

# Identifying Uniform Employment- termination Practices for Multinational Employers

Multinational hospitality operators can benefit from developing a uniform termination policy. Here are some of the basic criteria of such a policy, as well as the exceptions.

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**A**s multinational companies, hospitality chains operate in numerous countries with diverse legal systems. Because the legal environments in each of these countries can be quite different one from another, those differences pose operational challenges in a number of spheres—including employment law.

National differences in employment law are particularly challenging for several reasons. First, employment issues arise constantly, from the moment the hotel (or other operation) starts hiring. Second, employment law drives personnel practices, but what the law requires may be at odds with the practices a company may use to foster a sense of identity. Some companies use their personnel practices as a way to attract

talented employees, for instance, and to distinguish themselves from other employers. Additionally, most service businesses link their personnel practices to the quality of the services they provide customers. To the extent that the employment-law environment varies from country to country, maintaining a consistent sense of identity may be difficult.

Companies that simply try to export personnel practices from their home country to operations in other countries may find this approach to be a disruptive and potentially costly option. This is because policies and practices that protect an employer in one country may provide no protection in another—and, indeed, may incur legal liability. For example, in one country (e.g., the United States) the failure to dismiss an employee who engages in sexual harassment may result in liability in a lawsuit. In another country (such as Germany,

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where sexual harassment may not be viewed as an acceptable reason for dismissal), such a dismissal may create liability.

On the other hand, adopting separate personnel policies and practices for each country can be costly (although that approach affords some protection from liability). Operations consistency is nearly impossible where laws differ substantially, and transferred managers will have to be trained in the particular personnel practices of each new country. Furthermore, as noted above, such an approach may dilute the company's sense of identity. Finally, different policies may apply for expatriate employees who are covered by the laws of their home country.

### A Consistent Approach

We offer a third approach in this article—one that seeks to minimize the need for companies to adjust their personnel policies and practices to the legal exigencies of each country while at the same time maximizing the likelihood that their practices will comply with local legal requirements. We propose a uniform set of personnel policies that will cover most circumstances, although we recognize that local requirements will still create some policy variations.

The basic strategy we recommend is as follows: to the extent possible, identify policies and practices that will comply with the legal requirements of all countries where a company has operations. While we grant that this strategy cannot be achieved universally, we contend that many personnel policies and practices will, in fact, satisfy the laws of many countries with relatively modest adjustment on a country-by-country basis.

### Examining Different Systems

To determine the extent that a consistent set of personnel policies is feasible, we examined the laws of 11 countries: namely, Australia, China, Egypt, France, Germany, Italy, Japan, Mexico, South Korea, the United Kingdom, and the United States. In this paper we focus our attention on personnel practices related only to employee dismissals for cause. That is, we examine individual dismissals unrelated to the economy or the sale of the business. Not only is termination significant for employees, but it is often the most risky decision for employers because of the potential for subsequent legal action.

This paper begins by briefly examining relevant law in each of the 11 countries. Based on this foundation, we looked for multinational patterns and crafted policies and practices that assure compliance with those patterns (see the "Model Termination Policy" on the next page).

### Australia

Most Australian employees are governed by the Workplace Relations Act of 1996 (WRA), as well as state legislation.<sup>1</sup> Those excluded from WRA coverage include probationary, fixed-term, trainee, and casual employees. Employees not covered by the WRA may bring a wrongful-dismissal claim under common law.

The WRA restricts termination of employees in two ways. First, some termination simply may be unlawful. Statutorily prohibited grounds for termination include: temporary absence from work due to illness, injury, or prenatal leave; union membership (or nonmembership) or activity; the filing of a complaint against the employer; race, color, sex, sexual preference, or age; physical or mental disability; marital status, family responsibilities, or pregnancy; or religion, political opinion, national extraction, or social origin.

**Not harsh.** Second, termination may not be "harsh, unjust, or unreasonable." The WRA lists the following series of factors that will be considered when evaluating whether a dismissal falls within this rubric.

- Whether there was a valid reason for the termination related to the capacity or conduct of the employee or the operational requirements of the employee;
- Whether the employee was notified of that reason;
- Whether the employee was given an opportunity to respond to any reason related to his or her capacity or conduct; and
- For terminations related to unsatisfactory performance, whether the employee had been warned about unsatisfactory performance.

The statutorily required notice that must be provided prior to termination varies with length

<sup>1</sup> Unless otherwise noted, the exposition of Australia's labor law is drawn from: International Labour Office, *Termination of Employment Digest*, 2000.

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## A Model Termination Policy

### Termination of Employment for Non-economic Reasons

Employment with the company will continue unless terminated for just cause, with the following exceptions. This policy does not apply to individuals:

- (1) who are employed under a written contract that specifies a term of employment and grounds for premature termination or under collective-bargaining or trade-union agreements,
- (2) who have been employed with the company for less than the previous six months,
- (3) who are part-time employees, and
- (4) whose positions have been eliminated or substantially changed for economic reasons. This policy does not address special requirements that may apply to employees in certain protected categories or employees covered by collective-bargaining or trade-union agreements.

“Just cause” is defined as serious misconduct or substantially deficient performance. Misconduct is conduct that violates established work rules or is obviously detrimental to the best interests of the company or other employees. Serious misconduct is conduct that has been designated as such in work rules, is grossly detrimental to the company or other employees, or has been repeated despite receipt of progressive discipline and a final warning. It is the company’s obligation to establish just cause.

Deficient performance is performance that fails to meet standards of acceptability established by the company and which standards are communicated to the employee during training and the performance-appraisal process. Unless performance is grossly deficient and obviously irremediable, the employee will be advised of performance deficiencies and provided an adequate opportunity to achieve acceptability. Failure of an employee to maintain necessary licenses or other designated qualifications will be deemed substantially deficient performance.

Progressive discipline will be applied when an employee violates regular written work rules or engages in behavior that is deemed to be improper but not serious enough to warrant immediate dismissal. Progressive discipline means that the employee shall receive at least one written warning regarding her or his misconduct and at least one suspension without pay and final warning before being discharged.

In countries where it is permitted, the company may dismiss an employee without just cause on provision of required notice or payment of prescribed severance. [Country-specific supplemental policies must be consulted to determine whether dismissal is permitted with notice or severance.]

Prior to dismissal, the employee will be informed in person and in writing of the proposed basis for dismissal. The employee will be informed of the factual grounds for the dismissal recommendation and will be provided with an opportunity to address the charges and submit contrary evidence. The employee will be permitted a representative to advise him or her during this meeting.

Following this meeting, the manager who conducted the meeting shall recommend whether the employee should be dismissed and, if not, what discipline if any should be imposed. If the decision is to dismiss, the employee will be informed of the recommendation by registered mail. The employee may request review of the dismissal recommendation by the manager designated for that purpose within the time period specified in the dismissal letter. If the employee does not request review, the decision shall become final when the review period has expired, unless national laws require referral to a third party prior to dismissal.

If the employee appeals the dismissal, both the employee and the manager making the recommendation shall present all relevant records to the reviewing manager. The reviewing manager shall convene a meeting to be attended by the manager who recommended the dismissal and the appellant, who may be accompanied by a representative. Both parties shall be permitted to make arguments in support of their views. The reviewing manager may hear witnesses or make independent inquiries to the extent she or he deems it appropriate. Information obtained from independent inquiries shall be made available to both parties.

The reviewing officer shall render a decision in writing. Where the evidence is evenly balanced, the reviewing officer shall decide the matter in favor of the employee. If the dismissal is reversed, the reviewing officer shall have the authority to (1) reinstate the employee with back pay and reimbursement of costs and fees; (2) transfer the employee to another assignment in the company and award back pay and costs and fees; or (3) award a severance benefit that shall include costs and fees. If the decision is to dismiss, the reviewing manager shall so inform the employee in writing.—*J.J.Z. and D.S.S.*

of service, ranging from one week to six weeks.<sup>2</sup> Notice is excused in cases of serious misconduct, such as stealing from the employer.<sup>3</sup>

Aggrieved employees may challenge their termination before the Australian Industrial Relations Commission (AIRC). AIRC will first attempt to settle the dispute by conciliation. If conciliation is unsuccessful, the employee may pursue the matter further with AIRC (in the case of a harsh or unjust termination) or in federal court (in the case of unlawful discrimination).

## China

The 1994 Labor Law of the People's Republic of China regulates termination of employment in China. It applies to all categories of employees in state, collective, and domestic private enterprises. Additionally, the 1986 Provisional Rules on Dismissal of Workers and Staff for Work Violations in State Enterprises apply to state employees.<sup>4</sup> China has experienced tremendous political and economic change since the 1970s, and the resulting shift from lifetime employment to contract-based employment has had a substantial effect on termination policies.

**Often at will.** Private employers in China may terminate employees at will in some but not all circumstances. Terminations are illegal under the labor law if they are made for reasons of incapacity due to an injury suffered at work, when the employee is in receipt of medical treatment, or when women are pregnant or breastfeeding.

Presumptively, legitimate grounds for termination are when workers are unable to continue original work after illness or injury not suffered at work, not qualified for the required work, or unable to reach agreement with employer on the modification of the labor contract when its objective conditions have changed.

Termination on any of those grounds requires at least 30-days' notice, or compensation in lieu of notice.

<sup>2</sup>*International Labor and Employment Laws, Vol. II*, ed. William L. Keller (Washington, DC: International Labor Law Committee, Section of Labor Law, American Bar Association, Bureau of National Affairs, 1997), p. 34-17.

<sup>3</sup> *Id.*

<sup>4</sup> Unless otherwise noted, the exposition of China's labor law is drawn from: International Labour Office, *Termination of Employment Digest*, 2000, beginning at page 107.

An employee may be summarily dismissed without notice (and without compensation) if he or she has committed a serious violation of "labor discipline" or the rules and regulations of the employing unit, or has caused great losses to the employer due to dereliction of duty or malpractice. An employee may also be summarily dismissed if he or she is being investigated in connection with a crime.

Aggrieved employees may appeal dismissal to arbitration and may bring a case to the People's Court at any stage of the arbitration proceeding or if the arbitration proceeding is unsuccessful.

## Egypt

The employment relationship in Egypt is governed by Egypt's Labor Code, which codifies Act 137 of 1981 and controls employment termination by private-sector employers.<sup>5</sup> Employees may be dismissed for cause only if they have committed a serious offense. Examples of serious offenses are committing negligent actions that result in a loss to the employer, being under the influence of alcohol or illegal drugs while at work, disregarding posted safety regulations after having received a written notice, excessive absence, and revealing confidential information about the company.

**Stringent guidelines.** Employers must also observe stringent procedural guidelines when terminating an employee. Before termination is effective, the employer must submit a termination request for approval by a three-person committee. The committee comprises one representative from each of three groups: the governmental Directorate of Manpower, the workers at that company, and the employer. This procedure of mandatory committee approval protects all employees, except apprentices, probationary employees, fixed-term contract employees, and temporary employees.

After an employee is terminated with committee approval, the employer is required to pay the government social-insurance authority one-half of the employee's monthly wage for each of the first five years the employee has worked at that company, and one full month's wage for every year of employment beyond five years.

<sup>5</sup> Unless otherwise noted, the exposition of Egypt's labor law is drawn from: International Labour Office, *Termination of Employment Digest*, 2000, beginning at page 137.

An employee who believes that his or her employment was terminated without a valid cause may challenge the termination by petitioning the local-government administrative agency within one week of the termination. This agency will attempt to resolve the issue through settlement; if a settlement cannot be reached, the agency will refer the matter to a local judge.

### France

France's laws and regulations governing employment are generally incorporated in the French Labor Code (*Code du Travail*). Additionally, France is subject to EU directives and regulations and to the decisions of the European Court of Justice.

An employer must offer reasons that justify an employee's dismissal. Failure to do so may expose the employer to significant legal sanctions. When an employee is first hired, the employer and the employee agree on a brief trial period during which the employer may decide whether it wishes to retain the employee permanently.<sup>6</sup> Once an employer decides to make an employee permanent, any dismissal must be for legitimate reasons that are true, objective, and important enough to make it impossible to continue the employment relationship. The employer carries the burden of justifying dismissal and borderline cases are decided in favor of the employee.

Dismissal for cause, also termed "dismissal for personal reasons," is one legitimate reason for dismissal.<sup>7</sup> Three different types of dismissal for personal reasons exist, depending on the seriousness of the fault alleged against the employee. They are dismissal for "real and serious cause," dismissal for "reckless misconduct," and dismissal for "gross fault." French case law has accepted the following reasons, among others, for dismissal: professional incompetence, insufficient results, professional shortcomings, and the employer's loss of confidence in the employee.

**Conciliation.** Prior to dismissal, the employer must invite the employee in writing to a concil-

iatory meeting and explain the reasons for the contemplated dismissal. Only after this meeting may the employer notify the employee of his or her dismissal and must send the reasons for that dismissal by registered letter. After the letter is received and acknowledged by the employee, the employer must further give the employee a notice period ranging from one to three months that begins upon receipt of the letter. Additionally, employees receive indemnities, which may include indemnity for dismissal,<sup>8</sup> accrued vacation indemnity,<sup>9</sup> and indemnity in lieu of a notice period.<sup>10</sup> An employee terminated for "gross negligence" or "willful misconduct" will not benefit from any notice period or indemnity.<sup>11</sup>

Finally, a dismissal found to be without legitimate reason gives rise to claims for compensation and damages for abusive breach of the employment contract. Labor courts tend to grant an unfairly dismissed employee a minimum of six months' salary if that employee was on the job for at least two years.

### Germany

Germany is also bound by the employment-law regulations and directives of the European Union and by decisions of the European Court of Justice, as well as by the various aspects of the German Civil Code that address the employment relationship. German statutes designed to protect employees still apply even where employees are covered by a collective-bargaining agreement, if the statute gives the employee more favorable treatment than they would receive under the bargaining agreement.<sup>12</sup> German law contains a strong presumption against termination.

If an employee has worked for the same employer for more than six months and the employer has more than ten full-time employees, the Termination Protection Statute of August 25, 1969, applies. Under this statute, termination should be used only after all other options have

<sup>8</sup> Article R 122-2 of the Labor Code.

<sup>9</sup> *Id.* at Article L 223-14.

<sup>10</sup> *Id.* at Article L 122-8.

<sup>11</sup> *Id.* at Article L 122-8.

<sup>12</sup> Unless otherwise noted, the exposition of Germany's labor law is drawn from: *International Labor and Employment Laws, Vol. I (op. cit.)*, pp. 4-4 through 4-17.

<sup>6</sup> Unless otherwise noted, the exposition of France's labor law is drawn from: *International Labor and Employment Laws, Vol. I*, ed. William L. Keller (Washington, DC: International Labor Law Committee, Section of Labor Law, American Bar Association, Bureau of National Affairs, 1997), pp. 3-7 through 3-11.

<sup>7</sup> Articles L 122-14 and L 321-I of the Labor Code.

been exhausted (such as transferring the employee and maintaining the position at a lower wage or with altered responsibilities).

**Advance notice required.** German law generally requires an employer to give four-weeks' notice of termination, unless a more-specific provision is triggered by the length of employment. For instance, an employee over age 25 with five years of service must have two months' notice; after ten years, the notice is four months, and after 20 years, seven months. Those notice requirements can be shortened or lengthened by a collective-bargaining agreement.<sup>13</sup>

Termination frequently is triggered by poor performance or extended illness, both of which are frequently held to violate the terms and conditions of the employment agreement. An employer must satisfy a three-part test to terminate an employee because of illness. First, the illness must be long-term, and not merely a series of frequent illnesses. Second, the commercial effects of the employee's absence must be substantial. Third, the employer's interest in termination must outweigh the employee's interest in retaining the job.

A warning prior to termination may be required if the employee's action is on the level of frequent tardiness, but no warning is required if the employee's conduct is criminal, such as embezzlement. In a situation where the employee has violated criminal law, or in similar situations where continued employment is unreasonable, then the employer can act under the guidelines of "extraordinary termination for cause." This type of termination can be used even if it is not mentioned in an employment contract, but it must take place within two weeks of when the employer learns of the cause. An employer should still give the employee notice if possible, or a brief term of "final warning" may be used instead. Even if an employee is terminated in this situation, the employee must still be given a fair hearing, and the termination may only be issued by an employee at the company with authority to do so. For example, if the employer is a GmbH (a limited-liability company), the managing director must issue the termination.

<sup>13</sup>§622 B6B (*Bürgerliches Gesetzbuch*).

## Italy

Italian employees enjoy substantial protection against dismissal. The Italian Civil Code regulates contracts of employment, and a series of amendments to the code specify prerequisites to termination. Of particular relevance is Act 604 (1966) on Individual Dismissals, amended by Act

Our investigation identified multinational patterns regarding terminating employees, and from those we crafted general policies and practices to ensure compliance.

108 (1990). Act 604 regulates dismissals for fixed-term contracts and for contracts of indefinite duration.<sup>14</sup>

**Just-cause termination.** Employers may terminate fixed-term contracts prior to their expiration only for "just cause," which is generally defined as grave conduct that constitutes a serious and irremediable breach of the employment contract. A contract of indefinite duration may be terminated by the employer only for a "justified reason," which entails the obvious failure of the employee to fulfill his contractual obligations or reasons inherent in the production process.

Italian law also prescribes advance-notice requirements in some instances. Notice is not required for termination of fixed contracts on the grounds of just cause. To terminate an employee who has a contract of indefinite duration, however, the dismissal must be in writing. Subsequent to providing notice of dismissal, the employer must wait five days, during which the employee has the right to be heard. The employee is also entitled to ask the reason for dismissal within fifteen days, and the employer must respond within seven days. Dismissals are deemed inherently unfair unless they are for just cause or a justified reason and the appropriate procedures have been followed; the burden of proof lies with the employer. Failure to observe procedural requirements renders the termination null and void.

<sup>14</sup> Unless otherwise noted, the exposition of Italy's labor law is drawn from: International Labour Office, *Termination of Employment Digest*, Vol. 43 (2000), beginning at page 189.

Dismissals on the basis of political opinion, trade-union membership, sex, race, language, or religious affiliation are automatically unfair and are considered null and void. Dismissal on the grounds of marriage or pregnancy is also statutorily prohibited.

Employees are entitled to severance pay for any termination of their contract. The amount of severance is based on the employee's salary. Aggrieved employees must contest dismissal within 60 days of receiving notice. A judge may order reinstatement if the termination was unjustified or discriminatory.

In the United States, employers' ability to discharge non-union employees for any or no reason remains largely unfettered.

### Japan

The foundation for Japan's labor laws is the Civil Code of 1896, many provisions of which remain in effect.<sup>15</sup> While cause is not statutorily required for the termination of an employee, dismissal without cause will generally be held invalid as an abuse of the employer's discretion. One branch of dismissal for cause is employee misconduct, including insubordination, excessive absence, harassment of other employees, fraudulent misrepresentation of qualifications, and working for the competition. The other branch of dismissal for cause concerns an employee's unsatisfactory performance or inability to perform the functions of the job.

In addition to the *de facto* requirement of cause, Japan's Labor Standards Law of 1947 requires that employees be given notice prior to termination.<sup>16</sup> A minimum of 30 days' notice prior to termination must be given. In lieu of notice, 30 days' wages must be paid.<sup>17</sup> However, an employer may be exempt from giving either

<sup>15</sup> Unless otherwise noted, the exposition of Japan's labor law is drawn from: *International Labor and Employment Laws, Vol. 1 (op. cit.)*, pp. 32-3 through 32-10.

<sup>16</sup> Labor Standards Act of 1947, Art. 20.

<sup>17</sup> *Id.*

notice or compensatory wages if the employer receives a judgment from the local Labor Standards Inspection Office that the cause for the employee's dismissal is either a reason for which the employee is responsible, or that the reason is due to a natural calamity.

### Mexico

The concept of discharge for cause and worker protections have a longstanding tradition in the constitution and federal laws of Mexico. Article 123 of the constitution, entitled Labor and Social Security, and the Federal Labor Laws serve as the backbone of Mexican labor jurisprudence. This constitution explicitly abandoned traditional *laissez faire* principles concerning relations between labor and capital, recognized the existence of class conflict and inequality, and was the first constitution in the world to provide guarantees for the economically disenfranchised, formulating an arbiter's role for the state in conflicts between labor and capital.<sup>18</sup>

Mexico's labor laws and regulations are implemented by several government agencies and various boards and commissions whose members are representatives of government, workers, and employers. Local conciliation and arbitration boards address such issues as worker terminations, while similar federal boards address issues of national impact and disputes within the Federal District of Mexico City.<sup>19</sup>

Dismissal, called "recission," can take place only for specific causes contemplated by law. Additional bases for dismissal may not be formulated through labor contracts or collective-bargaining agreements. However, the statutory basis may be made more specific by contract. For example, the concept of progressive discipline may be introduced by specifying that the statutory basis for cause will not be sufficient absent repeated similar conduct.

Work relationships terminated without just cause will result in employer liability. While the constitution and FLL establish the right to man-

<sup>18</sup> "Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States," 17 *Comp. Lab. L.* 269.

<sup>19</sup> Unless otherwise noted, the exposition of Mexico's labor law is drawn from: *International Labor and Employment Laws, Vol. 1 (op. cit.)*, pp. 22-7 through 22-30.

datory reinstatement for unjust dismissal, in practice this process is lengthy and often results in a settlement being reached by the parties.

**Worker integrity.** Under Mexican labor law, integrity at work is required of all workers, and lack of integrity is a generic cause for dismissal. The Federal Labor Laws specify the kinds of conduct that constitute a lack of integrity and thus an acceptable basis for dismissal. Those causes are the use of false documentation to obtain employment; dishonest or violent behavior against the employer, his family, or co-workers; immoral acts in the workplace; revealing trade secrets; more than three unjustified absences in a 30-day period; incarceration; reporting to work under the influence of drugs or alcohol; carelessness that threatens the workplace; insubordination; and sabotage of the workplace.

The Federal Labor Laws authorize the establishment of work rules by a labor-management committee that governs the workplace. Work rules may define disciplinary measures and procedures involving oral or written reprimands, suspension of up to eight days without wages, and termination.

Employers must notify workers in writing of the cause or causes of dismissal. Failure to do so will result in a determination of unjustified dismissal. Moreover, if an employer does not move for termination within one month of an act constituting a cause for dismissal that cause is thereafter invalid.

Workers who do not seek redress before a local conciliation or arbitration board within two months of the dismissal lose their right to do so. A worker who claims to have been unjustifiably discharged has the right to claim reinstatement or indemnification equal to three months' salary and back pay. The worker may also claim 20 days' pay for every complete year of seniority and any accrued salary or bonuses.

## South Korea

Laws addressing discharge for cause are a relatively new phenomenon in the Republic of Korea. Prior to becoming a democracy in 1987, the government considered employment laws detrimental to its economy, which depended on exports and was dominated by large conglomerates, known as chaebols. In the wake of the nation's first freely held election, however, the

Korean General Assembly enacted two landmark laws granting protections to workers: the Equal Employment Act and the Labor Standards Act (LSA).

The primary purpose of the Labor Standards Act is to provide every employee with job security. Indeed, the LSA expressly states that employers must "make every effort to avoid [the] dismissal of workers."<sup>20</sup> In actualizing that purpose, the chief provision in the LSA provides that an employer must have a justifiable reason before it may discharge an employee. Unionized employees (a large portion of the Korean workforce) may enjoy even greater job security under their collective-bargaining agreements.

Under the LSA, employers must adhere to a comprehensive process before discharging an employee. First, when an employee is suspected of engaging in misconduct, the employer must delegate investigatory responsibilities to a work council comprising an equal number of management and labor representatives. Second, after the work council has issued its factual determinations, the LSA provides that an employer must have a "justifiable reason" before it may discharge an employee. While the LSA does not expressly define the term "justifiable reason," Korean experts note that discharges of employees may occur for the following instances of misconduct: lack of job aptitude, continuously producing a "defective" work product, breach of an employment contract, egregiously unacceptable behavior on the job, misrepresentation of previous education or work experience, an improper relationship with another employee, and a serious criminal violation.<sup>21</sup>

**Sincere consultation.** Employers must develop "rational and fair guidelines" to govern how an employee is dismissed once a justifiable reason is identified. At a minimum, employers must engage in a "sincere consultation" with an employee before his or her discharge. Korean ex-

<sup>20</sup> Unless otherwise noted, the exposition of Korea's labor law is drawn from: *International Labor and Employment Laws, Vol. II (op. cit.)*, pp. 36-1 through 36-21.

<sup>21</sup> The Office of Korean General Assemblyman Lee Bu Young generously has provided valuable insight into understanding the employment laws of the Republic of Korea. Mr. Lee was instrumental in the passage of both the Equal Employment Act and the Labor Standards Act and actively has monitored judicial interpretations of each statute.

perts state that the sincere-consultation requirement can be satisfied by offering a remediation plan to the employee.<sup>22</sup> Also, an employee terminated for justifiable reason must be provided with 30 days' advance notice or 30 days' ordinary wages in lieu of advance notice.

An aggrieved employee may challenge his discharge by petitioning the LRC—Labor Relations Committee—for relief. If the LRC issues an unfavorable determination, an employee may subsequently appeal the decision to a South Korean court. Liability for noncompliance with the LSA can include criminal sanctions not exceeding five years' imprisonment and monetary sanctions capped at 30 million won (approx. US\$24,000 or 16,500 GBP).

### United Kingdom

An employee has two distinct sets of rights under British law in connection with employment dismissal—contractual rights and statutory rights. Contractual rights are determined by the terms of an employment contract (oral or written) and are enforced by a suit for wrongful dismissal. The damages for breach of an employment contract are typically the salary owed for the remainder of the contract term. Therefore, a wrongful-dismissal action is usually an effective remedy only for highly paid employees.

**Unfair dismissal.** On the other hand, statutory rights are enforced by a claim for *unfair* dismissal made to an industrial tribunal.<sup>23</sup> Pursuant to the Employment Rights Act of 1996 (ERA), no employer may dismiss an eligible employee unless the employer has a valid reason for the dismissal. Dismissal can be justified where the employee's conduct is unacceptable, the employee is unable or unqualified to perform his or her job, the employer has insufficient work for the employee to perform (known as redundancy), or the employee cannot continue working without violating a statute. Once a potentially fair reason has been established, the employer must show that it acted reasonably in fact in treating that reason as sufficient for dismissing the employee.

<sup>22</sup> Office of Lee Bu Young.

<sup>23</sup> Unless otherwise noted, exposition of the United Kingdom's labor law is drawn from: Employment Rights Act of 1996 and *International Labor and Employment Laws, Vol. I (op.cit.)*, pp. 7–5 through 7–18.

Whether an employer has acted reasonably in dismissing an employee is a question that is resolved by examining the facts of each case. Generally, the most common reason for dismissals to be overturned is that the discharge process was deemed unfair, for example, where employers failed to give the employee adequate warnings that they were at risk for termination.

Unless the employee engages in gross misconduct, an employer must give the employee notice of dismissal. The length of notice depends on the number of years the employee has worked for the employer. An employee is generally entitled to one week's notice for each complete year worked, up to the twelfth year. If the employee has been employed for less than one year, he or she is entitled to one week's notice. Additionally, an employee is entitled to receive a written notice detailing the reasons for his dismissal.

The U.K.'s ERA provides three remedies for unfair dismissal: reinstatement, which requires an employer to treat the employee "in all respects as if he [or she] had not been dismissed"; re-engagement, which requires an employer to place the employee "in employment comparable to that from which he [or she] was dismissed or other suitable employment"; or, if no reinstatement or re-engagement order is made, compensation.

### United States

Employers' ability to discharge non-union employees for any or no reason remains largely unfettered in the United States.<sup>24</sup> The two most significant constraints on this employer freedom arise from federal and state prohibitions against employment discrimination and from limitations contained in intentional or unintentional contracts. Certain common-law doctrines, such as prohibitions against retaliatory discharge, also impose some limits. But for the most part, employment in the United States is at will, meaning that an employee or employer may end the employment for no reason or any reason, so long as the reason is not specifically prohibited.<sup>25</sup>

<sup>24</sup> Estimates are that approximately two-thirds of the non-agricultural workforce in the United States is employed at will. 115 *Monthly Labor Review*, 80, Table 19, June 1992.

<sup>25</sup> For a brief discussion of the history of at-will employment, see: Lionel J. Postic, *Wrongful Termination: A State-by-State Survey* (Bureau of National Affairs: Washington, DC, 1994), pp. xix–xxviii.

With the exception of public entities, employers may also discharge non-union employees without following any specific procedures. An employer need not give notice of the reasons for the discharge or give the employee any kind of hearing prior to the discharge and severance pay is not required. Employment by contract tends to be an exception for most private employers. Public employees are typically entitled to a rudimentary hearing prior to discharge to comply with constitutional due-process requirements.

Absent specific statutory restrictions, the employment relationship in the United States is largely governed by common law. This means that certain doctrines apply that have been developed over time by judges. The primary of these doctrines is referred to as "employment at-will." In general, this doctrine holds that an employer (or employee) is free to sever the employment relationship at any time and for any legal reason so long as the employment relationship has no definite term and is not subject to specific contractual restrictions. In only a few states have legislatures adopted statutes that significantly limit this doctrine.<sup>26</sup>

As a result of this doctrine, an employee who is discharged for what he or she deems inadequate reasons has no claim for redress on that basis alone in any governmental agency or court. For an employee to have any chance of recovering damages, he or she must claim that the dismissal violated some other employment statute, contract, or public policy.

Many employees who feel that their discharge was improper also believe that it was based on some form of discrimination. Thus, discrimination laws in the United States function to provide some protection against unjust dismissal, but only for those individuals who have legally protected characteristics (e.g., race, gender, age, religion, disability). Federal and state discrimination statutes also prohibit retaliation, and thus employees who are not able to prove discrimination may claim retaliation if they made any complaints of discrimination prior to being dismissed.

Executive-level employees often work pursuant to a contract for a specific period of time. Such agreements usually specify the circumstances under which early termination of the

agreement may occur. Below this level, however, few employers enter into formal, individual employment agreements with their employees.

**Unintentional contracts.** Employers sometimes find that they have entered into employment contracts unintentionally, however. Courts sometimes hold that employment contracts were implied by, for instance, employee handbooks that contain language that appears to promise continued employment unless certain events transpire. A typical implied handbook promise is that discipline will be progressive. Courts also impute contracts to oral promises made by employers. For a contract to exist, there must generally be some "consideration" by the employee. Courts have found this requirement satisfied simply by the fact that the employee began or continued employment after receiving the handbook or oral promise.

For an employee in the United States to have a chance of recovering damages, he or she must show that the dismissal violated some employment statute, contract, or public policy.

Employers in most U.S. states are prohibited from dismissing employees for engaging in certain protected activities. For example, employees who are injured and apply for statutory benefits or who report illegal activity by their employers (known as whistle blowers) are generally protected against arbitrary discharge.

In part because legal liability may result not from discharging an employee but from discharging the employee for a prohibited reason, employers are generally inclined to document the actual reasons for an employee's discharge. To the extent that the employer is able to make a compelling case for discharge based on poor performance, misconduct, or some similar reason, an employee may find it difficult to prove a claim of bias or retaliation.

Similarly, although private employers are not required to follow any particular dismissal procedures, most provide employees with a rudimentary hearing (or other procedural step) prior to dismissal—to be able to establish that the em-

<sup>26</sup> Montana and Kansas are the most notable examples.

ployer obtained all appropriate information before deciding to dismiss the worker.

### Patterns in Employment Law

To compare employment-termination law in these 11 countries, we believe it would be useful to identify the most important points of comparison. To keep the list manageable, not every procedure or step that might be required in any of the 11 countries is included. In particular, we excluded requirements that are particular to one or a few countries and those that are technical and easy to comply with.

Except for the U.S. and China, the countries reviewed in this report require employers to satisfy some standard of justification for dismissal of regular employees.

On the other hand, we included the following comparison points primarily because they are elements addressed in a number of the countries we examined and because they sharply affect whether the dismissal will be legally successful.

- **Substantive dismissal standards.** Is the employer required to satisfy one or more substantive standards to discharge an employee for non-economic reasons? If so, what are they?
- **Pre-termination process.** What procedures, if any, are employers required to follow before terminating an employee?
- **Notice period.** What kind of notice must an employer give and how far in advance of termination must that notice be given?
- **Severance payments.** What is the extent of severance to be paid, and are those payments in addition to or in lieu of a notice period?

### Substantive Dismissal Standards

Nine of the eleven countries reviewed require employers to satisfy some standard of justification for dismissal of regular employees. (The United States and China are the only exceptions.) Although the standards vary in terminology and approach, those nine countries share a minimum requirement that the employer must establish a reason for the dismissal that is valid and reasonable. For purposes of this discussion, we will refer to such a minimum requirement as just cause.

The category of just cause typically includes both employee performance deficiencies and misconduct. For example, in Australia, which prohibits dismissals that are "harsh, unjust, or unreasonable," valid reasons for dismissal are linked both to employee incapacity and misconduct. In the United Kingdom, valid reasons for termination may include the employee's aptitude or conduct. Similarly, in Japan, the just-cause requirement may be met either in connection with the employee's deficient performance or misconduct.

In a few countries, the forms of misconduct are specified in substantial detail by law. Mexico's Federal Labor Laws, for example, list specific causes that justify dismissal. In most countries, however, statutory standards are more general in nature.

Some countries have adopted multiple standards and link those standards to the amount of notice or severance compensation that is required. In Germany, for example, a sharp distinction is made between ordinary dismissals, which must be accompanied by notice, and summary dismissals, which may be immediate but which require a showing of grave misconduct or incompetence of the employee. Moreover, for a summary dismissal to be lawful, the situation must be intolerable for either party to continue the employment relationship during the ordinary notice period. Examples of situations that would satisfy this standard include criminal offenses, persistent refusal to satisfy the contract's requirements after being warned, and deceiving the employer about having the necessary skills or qualifications. If the employee can be transferred to a comparable position immediately or with reasonable training, the requirements of summary dismissal may not be satisfied.

China demonstrates a variation on this theme. Whereas in Germany any dismissal requires some demonstration of fault, in China, if notice is provided, an employee may be dismissed for any or no reason. However, if a Chinese employer can demonstrate serious fault on the part of the employee, the notice period may be waived. In the United States, no notice at all is required.

### Pretermination Process

A number of countries require employers to fulfill procedural requirements before an employee is dismissed. These include providing certain information about the dismissal, including reasons, to the employee prior to implementing the decision, pro-

viding an opportunity for the employee to respond to any charges or accusations, and consulting with third parties including unions and agencies.

In some countries, employers are specifically required to inform employees in writing that they are being dismissed and the reasons why. Mexico's Federal Labor Laws contain such a requirement. Moreover, if the employee refuses to accept the notice, the employer must notify the relevant board. Failure to provide notice may invalidate the dismissal.

In France, written notice must be provided before the decision is made to dismiss the employee. The notice must summon the employee to a meeting where he or she is given an opportunity to respond to the reasons. Similarly, in Italy notice of intended dismissal for a justified motive must be provided in writing (as described earlier).

Several countries have no specific notice or hearing requirements, but the fact of notice or a hearing is a factor in determining whether the dismissal was fair. In Australia, relevant factors include whether the employee was notified of the reasons for the dismissal and whether he or she was given an opportunity to respond. Similarly, in the United Kingdom, compliance with the employer's own procedures and basic principles of fairness are considered.

**Consultation.** Notice to and consultation with trade unions or other third parties is considered necessary in some countries, although such consultations need not always result in agreement. In Germany, the employer must inform an applicable trade union of the reasons for a dismissal. If the union does not respond within a set time limit, its lack of response is assumed to be agreement. If the union objects, it has no direct impact on the legality of the dismissal, but the union's objections must be provided to the individual employee, who may receive direction from them.

In other countries, however, third parties play a more substantial role in the dismissal process. In Egypt, no dismissal is permitted unless it has been approved by a committee comprising representatives of the employer, labor, and the government. In South Korea, disputed facts underlying a disciplinary situation must be resolved by a joint employer-labor committee.

**Fair hearing.** Many countries require that employees be informed of reasons for the dismissal, particularly where the dismissal is for disciplinary or performance reasons. Employers in the United

Kingdom, for example, must provide reasons for summary dismissals. Few of the 11 countries require direct consultation with the employee prior to termination or any pre-termination hearing conducted by the employer, although France is an exception. In addition, in several countries third parties must be involved in the dismissal process. In the remainder of the countries, no hearing or other pre-termination meeting with the employee is required by law. It should be noted, however, that such a meeting may assist the employer in establishing that it did not dismiss the employee for reasons prohibited by other laws within the jurisdiction. In the United States, for example, many employers meet with employees prior to termination to help establish that they had legitimate reasons for the dismissal and that it did not occur for prohibited discriminatory reasons.

In France, an employer who proposes to dismiss an employee must summon the employee to a meeting and state the reasons for the summons. During the meeting, the employer must state the reasons why it is considering dismissal. The employee must be given an opportunity to respond. The employee may be accompanied by an advisor of her or his choice. On deciding to terminate the employee, the employer must inform the employee of the reasons by registered mail.

In Germany, the employer is required to consult with a works or staff council (bodies that are similar to labor unions and whose leaders are elected by the workers), if there is one, before any ordinary or summary dismissal. The council is not required to agree, but if it disagrees, it must state its reservations within three days of a summary dismissal or a week of an ordinary dismissal. The employee may rely on those reasons in disputing the dismissal.

## Notice

In a number of the countries surveyed, employers are always required to provide notice prior to dismissing employees. In some countries, notice requirements apply regardless of whether the dismissal satisfies applicable standards for cause. In Germany, for example, an employer must provide at least four weeks' notice in the case of dismissal, although longer notice may be required depending on the employee's length of service and age. In Korea, 30 days' notice is required, unless (as in Australia) compensation is paid instead. In the United Kingdom, length of service

Employment-termination law in the countries discussed here is marked by considerable diversity. Yet certain patterns emerge from the comparison, suggesting that a universal policy could be developed that would achieve substantial legal compliance everywhere.

also determines the period of required notice. The maximum requirement is 12 weeks for employees with 12 or more years of continuous service.

A more frequent case is that notice is required for all cases except when the employer is dismissing the employee for cause. In Australia, between one and six weeks of notice must be provided depending on the employee's length of service and age, unless the dismissal is justified or an equal severance payment is made. In France, notice must be given except where the dismissal is for serious fault. Notice must be for one or two months depending on length of service. In Italy no notice is required if the dismissal is for just cause, but notice is required if the dismissal is for an otherwise justified reason. The length of notice, typically 30 days, is usually contained in trade agreements, but does not apply in the case of summary dismissals. In Mexico and the United States, no notice is required.

### Severance

Whether any severance payment is required, and to whom it is paid, varies greatly among the countries surveyed. In five of the countries (Australia, China, Germany, United Kingdom, and the United States) no severance payment is required other than payments that may be made in lieu of notice. Some countries require that payments be made to entities other than the individual. In Egypt, for example, employers are required to pay compensation to a social-insurance authority based on the length of employment. Retirees are entitled to direct payment of severance benefits. In Korea, severance payments are made in the form of contributions toward the employee's retirement allowance.

In France, severance payments are required unless the dismissal was for serious cause. But in Italy and Mexico, severance payments are made regardless of the reason for the dismissal.

### Toward a Uniform Termination Policy

It is evident from the foregoing review that employment-termination law in the 11 countries is marked by considerable diversity. Yet certain patterns emerge from the comparison, suggesting that a policy could be developed that would achieve substantial, albeit not total, compliance with this array of legal requirements.

As we examine in greater detail how components of a policy might be crafted to deal with each of the comparison points, we suggest that one approach

to creating a universal policy is to satisfy the most stringent requirements in each area. By satisfying the most stringent requirements, the policy will usually satisfy the less stringent requirements as well.

The question that must be addressed, however, is whether the cost of satisfying self-imposed policy requirements that go beyond the law in some countries is worth the benefits of having a uniform policy. Moreover, not all requirements can be arrayed on a continuum from less to more stringent. Some laws are different in kind, and a uniform policy may need to provide for exceptions.

### Substantive Standards

With respect to this key component of the policy, two substantial questions must be addressed. The first is whether the company is willing to adopt some type of just-cause standard for dismissals in the United States and China, which do not hold employers to such a standard. The second question is whether a just-cause-dismissal policy should include two levels of cause or just one.

**Requiring a cause.** Establishing a cause standard in the United States and China will probably incur additional costs relative to an at-will policy. The primary additional costs are likely to result from the employer's having to suffer for a longer period of time some employees who perform poorly or engage in misconduct before they can be terminated for cause. There are several reasons why this cost is not likely to be prohibitive, however. First, many companies already operate with such a standard. Companies with unionized work forces, for example, are familiar with the principle of just-cause dismissal. Many other employers have adopted this standard either as a matter of fairness or because they recognize that alleged-discrimination claims are more easily defended when they can show that an employee was discharged for good cause. Second, to the extent that the company has already developed policies and procedures to comply with other countries' just-cause requirements, the cost of exporting those policies to the United States and China should not be large.

Whether one level of standard or two should be included in a uniform policy is essentially a technical question. Once an employer has committed itself to justifying employee dismissals by some standard, it has crossed an important threshold. Managers are then required to monitor and interact with employees consistent with standards known to both. The implications of a two-level standard

are essentially economic. In some countries, if an employer cannot justify summary dismissal, it may still dismiss but is required to provide notice or severance payments. Although economic consequences are not to be minimized, they do not require the change in management orientation that is required by an initial decision to limit dismissal to just cause.

As a consequence, we have included in our uniform policy a single just-cause standard for dismissal, but we have recognized and left room for individual variation with respect to multiple levels.

### Reasonable Steps

Few countries require employers to provide an informal hearing to employees before their dismissal, but some consider the presence or absence of such hearings as a factor in determining whether dismissal is legally justified. To comply with the more-stringent requirements of these countries, we have included such a hearing in our model policy (see the box on page 74).

Indeed, we have taken the further step of incorporating an internal-appeal mechanism in the policy. Such a step is not expressly contemplated in the legal schemes of any of the 11 countries, but we propose it in the model policy to avoid situations where the evaluation of conduct is distorted by problems that may be particular to the immediate supervisory relationship.

We think the additional costs associated with such procedural requirements would not be large. Many employers already provide such hearings even though they are under no legal obligation to do so. They may hold such hearings because of union-related considerations or simply because they believe a hearing is an essential component of fairness. In addition, employers are mindful that such a hearing may provide information about how the employee intends to respond to the dismissal in later proceedings.

Few countries require that the employee have counsel at such a meeting, although several permit the employee to have some representation. We have provided for representation in a generic form and have noted that representation may include an attorney in some countries.

Even though employers in a few countries are required to involve third parties in the dismissal process, it makes little sense to extend that requirement to operations in other countries. Indeed, in many cases a third-party-entity equivalent does not exist. However, because of the

prominence of trade unions in many countries, we have included a provision that unions are to be informed of pending dismissals of employees whom they represent. This is a widely accepted practice even where it is not expressly required by law.

### Notice and Severance

The technical nature of notice and severance requirements and their substantial variation across countries mean that it would be difficult to adopt a single policy that meets all requirements. Such a policy could also be quite costly. We believe most employers will generally prefer not to pay more compensation than is required.

### Overlapping Rules and Regulations

The primary goal in undertaking this study was to make an initial determination based on a small sample of countries of whether it would be a sensible strategy for a company with operations in multiple countries to seek to develop uniform policies and procedures with respect to the issue of employment dismissals for all countries. Our preliminary answer is affirmative.

We found significant overlap in the laws of the 11 countries in the area of employee dismissals for cause. By adopting the approach of satisfying the countries with the most aggressive or stringent legal requirements and voluntarily adopting those responsibilities even where they are not required, an employer can do much to unify its personnel operations.

Nevertheless, a single comprehensive policy with no variation across countries does not appear feasible. Some countries maintain legal requirements that could not be meaningfully (or profitably) imposed elsewhere. Moreover, the cost of voluntarily making severance payments in countries where they are not required might impose an unacceptable competitive burden.

Cautions must be expressed in closing. This study was limited in scope. There may be situations in certain countries that are so unusual and in conflict with rules applicable in most other countries that conflict cannot be avoided. As we have stated, there also are particular detailed regulations that would not warrant duplication where they are not required.

For the most part, however, a great deal of uniformity appears to be achievable. The basic strategy of seeking common approaches appears to be worth pursuing. ■



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