termination of the work relationship. Covenants not to solicit (customers, employees or suppliers) or deal (customers) are not regulated in Venezuelan legislation. It may therefore be interpreted that these covenants are valid and enforceable as long as they do not violate the law and are considered reasonable, based on the employee's condition and status.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes, the law clearly requires that the employer pay a consideration to the former employee for the term of the non-competition covenant.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer may be held responsible for the acts or conduct of its employees when said acts or conduct are committed in relation to the employee's job and duties. The employer will be exempt from liability if the employee was negligent in committing said acts or conduct.

Taxation of employees

30 What employment-related taxes are prescribed by law?

Prescribed employment-related taxes are as follows:

- social security – depending on the employer's risk level, employers pay between 9 and 11 per cent of the employee's salary to the National Institute of Social Security. The employee pays the equivalent of 4 per cent of his or her monthly salary (payments have to be made every month);
- housing policy – an employer pays 2 per cent of the total monthly payroll. An employee pays the equivalent of 1 per cent of his or her monthly salary;
- National Institute of Socialist Training and Education – employers pay 2 per cent of payroll every three months. Employees pay the equivalent of 0.5 per cent of the profit-sharing bonus; and

- unemployment law – an employer pays 2 per cent of each employee's monthly salary. An employee pays the equivalent of 0.5 per cent of his or her monthly salary.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes, the LOTTT states that inventions created by an employee as part of his or her work are property of the employee, and the employee provides the employer with a licence to exploit the invention for the term of the employment. Moreover, the employee is entitled to a part of the profits rendered by the invention if these profits are disproportionate with the employee's salary. After termination of the employment, the employer has a right of first refusal of 90 days to acquire the invention. Inventions made by the employee using his or her own talent without employer's tools or resources are the property of the employee. If these were made in relation to the activities performed by the employer, the employer has a right of first refusal of 90 days to acquire the invention from the employee after receiving notice.

32 Is there any legislation protecting trade secrets and other confidential business information?

The LOTTT is vague with regard to protecting trade secrets and confidential business information and basically provides that breach or disclosure of trade secrets or confidential business information constitutes cause for termination.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There is no specific legislation protecting employee privacy or personal data. This is mainly regulated by article 48 of the Constitution, which guarantees everyone the right to the secrecy and privacy of their documents, mail in any shape or form, or personal information. This right is further protected by article 21 of the Law Against IT Crimes, which stipulates that the violation of a person's right to secrecy or privacy shall be punished with prison.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Yes. Under this legislation, a business transfer shall not affect an employee's employment. This business transfer must be notified to the employee, their trade union and to the Ministry of Labour. There is no rule that provides when this notice must be given. It is generally given approximately 30 days prior to the closing date of the transfer. The law provides that the new employer will retain all the liabilities deriving from the former business's employees. In fact, both the former business and the new business will be jointly liable for the liabilities of their employees for a period of five years. After this five-year period, the new business will be solely liable for these liabilities. These rules also allow an employee to choose whether to remain with the new business or to quit due to this business transfer. If the employee decides to quit because of the business transfer, the employee shall be entitled to indemnities, as if he or she was terminated without cause. The employee will have 90 days to choose whether to leave or stay at the business, after he or she has been notified of the business transfer.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Only executive management employees can be dismissed without a cause; the rest of the employees can only be dismissed for any of the just causes listed in the Organic Labor Law. Article 79 of the LOTTT lists the different 'just causes' for lawful dismissal. The most common lawful causes are:

- immoral conduct in the workplace;
- acts of violence, except when in self-defence;
- defamatory comments against superiors;
- intentional and negligent acts that affect safety in the workplace; and
- unjustified absence for three or more days in a month.

In addition to that, employees who are in any of the following circumstances can be dismissed for cause only, after obtaining approval from the Ministry of Labour:

- non-executive management employees after 30 days of employment until December 2018;
- pregnant employees and their husbands or partners and parents of a newborn child for up to two years following the child's birth;
- directors of the trade unions;
- employees on sick leave;
- employees with children with disabilities;
- the risk prevention delegates that comprise the Health and Safety Committee; or
- employees who are members of the Workers' Productive Council.

Finally, executive management employees or those employees dismissed with cause are not entitled to severance compensation.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Notice of termination is not required.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Not applicable.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes, article 92 of the LOTTT states that employees are entitled to a severance payment equal to the amount of the social benefits that the employee has accrued throughout their employment. These severance payments apply to all employees, except for executive management employees.

39 Are there any procedural requirements for dismissing an employee?

There are procedural requirements for dismissing an employee only if the employee is dismissed with cause. In such a case, the employer shall give notice to the Labour Court within five days after the dismissal took place. Regarding the foregoing, where there is a prohibition to dismiss, approval is required from the Ministry of Labour and employers must file a petition for dismissal within 30 days from the day when the employee triggered the cause for dismissal.

Approval is required from the Ministry of Labour in the following cases:

- non-executive management employees after 30 days of employment until December 2018;
- pregnant employees and their husbands or partners and parents of a newborn child for up to two years following the child's birth;
- directors of the trade unions;
- employees on sick leave;
- employees with children with disabilities;
- the risk prevention delegates that comprise the Health and Safety Committee; or
- employees who are members of the Workers' Productive Council.

40 In what circumstances are employees protected from dismissal?

See questions 35 and 39.

41 Are there special rules for mass terminations or collective dismissals?

Yes, there are. Article 95 of the LOTTT establishes that dismissal of more than 10 per cent of the employees of a company with more than 100 employees; of 20 per cent of the employees of a company with more than 50 employees; or 10 or more employees in a company with fewer than 50 employees, will be deemed as mass terminations. These

dismissals must take place within a time frame of three months. The labour inspector may suspend the effects of the dismissal and order the rehiring of the employees based on social circumstances. The rehiring of employees dismissed during a mass dismissal gives these employees immunity against dismissal.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Collective actions are allowed in Venezuela. However, there are certain plaintiff-number limitations established by jurisprudential means.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

A mandatory retirement age may only be imposed through a collective bargaining agreement provided that the employee receives considerations after retirement, usually in the form of a pension. The law does not provide a minimum age of retirement. This can be negotiated by the parties through a collective bargaining agreement.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

Yes, according to articles 6 and 138 of the Labour Procedural Law, parties may use private arbitration during the preliminary phase of the labour procedure to resolve any labour-related issues.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

At first, they cannot. Such a waiver is only allowed through a settlement and release agreement duly approved by the Ministry of Labour or Labour Court, after the termination of the employment relationship.

46 What are the limitation periods for bringing employment claims?

Claims for social benefits accrued during employment have a statute of limitation of 10 years. Labour claims resulting from work accidents or occupational diseases and all other employment benefit claims have a statute of limitation of five years.

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