

# The Global Employer: Focus on Trade Unions & Works Councils

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# Argentina

## 1. Introduction

### 1.1 Constitution Of The Argentine Republic

Section 14 of the Argentine Constitution establishes that all employees are entitled to associate themselves for lawful and useful purposes. Additionally, a 1957 amendment to the Constitution, incorporated into section 14, guarantees all workers “a free and democratic union organization by the mere registration with a special registry,” and further guarantees all unions the power to enter into collective bargaining agreements, to resort to settlement and arbitration proceedings, and to strike. The Constitution also guarantees union representatives the right to fulfill their duties as such and those related to the stability of their employment.

### 1.2 Additional Regulations

In addition to the Constitution, Argentina has several regulations that govern trade organizations and unions, as well as laws regulating workers’ collective rights and the relationships between employers and trade unions, including:

- **The Labor Organizations Law (No. 23,551):** The Labor Organizations Law regulates all matters related to the creation, operation, rights, and duties of workers’ associations, and the acknowledgment of their legal capacity as unions by the Ministry of Labor. Moreover, it establishes the rights and guarantees enjoyed by the union legal representatives and union delegates.
- **The Collective Bargaining Agreement Law (No. 14,250):** The Collective Bargaining Agreement Law governs all matters related to the execution, content, and application of collective bargaining agreements.
- **The Collective Negotiation Procedure Law (No. 23,546):** This law establishes a compulsory obligation to be followed by

employers and unions in order to execute a collective bargaining agreement. The negotiation process begins with a communication from one of the parties (the union or the employers) to the Ministry of Labor and to the other party on the personnel and territory that is going to be covered by the collective bargaining agreement. A commission with representatives of both parties is then created in order to negotiate. The Ministry of Labor must approve the agreement in order for it to be enforceable.

- **The Mandatory Settlement Law (No. 14,786):** This law establishes the mandatory settlement procedure that employers and unions must follow before adopting any direct measures, such as strikes, lock-outs, etc. The Ministry of Labor can order that either party take back the measure that led to the conflict during the negotiations.

## 2. Trade Unions

### 2.1 The General Role Of The Trade Union

Section 14 of the Argentine Constitution gives workers the right to associate on a free and democratic basis, which is acknowledged upon registration with a special register. Law No. 23,551 regulates this constitutional right and creates two kinds of trade union organizations: (i) registered workers' associations, and (ii) registered workers' associations with "exclusive recognition."

Law 23,551 also establishes the requirements that workers must meet in order to create and register worker associations. To create an association, workers must:

1. Group themselves exclusively under the terms prescribed by law (i.e., they may only associate themselves to create an association of workers of the same occupation, rank, craft, or profession);
2. Adopt a bylaw that meets all the requirements prescribed by law in order to ensure that the association operates as a democratic organization;

3. Determine a specific jurisdiction within the Argentine Republic;  
and
4. Register with the Ministry of Labor.

Law 23,551 authorizes plurality of workers' associations for the same category of workers, but it provides that only one of them may be granted "exclusive recognition" by the Ministry of Labor, which gives that association the exclusive right to be the representative of workers in a certain area or activity. In other words, several registered associations representing the same occupation, craft, rank, or profession of workers may exist, but only the most representative may have the government's authorization to represent all the workers of that same occupation, craft, rank, or profession vis-à-vis the employers.

In order to obtain this exclusive recognition, a workers' association must: (i) become the most representative of all the unions; (ii) be registered and have operated as such for a period longer than six months; and (iii) gather more than 20% of all the workers intended to be represented by it.

The Argentine system providing for exclusive recognition has been seriously criticized because it arguably contradicts the Argentine Constitution, which confers on workers the right to associate and freedom of choice. The system of exclusive recognition seriously restricts the power of registered workers' associations without such recognition in exercising typical union rights.

In practice, the system of exclusive recognition makes the principle of freedom of choice for trade unions unenforceable because workers' associations that are not exclusively recognized have no real power because:

- They cannot negotiate collective agreements;

- They cannot plan and call strikes;
- They cannot fix union contributions from the members of the represented activity, profession, occupation, or craft (although not affiliated);
- They cannot collect through check-off contributions;
- They cannot agree with employers within the collective bargaining agreement on contributions from employers to the union;
- They cannot create and manage the mandatory health and medical organizations for blue-collar workers; and
- They cannot control the fulfillment of labor and social security laws.

In addition to the typical function of all the associations, those with exclusive recognition have the duty to represent and defend the interests of the workers against the employer and the government.

Therefore, workers' associations with exclusive recognition have exclusive rights that cannot be exercised by other associations. Unions with exclusive recognition also have higher political power because they are empowered to negotiate in the name of the activity they represent. Further, only unions with exclusive recognition can exercise the right to strike. Although the right to strike is guaranteed by the Argentine Constitution to all workers' associations, the law regulating this right only allows exclusively recognized unions to enjoy it, thereby causing some concern that the law is unconstitutional.

Unions with exclusive recognition also have a preferred financial condition, given by their power to manage the health care provider of

the pertinent activity and by the possibility of imposing mandatory contributions on all the employees of the activity, regardless of whether or not they are members of that union. This power to impose contributions has been seriously objected to, but at present, judicial opinions have supported such power.

From a political and economical viewpoint, this preferential situation places any other trade union seeking to contend for exclusive recognition with a recognized union at a severe disadvantage. In fact, the procedure required by law to try to obtain exclusive recognition makes it almost impossible for contestant unions to replace those with exclusive recognition.

The system of exclusive recognition has also been deemed to infringe Convention 87 of the International Labor Organization (“ILO”) on the Freedom of Association and Protection of the Right to Organize. The ILO’s Committee of Experts on the Application of Conventions and Recommendations has determined that, in order to avoid abuse of the system, the representative capacity of trade unions must be determined according to previously established, objective criteria. Moreover, the Committee has set out certain guarantees that must be complied with in these cases, such as the right of any organization that could not obtain enough votes in a previous election to request a new vote after the expiration of a certain period or the right of a new trade union to request a new vote after the expiration of a reasonable term. Law 23,551 relies on objective criteria to determine representation, but does not meet the guarantees required by the Committee.

Consistently, the Supreme Court of Justice has recognized the registered workers’ associations rights that according to Law No. 23,551 are exclusively reserved to associations with “exclusive recognition”. These rulings<sup>1</sup> were grounded under the assumption that

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<sup>1</sup> Rulings of the Supreme Court of Justice in the cases: “Asociación Trabajadores del Estado vs/ Ministerio de Trabajo vs/ Ley de Asociaciones Sindicales”, 11/11/2008, and “Rossi Adriana María vs/ Estado Nacional - Armada Argentina” - 12/09/2009

the law violates the constitutional right of union freedom of choice and ILO Convention 87 (which under Argentine legal system has supremacy even regarding a national law).

Workers' associations (with or without exclusive recognition) may be classified as a first-, second-, or third-degree organization. First-degree labor organizations are those created by employees of the represented activity, profession, occupation, category, or craft. In Argentina, there are two kinds of first-degree organizations: "*sindicatos*," which are first-degree trade organizations with a restricted territorial scope (e.g., within a province), and "*uniones*," first-degree labor organizations with national representation and regional offices or delegations in the different jurisdictions.

Second-degree organizations, called "federations" (*federaciones*), are composed of *sindicatos*; third-degree trade unions, called "confederations" (*confederaciones*), are unions formed by the federations, non-federated trade unions (*sindicatos no-federados*), and *uniones*. In Argentina, at present, only the General Labor Confederation (*Confederación General del Trabajo* or "**CGT**") is deemed an exclusively recognized confederation empowered to validly represent the federations, non-federated trade unions, and "*uniones*" (i.e., first-degree labor organizations with national representation and regional offices or delegations in the different jurisdictions).

## 2.2 The Scope Of Trade Union Rights In Businesses

Argentine law does not contain any provisions granting special powers to workers' associations to take part in the business of a company or for the creation of joint administration councils. There are, however, rules granting exclusively recognized workers' associations the right to be informed about certain aspects of the business related to the professional training of the workers and to all matters necessary to perform an appropriate collective negotiation.

### 2.3 The Function Of Trade Union Representatives

The managing and administrative bodies of the workers' associations have a minimum of five members, to be chosen by a direct and secret vote of the affiliates. To be eligible for election, candidates must: (i) have no criminal or civil disqualifications; (ii) have been affiliated for a minimum term of two years; (iii) have rendered services in said occupation, craft, profession, or activity for two years; and (iv) be at least 18 years old.

The primary duty of the representatives of workers' associations is to administer, manage, and conduct the association. Representatives of exclusively recognized workers' associations are also lawfully authorized to exercise, in the name of the association, all the rights granted by the laws (e.g., to enter into collective bargaining agreements).

Union delegates are workers elected to represent exclusively recognized workers' associations inside a company. Delegates and the exclusively recognized workers' associations have a permanent and direct relationship. However, once elected as such, delegates must continue rendering their regular services to the company.

### 2.4 Union Stewards ("Delegates")

Delegates may act as official spokesmen of the workers in front of the employer, but they do not officially represent the workers (they may not sign any document in their name), nor can they enter into collective bargaining agreements. Only the exclusively recognized workers' association may legally represent all workers of the activity. However, delegates are able to take part jointly with the representatives of the exclusively recognized workers' association in the negotiation process of a company's new collective bargaining agreement. Additionally, delegates may verify fulfillment of the legal or conventional rules and participate in the inspections ordered by the labor administrative authority.

Delegates are also entitled to hold periodic meetings with their employers or employers' representatives. Moreover, delegates are entitled to a certain number of monthly paid hours off, established in the collective bargaining agreement, in order to fulfill their duties.

There are no provisions in Argentine law allowing delegates to participate in the management of companies.

In order to be elected as union delegates, workers must have been affiliated with the exclusively recognized workers' association for at least one year, be at least 18 years old, and must have rendered services for the company in which they are to be appointed for at least one year.

The election of the delegates is held during a primary election called by the workers' association through a direct and secret vote of the employees intended to be represented. The elections are to be held at least 10 days before the expiration of the term of office held by the previous delegate. Notice of the election must be given to the workers 10 days in advance of the election.

Unless the collective bargaining agreement provides otherwise, delegates must represent a minimum of 10 employees. Two delegates may be appointed when the number of employees to be represented is between 51 and 100; and, when the number of employees to be represented is more than 100, one more delegate for each additional 100 employees may be appointed. Establishments having more than one work shift can also appoint at least one delegate per shift.

Exclusively recognized workers' associations are authorized to revoke the representation of delegates at their own initiative or at the request of 10% of the total number of represented workers.

### 3. Works Councils

There are no provisions in Argentine law for Works Councils.

#### 4. Trade Union Employee Protection Rights

During the term of representation, traditional relationships between employers and representatives are suspended. Unless for a fair cause, representatives cannot be dismissed while holding their terms, and for up to one year after the expiration of the term.

In addition, union stewards (delegates) may not be suspended from their work, their labor conditions may not be modified, and they may not be made redundant or dismissed during their terms of representation, and up to one year after the expiration of the term. This protection is also extended to candidates – from the date the employee is nominated for the position and after the expiration of a six-month term subsequent to this nomination.

In order to dismiss, suspend, or modify the work conditions of delegates, candidates, or representatives, employers must file a legal action requesting the exclusion of the special protection in court. The employer's dismissal, suspension, or modification of employment conditions without previously filing this action in court empowers the delegates, candidates or representatives (as the case may be) to request the judge to reinstate them in their position and (in the case of delegates and candidates) to pay them all unpaid wages since their separation from the company, or, if appropriate, they may request the re-establishment of their modified employment conditions. Should employers refuse to reinstate the position or reestablish the employment conditions ordered by the judge, they shall be subject to fines until the final performance of the judicial order and during the whole term of office of the representative, delegate, or candidate.

Law 23,551 authorizes representatives and delegates (but not candidates) to either file the pertinent actions in court requesting reinstatement or re-establishment of their employment conditions or else consider themselves dismissed. In the last case, they are entitled to receive, in addition to the ordinary compensation for unfair dismissal, compensation equivalent to all the wages they would have

received until the termination of their employment, plus the amount corresponding to one additional year of wages.

Argentine law provides for specific sanctions against employers that affect or impede the normal exercise of any union rights. The labor courts may impose these sanctions after following a special procedure, whenever the union, the delegate, or any worker files the pertinent action. The amount of the fine is up to the Ministry of Labor.

This special protection mechanism is intended to dissuade employers from any interference with union rights, such as the employer providing a subsidy to the union, an employer's unfair refusal to negotiate with the union, or an employer promoting or discouraging workers' affiliation with the union.

# Australia

## 1. Introduction

The Australian industrial relations system is characterized by a high level of government regulation of trade unions and stakeholders. While Australian trade unions are provided with rights under state and federal industrial legislation, Australian unions rank as some of the most highly regulated unions in the world. This regulation extends to the eligibility rules of unions, their internal processes, and control of their finances. In exchange for this regulation, Australian trade unions enjoy a voice in the Australian industrial relations system effectively guaranteed by statute, as well as the right to be consulted by employers on many issues relating to the terms and conditions and employment security of their respective members. This includes consultation in cases of a reduction in force or changes to terms and conditions of employment.

In March 2006 there was a consolidation of industrial relations laws at a Federal level. Since this time, the vast majority of Australian employees have their terms and conditions of employment regulated under a single piece of legislation known as the *Fair Work Act* 2010 (“**Federal Act**”).

## 2. Trade Unions

### 2.1 The General Role Of The Trade Union

Under the Australian industrial relations system, trade unions enjoy the status of “party principal” and can therefore adopt a view in any proceedings that is not necessarily consistent with the views of its members. The most common role of the trade union is to act as the collective bargaining representative of the members in a particular workforce who fall within the union’s eligibility rules. There is a limited ability under the Federal Act to compel employers to collectively bargain in good faith.

The Australian industrial relations system is largely dominated by the workings of a Tribunal known as Fair Work Australia. As part of the Federal consolidation process that commenced in 2006, Fair Work Australia also conducted a consolidation of the many thousands of industrial awards that had application in Australia, to create approximately 130 Modern Industrial Awards, which have general application across industries and occupations. Trade Unions in Australia play an active role in agitating for increased benefits as part of the modern award system, as well as ensuring that employers comply with the minimum terms and conditions in the modern awards. The role of the trade unions in the collective bargaining area is often focused on obtaining site-based benefits, which may be more generous than the modern industrial awards that have application.

Until such time as the industrial tribunals consider, review, and formally approve the matters agreed upon between the parties, the matters agreed upon with any eligible union have no legal status. Once the industrial tribunal formally approves the industrial award or agreement, it becomes an “Industrial Instrument” and therefore has the force of law.

Where employees fall within the eligibility rules of a particular trade union, the trade union may also have the ability to bring forth an industrial dispute on behalf of its members and to have the industrial dispute made the subject of conciliation and/or arbitration by the applicable industrial tribunals. This may also include individual grievances such as discrimination and/or unfair dismissals.

## 2.2 Constitution Of The Trade Union

The constitutions, or “eligibility rules” of Australian trade unions effectively outline the types of employees that a union can represent before labour tribunals. These rules are determined by the various Federal and State labor tribunals. Historically, the rules of the particular union and unions have been drafted to ensure that there is no overlap between unions so as to avoid demarcation disputes.

Australian trade unions have historically aligned on a craft basis; however, with the advent of site-specific bargaining in the 1980s and 1990s, there has been a move by individual unions to dominate particular worksites or segments of industry, to the detriment of other unions. Where demarcation disputes have arisen with respect to two or more unions claiming coverage of particular employees, or a particular union seeking exclusive coverage of employees at a particular site, labour tribunals have been empowered to effectively award representation to a particular union over the interests of a less dominant or effective union.

Federal and State industrial legislation determines the internal workings of a particular union, including provisions with respect to ballots and whether individuals are fit and proper persons to hold union positions.

### 2.3 The Scope Of Trade Union Rights In Businesses

While Australian trade unions purport to represent a broad range of their members' interests, the most effective method of union activity is in the form of industrial action and employer-specific negotiations held in order to obtain concessions from individual employers on the terms and conditions of employment. Where the terms and conditions of employment agreed upon come within the definition of industrial matters in the relevant legislation, industrial awards or agreements can be made that are then binding on both the employer and the unions, often in the form of a Collective Agreement. A Collective Agreement may be negotiated with an individual employer on a site-by-site, or national basis, and takes its legal effect from the formal approval of the Collective Agreement by Fair Work Australia.

Matters that can be contained in Industrial Instruments include terms and conditions with respect to wages, hours of work, leave, meal breaks, overtime payments, and redundancy/severance entitlements. Trade unions have also historically attempted to negotiate and/or arbitrate award terms and conditions that effectively require the employer to consult with the relevant trade union in circumstances

such as redundancy, technological changes, and/or restructuring of the workforce. It is a common feature of all modern industrial awards and all Collective Agreements approved by Fair Work Australia to include positive obligations on the employers to consult with employees and trade unions in circumstances of reductions in force and material changes to terms and conditions of employment and work methods.

#### 2.4 The Function Of Trade Union Representatives

While many Australian trade unions have paid officers, attorneys, and officials, very few employers have day-to-day contact with trade union officials. The more common form of representation is by way of a union delegate, who is generally a worker who is a paid member of the trade union and is elected by other trade union members at the site to represent the individual workers in consultation with the paid officials of the union. The Federal Act makes no reference to delegates and/or their role. The Federal Act strictly regulates when a trade union may visit a work site. These regulations place a positive requirement on the union to nominate the reason for the visit and when such a visit can occur. Only union officials with a written permit can attend the workplace, and the employer can in most cases restrict access to such times and locations as to not disrupt the workplace.

#### 2.5 Works Councils

There is no requirement under Australian law for works councils to be formed. Works councils are not part of the Australian industrial relations system.

#### 2.6 Trade Union Employee Protection Rights

State and federal industrial legislation prohibits discrimination against union delegates and persons engaged in union activities at the workplace.

## Austria

### 1. Introduction

Industrial relations and labour law in Austria are characterized by a high degree of centralization and a strong tendency towards compromise. Several bodies represent the employees. The Austrian Trade Union Federation (“*Österreichischer Gewerkschaftsbund*” – “**ÖGB**”) is the most influential Austrian employees’ representation organization and is regarded as one of the most highly centralized trade unions in the western world. The Austrian Trade Union Federation normally negotiates the collective bargaining agreements and has a large influence on Austrian wage policies. Membership is voluntary.

Membership in one of the existing chambers of employees (“*Kammer für Arbeiter und Angestellte*”) is obligatory for all employees, except for those working in public services or holding a management position in private business. The chambers act as think tanks and sounding ports for the union movement. They take part in the legislative process and act as a service organization for employees. They provide free labour law advice and support for legal representation before the labour courts.

The leaders of employer and employee organizations have a close working relationship and there are, as a result, almost no strikes or lock-outs in Austria. This so-called “social partnership” (“*Sozialpartnerschaft*”) has gained a reputation throughout the world as an effective means of successful cooperation between employers and employees.

The primary piece of legislation in this area is the “*Arbeitsverfassungsgesetz*” (Labour Constitution Act).

## 2. Trade Unions

Employees have a right of freedom of association and the right to engage in union activity. Since the establishment of the ÖGB, all political viewpoints and groups of employees have been represented within the ÖGB. However, there is no direct trade union representation in the workplace. Instead, employees are represented by statutorily elected works councils.

The Labour Constitution Act provides legal authority for collective bargaining agreements. Collective bargaining agreements are usually put in place for particular industries or branches of industries and are usually concluded by the trade union representing the employees' side and the Austrian Chamber of Commerce ("*Wirtschaftskammer*") representing the employer's side.

## 3. Works Councils

Employees are represented in the workplace by statutorily elected works councils. Under the Labour Constitution Act a works council must be established if a business permanently employs at least five employees who are at least 18 years old. However, the establishment of a works council is a right of the employees and does not trigger any obligation for the employer to establish a works council. The works council has to represent the interests of the employees against the owner of the business. If the minimum number of employees is reached, they can form a works assembly ("*Betriebsversammlung*"), consisting of all employees of the business, and elect the works council by way of a secret vote. This works assembly can be held in the business and during working hours, provided it is reasonable for the owner. The number of persons to be elected to the works council increases with the number of employees. For example, there will be one member of the works council for 5 to 9 employees. For 10 to 19 employees, the works council consists of two members; for 20 to 50 employees, three members; for 51 to 100 employees, four members. For businesses with more than 100 employees, for every additional 100 employees another member is added to the works council. For

businesses with more than 1,000 employees, for every additional 400 employees another member to the works council is added. Depending on the size of the business, further procedures are required to determine the members of the works council. A chairman who represents the works council vis-à-vis the owner is elected from all members of the works council. The works council is established for a term of four years.

### 3.1 Rights Of Participation Of The Works Council

#### 3.1.1 General Right To Participate And To Obtain Information

The works council is entitled to supervise compliance with the laws relating to employees within the business. For this purpose, the works council may inspect the records kept in the business on the remuneration of employees and the calculation of the remuneration, as well as all other documents concerning employees. Once every quarter, or once a month upon request by the works council, the owner shall deliberate with the works council, informing it of important matters of the business.

The works council has the right to request that the owner remove irregularities and carry out the necessary measures.

The employer is required to notify the works council on the types of computer-assisted records existing on employees and identify data proposed to be processed and transmitted. The works council must be able to verify this information upon request.

#### 3.1.2 Participation In Social Matters

The works council has a comprehensive right to obtain information and deliberate on all matters of health and safety protection. It may participate in the management of in-house training, educational and welfare facilities. The form and scope of these participation rights can be set forth in a shop agreement.

#### 3.1.3 Participation In Personnel Matters

In personnel matters, the works council has a say in connection with the recruitment of new staff, the determination of remuneration in particular cases, relocations, disciplinary measures, the allocation of company residences, and promotions.

### *Recruitment And Relocation Of Employees*

The works council may propose to the owner the advertisement of vacancies. The owner in turn must inform the works council about the number of employees to be hired and their envisaged job descriptions. Upon request by the works council, deliberations may be held on individual hirings.

The employer must notify the works council of each hired employee, indicating his or her remuneration, the type of work he or she will do, and the salary scheme to which he or she will be allocated.

Any assignment of an employee to another workplace, which is supposed to last at least 13 weeks, is deemed to constitute relocation. The employer must promptly notify the works council of every relocation. If any relocation entails a reduction of the remuneration or the worsening of other working conditions on a lasting basis, such relocation requires prior consent of the works council in order to be legally effective, even if the employee himself or herself accepts that his or her working conditions change for the worse. Should the works council refuse its consent, the employer may sue for such consent in court. The competent labour court will approve the relocation if it is objectively justified.

### *Imposition Of Disciplinary Measures*

Disciplinary measures may be imposed on an individual employee only if a collective agreement or shop agreement so provides, and if they are approved in a particular case by either the works council or any body established with the consent of the works council (example e.g., a disciplinary commission). Any disciplinary measure that was imposed without the consent of the works council is ineffective. The

employee has the right to have the form or substance of any disciplinary measure reviewed by the court.

### *Termination and Dismissal of Employees*

The owner of the business must notify the works council prior to giving notice to an employee. Within one week the works council can either object, or not comment, or approve the proposed termination. If notice is given without notification of the works council or within the time limit granted for comments, it is ineffective.

The owner must notify the works council immediately after an employee's dismissal and, upon request of the works council, has to consult with the works council on this dismissal within three working days from notification.

#### 3.1.4 Participation In Concluding Shop Agreements

Shop agreements are agreements concluded between the works council and the owner. They must be made in writing and can regulate the matters that either the law or collective bargaining agreements specifically reserve to shop agreements. The terms of a shop agreement must neither violate mandatory statutory law nor mandatory collective labour law and must be posted in the company.

**Necessary shop agreements:** The owner may take certain measures only if a respective shop agreement has been agreed upon. These measures would include the introduction of an internal disciplinary code, staff questionnaires, certain control measures affecting a person's dignity, and piece-work pay. Should the works council not approve the proposed shop agreement, the owner cannot take the proposed measures, and the employee may refuse compliance.

**Necessary enforceable shop agreement:** Computer-aided personal data systems and personnel evaluation systems must neither be introduced nor used without the consent of the works council. Should the works council refuse to approve the proposed shop agreement, the

owner may refer the case to the conciliation board (“*Schlichtungsstelle*”) whose decision can replace the works council’s consent.

**Enforceable shop agreement:** In certain matters (e.g., use of in-house facilities, etc.), both the owner and the works council can force approval of a shop agreement by referring the case to the conciliation board for a decision.

**Voluntary shop agreement:** The Labour Constitution Act enumerates a number of matters that can be regulated by shop agreement on a voluntary basis (e.g., company pensions). All of these matters have in common that the works council cannot enforce their incorporation into a shop agreement.

### 3.1.5 Participation In Alterations Of The Company

The owner is obliged to notify the works council of a proposed alteration within the company at a time, in a manner, and with regard to contents in a way that enables the works council to assess the possible implications on the envisaged measure in detail and issue a respective opinion. Consultations may follow upon request by the works council. Alteration includes any limitation of operation, shut down or relocation of the company, merger with other companies, or change of the business purpose or organization.

The works council may propose measures to minimize any negative consequences for the employees arising from the change to the business. If the business has more than 20 employees and the change is detrimental for all or a substantial number of them, the employer and the works council may agree on a social plan in order to minimize such detrimental consequences for the respective employees. If the employer and the works council cannot agree on a social plan, the works council may address a special conciliation body (“*Schlichtungsstelle*”) at the competent labour court. In this event, the *Schlichtungsstelle* is entitled to decide the terms of a social plan after hearing the employer and the works council on the matter.

### 3.1.6 Participation In Economic Matters

Rather strict limits are imposed on the works council's participation in economic matters; under certain circumstances, the works council may take one third of the seats in the supervisory boards of stock corporations. In some companies with limited liability (e.g., with more than 300 employees), a supervisory board is mandatory, thus allowing participation of the works council's members.

### 3.2 Works Council Employee Protection Rights

The members of the works council must neither be subject to restrictions nor discrimination in pursuing their activities, and they enjoy special protection against notice and dismissal. Employment with members of the works council can only be terminated upon prior approval by the labour court, provided that certain reasons for the termination are met (e.g., closing of the business).



## Brazil

### 1. Introduction

There is no precise date indicating the beginning of syndicalism in Brazil. However, the first relevant collective labor movements in Brazil occurred at the beginning of this century (the expression “syndicate” (*sindicato*) was first used in 1903), when the environment was characterized by pluralism concerning the organization and administration of trade unions and by the absence of public intervention. At that time, trade unions were normally organized in the form of cooperatives, unions, or leagues of works. The early Brazilian syndicalism was strongly influenced by European labor movements, and its mainstream was dominated by ideas of anarchic syndicalism caused by the considerable presence of European immigrants (especially from Italy) in the labor movement.

The first efforts to regulate syndicalism in Brazil occurred in 1903, for rural workers, and in 1907, for city workers. According to these original regulations, the main purpose of trade unions was to protect, study, and improve the collective interests of a profession and the individual interests of their members. However, during this period, despite regulation and public intervention, social conditions – characterized by poor industrialization – did not allow for sensible development of syndicalism in Brazil.

Beginning in the 1930s, following the European movement, public intervention in Brazilian syndicalism began to strengthen steadily and to influence related Brazilian regulations and the behavior and social role of trade unions. Initially, public intervention was characterized by a preoccupation with raising labor movements and demonstrations against industrialization, with the increasing influence of foreign workers disseminating anarchic ideas and the political actions of trade unions. Public intervention was based on an “integration philosophy,” rather than the previous conflict ideology, and on apolitical syndicalism, under which trade unions would play the role of state collaborator in order to achieve agreements between employees and

employers. As this new philosophy gained popularity, the organization and administration of trade unions became considerably more regulated and strongly controlled by the public administration – even to the point where the existence of a trade union depended upon approval by the relevant ministry.

The “interventionist system” of the 1930s (which was further strengthened in the 1940s) considerably restricted trade unions. For example, the single trade union system (*unicidade*), which bans more than one union in the same geographical area (normally a county) was introduced; unions were classified according to the professions of their workers; the hierarchical organization system, under which more than three unions constitute one federation and more than five federations constitute one confederation, was introduced; civil servants were prohibited from taking part in trade unions; a compulsory union tax was introduced; and new restrictions were introduced regarding participation in international unions or entities. Additionally, unions were considered part of the state and prevented from striking or organizing lockouts, and the Ministry had several legal remedies to control union activities, such as revoking a union’s operating permit. The organization and function of unions were also highly regulated. For example, agreements negotiated by unions with employers were applicable to all workers, regardless of whether or not the workers were members of the union.

Then, in 1942, the Labor Law Consolidation (*Consolidação das Leis do Trabalho* or “**CLT**”) was enacted. The CLT introduced no significant changes (with the exception of a more liberal strike right) and maintained the existing system until the democratization of the country in the 1980s and the enactment of the new Federal Constitution of 1988.

The Federal Constitution of 1988, Articles 5 and 8, reintroduced the principle of freedom of association and organization in Brazilian syndicalism and gave unprecedented freedom to trade union activity in Brazil. However, some restrictions developed during the interventionist system were still maintained, such as the single trade

union principle, compliance with occupational or economic categories for establishing a trade union, the hierarchical system of organization of unions, and mandatory contributions.

The system as outlined in the CLT still exists in Brazil. However, as it has not been adapted to the new constitutional environment, it is not unusual to find rules within the CLT that have been superseded or that are no longer applicable, particularly those rules regarding the organization and control of trade unions.

Additionally, Brazil has ratified Convention 98 of the International Labor Organization (**ILO**) on collective bargaining. It has not, however, yet ratified Convention 87 on the freedom of association and organization or Convention 151 on the syndicalism of civil servants.

## 2. Trade Unions

### 2.1 The General Role Of The Trade Union

Trade unions can be freely organized in Brazil, provided that they are done so for the purpose of studying, protecting, and coordinating the financial or professional interests of a group or its members. The main requirement for forming a union is that the union must be composed of members that have solidarity of interests, who perform similar work, or who are in a similar position. In view of that, employees and employers necessarily compose different categories of trade unions: professional unions (*categorias profissionais*) representing employees, and economical unions (*categorias econômicas*) representing employers.

The Brazilian trade union system is based on the purpose of obtaining a consensus between social agents and on preventing conflicts, therefore, Brazilian unions concentrate their work on bargaining labor conventions (*convenções coletivas do trabalho*) and collective labor agreements (*acordos coletivos do trabalho*). Labor conventions and collective labor agreements are recognized by the Constitution of 1998, pursuant to Article 7, XXVI, as a social right of Brazilian workers. The intervention of unions in the bargaining process of labor

conventions or agreements is – according to Article 8, Paragraph VI of the Constitution – not only a guarantee, but also an obligation. In addition to negotiating collective labor agreements and conventions, trade unions are entitled to give assistance to their members, particularly in regard to health, education, and legal matters, and should collaborate with the government to find solutions to problems relating to labor and work conditions.

Brazilian trade unions are also entitled to defend the individual and collective interests of their members in judicial and administrative proceedings. The judicial representation of workers by unions is, however, pursuant to precedents of the Superior Labor Court (*Tribunal Superior do Trabalho*), not assured by the Constitution and is limited to conflicts involving certain wage adjustments and to cases expressly foreseen in statutes of law, such as claims regarding additional payments for dangerous work.

Brazilian trade unions must comply with a hierarchical system composed of unions, federations (a group of unions), and confederations (a group of federations). The main purpose of the hierarchical system is a wider and more efficient protection of interests of groups and their members within Brazil. However, the maintenance of the system, which is constitutionally guaranteed, is likely to produce unexpected problems in the interpretation of the extension of the freedom of association and organization principle reintroduced in Brazil.

## 2.2 Constitution Of The Trade Union

The new trade union system established by Article 8 of the Federal Constitution of 1988 ensures the principle of freedom of association and organization, so that unions can now be freely organized. The system under which the government laid down requirements relating to trade union structures and recognition has been extremely reduced or eliminated. Despite the freedom of association principle, constitutional restrictions regarding the existence of the single union principle, the hierarchical system, and payment of the union tax still

exist. Pursuant to the single trade union principle, company-based unions are not allowed in Brazil, and the geographical area, where just one union exists, cannot be smaller than a municipality.

Today in Brazil, trade unions are not required to obtain authorization to be incorporated. The only formal condition applicable for the organization of a trade union in Brazil is the registration at the relevant public agency, which, pursuant to the decision of the Brazilian Supreme Court of Justice, is the Ministry of Labor and Employment.

Brazilian trade unions are normally organized in the form of a civil partnership, but there are no restrictions concerning the election of another form. In view of the protection offered to directors of a trade union and in order to avoid abuse of that protection, certain scholars defend the applicability of rules concerning the composition of the board of directors contained in Article 522 of CLT. The board of a union should be integrated, consequently, by at least three members and by a maximum of seven members. However, despite these rules, in the last few decades, many workers' associations (the *centrais sindicais*, such as the *Central Única dos Trabalhadores*, or "CUT," and the *Central Geral dos Trabalhadores*, or "CGT") have been established. These workers' associations do not comply with a great part of these rules, but have still been exercising considerable pressure in Brazilian syndicalism. In view of the hierarchical system of Brazilian syndicalism, which is constitutionally ensured, the legal existence and activity of such associations have been questioned, but in March of 2008, the Brazilian government formally recognized the legality of these associations.

All workers, including employees of the public system (as provided in Article 37, Paragraph VI), have the right to take part in a trade union – even though no one will be obligated to join or remain a part in the union.

The existence and function of Brazilian trade unions is guaranteed by payment of the union tax (*contribuição sindical*), as provided in

Article 580 of CLT – equivalent to one day’s wage per year for employees, which is mandatory.

The different treatment of rural and urban syndicalism in Brazil, which had already been partially relieved, was also eliminated with the Constitution of 1988, so that rural unions are now governed under the same rules applicable to urban unions, except for peculiarities relating to the Brazilian rural environment.

### 2.3 The Scope Of Trade Union Rights In Businesses

Unions are entitled to defend the interests of a group and its members, particularly in the negotiation of collective labor agreements or conventions, because the participation of unions in the collective bargaining process is constitutionally ensured. The conditions negotiated by unions have a normative character and the advantages and/or rights obtained by collective bargaining generally complement the work conditions negotiated by workers individually or guaranteed in statutes of law, such as the CLT. In Brazil, the direct bargaining process between unions and employers (“collective labor agreements”) represents a large part of the negotiations. The normative character of the collective labor agreements and conventions is a result of the wide applicability of such agreements to the members of the union and also to non-members that belong to the same group (*categoria*).

There is no rule defining the rights that form the basis of the collective bargaining process, but the main issues generally negotiated in collective agreements and conventions in Brazil include working time, compensation for overtime, benefits, vacation, tenure jobs, the establishment of certain facilities to improve the work environment, and wages. Profit sharing for employees may also be ruled by collective agreements and conventions, as provided by Law 10.101/2000.

Additionally, it is important to note that, in accordance with Article 623 of the CLT, provisions of a collective labor agreement or

convention shall be deemed illegal where they are contrary to the standards established by the government economic policy or the wage policy in force.

## 2.4 The Function Of Trade Union Representatives

Union representatives (*dirigentes sindicais*) are entitled to represent the union and to negotiate during the collective bargaining process with another union or directly with the employer. The specific powers and limitations of union representatives shall be ruled, however, by a union's articles of organization and not by statutes of law.

Employers are prevented from dismissing union representatives from their candidacy to the end of their term, for up to one year after the end of the mandate, with the exception of termination due to gross negligence, as provided by Article 543, Paragraph 3 of CLT.

## 3. Works Councils

### 3.1 General Requirements And Principles

Pursuant to Article 11 of the Constitution of 1988, companies with more than 200 employees must elect an employee representative who is exclusively responsible for direct negotiations with the employer. Though the legal background for the regulation of Works Councils in Brazil was introduced by the Constitution, there are currently no statutes regulating the organization and action of such representatives. In addition, the Constitution of 1988 guarantees, pursuant to Article 7, Paragraph XI, only an exceptional participation of employees in the company's management. The form of this participation is, however, also not regulated.

The Brazilian syndicalism remains, therefore, based on the union system, so that the concrete regulation of such constitutional initiatives is likely to be difficult, particularly due to union opposition to Works Councils.

### 3.2 Functions And Rights Of Works Councils

Collective labor agreements and conventions in Brazil must be negotiated by unions, as provided by Article 8, Paragraph VI, of the Constitution of 1988. In theory, works councils could be entitled, based on the private autonomy principle, to negotiate specific agreements with the management without violating the monopoly of unions, but the establishment and functions of such Works Councils are not regulated. Additionally, even though Works Councils are foreseen in the Constitution of 1988, Article 11, for companies with more than 200 employees, no specific regulation exists.

Unions are entitled to negotiate collective labor agreements with relative autonomy, but the CLT rules the negotiation process and the enforceability of the conditions of such agreements. In order to reach enforceable agreements, the bargaining process must, therefore, comply with certain formal requirements, and the final agreement must at least include the issues listed in the CLT, such as the conditions for renewal and dispute settlements, as well as penalties. The agreement must be registered with the relevant department of the Labor Ministry within eight days from its execution and shall enter into force three days following registration. The Labor Ministry has, however, no right to comment on the merit of the negotiated conditions. Agreements cannot have a term longer than two years.

In principle, unions are not entitled to use collective labor agreements and conventions as an instrument to limit or reduce individual labor rights. However, due to the recent necessity to create more flexible labor relationships and, therefore, to preserve jobs during an economic recession, the Constitution of 1988 has permitted the reduction of wages or the time compensated by means of collective bargaining. The advantages or benefits obtained by means of collective bargaining shall not be part of the individual labor rights of workers and, upon termination of the agreement or the convention, workers do not preserve such benefits or advantages – they must be renegotiated.

A labor dispute can be settled by means of arbitration according to Article 114, Paragraph 1, of the Constitution of 1988. When arbitration does not work or is not accepted by one party, the labor courts are empowered to decide on the conflict and to set out conditions regulating the dispute.

### 3.3 Enforcement Issues

In order to ensure the enforceability of collective labor agreements and conventions, unions are entitled to claim against employers or employers' unions on the specific performance of such agreements (*ações de cumprimento*).

## 4. The Interaction Between A Works Council And A Trade Union

The establishment of Works Councils by means of collective bargaining is expressly ensured by Article 621 of the CLT, but employees' unions have had no success in implementing Councils. As other similar forms of Works Councils constitutionally foreseen have not yet been regulated, the interaction between works councils and trade unions does not represent a legal issue in Brazil.

## 5. Other Types Of Employee Representation

There are two other types of employee representation in Brazil: (i) internal commissions for the prevention of accidents ("**CIPA**"), and (ii) trial settlement commissions (*Comissões de Conciliação Prévia* or "**CCP**"). These commissions have, however, limited authority and are not entitled to take part in the collective bargaining process.

The CLT and Ruling 3214/78 regulate the CIPAs, and their main purpose is to discuss labor accidents occurring in a company and to present solutions or preventive measures to such accidents. The CIPAs are also responsible for organizing prevention campaigns and courses for employees. The CIPAs are composed equally of members representing the employer and members representing employees, each elected for one year. The number of members elected in a CIPA depends on the risk related to the company's activity and on the total

number of employees in the company. The CIPA president must be a representative of the employer. Employers are prevented from arbitrarily dismissing employees elected to the CIPA.

The CCPs were created to offer an alternative settlement solution for individual conflicts and/or disputes between employers and employees without the necessity of judicial intervention, thereby reducing the excessive number of labor claims before the Labor Courts. The employer or unions are entitled to establish a CCP, but not obliged to do so. A CCP in a company must be equally composed of representatives of the employees and the employer, and the composition of a CCP in a union must be regulated in the collective labor agreements or conventions. Representatives are elected for one year. The employer is prevented from dismissing the representatives of employees, unless for gross negligence.

# Canada

## 1. Introduction

Trade unions and labour laws in Canada are largely based upon the U.S. model of industrial trade unionism, in which unions primarily seek representation rights in each individual workplace (the construction industry being a major exception, where unions are organized on the basis of their craft). Therefore, for example, in manufacturing the employees in each plant decide whether or not to be represented by a union. Likewise, in retail, the employees in each store (or sometimes all stores in a municipality) decide whether or not to be represented by a union. However, there are some important differences in the laws, particularly since Canada has examples where union representation rights are determined without a vote by “card check”, that is where the union becomes automatically certified as a result of a certain number of union cards being signed, or imposed as a remedial measure for an unfair labour practice.

Today, unions represent about one-third of Canada’s workforce. As a result, they are a powerful political force and maintain a loose connection to one of the country’s political parties. However, regardless of which party is in power, labour legislation tends to respect union rights.

Labour law in Canada primarily falls within the jurisdiction of the provincial governments. The federal government’s jurisdiction is limited to its own employees and those of banks, inter-provincial transportation companies (including the airlines and major railroads), and communication companies (television, radio, and telecommunications), but not those companies that support and supply such endeavors. Most private enterprise is therefore subject to provincial labour laws. These laws differ from province to province, but the essential model remains the same and, with the exception of Quebec, is founded on common law principals. In Quebec, the system is based on the Civil Code.

The law below is set out as for Ontario, which is the most populous of the 10 provinces. A few major differences, where they exist in other provinces, are noted.

## 2. Trade Unions

### 2.1 Certification

Often, the first time an employer knows that its employees have decided to join a trade union is when it receives notice of an application for “certification” from the Labour Board.

The Labour Relations Boards are independent government bodies much like a court. The major difference between the Board and a court is that the Board’s authority is limited to labour law matters, and its membership is made up of individual experts in that area. Most Labour Boards are tripartite, which means that they are composed of representatives of management, labour, and neutrals. The neutrals include a chairperson and a number of vice-chairs. Cases before the Boards are often heard by three members – one member representing each side and one of the neutrals, either the chair or a vice-chair.

Prior decisions of the Board are not absolutely binding in any case, but the Boards look to them for guidance. In many areas, 50 years of Board decisions have resulted in policies being set down that are very inflexible.

The Board’s primary responsibility is to process applications for certification. In most situations, the right of a trade union to represent employees has come about as a result of a Board Certificate, though it is possible in most provinces for an employer to voluntarily grant recognition to a trade union.

### 2.2 The General Role Of The Trade Union

According to the Ontario Labour Relations Act’s provisions regarding certification, “a trade union may... apply... to the Board for certification as a bargaining agent of the employees in the unit.” The

Act defines a “trade union” as “an organization of employees formed for purposes that include the regulation of relations between employees and employers.” Similar provisions are found in each province.

Many groups that are trade unions as defined by the statutes actually refer to themselves by other names, such as “associations.” The Labour Relations Board determines whether a group is a trade union the first time the group makes an application to the Board. The Board examines whether the members of the organization are employees and employers and whether it has officers who are able to carry out the organization’s purposes. Once the Board has declared that an organization is a trade union, this declaration is good for all subsequent cases unless challenged.

An application for certification generally can be made when there is no existing trade union that has the right to represent the relevant employees. When there is a trade union already in existence, another trade union can apply only during a designated time. In Ontario it is the last two months of the collective agreement. Where there is no collective agreement, another trade union may only apply a year after expiration of the last agreement or after certification of the current trade union.

Additionally, outside the construction industry, unions can and do represent almost any group of employees. So, for example, United Steelworkers represents some hotel employees, and the Canadian Autoworkers Union represents some fishermen. There have also been numerous union mergers since the mid-1980s, and therefore the number of unions has shrunk. However, average union membership has grown significantly, with the primary unions each having approximately 200,000 members.

### 2.3 Certification and the Bargaining Unit

Upon review of an application for certification, one of the Labour Board’s primary responsibilities is to determine which employees

should be included in the unit that the trade union will represent. This unit is called the “appropriate bargaining unit.”

The Board’s general approach is to include all those employees who share a community of interest in the unit. To this end, the Board will consider the nature of the work involved, the skills of the employees, and the dependence or independence of the various work groups under consideration. The Board will also look at the history of collective bargaining in the particular industry and the employer’s own organizational structure. In general, the Board prefers larger rather than smaller units and is against segmenting groups that could be grouped together.

As a result of these policies, a typical manufacturing enterprise will be made up of two bargaining units: one unit composed of all the employees in the factory, and the second unit composed of all the employees in the office. Part-time employees and summer students are usually separated from full-time employees in a single bargaining unit unless the union and employer agree otherwise.

Special rules regarding the appropriate bargaining unit exist for employees exercising a particular craft, particularly in the construction industry. In this industry, the appropriate bargaining unit consists of employees who are engaged in one of the traditional crafts (e.g., carpentry). General labourers also form one appropriate bargaining unit. A union can make an application for all employees of a construction employer to be included in one unit, but the Act gives applications for craft groups special preference.

The legal basis for, and the nature of, the unions’ role in the entertainment business is mostly based upon accepted industry practices peculiar to the trades involved.

In order to be certified by the Board, in most provinces a trade union must win a representation vote of all employees in an appropriate bargaining unit. The Board will order a representation vote when, in an application for certification, the union asserts that a certain defined

percent or more employees of a proposed bargaining unit are members of the union, typically by having those employees sign union membership cards. In Ontario the threshold is 40%. If the employer challenges the union's assertions of percent support, the vote will be sealed pending a hearing to resolve the matter.

The vote is held within a short time, in Ontario within five business days, after the Board receives the union's application, unless the Labour Board orders otherwise.

In most cases, the union will be certified without a hearing ever being held. The Board has found that the parties abandon most of their disputes over details once the result of the vote is known.

### 2.3.1 "Card Check"

Not all provinces have mandatory certification votes. In British Columbia, for example, the Board will automatically certify a union if over 55% of the employees in the bargaining unit file membership applications. In Ontario in the construction sector, where greater than 55% of employees in the bargaining unit file membership cards the union will be automatically certified. Where certification is granted without a vote, all employees of the proposed bargaining unit are subject to unionization regardless of whether the employee signed a membership card. Card check systems can lead to increased complaints of coercion and threats against union organizers.

### 2.3.2 Penalty Certification

In certain Provinces, most notably Ontario, a union can also be certified with the right to represent employees by an order of the Labour Relations Board. Certification in this manner is not common, however the Labour Board has remedial authority to impose certification on the employer where it can be proven that the employer has committed an unfair labour practice that is found to have interfered with the employees' ability to express their free wishes through a vote.

## 2.4 The Scope Of Trade Union Rights In Businesses

Once the Labour Board has certified a union as the representative for a group of employees, the employer is required to deal exclusively with the union regarding the terms and conditions of employment of those employees.

Following certification, the union will send the employer a notice to bargain for a collective agreement. (In certain portions of the construction industry, the employer will automatically become part of an employer's association, and the association's collective agreement will apply.) The Act requires that the employer meet with the union and try, in good faith, to reach an agreement. Failure to proceed in good faith is an unfair labour practice, as is any attempt to deal directly with employees on such matters.

The grant of certification also continues the "freeze period," during which the employer cannot unilaterally change an employment condition without the approval of the union. The freeze starts when the employer receives notice of the union's application for certification and, if the union is certified, lasts either until a collective agreement is signed or until the right to strike and lockout arises.

## 2.5 The Function Of Trade Union Representatives

Following receipt of a notice to bargain from the union, arrangements must be made to meet and commence bargaining. The union bargaining team usually consists of a professional from the union's full-time staff and the bargaining committee of the employees. These committees are usually made up of three to five persons representing the various work groups contained within the bargaining unit.

The employer's bargaining team should consist of the most senior manager with immediate knowledge of the work involved. If the bargaining unit is a factory group, the plant manager usually fills this position. Also on the team should be the person responsible for personnel matters. Many employers choose to employ a professional to be their spokesperson at the table, as they have the experience

necessary to balance the union's full-time representative, knowledge of the actual effect of the proposed clauses, and knowledge of the union involved and how it operates.

Every negotiated collective agreement must be ratified by a union's membership before it comes into effect. Ratification occurs when more than 50% of those voting in a secret ballot vote cast their ballots in favour of the new collective agreement. Some union constitutions require a higher threshold.

Collective agreements are usually established for time periods of one to three years.

### 2.5.1 First Contract Arbitration

A number of Provinces have provisions that allow one of the parties to apply for the appointment of a third party arbitrator to impose a collective agreement on the parties. These provisions are generally found in first contract situations.

## 2.6 Strikes And Lockouts

Collective bargaining for a collective agreement typically lasts through five to ten meetings. If this process is not successful, the next legally required step is to involve a government neutral to assist the parties. If an agreement is still not reached, the parties have a mandatory waiting period of a couple of weeks, after which a strike or lockout is legal.

## 2.7 Termination Of Union Rights

Very few applications are made to the Labour Board to terminate bargaining rights. Of those that are made, many are a prelude to an application for certification by another union or follow the imposition of a trade union on a workforce without an initial representation vote. Certification applications by other unions to displace an incumbent union can be made only during the same time periods as a decertification application can be made by employees (see below). As a result of internal union politics, unions will often secretly support an

employee decertification and then apply for certification rather than directly applying to replace an incumbent.

An employer can only bring applications for decertification in very limited circumstances where the union is entirely failing to pursue its bargaining rights. In most such cases, the very application produces union activity that is then considered sufficient by the Board to deny the application.

Employees may file a termination application under the following conditions (in addition to some very technical, rarely used timing rules):

1. If no collective agreement is signed within a specified time following certification; or
2. Where the parties are or have been party to a collective agreement, during a specified period that starts prior to expiry of the agreement and ends either with the expiration of the agreement or with the appointment of a government officer to help the parties in negotiations, whichever happens later. In Ontario that period is two months.

Employees must make an application for termination to the Board on forms available specifically for that purpose. The application must be accompanied by proof, usually a signed statement, that at least a certain percent (40% in Ontario) of the employees in the bargaining unit support the application. If the application meets these conditions and a certain percent (50% in Ontario) of those voting support termination, then the Board will terminate the union's bargaining rights. The Board will reject the employees' application if it believes it was actually generated by the employer. To check for employer involvement, the Board will hold an inquiry.

## 2.8 Sale Of A Business

The basic rule is that when an employer sells, leases, or otherwise disposes of a business (including via a bankruptcy), the union's rights follow the business. If the company and the union have a collective agreement, the new owner picks up the agreement as it is. If the parties are bargaining, or are at a point in time where the union could give notice to bargain, the union can give notice to bargain to the new employer.

Whether or not a particular transaction represents a "sale of a business" occasionally causes some confusion. It does not matter whether the sale is structured as a share or asset purchase if the business is changing hands, but it is not always clear what constitutes "the business." The Ontario Board has held, for example, that where a lease is the key item to carrying on a particular kind of business, then the sale of the lease is a sale of the business. A dispersal of assets to various concerns not picking up customer lists or other goodwill will probably not be considered a sale of the business.

## 2.9 The Collective Agreement

### *The Basic Provisions Of An Agreement*

The provisions of each collective agreement vary with the nature, size, and complexity of the industry and the concerns that the parties bring to the negotiations. However, virtually every collective agreement in Canada includes provisions regarding wages, vacation and holiday entitlements, benefits, and hours of work. The following paragraphs set out some additional standard provisions.

### *Recognition*

The recognition clause sets out a description of the bargaining unit, which is the group of employees that the trade union represents and for whom it bargains. The union is entitled to represent the unit specified by the Labour Relations Board in its certificate, and neither side can insist upon changing it. Either party can, however, propose

changes in the bargaining unit description so long as a dispute over these changes does not reach the point of a strike or lockout.

### ***Union Security And Check off***

Ontario law and the law in most Provinces now provide that, if the union so requests, an employer must agree to a provision in a collective agreement that calls for mandatory union dues deductions from all employees.

### ***Management Rights***

It is generally accepted that management retains those rights that predate the arrival of a trade union except to the extent the collective agreement specifically limits the company's authority. Nonetheless, a management rights clause clarifies and lends support to management's ongoing role after the arrival of a union.

The management rights clause provides an opportunity to ensure that the company has certain rights that it would not otherwise have or that might otherwise be in doubt. Such rights include the right to retire employees at an established retirement age and the right to require that employees get a medical examination from a doctor of the company's choice where a claim on medical grounds is being made.

### ***Grievance And Arbitration Procedure***

The law requires that disputes about the interpretation, administration, or application of the collective agreement be submitted to binding third-party arbitration or the Labour Board.

Collective agreements inevitably provide for pre-arbitration discussion of such disputes at various levels of the union and the company. Typically, such discussions are required first between the individual and the foreman; then between the individual, the local union official, and the plant manager; and finally between the individual, the local union official, a full-time union representative, and a senior

representative of management. Large employers often establish committees for the last stage of the discussions. If this procedure for discussing the grievance does not resolve the problem, the matter proceeds to arbitration by an outside arbitrator or board of arbitration.

At one time, almost all collective agreements called for arbitration by three-person boards appointed by the parties when required. The boards would consist of a company representative, a union representative, and an agreed-upon neutral chairman chosen by the two representatives. Recently, single arbitrators chosen directly by the parties have become more common. If the parties cannot agree on an arbitrator, there are generally default provisions allowing any one party to have one appointed.

### ***Just Cause, Discharge, And Discipline***

Every collective agreement is deemed to require that any discipline or discharge of an employee be for just cause. In discipline and discharge cases, arbitrators have the authority, not only to uphold or repeal management's decision, but also to substitute a different penalty, unless the collective agreement specifically sets out the penalty that is to follow a particular infraction.

### ***Seniority***

Even relatively simple collective agreements for small operations often contain extensive seniority provisions. "Seniority" means the length of time an employee has been with the company. Seniority clauses seek, at the very least, to ensure an employee's security of future employment, primarily by requiring that the company grant the greatest degree of security of employment to the employees who have been with the company the longest. The most common seniority provision requires that any layoff be in reverse order of seniority, subject to the company having to retain workers with special skills.

Seniority may also be the trigger for other rights found in the collective agreement. A provision is often made for a probationary

period, typically 60 days, during which the employee does not acquire seniority rights. Probationary employees are also usually excluded from certain benefit coverage, such as holiday pay and life insurance. Unions may also seek to apply seniority to promotion and transfer decisions within the bargaining unit.

### ***Strikes And Lockouts***

In Ontario, strikes and lockouts during the term of a collective agreement are prohibited. It is common for a provision restating this requirement of the Labour Relations Act to be found in the agreement.

A legal strike or lockout can occur after bargaining has taken place, a neutral government employee has failed in an attempt to assist the parties, and a waiting period has expired.

### **3. Works Councils**

Works Councils are not a part of the Canadian system, although some workplaces have labour-management committees designed to provide a forum for union-management discussion. A few enterprises have also experimented with union representation on their board of directors, but this is uncommon. In none of these cases has significant authority been given to union representation.

In some Provinces, workplaces are required to have a functioning joint health and safety committee to address workplace issues.

### **4. Trade Union Employee Protection Rights**

Most statutes contain a number of provisions designed to protect an employee's right to join a union and the union's right to organize and represent employees, free from employer interference.

The Act prohibits employers and their representatives and agents from:

1. Interfering in a union's organizing campaign;

2. Firing a person, or refusing to employ a person, because of their support for or membership in a union;
3. Restricting a person's right to join a union; and
4. Intimidating, disciplining, or in any way discriminating against a person because of his or her support for or membership in a union.

Employer support of a trade union is also prohibited.

Complaints that an employer has violated these provisions are often made during a union-organizing campaign. The most common complaint is that the employer has fired an employee because of the employee's support for the union.

Another common complaint made to the Board is that the employer has interfered in the organizing campaign. Such complaints often allege that the employer has threatened employees who join the union, possibly in a speech or in a memo distributed to all employees.

While the Labour Relations Act specifically preserves the employer's right to free speech, the Board has repeatedly found that threats designed to stop employees from joining a union are prohibited by the Act. Such threats are often subtle, such as in suggestions that the company might close down if a union is certified.

If a complaint is made to the Board that the employer has treated any individual in a way that violates the Act, a special provision of the Act requires that the employer prove that the complaint is not true. This reversal of the "burden of proof" requires that employers must be extremely careful about any actions they take once they know a union organizing campaign is underway.

Once a complaint is made to the Board, an officer of the Board is appointed to try and settle the case. In Ontario, the officer's only duty

is to try and obtain a settlement. If unsuccessful, the officer does not include what he or she has found out in his or her report to the Board.

If the Board finds an employer has violated the Act, it can order, among other things, that the employer:

1. Rehire people with full back pay;
2. Post a notice that it had violated the Act;
3. Allow the union to meet with employees on company time;
4. Provide a bulletin board for the union's use; and/or
5. Pay the union's organizing costs.

In addition, if the Board finds that the employer's improper conduct made the results of a representation vote unreliable, the Board may order that the vote be reheld. In Ontario the Board may impose union representation as a remedy regardless of whether there has been a vote of the employees or not.

## Chile

### 1. Introduction

The National Constitution and the Labor Code guarantee the right to form labor organizations without employer or government interference. Membership in Trade Unions is voluntary. More than one union is permitted in the same workplace. Employees may belong to only one Trade Union for each job that they hold. Employees may not be required to join a union as a condition of employment.

Laws enacted during the military regime in Chile somewhat diluted the power of Trade Unions by restricting their ability to bargain collectively on an industry wide or area wide basis, but the trend of labor legislation in the 1990s has been to strengthen union bargaining power. Collective bargaining on an area wide basis is an issue prompting bitter debate in the National Congress. As a practical matter, however, union power remains limited, and as of 2009, the percentage of active workers represented by unions was a relatively small 12.5%. Union-represented employees are found primarily in mid-sized to large companies. In small companies, union representation is rare. Trade Unions and labor relations are overseen by the Ministry of Labor and Social Security through the local Labor Inspectorates.

### 2. Trade Unions

#### 2.1 Types Of Unions

Chilean law recognizes seven types of unions:

- Enterprise unions (all members are employees of the same employer);
- Inter-enterprise unions (members are employees of two or more employers);
- Unions of self-employed workers;

- Unions of temporary workers;
- Federations;
- Confederations; and
- Workers' centrals.

## 2.2 The General Role Of Trade Unions

Under Chilean law, the purposes of Trade Unions include the following:

- To provide mutual assistance to union members, to represent workers in collective bargaining;
- To promote education and workplace security;
- To monitor employer compliance with employment legislation and social security;
- To provide various nonprofit services, including humanitarian services, for union members; and
- To represent workers in the exercise of their contractual rights.

## 2.3 Constitution Of The Trade Union

The unionization of employees in Chile is quite different from the process of unionization in the United States. Unlike unions in the United States, where a union is certified to represent all employees in a defined bargaining unit regardless of whether they are members of the union, in Chile, unions represent only those employees who are members. Thus, more than one union is permitted in the same workplace.

When a sufficient number of employees become members of a union at a particular company, a union is “formed” in that workplace and may negotiate with the employer for a collective labor contract covering its members. Recent amendments to the Chilean Labor Code implemented changes that make it much easier for unions to organize and represent employees, such as:

- In companies with 50 or fewer employees, a union may be formed with at least eight employees, regardless of the percentage of employees represented.
- In companies with more than 50 employees, a union may be formed with at least 25 workers joining within one year of its creation, provided that this represents at least 10% of the employer’s workforce. When an employer maintains multiple places of business, a union may be formed with at least 25 workers at each site, provided they represent at least 30% of the employees at each location.
- In companies with 250 or more employees, a union may be formed regardless of the percentage of employees represented.

These numerical restrictions do not apply to inter-enterprise unions and unions of self-employed workers, which are formed when they have at least 25 members, regardless of where those employees are employed.

The required number of employees must undergo specific formalities contemplated under the law. The formation of a union is a matter left entirely to the discretion of employees. An employer may neither interfere with its employees’ right to form and join a union, nor require employees to form or join a particular union. Chilean law establishes a right on the part of each employee to join, refrain from joining, or withdraw membership from any union or labor organization, and membership in a union cannot be required as a condition of employment. A union may not engage in a strike or other

economic pressure against an employer while organizing the employer's employees. If organizing efforts fail, neither the union nor the employees are required to wait any prescribed period of time before again attempting to organize employees at the establishment.

The Labor Code does not provide a specific procedure by which an employer, an employee, or another union may challenge the formation of a union. The Labor Code does, however, authorize the Labor Inspectorate to object to the formation of a union during a 90-day period following the purported creation of the union.

#### 2.4 The Scope Of Trade Union Rights In Businesses

##### **Time For Performance Of Union Business**

###### *Weekly Leave*

Union directors are entitled to six hours of leave per week to perform union business. If the union has 250 or more members, the leave may be increased to eight hours per week. The director's leave may accumulate within a calendar month.

###### *Annual Leave*

Union directors receive an additional week of leave each year for necessary union business. A director may also go on leave for anywhere between six months and the term of the contract if the union so decides in accordance with the union by-laws. A director of an inter-enterprise union may receive leave of one month for collective bargaining. Directors of federations and confederations may receive leave for the entire term of their mandate and for one month after its expiration.

###### *Payment for Leave*

Time spent on leave is considered hours worked, but the wages for these hours are paid by the union. While the employer must preserve

the union director's job during leave, it may fulfill this obligation by giving the director an equivalent job upon return from leave.

## 2.5 Collective Bargains

### *The Duty To Bargain*

Generally, an employer has a duty to bargain with any union of its employees that has met the legal requirements for establishing a union. However, employers that have been in operation for less than one year and employers with fewer than eight employees are exempted from collective bargaining. In addition, the following classes of employees are not entitled by law to engage in collective bargaining, although they may form or join a union:

- Apprentices;
- Employees hired for a particular task; and
- Temporary employees.

An employment contract may also exempt the following employees from bargaining, although they, too, may join or establish a union:

- Managerial employees;
- Employees authorized to hire or fire employees; and
- Upper-level employees with decision-making authority as to policies or processes of production or commercialization.

If the employment contract of an individual employed in one of these categories does not expressly exclude the individual from collective bargaining, the individual is presumed to be eligible to participate in and benefit from collective bargaining.

### ***Subjects Of Bargaining***

In general, collective bargaining covers matters concerning compensation and working conditions. The parties may not negotiate any waiver or modification of the employees' minimum legal rights, nor may the parties negotiate limits on the hiring of nonunion workers. The parties may not negotiate limits on management's right to administer and organize the company, including the use of machinery and the various forms of production, nor may the parties negotiate any matters that are unrelated to the company. Union security clauses, such as provisions requiring union membership as a condition of employment or requiring employees to join the union within a certain time period after being hired, are not permitted.

### ***Level Of Bargaining***

Although Chilean law generally restricts the scope of collective bargaining to a single employer and its unions, collective bargaining may take place on a multi-employer or multi-union level as agreed to by the parties. Collective bargaining negotiations between an employer and all of the unions or bargaining groups representing its employees take place at one time, unless the parties agree to separate negotiations. When multiple unions represent various groups of employees at an employer's establishment, the unions may choose to present a common proposal for a collective bargaining agreement to the employer, or they may present multiple proposals, each covering one or more of the unions or bargaining groups.

### ***Bargaining Procedure***

Formal collective bargaining, which may be carried out at the enterprise level or at multi-enterprise levels, is called regulated bargaining (*negociación reglada*) and is a highly detailed procedure established by statute. The collective bargaining process begins with the submission of a proposal for a collective contract (*contrato colectivo*)—as opposed to a collective agreement—by a union or bargaining group. The Labor Code establishes a 45-day period for

collective bargaining, and during this period the employer is expected to respond to the initial proposal. If the employer does not respond at all within 20 days, it is deemed to have accepted the proposal. Any agreement that the parties reach becomes the exclusive contract between the parties and must remain in effect for at least two years. At any time during collective bargaining negotiations, the parties may agree to appoint a mediator to aid the negotiation process. Arbitration is also available as a means by which parties to collective bargaining negotiations can resolve their differences and reach an agreement.

Informal or non-regulated bargaining may be initiated at any time by the parties and is not regulated by Chile's formal bargaining statutes. Employees who are precluded from regulated collective bargaining (e.g., temporary employees) can engage in non-regulated collective bargaining, but this process is also available to all employees. When non-regulated collective bargaining fails to result in an agreement, however, the employees may not lawfully engage in a strike. When non-regulated collective bargaining is successful, the resulting agreement is called a "collective agreement" (*convenio colectivo*) and is governed by the same norms and formal requirements that apply to collective contracts established through regulated bargaining.

## 2.6 Strikes And Lockouts

### *Strikes*

When the parties to regulated collective bargaining negotiations are unable to reach an agreement, the only economic weapon available to the employees is the strike. Any other activities the employees may undertake to pressure the employer into accepting their proposal (e.g., picketing, work slowdowns, or secondary boycott activity) would be illegal. In non-regulated bargaining, strikes are illegal.

A strike may not be called during the term of a collective contract. Consequently, a no-strike clause is superfluous in a collective contract. Even when no collective contract is in effect, a strike is legal only when it is called in furtherance of lawful regulated collective

bargaining demands. Strikes in protest of unfair labor practices are unlawful at all times. A strike may be called only upon a majority vote of the union members or bargaining group, as the case may be.

A strike suspends the individual employment contracts of strikers and suspends both the striker's duty to work and the employer's duty to pay the strikers. Once a strike begins, the employer may hire temporary replacement employees, provided that the employer's final offer to the union was timely made (i.e., presented to the union at least seven days before the end of the 45-day negotiating period), was at least equal to the prior working conditions, and included a pay raise equal to at least 100% of the increase in the cost of living with future pay tied to increases in the Consumer Price Index. If the employer's offer does not meet these conditions, the employer can hire temporary replacements only after the strike has gone on for 15 days. The parties to a strike may appoint an arbitrator at any time to settle their differences.

Once employees go on strike, they do not have an unfettered right to return to work at will. Instead, the law imposes restrictions on their individual ability to abandon the strike and return to work. If the employer complies with the rules governing replacement employees, the strikers may return to work 15 days after the strike begins. If the employer does not so comply, the strikers may return to work 30 days after the strike begins or 15 days after the submission of the employer's final offer, whichever comes first. Strikers who return to work must do so under the terms of the employer's last offer. If more than 50% of the strikers return to work, the strike is terminated, and the remaining employees must also return within two days. If the remaining strikers fail to return to work within that time period, the employer may terminate them for abandoning their jobs, a reason that will disqualify the employees from receiving the statutorily required severance indemnity.

Provided an employer complies with the rules governing replacement employees, including payment of the replacement fee referenced

above added by 2001 amendments to the Chilean Labor Code, strikers may return to work 30 days after the strike commences.

### ***Lockouts***

A lockout is defined as the employer's right to prohibit employee access to its premises in case of a strike. A lockout bars plant access not only to striking employees, but also to all employees in the plant other than management, persons with the power to hire and discharge employees, and high-ranking personnel with decision-making authority over company policies and procedures. A lockout may be declared only if more than 50% of the employees at the affected location are on strike or if the strike threatens to endanger activities that are essential to safeguard the functioning of the business. A lockout suspends the collective or individual labor contract of the affected employees, but the employer must pay the pension and social security payments of all employees not on strike who are affected by the lockout. When a lockout occurs, it must terminate at the same time as the strike or on the thirtieth day after the strike began, whichever occurs first. Thus, if the strike continues after 30 days of lockout, the employer must terminate the lockout at the end of the 30-day period and reopen the plant. This situation rarely arises, however, because private-sector strikes in Chile seldom last more than 15 days.

## **3. Trade Union Employee Protection Rights**

### ***Employees Protected***

The legal doctrine called the *fuero* protects some union members from termination of employment in certain circumstances. The *fuero* extends to the following:

- Candidates for a union director position, beginning from the time the election date is set until the election is completed, but not to exceed 15 days;

- Union directors and directors of federations, confederations, and workers' centrals during their terms of office and for six months thereafter;
- Employees involved in collective bargaining during the period starting 10 days before bargaining begins and ending 30 days after bargaining is completed; and
- Staff delegates during their terms of office and for six months thereafter.

### ***Wrongful Dismissal Based On Anti-Union Animus***

In addition to increasing penalties for unjustified dismissal generally, the 2001 amendments to the Labor Code also created a new legal claim for wrongful dismissal based on anti-union animus. Pursuant to these provisions, the worker may have the option of reinstatement or receiving an expanded severance payment. In the event a Labor Court determines that an employer unlawfully terminated an employee based on union animus, the employer may be ordered to pay the employee between 3 and 11 times his or her salary in addition to any severance otherwise due.

## **4. Other Types Of Employee Representation**

Employees who do not wish to form a union may nonetheless elect a representative, known as a "staff delegate." The employees who wish to be represented by a staff delegate must fulfill the representational requirements applied to enterprise unions (i.e., numerosity and representative status) and must not be affiliated with any union. Like union directors, staff delegates serve two- to four-year terms and are the means of communication and negotiation between the represented employees and the employer. Staff delegates may also represent their workers before government labor authorities. Employees who elect a staff delegate must submit the delegate's name to the employer, along with the names and signatures of all represented employees.

During their term of office, staff delegates receive the same employment protections afforded to union directors, including protection under the *fuero*. The *fuero* covers staff delegates during their terms of office and for six months thereafter.

## 5. Employer Organizations

Employers may form their own organizations, also known as “craft associations” (*Asociaciones Gremiales*), for the purposes of undertaking common activities and providing mutual aid within the area of the employers’ commercial activity. Craft associations do not represent their members in collective bargaining with unions. Craft associations also may not engage in political or religious activity, but do represent their members in discussions with governmental agencies and the National Congress to promote economic and labor policies favorable to their members’ interests. Matters that a craft association may address include tax policies, import and export regulations, foreign currency policies, and labor laws. These organizations must register with the Ministry of Economy, Development, and Reconstruction (*Ministerio de Economía, Fomento y Reconstrucción*) and may also form federations and confederations.

## 6. Unfair Labor Practices

Chilean law identifies certain unlawful acts constituting unfair labor practices. Unfair labor practices include acts committed by unions and employees as well as those committed by employers. Charges of unfair labor practices are heard by the Labor Courts, which have the power to punish violators by imposing a fine. The Labor Directorate maintains a register of unfair labor practice violators and periodically publishes a list of repeat offenders.

### ***Unfair Labor Practices Committed by Employers***

An employer commits an unfair labor practice if it:

- Offers special payments or benefits to employees or exerts other pressure to prevent their joining a union;

- Discriminates among workers for the purpose of discouraging union membership or requires an employee to join a union as a condition of employment;
- Uses moral or physical coercion to induce an employee to join or resign from a Trade Union or if it interferes with free speech among union members;
- Refuses to bargain with a certified union;
- Refuses to provide necessary information to a union;
- Interferes with the establishment of a union by threatening to reduce wages or benefits or to close the facility, or to manipulate the number of employees in the work force to prevent or interfere with the formation or maintenance of a union;
- Interferes in a union's affairs, arbitrarily discriminates between Trade Unions, or requires an employee to join a union or to authorize wage deductions for union dues as a condition of employment; or
- Fails to provide certain financial information to unions to facilitate bargaining. Failure to do so is now an unfair labor practice remediable through the Labor Courts.

### ***Unfair Labor Practices By Unions And Employees***

Unions or employees commit an unfair labor practice if they:

- Conspire with an employer to help the employer commit an unfair practice;

- Conspire with the employer to terminate or discriminate against an employee for nonpayment of union dues or fines, or if they exert pressure on an employer to perform any of these actions; or
- Use moral or physical coercion to induce an employee to join or resign from a Trade Union, or if they interfere with free speech among union members.

Unions or employees also commit an unfair labor practice if they:

- Disclose an employer's confidential information to third parties;  
or
- Interfere with an employer's right to choose its representatives for collective bargaining.

It is an unfair labor practice for a union to fine a union member for not obeying an unlawful union decision or for bringing charges against or testifying against the union. A union officer who ignores a member's complaint or claim also commits an unfair labor practice.



## China

### 1. Introduction

The modern Chinese labor union movement can be traced back to 1921 when the Chinese Labor Union Secretariat was established.

In the early years of the People's Republic of China (**PRC**), which was founded in 1949, as long as private industry continued to exist, labor unions have represented the interests of workers against their employers. Then, in the early years of the Cultural Revolution (1966 to 1976), labor unions almost disappeared. However, beginning in 1971, the labor union organisation began to rebuild itself, and on October 23, 1983, a new Labor Union Charter was enacted and, in 1992, the Labor Union Law of the People's Republic of China was passed to replace the archaic Labor Union Law of 1950.

While Article 35 of the Constitution of the People's Republic of China (adopted on December 4, 1982, and amended in 1988 and 1993) guarantees the freedom of assembly and the freedom of association, PRC law (Article 12 of the Labor Union Law) provides that only union organisations belonging to the All-China Federation of Labor Unions (“**ACFTU**”) are permitted to exist in China. Although the Labor Union Law gives unions the right to carry out their work “independently and autonomously,” these rights are subject to compliance with the provisions of the Labor Union Charter and PRC laws enshrining the supremacy of the Chinese Communist Party (**CCP**) over labor unions (Article 4 of the Labor Union Law). Consistent with this approach, China has not ratified the International Labor Organization conventions No. 87 on Freedom of Association and Protection of the Right to Organize nor No. 98 on the Right to Organize and Collective Bargaining.

However, Eastern European developments in the 1980s, particularly the Polish “*Solidarnosz*” movement, and the establishment of independent unions in China during the movement for democracy (that ended with the Tian'anmen tragedy on June 4, 1989) may have

helped Chinese government authorities rethink the role of labor unions. Remarkably, it was acknowledged that there may be contradictions between the interests of workers and those of other groups in society and that corruption and bureaucracy harm the interests of the masses. The promulgation of the Labor Union Law in 1992, a push to establish more labor unions in foreign-invested enterprises (**FIEs**), such as joint ventures and wholly foreign-owned enterprises, and political pressure to sign collective contracts could be read as an attempt by the government to preserve the leadership role of the CCP by strengthening, at least *pro forma*, the role of labor unions without giving them real independence or power.

Recently, there has been an increased focus on collective bargaining both at the enterprise union level and at the regional and industry levels. Several local and provincial governments released rules and guidelines on the collective bargaining process in 2010 and 2011. In 2010 the ACFTU indicated that the Labor Union Law may be amended. However, as of April 2011, the National People's Congress simply has indicated that it may consider looking into an amendment to the Labor Union Law with no concrete dates given yet as to when the law may actually be amended.

Today, labor unions are well represented in urban state-owned enterprises and collectively owned enterprises. Since 2004 the ACFTU has been campaigning for increased union coverage in FIEs, which reached a peak in 2008. Pursuant to its three-year plan issued in 2011, the ACFTU has set unionization goals of 90% for enterprises in China, and 95% for Fortune 500 companies in China by the end of 2013.

## 2. Labor Unions

### 2.1 The General Role Of The Labor Union

In the past, Chinese labor unions seldom represented employees' interests against management in a confrontational manner, and most labor unions were described as "social clubs" that organized collective welfare and social activities, such as going to the movies, preparing

group vacations, etc. However, recently some unions have started to become more confrontational, particularly if a more outspoken employee becomes the union chairman.

Pursuant to the Labor Union Law, labor unions have a dual mission in relation to employees and employers. On the one hand, Article 6 of the Labor Union Law provides that the labor unions are charged with safeguarding the lawful rights and interests of the workers. On the other hand, Article 6 and 27 of the Labor Union Law provides that labor unions are charged with ensuring that workers complete production and work tasks, and in the event of a strike, to assist the employer with resuming production and work as quickly as possible.

## 2.2 Constitution Of The Labor Union

The ACFTU is organised hierarchically and, to some extent, mirrors the organisations of the Chinese Communist Party and the government. The National Council and the Executive Committee are the main union organisations at the national level. ACFTU organisations also exist on the provincial, municipal, and county levels.

The primary organisations are labor unions formed on the enterprise level. Article 3 of the Labor Union Law gives all employees in China whose main income is derived from wages the right to join a labor union or to form one at the enterprise or unit level. There is no obligation, however, to join a union, and “closed shop” issues of compulsory unionism are not relevant.

Labor unions are usually single-company unions with elected representatives of the employees of a specific enterprise. They are staff associations solely within the enterprise and are usually not subject to strong outside intervention. Nevertheless, through labor unions at a higher level (and less often, through the CCP cell at the enterprise level), the CCP occasionally exercises political pressure on enterprise-level union organisations to act in a certain manner, such as in negotiating and concluding a collective contract with management.

However, negotiations are usually conducted by the union representatives of the enterprise. In the event that enterprise-level unions face difficulties when making a request for collective bargaining, the upper level unions can represent the enterprise-level unions in making the request.

Chinese labor unions at the enterprise level represent all employees, including executives and other senior management personnel. Therefore, there are no separate or specialised unions to represent the interest of managers. There can be only one union operating in each company, and it would represent all employees, even those that decide not to join the union. In the past, the union chairman was also often a member of the management. However, the Enterprise Union Regulations now make clear that senior management cannot be union chairman or any member of the union committee, so this practice will likely change in the future.

The Labor Union Law stresses that labor unions may be established by the “working classes”, of their own free will. According to the Labor Union Charter, the election of labor union committees at all levels should reflect the will of the voters, the lists of candidates should be subject to full discussions, and elections should be held by secret ballot (Article 10 of the Labor Union Charter). The formation of a new labor union is to be submitted to the union at the next higher level for approval (Article 16 of the Labor Union Charter). Therefore, in practice, the entire process, starting with whether a labor union is established in an enterprise, is decided by higher-level authorities.

### 2.3 Labor Unions In FIEs

Employees of foreign-invested enterprises, just as in other types of enterprises, have the right to set up a labor union within the enterprise to carry out labor union activities. The right is expressly stated in the Implementing Regulations for the Law of PRC on Sino-Foreign Equity Joint Ventures (“EJV Regulations”) and the Implementing Regulations on the PRC Wholly Foreign-Owned Enterprises Law (“WFOE Regulations”).

The Labor Union Law does not require companies to establish enterprise unions among their employees. There are no legal penalties imposed on a company if an enterprise union has not been established in it. However, the Labor Union Law does prohibit companies from actively obstructing employees or the ACFTU from establishing a union in the company.

## 2.4 The Scope Of Labor Union Rights In Businesses

### *General*

The scope of labor union rights is laid down in the Labor Union Law and other related regulations, which provide unions with the right to:

1. Protect the democratic rights and interests of the employees;
2. Help the enterprise in the management and supervision of the welfare and bonus fund;
3. Organise studies and carry out recreational activities; and
4. Teach employees to abide by laws, regulations, and internal enterprise rules.

### *Participation In Board Meetings*

In Sino-foreign equity joint ventures, when meetings of the board of directors are held to discuss “major matters such as development plans and production and operational activities” of the enterprise, union representatives have the right to attend as non-voting delegates and to make known to the board the opinions and demands of employees (Article 87 of the EJV Regulations). Additionally, when the board discusses questions relating to employee rewards and penalties, wage systems, welfare benefits, labor protection, and labor insurance, labor union representatives should attend as non-voting delegates and the board “shall heed the opinions of the labor union and obtain the labor

union's cooperation.” The Implementing Regulations of the Wholly Foreign-Owned Enterprises Law, effective December 12, 1990, and as amended by the State Council on April 12, 2001, contain a similar provision with regard to employee matters.

The labor union also has participation rights under the Company Law. In particular, Article 18 of the Company Law states that in the event an enterprise “considers a decision on restructuring its system, major issues on its business operations or the formulation of important internal rules and regulation,” it shall solicit the opinion of its labor union. In addition, the enterprise “shall solicit opinions and suggestions from its workers and staff members” in this regard.

As the Company Law only requires enterprises to “solicit opinions and suggestions” of labor unions whereas the Implementing Regulations state a requirement to “obtain cooperation” from the labor unions, it is arguable that the Company Law takes away the requirement to obtain the labor union's cooperation, but attendance would still be legally required, and the union would have to be invited to provide opinions and suggestions.

### ***Participation In Labor and Employment Issues***

Under the Labor Union Law, where an employee alleges “serious violations” of labor laws or regulations by a company, the labor union has the power to represent the employee in negotiations with the company and request that the violation be corrected. Examples of serious violations include withholding wages, keeping unsafe or unsanitary working conditions, illegally extending working hours, and taking illegal advantage of female and underage employees.

Under Article 4 of the Employment Contract Law, one of the necessary steps in validly adopting a set of company rules or regulations (such as an employee handbook or code of conduct) is consultation with a labor union or elected employee representatives. If such procedures are not followed, an employer cannot use those company rules as a legal basis for taking action against an employee.

### ***Involvement In Dismissals***

Under the Labor Law and Article 41 of the Employment Contract Law, labor unions have a certain role in mass lay-offs. If an enterprise genuinely needs to reduce its personnel because of statutory restructuring during bankruptcy; due to major difficulties in terms of production or operation; due to a change in production, the introduction of a major technological innovation, or change in mode of operations; or due to other major changes in objective economic circumstances, the enterprise has to explain the situation to the union 30 days in advance. The labor union has the right to voice its opinion on the matter, and its opinion shall be heard (Article 41 of the Employment Contract Law). National and local regulations also provide details regarding the conditions and mechanics of such mass lay-offs.

For other types of dismissal, the Labor Union Law and Employment Contract Law require that an employer give prior written notification to a union before unilaterally terminating its employee. This requirement applies in all cases of unilateral termination, even termination for misconduct. The notification requirement can frequently be satisfied by sending a letter to the labor union notifying them of the identity of the employee, the intended date of termination, and the grounds for termination. However, the employer must give the labor union an opportunity for comment, although the labor union does not have a veto over the layoff plan or the termination.

The Labor Union Law provides that if the union believes a termination violates the law or any relevant contract, it may demand that the enterprise reconsider its termination decision, and the enterprise should then consider the union's opinion and notify the union in writing how it will handle the matter. On the other hand, if labor union authorities do not respond, the employer has met its responsibility, and the employees can then be terminated from employment. The employee being terminated can challenge the termination himself or herself before a labor arbitration panel or court,

and the union may provide support and assistance to the employee's complaint.

### ***Assistance In Signing Individual Labor Contracts***

Labor unions in FIEs have the power to assist employees in signing individual labor contracts (Article 20 of the Labor Union Law, Article 85 of the EJV Regulations, and Article 67 of the WFOE Regulations).

### ***Collective Bargaining***

Collective bargaining may be required where it is requested by the labor union or at least one-half of the employees. Pursuant to the Labor Law, an enterprise "may" enter into a collective contract with its employees. This provision, however, is further modified by other national regulations. In particular, according to the Provisions of Collective Contracts ("Collective Contract Provisions"), effective May 1, 2004, if either party makes a written request for a collective contract, the other party shall not refuse without justifiable reason to conduct collective negotiations. In light of this, it is very difficult for FIEs to avoid collective contracts if the labor union wants one.

The Employment Contract Law explicitly envisions and allows for regional collective bargaining, though with some restrictions; the collective bargaining should be done within a certain industry and only within areas below the county level. Such regional collective contracts would be binding on all enterprises within the industry and/or area concerned and all employees working at the enterprise(s).

The standards for working conditions and remuneration in all individual employment contracts reached between the enterprise and its employees must not be any lower than the standards stipulated in the collective contract. In this way, the collective contract can be seen as a framework agreement between an employer and its employees under which all individual employment contracts must be covered.

In 2010 and early 2011, there were significant legislative developments on collective bargaining in multiple localities, including but not limited to Tianjin, Guangdong, Guangzhou, Fujian, Heilongjiang, Hubei, Hunan, Jiangxi, Liaoning, Wuxi, Yunnan, Zhejiang and Shenzhen. Some of these localities have passed collective bargaining regulations while others are still in draft form. The ACFTU's 2011-2013 three year plan calls for 100% of Fortune 500 companies with offices in China to have collective bargaining agreements by the end of 2013.

### ***Involvement In Labor Disputes***

Labor unions also participate in the mediation and arbitration of labor disputes. Labor union representatives may sit on mediation committees. They also offer support and assistance when an employee applies for arbitration or litigation.

#### **2.5 The Function Of Labor Union Representatives**

In enterprises with 200 employees or more, full-time union personnel may be hired. Union chairman, vice-chairman, and other union committee members are protected against certain actions by the enterprise, for example: if the employment contract of the union chairman, vice-chairman, and other union committee members is a fixed-term contract and is due to expire during the individual's term in office, it should be automatically extended to coincide with his or her term of office unless he or she reaches the statutory retirement age during the term of office. A union chairman, vice-chairman, and other union committee members can only be unilaterally terminated by an employer during their term of office on "for cause" grounds listed in Article 39 of the Employment Contract Law. If an enterprise terminates or transfers union personnel in violation of the law, the enterprise may be ordered to reinstate the employee to his or her original position and/or pay compensation to the employee.

Full-time labor union representatives shall continue to receive their wages, bonuses, and allowances and shall enjoy the same social

insurance and welfare benefits as regular employees (Article 41 of the Labor Union Law). However, the national law is not clear on who must pay the salary of full-time labor union representatives. Article 41 of the Labor Union Law, which provides that the salary shall be paid by the enterprise, applies only to state-owned enterprises and collectively-owned enterprises; the Labor Union Law is silent on FIEs. There is some indication that, the ACFTU is considering electing professional union chairmen for regional and enterprise level unions and have them funded by higher level unions.

The “election” of the labor union chairman must be approved by the labor union organisation at a higher level. The chairman cannot be removed unless the removal is discussed by the members’ assembly or the members’ representative council and passed by either body with a 50% or greater vote.

### ***Conducting Union Activities***

Enterprise unions should generally conduct any of their meetings or union activities outside of working hours and may only conduct meetings or other activities during working hours with the prior consent of the enterprise. A union committee member who is not a full-time union personnel may not conduct meetings or activities during working hours for more than three days per month, and, as long as the union committee member stays within this three-day limit, his or her wages and benefits should not be affected by participation in the union activities. However, certain types of “civic activities” may be undertaken during working time, and wages must be paid as if the employees were working. Such civic activities include attending as an elected representative meetings convened by the labor union, the government, or other mass organisations, and other activities (Article 10 of the Provisional Regulations on Payment of Wages of January 1, 1995).

## 2.6 Funding Of Labor Unions

FIEs must pay 2% of the total monthly payroll to the labor union. The total payroll includes the salary of non-union members and of the expatriate employees of the FIE. In addition to allocations from the enterprise, labor unions also receive membership dues and government subsidies. A portion of the labor union income must be forwarded to higher-level labor union organisations, but the bulk is used for enterprise employees.

## 2.7 Industrial Actions

The PRC Constitutions of 1975 and 1978 provided explicitly that employees had the right to strike. However, the right to strike is not included in the 1982 Constitution, which is still in force.

The Labor Law is also silent on the right to strike. Article 27 of the Labor Union Law only states that if there is a work stoppage or work slowdown, the labor union must represent the employees in consultations with the enterprise and put forward opinions on resolving the matter and that the labor union shall also assist the enterprise in duly carrying out the work concerned and resuming production and work as quickly as possible.

In May 2010, workers at a Honda factory in Foshan, Guangdong went on strike resulting in a shutdown of operations at the factory and other factories in the supply chain. The strike resulted in an increase in pay increases of 24% to 32% for the workers. The Honda strike led to additional strikes in Guangdong Province primarily at Japanese and Taiwanese-owned factories. The Guangdong strikes spurred the Chinese government and the ACFTU to push for more collective bargaining agreements to ease tensions between employers and the workforce.

## 2.8 Alternate Forms Of Employee Representation – Employee Assemblies / Employee Representative Councils

Many laws and regulations make reference to employee assemblies and employee representative councils, though most FIEs and their

foreign investors are unfamiliar with the concept. This is likely because until recently employee assemblies/employee representative councils generally only existed in state-owned enterprises and rarely appeared in FIEs.

Recent regulations and union rules contemplate employee assemblies/employee representative councils existing and operating in private enterprises, including FIEs. For example, according to the Employment Contract Law, one of the necessary steps in adopting company rules or regulations is discussion of the proposed rules or regulations by an employee assembly or employee representative council, which can then issue its suggestions and opinions on the proposed rules. In addition, the Collective Contract Provisions require that a collective contract be voted on by an employee assembly/employee representative council before the collective contract can come into effect. The Enterprise Union Regulations also specify that employee assemblies/employee representative councils shall have certain duties in private enterprises and FIEs, including the following:

1. Listening to the enterprise's reports on its development plans and yearly plans and providing comments and suggestions regarding those reports;
2. Adopting collective contracts and company rules and plans that affect the immediate interests of employees;
3. Supervising the enterprise's operations with regards to employee matters; and
4. Other matters provided by law, policy, or company rules.

While there are currently no national laws or regulations mandating that each enterprise must have an employee assembly/employee representative council, this may become necessary if, for example, a meeting of all employees to discuss company rules is not feasible because of the large number of employees in the enterprise or a

collective contract is required. Under the Collective Contract Provisions, a collective contract must be adopted by an employee assembly/employee representative council before it can come into force. This is one example demonstrating how the establishment of an enterprise union, which can then demand collective bargaining, may lead to other forms of employee representation needing to be established. Therefore, although there are currently only a few FIEs that have employee assemblies/employee representative councils, it would be generally useful for FIE managers to be familiar with the nature and basic workings of such bodies as they may become more prevalent in the future.

In terms of exactly how employee representative councils should operate in private enterprises and FIEs, there is limited statutory guidance. On the national level, the Enterprise Union Regulations, as well as regulations directed towards state-owned enterprises provide some guidance. Elections of employee representatives are only valid if two-thirds of the employees attend the vote and if the representative receives more than one-half of the votes cast. Similarly, any resolution passed by an employee representative council will only be valid if two-thirds of the employee representatives attend the vote and the resolution receives more than one-half of the votes cast. Generally, employee assemblies/employee representative councils should meet once or twice a year to discuss employment matters and may also be called for ad hoc meetings to discuss company rules and collective contracts.

Since 2008, several provinces and cities have issued regulations on employee representative councils, most importantly, Shanghai. Shanghai recently passed its Municipal Regulations on Employee Representative Councils, which took effect May 1, 2011. The Shanghai regulations provide that all employers in Shanghai with more than 100 employees should (*yingdang*) establish employee representative councils (“**ERCs**”). Employers that have less than 100 employees generally shall hold all-employee assembly meetings instead of ERC meetings to handle the matters that an ERC would normally handle. Given these recent legislative developments,

employee representative councils may gain more importance as an actor in labor relations in the future.

## Colombia

### 1. Introduction

In Colombia, the Second Section of Law 141, 1961 (the Labor Code) regulates collective employment relations within the principles and guidelines established in Articles 39, 55, 56, and 57, among others, of the 1991 Constitution. The Second Section of the Labor Code develops the principles to be applied in labor relations of a collective nature (e.g., association rights, collective bargaining, etc.).

Based on the freedom of association principle, in Colombia all employees have the right to form or join professional organizations working towards the defense of their rights and interests. The Colombian Constitutional Court has considered that freedom of association must be understood as a positive and negative right of the employees; therefore, employees also have the right to retire from the unions at any time.

The constitutional legislation incorporates Agreement No. 87 of the International Labor Organization (**ILO**) regarding the right of employers and employees to constitute the organizations they deem convenient, as well as affiliating with these organizations. In addition, organizations of employees and employers are entitled to draft their administrative statutes and regulations, freely elect their representatives, and organize their management and activities.

In Colombia, private sector unions are weak. The tendency has been to reduce affiliations due to a series of factors, including the high rates of unemployment in Colombia and recent labor reforms liberalizing the terms and conditions of employment.

### 2. Trade Unions

Under Colombian collective law, trade unions may be composed of employees belonging to a company, industry, or a guild of varied occupations. The company union is the most common because it is

formed by persons of different professions, jobs, or specialties rendering services to the same company or institution.

Trade unions of varied occupations can be constituted only in places where there are no other workers that perform the same activity, profession, or occupation in the minimum number required to constitute a guild union, and only while this condition persists.

The industry unions are those formed by workers belonging to the same industry but hired by different employers. Usually, these unions have national coverage and have active participation in the country's politics. The industries in Colombia with the strongest unions are oil, tobacco, metal, electrical, and textile industries. The public sector also has well-organized unions, such as the telecommunications sector.

Trade unions cannot have as their purpose the exploitation of businesses or activities with profit-making aims.

### 2.1 Constitution Of The Trade Union

In order for a trade union to exist, it must have at least 25 affiliated employees. From a legal standpoint, a trade union cannot be integrated by outsourced personnel or seconded employees provided by a temporary services agency. To become part of a union, employees must be at least 14 years old and performing a labor-related activity. These requirements must be certified at the initial constitution meeting executed with the intent to become unionized employees, for which the employees shall sign a foundation minute. The foundation minute is one of the requirements that must be fulfilled to register the trade union before the Ministry of Social Protection.

Once the constitution assembly has been held, the employees must inform their employer and the Ministry of Social Protection about the constitution of the trade union, stating the names and identification of each one of its founders. This communication is a formality that must

be met on a timely basis in order for the constitution act and the union privileges to take effect. However, the omission of delivering this communication neither invalidates the foundation of the union nor obstructs its registry.

In the assembly of constitution or in future meetings, the statutes of the trade union must be discussed and approved and the directive personnel of the union must be appointed. Minutes must be subscribed in order to evidence the approval of the statutes and the election of union directives.

Pursuant to the constitution assembly, the trade union will automatically have legal capacity. However, in order for the unions to act validly before third parties, they shall register before the Ministry of Social Protection. This registration must be performed within the next five business days counted from the constitution assembly. Legislation does not establish any legal consequences if the registration is not performed in this time frame. Once the request for the registration is received, the Ministry of Social Protection will have 15 business days to admit or deny its registration.

Employees can constitute and be members of more than one company union; furthermore, they can be affiliated with different unions of the same classification or activity. Nevertheless, according to annulment ruling No. 3398 issued by the Supreme Court of Justice, unionized employees will not be able to receive the several benefits contained in the different collective bargaining agreements but only those of the collective bargaining agreement they freely choose and which best suits their economic interests.

Traditionally, Colombian regulations prohibited multiple affiliations with unions of the same classification or activity. Pursuant to ruling C-797 dated June 29, 2000, the Constitutional Court declared that the provisions containing such limitations were unconstitutional, as they threatened the union association right of employees.

Decree 2351 of 1965, which amended the Colombian Labor Code, prohibited the coexistence of more than one base union within the same company. However, such prohibition was also declared unconstitutional by decision C-567 dated May 17, 2000. In this case, the Constitutional Court considered that the employee's right to constitute union organizations as well as their effective enjoyment of union freedom was being limited.

## 2.2 The General Role Of The Trade Unions

The general role of trade unions in Colombia is to protect the affiliated employees' labor rights and ensure better economic and employment conditions for the employees and their families.

Unions represent the employees' rights and needs before their employer. Before 2008, the Colombian Labor Code provided that when, within a single enterprise, a base or company trade union coexisted with an industry or guild union, the representation of the employees for the collective bargaining agreement would be the union with the majority of the workers of that company. Pursuant to ruling C-063 dated January 30, 2008, the Constitutional Court declared that this provision was unconstitutional, as it unreasonably and disproportionately limited the collective bargaining or negotiation right for minority trade unions. Therefore, all the unions related to the enterprise are allowed to participate in the negotiation process.

In addition, law has provided the following roles to the trade unions:

1. Study the characteristics of the respective profession and wages, benefits, fees, or protection systems to prevent accidents and other working conditions relating to their affiliated employees to pursue their improvement and their defense;
2. Propel the rapprochement between employers and workers on the basis of justice, mutual respect, and subordination to the law;

3. Execute collective bargaining agreements and union contracts, ensure compliance by their members, and exercise the rights and actions that arise from them;
4. Advise affiliated employees in defending the rights derived from their labor contracts or their professional activities, and represent them before the administrative authorities, employers, or third parties;
5. Represent in court or before any authorities or agencies the common economic interests of the general association or the respective profession, and represent those interests before the employers and third parties in the event of collective conflicts that could not be resolved by direct settlement, by seeking conciliation;
6. Promote technical education and general members;
7. Provide relief to members in case of unemployment, sickness, disability, or calamity;
8. Promote the development of cooperatives, savings banks, loans and mutual aid, schools, libraries, technical institutes, placement offices, hospitals, field trials or sports, and other appropriate agencies for professional, cultural, and solidarity purposes established in the statutes of the union;
9. Be intermediaries for the purchase and distribution of consumer goods, raw materials, and working elements; and
10. Acquire and hold title to any property and furniture required for the exercise of all activities.

### 2.3 The Scope Of Trade Union Rights In Businesses

Unions are authorized by law to enter into collective bargains on behalf of the employees affiliated with the union. By means of

bargaining agreements unionized employees negotiate with their employers greater labor benefits for them and for their families. Pursuant to current rulings, more than one collective bargaining agreement may exist in each company. In addition to the provisions agreed upon between the parties, the collective bargaining agreement must indicate the enterprise or establishment, industry and trades covered, the place or places where it is to govern, the date on which it takes effect, its duration, the causes and methods of its renewal and termination, and the responsibility for nonperformance.

The collective bargaining agreement must be in writing and produced in as many copies as the number of the parties, plus one, to be deposited with the Ministry of Social Protection. The bargaining agreement shall be invalid until compliance with these formalities is attained.

Collective bargaining between employers and labor unions whose members do not exceed one-third of the total number of workers of the given enterprise is applicable only to members of the union that executed the bargaining, and to those who adhere thereto or subsequently become members of that union. When one of the parties to the bargaining is a union whose members exceed one-third of the total number of workers of the given enterprise, the provisions of the bargaining extend to all workers of the enterprise, whether unionized or not.

Within 60 days prior to the date of expiration of the collective labor convention, either party can propose a date for the collective negotiation by submitting a petition sheet with the proposed stipulations for the new bargaining agreement (this is commonly known as “denunciation” of the collective labor convention). Nevertheless, ruling C-1050 dated October 4, 2001, issued by the Colombian Constitutional Court, determined that even if the employer is legally entitled to propose the referred “denunciation”, the latter does not imply that the employer may initiate the collective conflict. Only trade unions are entitled to begin the conflict with the presentation of the relevant petition sheet to their employer.

With such denunciation, the collective conflict commences with three representatives appointed by the union and by the employer company that shall enter into discussions within the five days following the presentation of the petition sheet. This negotiation stage is called “direct agreement”, and its duration is 20 calendar days, which may be extended upon mutual consent of the parties up to another 20 calendar days. If the parties reach an agreement, they must record it as the new text of the collective bargaining agreement, therefore terminating the collective conflict.

When differences continue after conclusion of the direct arrangement stage, the employees may opt to declare a strike or to submit their differences to arbitration.

### 3. Works Councils

In Colombia, Works Councils do not exist.

### 4. Enforcement Issues

Trade unions cannot directly or indirectly restrict freedom of work. It is forbidden for trade unions of all kinds to:

1. Directly or indirectly compel workers to join the union or retire from it, except in cases of expulsion on grounds provided for in the statutes and fully proved;
2. Invest any social funds or assets for purposes that are different from those of the association or if, even if invested for these purposes, involve expenditures or investments that have not been duly authorized in the manner provided by law or the statutes;
3. Promote cease or stoppages at work, except in cases of strike in accordance with the law and of strike attributable to the employer for breach of obligations towards its workers;

4. Promote or support campaigns or movements designed to de facto ignore collectively, or particularly by the members, the legal precepts or acts of a legitimate authority; and
5. Recommend or sponsor any act of violence against the authorities or in prejudice of employers or third parties.

Sanctions for the above-mentioned breaches are as follows: (i) if the breach is attributable to the same union, constitutes an act of their directives, and the infringement has not been consummated, the Ministry of Social Protection will force the union to reverse its determination; (ii) if the offence has been committed already or if the order to avoid the offence was not obeyed, the Ministry of Social Protection will proceed to impose fines equivalent to the amount of one to 50 times the minimum monthly legal wage; or (iii) if despite the fine, the union persists in the violation, the Ministry of Social Protection can apply to a labor court to dissolve and liquidate the union, and cancel the registration of the association.

Applications for dissolution, liquidation, and cancellation of registration of association must be made before the labor judge in the domicile of the labor union, according to the following procedure: (i) the request made by the Ministry of Social Protection should present a statement of facts and evidence that supports the facts; (ii) once the request is received, the judge, no later than the next day, shall notify the trade union; (iii) the union, after notification, has five days to answer the demands and submit evidence deemed relevant; (iv) the judge will rule on the evidence within five days; and (v) the judge's decision may be appealed before Superior Court, which must decide within five days after receiving the process.

If the act or omission is attributable to any of the directors or members of the union, and has committed the act or omission in his or her capacity as such, the Ministry of Social Protection will notify the union to implement disciplinary sanctions provided for in the statutes. After expiration of the term specified in the order of the Ministry of

Social Protection, which shall not exceed one month, without penalties, it is understood that there is a breach of the union.

## 5. Trade Union Employee Protection Rights

### 5.1 Union Leaves

Union leaves are part of the guarantees of employees established by law to ensure the proper management by the union representatives. For employees of the private sector, the union leaves are established from two perspectives: as an obligation of employers in execution of the labor contract, and as a means to allow the performance of the activities related to the management of the trade unions. The union leaves can be created or agreed through collective bargaining. When the conflict between the union and employers is decided by Arbitration Court, the arbitrator can create union leaves, if and only if, they do not have the nature of permanent leaves.

For public employees, the law does not authorize the granting of union leaves.

### 5.2 Privileges

Colombian labor laws provide that employers cannot unilaterally terminate employees based upon their trade union membership. Union privilege is the guarantee of employees to have labor stability, and to impede dismissal, diminishment of labor conditions, or transference to other facilities or a different place of work, without a just cause qualified by a labor judge.

There are several types of union privileges for founders or directors of a union. Founders are guaranteed labor stability from the day of constitution of the union until two months after its registration (which cannot exceed six months). Directors are guaranteed labor stability for the term of their appointment plus six months, which applies to the following employees: (i) the principal and alternate members of the board of members and vice-directors of any trade union, up to a

maximum number of five principals and five alternates; and (ii) one principal and one alternative member of the sectional committee.

Decree 2351 of 1965 provides a special union privilege called “circumstantial” by the Courts, which protects the employees presenting the petition sheet (unionized employees and beneficiaries). In these cases, the protected employees cannot be dismissed without just cause during the period of presentation of the petition sheet until the termination of the collective conflict.

Colombian labor law provides a special labor proceeding, through which employers request authorization from the labor judge to terminate the employment agreement of these protected employees with just cause. If an employee with union privilege is dismissed without authorization from the labor authority, termination of employment has no legal effect, and the employer will be obliged to reinstate the employee with the payment of salaries and social benefits owed for the period of unemployment.

### 5.3 Strikes

Article 56 of the Colombian Constitution recognizes the right to strike as fundamental. Employers are not permitted to use strike-breakers.

Only in cases expressly excluded by law will a strike be deemed illegal (possibly resulting in the dismissal of union officers), including the following:

- When incurred in essential public service entities;
- When it pursues purposes other than professional or economic ones;
- When the stages to legally vote for a strike have not been complied with;
- When it exceeds the legal term or duration;

- When it is not limited to the peaceful suspension of work; and
- When it demands from the authorities the execution of some act that falls within the union's functions.

Pursuant to Article 429 of the Colombian Labor Code, a strike is defined as a collective, temporary, and pacific suspension of work, by the workers of an establishment or enterprise, for economic and professional purposes, proposed to their employers, and following the legal procedure to invoke it.

Currently, the right to strike in Colombia is mainly determined by the existence of a collective conflict. The date (or stage) of the strike must be decided by the union members within 10 days following the failure to resolve the issues after negotiations in accordance with the procedure set forth under the law.

The decision to go on strike requires the affirmative vote of the majority of the employees of the given enterprise (or of the union members when such members make up more than half of the employees of the given enterprise). Strikes are only legal if they begin two to ten days from the date of the resolution authorizing a strike.

The Ministry of Social Protection and the President can intervene in disputes through compulsory arbitration when the strike is declared illegal or exceeds 60 calendar days.

#### 5.4 Special Protection

In addition to the aforementioned constitutional and employment-related protection that Colombian legislation confers to trade unions and unionized employees, given the special conditions and status that our laws and rulings have granted to individuals and entities, they are also protected by the Colombian Criminal System.

Article 104 of the Colombian Criminal Code, modified by Law 1426, 2010, states that the penalty established for murder will be increased if said crime is performed against a member of a trade union. Also, Title III of said Code deems as criminal acts a series of actions against the freedom of association and the freedom of work. Article 200, in particular, includes a penalty ranging from 100 and 300 minimum monthly legal salaries to an individual who disturbs or interrupts a valid meeting or the exercise of rights granted by labor laws, or engages in retaliatory actions because of a strike or a lawful assembly, reunion or association.

# Czech Republic

## 1. Introduction

During the past decade, Czech employee representatives (in particular trade unions) have been quite active in representing the interests of employees in the Czech Republic. Trade unions have the right to participate in a wide range of labor-related issues including, in particular, collective bargaining, protection of health and safety at work, and termination of employment relationships.

There are three types of employee representatives recognized by the Czech Labor Code:

- Trade unions;
- Works Councils; and
- Representatives of employees for safety and protection of health at work.

A trade union may be established by three employees (at least one of them must be 18 years old or over).

## 2. Trade Unions

### 2.1 The General Role Of Trade Unions

Under Czech law, trade unions are considered legal persons whose establishment is governed by Act No. 83/1990 Coll., on Associations of Citizens, as amended. At least three workers are required in order to create a trade union on the basis of statutes adopted by such workers. It is very simple and not expensive to establish a trade union. A trade union is established on the day following a notification to the Ministry of Interior of the Czech Republic indicating creation of the trade union.

A “trade union body” is a body authorized to act in the name of a trade union organization or its organizational unit within the scope of its competence as stated in the statutes of the trade union. Generally, the board of the trade union organization (or in smaller organizations, the trustee of such organization) acts as the representative body of the trade union organization in negotiations with the employer.

## 2.2 Constitution Of A Trade Union

Upon delivery of notification to the Ministry of Interior of the Czech Republic, a trade union, as a legal person, has the right to represent its members in all matters relating to their employment relationships (including negotiations on behalf of its members in order to conclude a collective bargaining agreement). As a matter of law, trade unions represent both member and non-member employees.

The Czech Charter of Fundamental Rights and Freedoms provides for the right to associate freely with others in order to protect economic and social interests. It prohibits attempts to limit the number of trade union organizations or to give preferential treatment to a trade union organization at a given enterprise or in an economic sector. Thus, if more than one trade union organization exists at one enterprise, the employer must fulfill its trade union-related obligations with respect to the relevant bodies of all existing trade union organizations, unless otherwise agreed with all trade union organizations. In case of any disagreement between trade unions, special procedural rules stated by the Labor Code apply.

## 2.3 Scope Of Trade Union Rights In Businesses

There are three levels of cooperation with a trade union:

1. Prior consent of the trade union required (e.g., if a notice of termination or immediate cancellation concerns an individual who is a member of a competent trade union body (during such member’s term of office and/or for a period of one year thereafter), the employer is required to obtain the prior consent of the competent trade union body before serving notice of

termination/immediate cancellation to such employee; another example is the adoption or modification or cancellation of employment handbooks and employment policies;

2. Prior consultation requirement (e.g., termination by notice of termination or immediate cancellation of employment, in case of automatic transfer of employees, measures relating to a higher number of employees, collective dismissal, vacation plans, and split of working shifts, matters related to protection of health and safety at work); and
3. Prior information obligation (e.g., anticipated changes in the employer's operations, changes in number of employees, environmental issues, and measures against discrimination).

The Labor Code also contains a number of other duties and obligations of the employer with respect to any trade union organization.

An employer is also required to inform and consult the relevant trade union organization if it intends to carry out structural changes, reorganizational measures, or other changes that may result in redundancies. Such information and consultation must include the reasons for the intended measures and indicate the number of employees that will be affected by them, as well as their job profiles, the related measures, consequences and timing. Employers must also consult with the trade union on selection criteria and measures that may prevent or limit the proposed collective/mass redundancies, and measures to mitigate the unfavorable consequences to employees of such collective/mass redundancies, including the possibility of providing affected employees with work in other positions. However, the final decision as to these matters rests with the employer, and the employer is not bound by the trade union body's ultimate position or opinion regarding the proposed measures (with a few exceptions, e.g., dismissal of a trade union representative).

Additionally, an employer must inform the relevant trade union body of the employer's principal future goals and its economic situation and prospects. The employer and the trade union body also must jointly determine the use of financial means that have been allocated to any special corporate funds for cultural and social needs, if applicable.

The employer is obligated to make reasonable premises (including all necessary equipment) available for the trade union organization's operations. Terms for such use of premises are, in most cases, governed by the terms of the collective bargaining agreement.

#### 2.4 Collective Bargaining Agreements

Wages and other labor-related rights may be regulated in collective bargaining agreements, subject to limits as provided in Czech labor regulations. In general, only collective bargaining agreements with private sector employers may extend labor rights beyond that provided for under Czech labor legislation.

Any rights that individual employees acquire on the basis of provisions of a collective bargaining agreement are asserted and enforced as any other employee rights ensuing from individual employment agreements.

The Act No. 2/1991 Coll., Collective Bargaining Act, as amended, governs the process of concluding collective bargaining agreements. This Act draws a distinction between "corporate" collective bargaining agreements concluded between one relevant trade union body and an individual employer (i.e., agreements only effective for a particular employer), and "higher" collective bargaining agreements concluded for, and binding on, a larger number of employees (represented by a "higher" trade union body embodying more than one trade union organization) and several employers in a given industrial sector. Higher trade union bodies are customarily represented by an Executive Committee of the trade union for the relevant industry. Such trade union body concludes a collective agreement for all

employees in that industrial sector, including those who are not members of the trade union.

Provisions of a corporate collective bargaining agreement are only enforceable to the extent that they do not contradict provisions of the relevant higher collective bargaining agreement (if any). For example, a provision in a corporate collective bargaining agreement that provides for lower wages than anticipated in the higher agreement would be held unenforceable with respect to that portion of the agreement.

If a right of an employee or the trade union or the employer arising from the collective bargaining agreement has been violated, the damaged party may enforce that right through special labor arbitration or civil court proceedings.

Collective bargaining agreements may not, as a rule, provide lesser rights to employees than those stipulated by generally binding legal regulations.

### **3. Works Councils And Representatives Of Employees For Safety And Protection Of Health At Work**

Under Section 281 (1) of the Labor Code a Works Council or representative of employees for safety and protection of health at work may be established with an employer.

Works Councils or representatives of employees for safety and protection of health at work can be established with any employer, i.e., no limitations as to the minimum number of employees employed by an employer exist in this respect. To the extent that there are no employee representatives established within the employer, the employer is then required to provide each individual employee information and consultation that would otherwise have been provided to the employee representatives.



## France

### 1. Introduction

French Labor Law recognises two major types of employee representation within the company. The first type, and the older one, consists of employees appointed and controlled by trade unions, whereas the second one consists of elected members and is more diversified, with a major place for the Works Council when a company employs 50 persons or more.

Any action from the employer that is likely to hinder the employee representatives' functions, or failure from the employer to organise professional elections when so required, is a criminal offence that may be punished for the company's legal representative by a maximum fine of EUR 3,750 and/or a maximum of one year of imprisonment. The legal entity could also be punished by a maximum fine of EUR 18,750.

### 2. Trade Unions

#### 2.1 The General Role Of Trade Unions

The exclusive purpose of a trade union is to protect the professional interests of its members (Article L. 2131-1 of the French Labor Code). A trade union is represented, within companies, by a union cell ("*section syndicale*"), and by one or several trade union delegates ("*délégués syndicaux*").

To perform their duties, trade unions may use political pressure, propaganda, and, in some cases, the constitutional right to strike, which can be, under certain conditions, a powerful legal recourse for employees.

Trade unions may gather in national or local associations or federations. The federations determine the policy applicable to all its members, and trade unions do the same for their union cell within companies.

## 2.2 The Constitution Of A Trade Union

The only formality necessary to constitute a trade union is to draft statutes of the trade union and to register such statutes with the city hall where the trade union is located.

In order for a trade union to be able to create a union cell within a company, it first has to be considered as a representative union (Article L. 2142-1 of the French Labor Code).

Before the law dated August 20, 2008, five major trade unions in France were automatically considered as representative: the CGT, the CFDT, the CGT-FO, the CFTC, and the CFE-CGC (the latter being considered as representative only for executive employees, also known as “*cadres*”). All other trade unions had to prove their representativeness within the company on the basis of several criteria. Aside from a criterion relating to the patriotic attitude of the trade union during the occupation (WWII), the other criteria that may be used for such proof are quantitative (e.g., importance of the membership and of the contributions received by the trade union concerned) and qualitative (e.g., independence of the trade union concerned vis-à-vis the company’s management and the political power, experience, and seniority of the trade union, etc.).

Since a new law dated August 20, 2008, all the trade unions (both at the company and at the branch and at the national levels) have to demonstrate their representativeness by complying with new criteria (Article L. 2121-1 of the French Labor Code):

- Respect of republican values;
- Independence;
- Financial transparency;
- Minimum seniority of two years in the professional or geographical scope concerned;

- Minimum percentage of votes at the last professional elections (10% at the company's level, 8% at the branch and national levels);
- Influence, which is mainly characterized by the activity and the experience; and
- Importance of the membership and of the contributions received.

However, until the results of the first professional elections within the company, the five trade unions mentioned above (CGT, CFDT, CGT-FO, CFTC, and CFE-CGC) will continue to be considered as representative, as well as the trade unions that were considered as representative under the previous criteria.

Each representative trade union may only create one union cell within the same company (or establishment). The creation of a union cell may result from the mere appointment of a trade union delegate within that company (or establishment) by the trade union.

### 2.3 The Scope Of Trade Union Rights In Businesses

A union cell within a company or establishment benefits from various rights (some of which are subject, prior to their implementation, to the conclusion of an in-house collective agreement with the employer), in order to efficiently defend employees' rights. In particular, the union cell is entitled to:

- Collect, on the company's premises, the financial contributions made by the employees to the union;
- Distribute its publications and leaflets on the company's premises at the beginning or end of working hours;
- Organise a meeting with its members once a month, after working time;

- Organise meetings in order to invite external personalities, either trade unionists or non unionists (in the latter case, the agreement of the employer is required); and
- Regardless of the trade union delegates' rights, every union cell may benefit, where there are more than 500 employees, up to 10 hours a year dedicated to the negotiation of in-house collective agreements within the company (increased to 15 hours a year when there are more than 1,000 employees).

Additionally, the employer must provide a specific notice board for trade union communications and, when the company employs more than 200 employees, the employer must provide a furnished location specifically designated for the union cells. There must be individual premises for each union cell when the company employs more than 1,000 employees.

#### 2.4 The Function Of Trade Union Representatives

##### *Trade Union Delegates*

A trade union can appoint an employee (member or not of the trade union) as its trade union delegate. Only trade unions having constituted a union cell may appoint delegates, and the company must employ at least 50 employees (however, the first condition is a bit artificial given that French case law considers that the mere appointment of a trade union delegate is sufficient in itself to create a union cell). Where the company employs fewer than 50 employees, it is still possible for a trade union to appoint either an employee delegate as trade union delegate or to negotiate and enter into an in-house collective agreement providing for the appointment of a trade union delegate.

In order to be appointed as trade union delegate, an employee must be at least 18 years old, must be employed by the company for, in

principle, at least one year, and must be in full possession of his or her civic rights.

The trade union must notify the employer of the appointment by registered letter with return receipt requested or hand-delivered letter against a signed release. A copy of the letter must also be sent by the trade union to the Labor Inspector, and the appointment must be posted on the trade union notice boards.

The employer cannot interfere in the designation of a trade union delegate, but may challenge it before the First Degree Civil Court (“*Tribunal d’Instance*”), within a maximum period of 15 days following the date of reception of the appointment letter sent by the trade union. The appointment will be cancelled by the Court if it does not comply with the above legal requirements or if it is deemed fraudulent (e.g., only made in order for the appointed employee to benefit from the specific protection granted to trade union delegates).

The number of delegates a trade union can appoint within the same company is based on the number of company’s employees:

<b>Number Of Employees</b>	<b>Delegates Per Union</b>
From 50 To 999	1
From 1,000 To 1,999	2
From 2,000 To 3,999	3
From 4,000 To 9,999	4
From 10,000 Or More	5

The trade union delegate represents its trade union vis-à-vis the employer, and may present claims to the employer in view of improving the employees’ working conditions (e.g., salary increases, additional days of vacation, time-off, etc.).

To perform their duties, trade union delegates are authorised to circulate freely within the company’s premises. They also benefit from paid time-off to perform their mission as employee

representatives (10 hours per month in companies employing from 50 to 150 employees, 15 hours in companies employing from 151 to 500 employees, and 20 hours in companies employing more than 500 employees), which are granted in addition to the union cell's time-off hours and which can be exceeded in exceptional circumstances (such as a strike).

The most important prerogative of trade union delegates is the monopoly they have in negotiating and concluding in-house collective agreements with the employer. In principle, an in-house collective agreement cannot be validly concluded without being signed by a trade union delegate (Article L. 2232-16 of the French Labor Code), even where the majority of the company's employees is favourable to such an agreement.

Trade unions may also have representatives attending Works Council's meetings.

### 3. Works Councils

#### 3.1 General Requirements And Principles

Any company employing at least 50 employees is required to organise Works Council's elections (Article L. 2321-1 of the French Labor Code). The company is considered as employing 50 employees (or more) when this minimum number has been reached for 12 months, whether consecutive or not, over the last three years.

The employer must initiate the organisation of the Works Council's elections by inviting every representative trade union to present a list of candidates. When the initiative comes from an employee or a trade union, the employer must start the organisation of elections within one month. The employer and the trade unions must negotiate a pre-electoral in-house collective agreement ("*accord préélectoral*") in order to determine the modalities for the organisation of the elections. In the absence of trade unions, or where no pre-electoral agreement is concluded, the employer must organise the elections in compliance with the mandatory conditions set forth by the law.

### 3.2 Election Of Works Councils

Trade unions have a monopoly of candidature for the first ballot of the elections. In the event there are no trade union candidates, or if less than 50% of the electors vote, a second ballot must be organised no more than 15 days later. For this second ballot the candidatures are free, which means that any employee (not only trade union candidates) fulfilling the eligibility conditions can be a candidate.

The employer must also organise mid-term elections if the number of vacancies among the Works Council's members exceeds half of the number of representatives, or if one of the employee categories is no longer represented.

Voters must be at least 16 years old and must be employed by the company for at least three months. A company's representative, or close relatives, have in principle no voting rights, even if they are employed by the company.

To be eligible as a Works Council's candidate, an employee must be at least 18 years old and must be employed by the company for at least one year. A company's representatives or close relatives cannot in principle be candidates, even if they are employed by the company.

Works Council's members ("*titulaires*") and deputies ("*suppléants*") must be elected separately, with separate lists for the different categories of employees. The Works Council's seats are then distributed among the relevant categories of employees, as specified in the pre-electoral in-house collective agreement.

The elections are organised during working time and on the company's premises. The employer must provide ballot boxes and polling booths in order to ensure the secrecy of the votes. The vote is based on a system of proportional representation.

The term of office for Works Council's members is four years. A collective bargaining agreement or an in-house collective agreement may provide for a different length, between two and four years.

### 3.3 Works Council's Members

Article L. 2324-1 of the French Labor Code specifies the Works Council's composition.

The employer has the right to appoint one representative to the Works Council, who will also serve as the Works Council's chairman. The corporate representative of the company may, in this respect, be represented by either another corporate officer of the company or by an executive employee.

Most of the other Works Council's members are elected employees. The number of seats available for elected employees depends upon the total number of employees employed by the company:

<b>Number Of Employees</b>	<b>Members</b>	<b>Deputies</b>
From 50 To 74	3	3
From 75 To 99	4	4
From 100 To 399	5	5
From 400 To 749	6	6
From 750 To 999	7	7
From 1,000 To 1,999	8	8
From 2,000 To 2,999	9	9
From 3,000 To 3,999	10	10
From 4,000 To 4,999	11	11
From 5,000 To 7,499	12	12
From 7,500 To 9,999	13	13
From 10,000 Or More	15	15

In addition to the employer representative and the elected employees, the Works Council also has designated members, who are trade union

representatives. Each representative trade union may designate an employee to be its representative to the Works Council.

All Works Council's members who are entitled to vote (i.e., the president and the elected members, but not the deputies and not the trade union representatives) may vote for a secretary to do the administrative work (such as drafting the minutes of the Works Council's meetings) and to represent them. The secretary has no special right and must be specifically empowered by the Works Council for each assignment. Any other Works Council's member may also be duly empowered for a specific mission.

### 3.4 Management Of Works Councils

Works Council's meetings must be held once every two months when the company employs no more than 150 employees, and at least once a month when the company employs 150 employees or more. The agenda of the meeting is prepared jointly by the employer and the Works Council's secretary and must be sent to the Works Council's members, along with a convocation letter, at least three days before the meeting (from a practical standpoint, a one-week notice is generally recommended).

External persons may attend Works Council's meetings when required (e.g., Labor doctor, auditor, etc.) and if agreed by the Works Council's members. The employer is entitled to be assisted by two persons during the meetings (in principle belonging to the company's personnel).

Each Works Council member may give a personal opinion during the meeting, but only the president and the elected members (apart from the deputies) may vote on decisions. Thus, a distinction is made between the members having a deliberating voice (employer representative and elected members) and the members who have a consultative voice only (designated members and deputies).

A secret ballot is imposed only where the Works Council must vote on the dismissal of a protected employee or the hiring/dismissal of the Labor doctor.

Works Council's decisions are made by a majority of attending members. Time spent in a Works Council's meeting is paid like working time and is not deducted from the time-off given to each Works Council member for his or her employee representative's functions. At the end of a Works Council meeting, minutes of the meeting are drafted by the Works Council's secretary.

The Works Council may create commissions in different fields of its competence. Commissions may also be compulsory. For example, when there are more than 200 employees, there must be a professional training commission and a commission on equal rights between men and women; when there are more than 300 employees, there must be an information and assistance commission for housing; and when there are more than 1,000 employees, an economic commission must be created.

### 3.5 Functions And Rights Of Works Councils

The primary function of a Works Council is to ensure the collective expression of the employees and to protect their interests professionally, economically, socially, and culturally.

#### ***Works Council Rights***

To protect employees professionally and economically, Works Councils have specific rights regarding information, consultation, and alerts.

#### *Information*

An employer is required to provide regular information to the Works Council, the most important of which include:

- An economic and financial report on the company (one month after the Works Council's election);
- The annual general report (once a year);
- The annual report on the evolution of salaries (once a year);
- Documents transmitted to the annual general meeting of the company (before their transmission);
- Accounting and financial documents of projected management (at the same time as for the shareholders);
- Information on improvements, changes, or transformation of the equipment (every three months and orally);
- General evolution of the financial status of the company (every three months and orally);
- An analysis of the employment situation (every three months);
- Take-over bids (when it occurs);
- An annual report on part time work (once a year); and
- Any modifications to the internal regulations (when they happen).

### *Consultation*

Prior to making some decisions, an employer must consult the Works Council for its opinion (in particular according to Article L. 2323-6 of the French Labor Code), such as decisions relating to:

- The organisation, management, and general operation of the company;

- Staff and dismissals;
- A modification in the economic or legal organisation of the company; and
- Technological developments and evolutions, employment, hygiene and safety, working conditions, duration of work, handicap, fixed-term contracts, equal rights between men and women, internal regulations, profit-sharing, and professional training.

Pursuant to case law, a Works Council must also be consulted before or at the same time an in-house collective agreement is to be concluded.

In order to be able to provide an opinion, the Works Council needs to be properly informed, with all appropriate documentation, and it must be provided with sufficient time to examine the situation. Generally, the Works Council will give its opinion by means of a vote during a second meeting.

Under French Labor law, Works Council's consultation means that the employer must seek the Works Council's opinion. An opinion is necessary, but is not binding upon the employer's decision.

However, under rare circumstances, the employer's decision must be driven by the Works Council's opinion, such as in case of:

- Nomination and/or dismissal of the Labor doctor;
- Repartition of the working time over four days per week;
- Institution of time-off to compensate overtime;
- Determination of the number of hygiene and safety committees in companies having several establishment of 500 employees or

more, and designation of employee representatives to the hygiene and safety committee; and

- Refusal to give an authorisation of absence to an employee for participating in professional training.

### *Alert Right*

When the Works Council is concerned, with justification, over the economic situation of the company, it may ask for some explanations from the employer. If the answer is insufficient or confirms its concerns, the Works Council (or its economic commission) may draft a report, which is then transmitted to the statutory auditor. In drafting its report, the Works Council may solicit the help of a chartered accountant paid by the company.

If the Work Council's report confirms its concern, the Works Council may communicate this report to the board of directors. The board of directors will then have to give a substantiated answer within one month.

### *Social And Cultural Rights*

Social and cultural activities must be organised in the interest of the employees or their family, without discrimination, and their purpose is to improve the working and social conditions within the company. The Works Council manages directly, participates, or supervises the management of these activities.

### *Distinctive Rights*

A distinction must be made among the rights of Works Council's members, the right for the Works Council to appoint an expert, and the Works Council's finances.

### *Members*

Works Council's members are entitled to 20 hours per month of paid time-off to perform their duties. They are also entitled to circulate freely on the company's premises and to be provided with some office space to hold meetings. Unless otherwise agreed with the Works Council, this office space must be used exclusively by the Works Council and should include the usual office equipment and facilities.

### *Experts*

A Works Council may be assisted by experts. Thus, a chartered accountant may be appointed for examining the annual accounting report (in case of economic dismissals), for examining the provisional management documents, and for drafting a report for the Works Council when it exercises its alert right.

The Works Council's chartered accountant is entitled to be provided with the same documents as the company's statutory auditor, is granted free access to the company's premises, and is paid by the company.

Provided the company employs at least 300 persons, the Works Council may also decide to appoint an expert in new technologies, remunerated by the company, in situations where the employer contemplates the introduction of new technologies within the company.

The Works Council may also decide to appoint an expert for preparing its works. In such case, the expert will only benefit from access to the same documents as the Works Council and will be paid by the Works Council.

Works Council's members and experts are equally bound by a confidentiality obligation.

### *Financial Means*

The Works Council is paid two legal subventions by the company each year:

- A functioning subvention representing a minimum amount of 0.2% of the company's payroll (an in-house collective agreement may provide for a higher amount); and
- A subvention for financing social and cultural activities expenses, which cannot be less than the highest amount paid by the company for the same purposes during any of the last three years.

### 3.6 Agreements Between The Works Council And Management

Since December 31, 2009, within companies employing less than 200 employees, in-house collective agreements can be entered into between the Works Council and Management subject to specific conditions and in particular if there are no Trade-Union Delegates within the company. Such possibility however only concerns the measures that cannot be implemented in the absence of in-house collective agreement.

Agreements entered into between the Works Council and Management, which would not comply with the conditions set by law, are deprived from the legal force and binding effect attached to in-house collective agreements. They only create obligations for the employer as a unilateral undertaking. Such agreements have the same legal nature as custom and usage, and they may, therefore, be denounced by the employer, provided that the employer observes a reasonable notice period after having informed the employee representatives and each of the employees concerned in writing.

Moreover, collective agreements can be entered into between a Works Council and management where a specific provision of the law so provides, for example for setting up either a mandatory profit-sharing

scheme (“*participation*”) or an optional profit-sharing scheme (“*intéressement*”).

#### 4. The Interaction Between A Works Council And A Trade Union

When trade unions are present within a company, their members are quite often also members of the Works Council, because of trade unions’ monopoly to present candidates at the first ballot of the professional elections. In such case, both institutions are represented by the same people.

The situation is different when there is no (or minor) trade union presence within the company, which happens rather frequently. In such a case, the Works Council may be much more representative of the employees than trade unions. Even so, trade unions still have a monopoly to negotiate and conclude in-house agreements, which may result in situations where an in-house collective agreement is negotiated by trade unions representing a minority of the company’s employees (which may explain why there are so many “atypical” collective agreements between management and Works Councils, even though they do not have the same value as an actual in-house collective agreement).

#### 5. Trade Union And Works Council Employee Protection Rights

All employee representatives (whether “members” or “deputies” to the Works Council, trade union delegates, etc.) benefit from a very protective status. In particular, the employer may only terminate their employment contract after having first consulted with the Works Council (only applicable for elected employee representatives, such as Works Council’s members) and subject to the prior written authorisation by the Labor Inspector (applicable to all employee representatives).

Regarding the Works Council, this protection is applicable to employees having initiated the elections (for six months), candidates

or likely candidates (for six months), elected employees (during their term of office), former elected employees (for six months following their term), and employees designated by trade unions (since receipt by the employer of the letter of designation until six months after the end of their term of office).

Regarding trade unions delegates, the protection starts upon receipt of the designation letter up until 12 months after the end of their term of office.

The specific protection applies not only in cases of dismissals, but is also effective for any modification of the employment contract or the employee's working conditions.

During the meeting when the Works Council is consulted, the protected employee must be heard by the Works Council's members.

The Labor Inspector is, in general, extremely reluctant to authorise an employer to dismiss a protected employee or modify a protected employee's employment contract. In the most favourable cases for the employer, the Labor Inspector will only authorise such actions after a minimum period of 15 days during which a preliminary inquiry will be held in order to verify compliance with the specific procedure and the absence of discrimination. The Labor Inspector's decision must be motivated, but a refusal of authorisation could be justified by general interest considerations. The employer may challenge a refusal decision before the Labor Minister or by filing a claim before the Administrative Court.

## 6. Other Types Of Employee Representation

### 6.1 Employee Delegates

Where a company employs 11 persons or more, the employer is required to initiate employee delegates' elections (Article L. 2312-1 of the French Labor Code). The election takes place the same day as the Works Council's elections (when there is one).

The number of employee delegates is calculated on the basis of the number of company's employees, as follows:

<b>Number Of Employees</b>	<b>Members</b>	<b>Deputies</b>
From 11 To 25	1	1
From 26 To 74	2	2
From 75 To 99	3	3
From 100 To 124	4	4
From 125 To 174	5	5
From 175 To 249	6	6
From 250 To 499	7	7
From 500 To 749	8	8
From 750 To 999	9	9
One more employee delegate every 250 more employees.		

Employee delegates are elected every four years (unless differently provided for in a collective bargaining agreement or an in-house collective agreement), according to the same rules as for the Works Council, and their term of office is four years.

Where fewer than 25 persons are employed by the company, all employees are gathered in a unique voting college (and are not divided in separate categories as for the Works Council's election).

Employee delegates' duties are to:

- Assist the employees in submitting their grievances to the employer;
- Control the proper application of the provisions of the Labor Code; and
- Perform the duties of the Hygiene and Safety Committee (“**CHSCT**”) and the Works Council, in the absence of such

institutions in companies employing 50 employees or more. In such case, the employee delegates are entitled to 20 additional hours per month (for Works Council's duties) and a number of hours equivalent to that allowed to the CHSCT's members.

Employee delegates are allowed to circulate freely within the company. They also benefit from 10 hours of time-off per month to perform their duties where the company employs fewer than 50 persons (15 hours where the company employs 50 persons or more).

A meeting with the employee delegates must be organised each month by the employer.

## 6.2 The Sole Body Of Employee Representatives

In companies employing more than 49 but fewer than 200 employees, the employer may choose to set up a sole body of employee representatives ("*délégation unique du personnel*"), whose duties and rights are those of the employee delegates on the one hand and those of the Works Council on the other hand. The representatives thus appointed are elected according to the rules applicable to employee delegates and are entitled to 20 hours per month to perform their duties. The number of employee representatives is the same as the employee delegates.

## 6.3 The Group Committee

A Group Committee must be created within each group composed of a parent company having its registered office in France, its subsidiaries, and all affiliated entities (Article L. 2331-1 of the French Labor Code). However, this is subject to the condition that the parent company directly or indirectly controls the subsidiary/affiliates. Companies having their parent company located in France and which are controlled by such parent company (10% of their capital shares at least) may be included in the group where the permanence and the importance of the relationship between the two companies demonstrates that they belong to a same economic group.

The Group Committee is not a substitute for the Works Council or the European Works Council. Its purpose is to provide the representatives of each company with more comprehensive information concerning the activity of the group as a whole.

The Group Committee meets at least once a year and must be informed on matters such as the group's businesses, its financial situation, the employment evolution and employment forecasts on an annual or several years' basis, possible prevention actions, and the economic prospective of the group for the year to come.

The Group Committee includes employer and employee representatives. The employer is represented by the head of the parent company, which is assisted by two other persons of its choice.

Employee representatives (maximum 30, with no more than two representatives from each Works Council) are appointed by the trade unions among the members of the various Works Councils.

#### 6.4 The European Works Council ("EWC")

The EWC Directive was transposed into French Labor Code (Article L. 2341-1 and followings) on November 12, 1996.

#### 6.5 The Hygiene and Safety Committee ("CHSCT")

In each company employing 50 employees or more, the employer must create a CHSCT (Article L. 4611-1 of the French Labor Code). The purpose of this committee is to contribute to the protection of the employees' health and security and to the improvement of working conditions. The committee must be consulted in all cases of major changes regarding hygiene, safety, and working conditions within the company.

The CHSCT members benefit from paid time-off to perform their duties (time spent in meeting with the employer is not deducted from such time-off). The number of hours of time-off is based on the number of company's employees, as follows:

<b>Number Of Employees</b>	<b>Hours Per Month</b>
From 50 To 99	2
From 100 To 299	5
From 300 To 499	10
From 500 To 1.499	15
1,500 Or More	20



# Germany

## 1. Introduction

In the Federal Republic of Germany, there is a strict distinction between the organisation of employees through trade unions and the organisation of employees through Works Councils. In particular, Works Councils do not have the right to call for strikes. They are rather obligated to work together with the employer on the basis of mutual trust and cooperation (*vertrauensvolle Zusammenarbeit*). Trade unions, on the other hand, may call for industrial action, provided the legal conditions are met. However, both systems of employee representation have a long historical tradition, as well as an important practical meaning for companies doing business in Germany.

### 1.1 Purpose And Practical Importance Of Union Representation

At the end of the 19<sup>th</sup> century, the first trade unions were founded aimed at the improvement of the appalling working conditions during the initial period of industrialisation. As a result of these actions, collective bargaining agreements (*Tarifverträge*) were established as a unique source of employment law. The purpose of collective bargaining is to ensure that the working conditions are negotiated between equal parties rather than by the individual employee, who has generally been considered to have less influence than his or her employer.

Today, the practical importance of collective bargaining agreements is obviously high. Every year, approximately 7,000 new collective bargaining agreements are concluded, which means that currently there are more than 69,600 collective bargaining agreements in force. These agreements are directly effective for about seven million employees, and a much higher number of individual employment agreements refer to the working conditions set forth in collective bargaining agreements. Also, about 454 collective bargaining agreements are declared to be mandatory by decree of the Federal Ministry of Labour and Social Welfare, meaning that even if an

employer has not concluded a collective bargaining agreement or referred to it in the employment agreement, it has to comply with the provisions of a mandatory collective bargaining agreement, provided the employer falls within the scope of applicability of such agreement.

### 1.2 Purpose And Practical Importance Of Works Councils

From the beginning of its development in the middle of the 19<sup>th</sup> century, the idea of employee representation by Works Councils has been separate from the organisation through trade unions. The purpose of the Works Council, generally speaking, is to enable employees to participate in decisions concerning the organisation of the business and the workforce in its entirety. While collective bargaining agreements deal particularly with material working conditions (e.g., remuneration, working time, etc.), the rights of Works Councils mainly relate to formal working conditions that must be regulated uniformly for all employees of the business and that are normally subject to the employer's right of direction.

According to information from the Federal Ministry of Labour and Social Welfare, about 35% of all employees are currently engaged in businesses in which Works Councils exist. As a matter of practice, most sizeable businesses have a Works Council, while in smaller businesses there is often no need to form a Works Council since the employees are in close contact with their employer.

### 1.3 Sources Of Collective Labour Law

The laws dealing with the organisation of employees through trade unions and the representation of employees through Works Councils are called collective labour law. They are distinguished from individual labour law, which contains the rights and obligations of employers and employees, as set forth by statute or provided for by contract. The main sources of collective labour law are:

1. Art. 9 para 3 of the German Constitution (*Grundgesetz*, or “GG”);
2. The Collective Bargaining Act (*Tarifvertragsgesetz*, or “TVG”);

3. The Works Constitution Act (*Betriebsverfassungsgesetz*, or “BetrVG”);
4. Collective bargaining agreements between a trade union and either an individual employer (*Firmentarifvertrag*) or an employers’ association (*Verbandstarifvertrag*); and
5. Works agreements between the Works Council and the employer (*Betriebsvereinbarung*).

## 2. Trade Unions

### 2.1 The General Role Of Trade Unions

The main function of trade unions is to negotiate and enter into collective bargaining agreements with either an individual employer or an employers’ association. If a certain employer is a party to such an agreement, or is a member of an employers’ association that concluded a collective bargaining agreement, the provisions of the agreement have direct legal consequences for the relationships between the employer and union members working in its enterprise. Provisions of individual employment agreements deviating from the working conditions set forth in a collective bargaining agreement are valid only if they are in favour of the employee concerned (Sec. 3 and 4 TVG).

During the term of the collective bargaining agreement, industrial disputes regarding working conditions contained in the agreement are unlawful (*Friedenpflicht*). Once its term has expired, trade unions can in principle go on strike. During strike activities, union members do not have to be paid by the employer but are instead subsidized by the union. The more union members go on strike, the more funding is required. Therefore, innovative forms of industrial action have emerged during the past years. One of them is the so-called “flash mob action”. An example of a “flash mob action” is when dozens of union members enter a shopping centre and load up shopping carts with all kinds of goods leaving them unpaid in the store deliberately

blocking aisles and exits. In 2009, Germany's Federal Labor Court (*Bundesarbeitsgericht*) ruled that flash mobs actions are a legitimate form of industrial action.

In addition to the above-mentioned functions, trade unions also generally play a very important role as political lobbyists. Without the unions' informal consent, it is rather difficult to enact or amend employment law provisions in Germany.

## 2.2 Constitution Of A Trade Union

Art. 9 para 3 of the German Constitution guarantees the constitutional right to freely establish trade unions and employers' associations. In order to be qualified, a trade union must be formed freely and voluntarily in order to improve employees' working conditions. In particular, it must be independent and have no members of the opposing party, such as employers (*Gegnerfreiheit*). Also, it must be powerful enough to negotiate collective bargaining agreements with the opposing party (*Mächtigkeit*). However, unlike in other jurisdictions, it is not necessary in Germany for a union to be expressly recognised before entering into collective bargaining negotiations. As a matter of fact, the most powerful and important German trade unions are affiliated with the Confederation of German Trade Unions (*Deutscher Gewerkschaftsbund* or "DGB") and organised with regard to different lines of business. During the past decades, it was widely accepted by the labor courts that only one collective bargaining agreement could apply in one business (*Grundsatz der Tarifeinheit*). Recently, however, Germany's Federal Labor Court (*Bundesarbeitsgericht*) has overruled this principle. The judges decided that multiple collective bargaining agreements can exist within a business. The ruling certainly endorses smaller unions to be established and strengthens the position of already established unions for specialized employees, such as pilots (*Vereinigung Cockpit*), train drivers (GDL) or hospital doctors (*Marburger Bund*), since these groups do not feel represented adequately by the DGB unions any more.

### 2.3 The Scope Of Trade Union Rights In Businesses

The BetrVG grants trade unions substantial rights that can be exercised either in collaboration with or without regard to the Works Council, provided that the union is represented in the business (i.e., that it has at least one member employed in the particular business). Unions may influence to a certain extent the Works Council elections, can take the employer to court in case of gross violation of its duties under the BetrVG, and have certain consulting authority in connection with training and education seminars for Works Council members. Furthermore, unions are permitted to be present at every session of the general works assembly (*Betriebsversammlung*). Additionally, subject to some restrictions (e.g., obligatory security regulations, protection of trade secrets, etc.), union officials have the right to access the employer's premises in order to exercise their rights provided by the BetrVG. The right of free access, however, does not exist for general union purposes. Nevertheless, according to a recent judgement of the Federal Labour Court, trade unions are entitled to recruit or enlist new trade union members also through employees not working in the employer's business.

### 2.4 The Function Of Trade Union Representatives

In addition to the union rights contained in the BetrVG, unions can exercise some influence within the business through spokesmen (*Vertrauensleute*), whose function is to provide a contact or liaison between the union organisation and its members. Given the extensive participation rights granted to the Works Council, however, union spokesmen, in practice, have little meaning. Furthermore, union representatives are allowed to represent union members in labour court proceedings.

## 3. Works Councils

The most important representative body under the BetrVG is the Works Council. Nevertheless, further representative bodies may be established, such as the committee for managerial employees (*Sprecherausschuss*), the youth and trainee representation (*Jugend-*

*und Auszubildendenvertretung*), or the severely disabled employees' representation (*Schwerbehindertenvertretung*).

### 3.1 General Requirements And Principles

#### ***Requirements For The Establishment Of Works Councils***

The BetrVG applies to private enterprises regardless of their legal form, such as stock corporations (*Aktiengesellschaft*) or companies with limited liability (*GmbH*), but not to federal, state, or municipal agencies or authorities, or to any enterprises incorporated as legal persons under public law. The territorial application of the BetrVG extends to all businesses located in Germany, regardless of whether or not the employer and the employees are German citizens or whether or not the individual employment agreements are governed by German law.

According to Sec. 1 BetrVG, a Works Council may be established in businesses that regularly have at least five permanent employees eligible to vote, of whom three are eligible for election. Employees are eligible to vote if they have reached the age of 18. Employees of the business are entitled to be elected if they have been employed for at least six months, unless the business has been in existence for less than six months.

If the preconditions for setting up a Works Council are not met, the employees are not allowed to individually exercise the collective rights granted by the BetrVG. Even if the conditions are met, there is no statutory obligation to establish a Works Council, neither for the employer nor for the employees. The employer, however, must refrain from any action that could impede or interfere with the formation of a Works Council. Otherwise, the employer can be subject to imprisonment of up to one year or to criminal fines.

With regard to the requirements for setting up a Works Council, the BetrVG refers to the terms "business" and "employee." However, it defines neither the term "business" nor the term "employee."

Therefore, both terms have to be clarified with reference to the general definitions in German labour law.

### ***Business And Subordinate Business***

Generally, the term “business” is defined as a unit of organisation or establishment in which the entrepreneur, either alone or together with its employees, pursues – on a continuing basis – operational purposes with the assistance of means both tangible and intangible.

Consequently, a business establishment is not an enterprise in its entirety, but is the individual unit in which people work. As a rule of thumb, a unit is considered to be a business as meant in the BetrVG if it has a human resources department in which all important decisions regarding personnel are made.

If a unit does not meet the above-mentioned preconditions of Sec. 1 BetrVG, it is a subordinate establishment of another business. Such subordinate business for Works Council purposes is considered as one unit together with the main business, and its employees are deemed to be employees of the latter. A subordinate business is defined as any business establishment that meets the general definition of a business and serves the main business in a subordinate function. In the event that such a subordinate business meets the conditions contained in Sec. 1 BetrVG, a separate Works Council can be established if the subordinate business is located some distance from the main business and is independent in terms of functions and organisation (Sec. 4 BetrVG).

### ***Employees And Managerial Employees***

Under German labour law, an “employee” is defined as a person who, by individual employment contract, is obliged to render services for another person as directed by the latter. The main criterion for distinguishing employees from self-employed independent contractors is whether or not the individual is personally dependent on the person who requests his or her services. The BetrVG does not cover self-employed independent contractors, but it does cover all types of

employees who permanently work in a business unit, including, for instance, part-time employees.

Sec. 5 para 2 and para 3 BetrVG expressly exclude from coverage certain groups of persons, regardless of whether they can be considered as employees under the general definition. In particular, this holds true for individuals who act as legal representatives of the business or enterprise pursuant to the applicable civil or commercial law provisions (e.g., managing directors [*Geschäftsführer*] of a company with limited liability or members of the board [*Vorstand*] of a stock corporation) and managerial employees (*leitende Angestellte*). According to Sec. 5 para 3 BetrVG, managerial employees are those who:

1. Are authorised to independently employ and terminate employees of the entire or a part of the business unit;
2. Have certain statutorily defined powers to represent the company, i.e., general power of attorney (*Generalvollmacht*), procuracy (*Prokura*), etc.; or
3. Exercise duties of specific importance for the existence and the development of the enterprise or a business unit, whereby they either independently decide upon how they carry out their duties without being subject to detailed instructions of their employer or significantly influence decisions of the employer.

Particularly with respect to the third category, it is often very difficult to determine whether an employee can be considered as a managerial employee and, therefore, cannot vote for and is not represented by the Works Council. In case of a dispute, the labour court is competent to decide if a person can be grouped into the category of managerial employees.

### ***Scope Of Representation***

The Works Council created in a business unit only represents the employees who belong to that specific business. The affiliation to a certain business unit can be particularly difficult with respect to employees whose services are made available to another employer (e.g., an affiliated company). If employees are temporarily leased from one company to another, the employees on the payroll of the lending company generally remain members of that company's business, even if they are borrowed for a longer period of time and, thus, are integrated into the organisation of the borrowing company. The same holds true in relation to employees who are temporarily transferred to a foreign company. On the other hand, the German Works Council does not, under any circumstances, represent employees who work in and are hired by foreign branches of German companies irrespective of whether the foreign branch is independent or considered to be subordinate to the parent business.

### ***The Co-operation Between Employer And Works Council***

Since the German Constitution guarantees economic freedom, the employer, as an entrepreneur, is granted freedom of decision, which cannot be and is not overridden by the BetrVG. Hence, fundamental economic or business decisions are reserved to the employer as a result of its control of the property and the facilities.

Within this framework, the employer shall, in furtherance of the interests of the employees as well as the business, co-operate with the Works Council in good faith, thereby observing applicable collective bargaining agreements. As a consequence of this general principle, the employer, for instance, may not unlawfully interfere with the work of the Works Council, shall observe and safeguard the principle of non-discrimination, and shall inform the Works Council in a timely and complete manner in order to enable the latter to duly and properly exercise its functions under the BetrVG. The Works Council, on the other hand, must not disturb the operations or the peace in the workplace (i.e., it must not agitate against the employer or distribute provocative pamphlets). Industrial disputes are not allowed on the works level, but are limited to trade unions. On the contrary, the

employer and the Works Council shall meet together at least once a month and discuss problems with the clear purpose of reaching a mutual understanding. Secret information that Works Council's members receive from the employer in connection with their office must be kept confidential.

In case of a gross infringement of the duties under the BetrVG, the employer is entitled to apply to the labour court for the dissolution of the Works Council or the expulsion of an individual Works Council's member.

### 3.2 Election Of Works Councils

In Germany, Works Councils are elected at four-year terms. Since the last elections were held in 2010, the next elections will be in 2014. When a Works Council is elected in a business for the first time, it remains in office until the following May 31, falling within the sequence of four-year intervals, provided that there is at least one calendar year between the date of the election and that May 31. Afterwards, Works Council elections are regularly held from March 1 until May 31, except elections that become necessary for extraordinary reasons, such as the dissolution of the Works Council or material changes in the number of persons employed in the business.

The Works Council election is organised by an election committee of at least three employees that are appointed by the Works Council. In case of initial elections of a Works Council, the committee is elected by the general works assembly (*Betriebsversammlung*). The election committee has a duty to organise the election in an expeditious and timely manner and to count the votes. Members of the election committee are entitled to paid time off in order to perform their duties and are protected against termination of employment.

The members of the Works Council are elected directly by the employees. The election shall take place during working hours, and the employer is not permitted to reduce wages or salaries. Further, the

employer has to bear all costs incurred in connection with the election, excluding any campaign costs.

If substantial provisions regarding the right to vote, the eligibility for election, or the election procedure are violated, the election can be contested in court. If a Works Council was created in an election that is held null and void, all actions of that Works Council are null and void from the date of the court decision.

The size of the Works Council varies depending on the total number of employees or employees entitled to vote. In a business employing from five to 20 employees entitled to vote, the employees vote for a single works representative (*Betriebsobmann*). In businesses employing from 21 to 50 persons entitled to vote, the Works Council consists of three members. In businesses with 51 employees or more, the size of the Works Council increases depending on the number of employees, regardless of their right to vote.

### 3.3 Works Council Members

Works Council members perform their duties without any extra compensation. However, they are entitled to sufficient paid time off to perform their functions, without losing any remuneration they normally would have earned. In businesses with more than 200 regular employees, one or more members of the Works Council must be completely relieved from all work duties while getting paid their normal remuneration.

Each member of the Works Council must be relieved from work, with pay, for the attendance of training courses that are necessary for the proper performance of his or her function. The costs of such courses are borne by the employer. In addition, members of the Works Council are entitled to be relieved from work for a total of three weeks, with pay, in order to attend educational or training seminars that are recognised by the State Labour Ministry as being useful for the Works Council's functions.

Apart from the regular expiration of the Works Council's office, the office of a single Works Council member is terminated if he or she resigns, terminates his or her employment, or is no longer eligible for or is, by court order, excluded from the Works Council.

Members of the Works Council and substitute members enjoy special protection against dismissal. Pursuant to Sec. 15 German Termination Protection Act (*Kündigungsschutzgesetz* or "*KSchG*"), an employer may dismiss a Works Council member or a substitute member only for cause (*wichtiger Grund*), which is generally hard to prove in practice. Additionally, the Works Council must give its prior consent. If it withholds its consent, the employer must request the labour court to overrule the lack of consent. The same procedure applies if the employer intends to transfer a Works Council member to another business.

### 3.4 Management Of Works Councils

Any Works Council has to elect a chairman and a vice chairman. The chairman has the function of representing the Works Council, but must not act without authorisation through a Council resolution. Therefore, an employer cannot rely on the chairman's authority without confirmation that his or her actions or statements are supported by the Council's decision. The chairman, in any case, is authorised to accept notices of the employer on behalf of the Works Council.

All costs incurred by the Works Council in the exercise of its functions are to be borne by the employer, provided that such costs could reasonably be regarded as indispensable at the time they were incurred. These costs include, for example, expenses for travelling, accommodation, interpreter, legal fees, and fees for the services of legal counsel in circumstances where legal advice can be considered necessary. Further, the employer is obliged to provide the Works Council with office space, material, facilities (e.g., notice board), and personnel as required by the Works Council in order to conduct its day-to-day business and to hold meetings and consultations.

### 3.5 Functions And Rights Of Works Councils

#### *General Duties And Tiers Of Participation*

According to Sec. 80 BetrVG, the Works Council has the following general duties:

1. To ensure that the provisions set forth by statutes, regulations (particularly regarding work safety and protection against work accidents), collective bargaining agreements, and works agreements are observed by the employer;
2. To propose to the employer measures that benefit the plant and the workforce;
3. To further the enforcement of equal rights for female and male employees and to promote compatibility of family with employment;
4. To mediate between employees and employer;
5. To promote the integration of handicapped persons, foreign employees, senior persons, and other employees deserving special protection; and
6. To cooperate with youth representatives.

In addition, the BetrVG grants the Works Council a variety of specific participation rights that can generally be distinguished as follows:

1. Rights to information (i.e., the employer has to provide the Works Council with information in a complete and meaningful manner, supported by documentation if so required, and give the Works Council the opportunity to comment on the information it has received);

2. Rights of consultation and co-operation (i.e., the employer is obliged to hear any arguments given by the Works Council and to jointly discuss and develop the topic involved);
3. Veto-rights and rights of consent (i.e., the Works Council has the right to block management decisions until an agreement is reached or a decision by the labour court is taken overruling the veto); and
4. Rights of co-determination (i.e., the employer cannot make or enforce any decision in related matters without the Works Council's consent or a decision of the conciliation board (*Einigungsstelle*)).

With respect to the matters concerned, the rights of participation contained in the BetrVG can be divided into four categories:

1. Social matters (Sec 87 – 89 BetrVG);
2. Operational matters such as organization of workplace, work place, and work environment (Sec. 90 et seq. BetrVG);
3. Personnel matters (Sec. 92 – 105 BetrVG); and
4. Economic and financial matters (Sec. 106 – 113 BetrVG).

### ***Social Matters***

One of the most important areas of the Works Council's co-determination is covered by Sec. 87 BetrVG dealing with social matters. Any measure of the employer in relation to any matter included in the enumerative catalogue of this provision is invalid unless the employer reached an amicable agreement with the Works Council or a decision of the conciliation board is taken. As a general rule, the co-determination rights granted in Sec. 87 BetrVG are limited to collective matters (i.e., that they must affect the employees at large). Measures vis-à-vis one or more individual employees,

however, as a general rule, can be taken without the approval of the Works Council.

Of great practical importance are the Works Council's co-determination rights regarding working hours, wages, and salaries. The employer must reach an agreement with the Works Council on the beginning and end of a workday, breaks, overtime work, variable work hours, shift work, and the introduction of temporary reductions of the regular work hours. However, the co-determination right does not extend to the duration of daily or weekly working hours. The same holds true for the amount of wages and salaries. These material working conditions are subject to either individual employment agreements or collective bargaining agreements. On the other hand, the employer must obtain the consent of the Works Council on collective rules regarding criteria to be applied for determining wages and salaries of all employees, the implementation of systems that classify wages according to performance or time spent (e.g., bonus schemes), the mode of payment, and the method of determining criteria for pension rights.

Another area that, in practice, often gives rise to disputes between employers and their Works Councils is the installation and operation of devices designed to monitor or control the behaviour or the work efficiency of employees. According to the jurisdiction of the Federal Labour Court, the Works Council's co-determination right is triggered if the mere possibility of technical supervision and control exists; it is not necessary for the employer to actually intend to use the device for such a purpose. Therefore, the co-determination right not only includes, *inter alia*, productivity measuring devices or automatic storage of phone calls including private calls, but – particularly – computer-assisted personnel information systems.

In addition to the above-mentioned matters, Sec. 87 BetrVG covers plant regulations and behaviour of employees (e.g., entrance control, time clocks, smoking, etc.), vacation (e.g., general guidelines regarding vacation, vacation schedules, general shutdown of the plant for vacation purposes, etc.), health and safety, social facilities (e.g.,

cafeterias, pension funds, etc.), employer-owned homes, systems for operational suggestions, and promotion of investment by employees.

### ***Operational Matters***

The employer must inform and consult with the Works Council regarding certain operational matters, the proposed measures to be taken, and the impact of those measures on the business and on the workforce. Those operational matters include:

1. Construction of, or alterations and additions to, manufacturing, administration, and other plant facilities;
2. Technical installations;
3. Work processes and work methods; and
4. Positions.

Further, the Works Council can demand measures to alleviate or mitigate hardships arising from changes affecting positions, work processes, or the work environment if such changes contradict proven research about social work systems.

### ***Personnel Matters***

In respect to personnel matters, the BetrVG distinguishes between general and individual matters. General personnel matters trigger the following participation rights:

1. The employer is obliged to fully inform and consult with the Works Council on all matters regarding general personnel planning (e.g., planning of personnel structure, recruiting, development, costs, etc.);

2. The Works Council may demand, as a general rule, that the employer make any job vacancies known in a way that ensures that all employees receive notice thereof;
3. The content and use of questionnaires and appraisals is subject to the prior consent of the Works Council;
4. The employer must seek the Works Council's approval on guidelines concerning the selection of employees to be hired, transferred, regrouped under collective bargaining agreements, or dismissed (in businesses with more than 500 employees, the Works Council also has the right to demand that the employer introduces guidelines regarding qualifications, personnel situation, and social status); and
5. The Works Council has a consultation right concerning vocational training, including the installation and equipping of training facilities, and a co-determination right relating to the implementation of training measures.

In businesses with more than 20 regularly employed persons, the employer must inform the Works Council before hiring, grouping, regrouping, or transferring an employee covered by the BetrVG. The Works Council can refuse its consent on the intended measure with respect to one of the grounds listed in Sec. 99 para 2 BetrVG (e.g., if the measure is illegal or causes disadvantages for other employees that cannot be justified). If the Works Council withholds its consent, the employer may request the labour court to rule the consent in lieu of the Works Council. In the event the employer fails to consult the Works Council, the latter can demand the suspension of the hire or transfer.

Of utmost importance is the Works Council's participation right regarding any dismissal of employees covered by the BetrVG. A notice of termination given without first hearing the Works Council is null and void. In a lawsuit, a valid dismissal can only be based on

grounds for which the employer provided the Works Council with sufficient information.

### ***Economic And Financial Matters***

In businesses with more than 100 permanent employees, the Works Council must establish an economic committee (*Wirtschaftsausschuss*). The economic committee discusses economic matters with management and then reports those consultations to the Works Council. The employer is obliged to provide the economic committee with timely and full information regarding, for instance, the company's economic and financial situation, reorganisation plans, and the shutdown, reduction, or relocation of plants. In particular, management has to inform the economic committee about planned share sales or asset sales. If a company does not meet the conditions for establishing an economic committee, the Works Council itself has the right to be informed regarding an intended share sale or asset sale.

Since operational measures normally have significant impact on the entire or parts of the workforce, the BetrVG ensures that, in businesses with more than 20 employees, the Works Council is involved in the planning process of such actions. If no Works Council exists, rumours about an operational measure planned by the employer quite often give employees a reason to establish a Works Council (although a Works Council elected after the employer has made its decision on an intended operational change does not have consultation rights in regard to that change).

According to Sec. 111 BetrVG, operational changes trigger certain participation rights of the Works Council if they are significantly detrimental to the personnel or to large segments thereof. Such operational changes include:

1. The reduction of operations in, or the closure of the whole or important units of, the establishment;
2. The transfer of the whole or important units of the establishment;

3. The amalgamation with other establishments or the divestiture of establishments;
4. Important changes in the organisation, purpose, or plant of the establishment;
5. Where an entirely new method of work or production is introduced; or
6. Dismissals for compelling business reasons, depending on the number of employees concerned (e.g., the dismissal of six or more employees in a business with 21 to 59 employees).

The actual sale or transfer of a business to a third party does not, in itself, fall under Sec. 111 BetrVG. The seller is only obliged to inform the Works Council about the fact of the intended asset sale. However, if the transfer of business is accompanied by operational changes in the sense of Sec. 111 BetrVG, management must observe additional participation rights of the Works Council. Firstly, the employer must inform the Works Council about the reasons for the intended measure, the timetable for implementation, any applicable alternative measures, and the justification for the measure chosen. According to German labour court decisions, the Works Council must be involved in the planning before the management has made a final decision as to whether or not the operational change should take place or how the change will be implemented. Once all of the required information has been provided to the Works Council, the employer must consult with the Works Council in an attempt to conclude an “equalisation of interest” agreement (*Interessenausgleich*). An equalisation of interest agreement addresses if and how the operational change should be implemented as well as if and how disadvantages for the employees can be moderated. If an agreement cannot be reached, both parties can apply to a conciliation board, which, however, has no power to force an agreement upon the employer. The consequence of not seeking an equalisation of interest agreement or deviating from its content is that the employees

concerned can claim compensation for any hardship caused by the operational change.

The Works Council does, however, have the power to obtain from the employer (through a final and binding decision of the conciliation board) a package of compensation and social benefits designed to alleviate actual or possible hardship to the workforce resulting from the operational change. In practice, negotiations regarding the content of this social plan (*Sozialplan*) take most of the time spent on consultations regarding operational changes and can quite often last for several months. The social plan, inter alia, can consist of commuting allowances, rehabilitation subsidies, incentive payments, transfer of accrued pension rights, payment of the difference between unemployment benefits under the government plan and the regular net income, and – most importantly – severance payments to dismissed personnel (normally one-half to one gross monthly salary per each year of employment).

### 3.6 Agreements Between Works Councils And Management

In relation to those areas of business operations where the BetrVG grants the Works Council rights of participation, the Works Council and employer may, either formally or informally, enter into valid and binding agreements. Formal agreements are called works agreements (*Betriebsvereinbarungen*) and are valid only if they are in writing and signed by both parties. The main difference between informal agreements and formal works agreements is that the latter have immediate legal consequences on the relationships between the employer and all individual employees of the business. This means that they create direct rights and duties on the part of the employer, in relation to the employee, from which the parties can only deviate when in favour of the employee.

If works agreements and collective bargaining agreements deal with the same issue, the provisions set in the latter, as a general rule, have priority. Generally, the provisions of collective bargaining agreements override diverging provisions of works agreements, even

if the latter are more favourable for the employees. Furthermore, the employer is not allowed to enter into agreements with its Works Council regarding issues covered in a collective bargaining agreement, even if the company is not bound by such collective bargaining agreement. If the employer is bound by a collective bargaining agreement, according to a recent decision of the Federal Labour Court, the trade union can stop the employer from implementing a works agreement that is not in compliance with the provisions of the collective bargaining agreement.

If management and the Works Council cannot reach an agreement upon a certain matter, the parties can agree to have the dispute settled by a conciliation board – a body with specific arbitration or mediation functions. In a limited number of matters (e.g., social matters, social plan, etc.), the BetrVG provides for a compulsory conciliation proceeding that, in principle, leads to a final and binding works agreement. The conciliation board consists of an equal number of members appointed by management and the Works Council, as well as an independent chairman who has the decisive vote. In practice, most of the chairmen of conciliation boards are labour judges. In cases where conciliation proceedings are compulsory, the final decision of the conciliation board is subject to court appeal only with respect to questions regarding whether or not the conciliation board violated general principles of law and whether or not it exceeded its discretion granted in the BetrVG. All costs of the conciliation board, including the Works Council's costs and compensation for the members and the chairman of the committee, have to be borne by the employer.

### 3.7 Enforcement Issues

If an employer fails to seek its Works Council's prior consent regarding a social matter covered by Sec. 87 BetrVG, the Works Council is considered to have a claim to compel the employer from taking the intended measure. With respect to operational measures according to Sec. 111 BetrVG, it is disputed among German labour courts whether the Works Council can apply for a temporary

injunction in order to prevent the employer from going ahead with the intended measure. As a matter of fact, the enforcement of the Works Council's participation rights regarding operational changes depends on the labour court district in which the business is located.

In case of major infringements of its provisions, the BetrVG provides for criminal sanctions and administrative fines of up to EUR 10,000.

#### 4. The Interaction Between A Works Council And A Trade Union

The systems of employee representation through trade unions and, respectively, Works Councils, are autonomous under German law. Therefore, the Works Council generally has to perform its duties independently from trade unions, but may request union assistance. In particular, trade union officials can represent the Works Council in labour court proceedings, provided that at least one member of the Works Council belongs to the union. Upon request of 25% of the Works Council's members, a union official is allowed to attend Works Council meetings.

Beside this formal interaction, a significant number of Works Council's members are also union officials or union members at the same time. Hence, union politics quite often indirectly influence the cooperation between the Works Council and the employer.

Also, in case of operational changes, an employer may have to negotiate with both the Works Council and the trade union; in addition to social plan negotiation with the Works Council under Sec. 111 et al. BetrVG, the employer may be obliged to deal with similar claims of the trade union, according to a recent decision of the Federal Labour Court. The Federal Labour Court ruled that claims regarding severance payments, extension of notice periods as well as payments for professional training due to operational changes can be the content of a collective bargaining agreement. Thus, the negotiation of a social plan is not the exclusive right of the Works Council. Therefore, a strike regarding these matters can be admissible irrespective of the

costs of the measures. The court furthermore underlined that negotiations with the Works Council relating to the same matters do not suspend union rights.

## 5. Trade Union And Works Council Employee Protection Rights

As a consequence of the constitutional freedom of association (Art. 9 para 3 of the German Constitution), an employer must not in any way discriminate against an employee with respect to his or her union membership. Further, during the hiring process, an employer is not allowed to ask the applicant whether he or she is a union member. If the employer does ask that question, the applicant is technically allowed to lie.

The BetrVG ensures that no member of the Works Council shall suffer any disadvantage from his or her office. Any discrimination in pay and work in relation to comparable employees during the period of office and for a period of one year following the expiration of such term of office (two years for members who have been totally relieved from their work duties) is prohibited. Furthermore, Works Council's members are protected against ordinary dismissals with notice during the period of their office and for one year after its expiration. In case of a closure of the entire or a part of the business, the employment of Works Council's members generally can only be terminated effective as of the time of the shutdown.

## 6. Other Types Of Employee Representation

### *Employee Representation Under The BetrVG*

All employees working in a specific business are members of the "general works assembly" (*Betriebsversammlung*), which must meet every three months. The general works assembly is the mechanism by which the Works Council regularly or on special occasions reports to the employees on its activities. Once a year, the employer is obliged to inform the general works assembly about the social and personnel

status of the business, as well as its financial condition and development.

The BetrVG further provides that all Works Councils existing in a particular enterprise must establish a Joint Works Council (*Gesamtbetriebsrat*), which has the exclusive authority in those matters that concern the enterprise in its entirety, and that cannot be handled by the local Works Councils. Further, a Group Works Council (*Konzernbetriebsrat*), composed of members of the various Joint Works Councils, may be established. The Group Works Council deals with matters relating to a whole group of companies.

Additionally, employees under the age of 18 are represented by the Works Council as well as by a committee of youth representatives (*Jugend- und Auszubildendenvertretung*), which is responsible for ensuring that the interests of juvenile employees are properly protected. The committee of youth representatives does not, however, have any veto or co-determination rights.

### ***Corporate Employee Representation***

Corporate employee representation refers to employees' co-determination on the supervisory board (*Aufsichtsrat*). The main function of the supervisory board is to appoint and dismiss the managing directors of the company, including the conclusion and termination of their service contracts. In this respect, the supervisory board also supervises their performance. The scope of co-determination of the supervisory board depends on the number of employees in the company. In companies with up to 500 employees, there is no mandatory co-determination in the supervisory board. In companies with more than 500 and up to 2000 employees, there must be a supervisory board established under the provisions of the One-Third Participation Act (*Drittelbeteiligungsgesetz*, or "DrittelbG"). Accordingly, one-third of the members of the supervisory board must consist of representatives of the employees. This applies in particular to stock corporations (*Aktiengesellschaft*, or "AG"), limited liability companies (*Gesellschaft mit beschränkter Haftung*, or "GmbH"),

cooperative society (*Genossenschaft*), and partnerships limited by shares (*Kommanditgesellschaft auf Aktien*, or “KGaA”). In a stock corporation, a limited liability company, cooperative society, or a partnership limited by shares employing more than 2000 employees, the supervisory board must consist of equal numbers of employees and shareholders under the Codetermination Act (*Mitbestimmungsgesetz*, or “MitbestG”).



# Hong Kong

## 1. Introduction

Despite the fact that Hong Kong residents have the right to be or to become a member of a registered trade union, Hong Kong has a relatively low level of employee participation in trade unions and related activities in comparison to many other modern industrialised countries. Trade union activity is more prevalent in certain industries such as the aviation industry. Hong Kong enjoys an effective dispute resolution system co-ordinated by the Labour Relations Division of the Labour Department.

Nevertheless, a regulation system exists to administer trade unions and their operation. The following is a general summary of laws in Hong Kong regarding trade unions and their activities.

## 2. Applicable Legislation

Registration, membership, and operation of trade unions are regulated by the Trade Unions Ordinance (**TUO**) and the Trade Unions Registration Regulations (**TURR**). Further provisions relating to trade unions and their activities can be found under the Employment Ordinance (**EO**) and the Labour Relations Ordinance (**LRO**).

## 3. Establishment Requirements

Under the TUO, a trade union is defined as “any combination the principal objects of which are under its constitution the regulating of relations between employees and employers, or between employees and employees, or between employers and employers, whether such combination would or would not, if the TUO had not been enacted, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.”

In order to be legally established in Hong Kong, every trade union must be registered in accordance with the statutory provisions of the

TUO. It is an offence for any person to act as an officer or take part in the management or administration of an unregistered trade union.

The Registrar of Trade Unions is empowered to refuse to register or cancel a registration. The Registrar also has the power to appoint persons for membership or for the position as an officer of a trade union. Furthermore, the Registrar may require persons to cease to hold office or cease to be a member of a union if the appointment breaches any rules of the particular trade union or otherwise contravenes section 17 of the TUO. Section 17 of the TUO provides the following:

- To be a member or an officer of a registered trade union, a person must be ordinarily resident in Hong Kong and be engaged or employed in a trade, industry, or occupation with which the trade union is directly concerned.
- Any person who has lawfully been a member of a registered trade union may, upon his or her retirement on account of age or ill-health from the trade, industry, or occupation in which he or she was engaged or employed and by virtue of which he or she was a member of the trade union, remain a member thereof, but is not permitted to be a voting member.
- Any person convicted of fraud, dishonesty, extortion, or membership of a triad society cannot be an officer of a registered trade union within a period of five years from the date of the conviction or discharge from prison, whichever is later.
- Any person under the age of 16 may be a member of a registered trade union but cannot be a voting member or a member of the executive of a registered trade union.
- Any person between the ages of 16 and 18 (including the age of 18) may be a member of a registered trade union but may not be a member of the executive of a registered trade union.

- Any offence in contravention of the above is punishable by a fine of HK\$1,000 and six months' imprisonment.

#### 4. Registration Requirements

Every trade union, trade union federation, and amalgamation must be registered at the Registry of Trade Unions. A trade union federation is a trade union that is wholly an association, or combination, of other trade unions. An amalgamation takes place where two or more trade unions wish to be combined together to form a single trade union.

Schedule 2 of the TUO provides that the rules of every trade union shall:

- (a) Contain a statement of the name of the trade union and the address of its registered office;
- (b) Declare the whole of the objects for which the trade union is established;
- (c) Subject to certain provisions of the TUO, declare the conditions under which persons may enjoy:
  - (i) Voting membership; and
  - (ii) Non-voting membership;
- (d)
  - (i) Provide for the keeping of a register of members of the trade union; and
  - (ii) Make provision for the maintenance of discipline within the trade union, including provision for appeal to the voting members at a general meeting of the trade union against any decision of the executive cancelling the membership of any member or dismissing any officer;

- (e) Specify the method of convening and conducting annual general meetings and extraordinary general meetings, and the matters to be presented to the members of the trade union at such meetings, including in the case of annual general meetings the presentation of audited accounts;
- (f) Provide for the appointment and replacement of officers of the trade union;
- (g) Provide that every voting member of the trade union shall have a reasonable opportunity of voting;
- (h) Provide that all decisions in respect of the following matters be taken by decision of the voting members of the trade union by means of secret ballot-
  - (i) The appointment of members of the executive;
  - (ii) Change of name of the trade union;
  - (iii) Amalgamation of the trade union with any other trade union;
  - (iiia) Establishing an electoral fund;
  - (iiib) The payment of any expenses of a kind mentioned in section 33A(1);
  - (iiic) Being or becoming a member of an organization which is established in a foreign country; and
  - (iv) Federation of the trade union with any other trade union or with a trade union federation;
- (i) Specify the amount and manner of payment of subscriptions, fees, and contributions payable by members of the trade union;

- (j) (i) Subject to certain provisions of the TUO, specify the purposes to which the funds of the trade union may be applied;
- (ii) Provide for the creation, administration, protection, disbursement, and disposal of the welfare fund (if any) and declare the conditions under which any member, or the family of any member, of the trade union may become entitled to any benefit assured thereby;
- (iii) Provide for the administration, protection, disbursement, and disposal of the electoral fund, if one is established, and declare the conditions under which money in the fund may be spent.
- (k) Provide for the custody and investment of the funds (if any) of the trade union, the designation of the officer or officers responsible therefore the funds, the keeping of accounts, and the annual, or more frequent periodic, auditing thereof;
- (l) Specify the commencement and termination of the financial year of the trade union;
- (m) Ensure reasonable opportunity for the inspection by members of the trade union of the rules of the trade union, its account books, and the registers of the names of the members thereof;
- (n) Provide for the making, altering, amending, and rescinding of the rules of the trade union;
- (o) Provide for the method of dissolution of the trade union and the manner in which the funds thereof shall be disposed of upon dissolution; and
- (p) Provide for the safe custody of the common seal of the trade union.

An application for the registration of a trade union shall be made to the Registrar in the prescribed form within 30 days of the establishment of the union. Every such application must be signed by not less than seven voting members of the trade union (including officers of the union). Upon receipt of any such application in the prescribed form, the Registrar will issue to the trade union a certificate in the prescribed form acknowledging receipt of such application.

An application for the registration of a trade union federation must be made to the Registrar in the prescribed form. A trade union federation can only be registered when all of the separate trade unions, which make up the federation, are registered and any addition to the membership must be approved by the Registrar. An application for registration shall be signed by the chairman and one other officer of each of the registered trade unions and should be accompanied by a declaration from each of such trade unions, signed by seven voting members, that the application is made with the consent of the voting members.

Where two or more registered trade unions wish to amalgamate to form a trade union federation, an application must be made to the Registrar for his consent. The application must be made in the form prescribed in the TUC and must be signed by the chairman and one other officer of each trade union. A new set of the proposed rules (three copies) to be formed by the amalgamation must also be included.

## 5. Consultation Requirements

There are no statutory consultation requirements/obligations on employers or employees in Hong Kong unless specifically required in an agreement with the relevant trade union.

## 6. Union Membership/Closed-shop arrangements

*Rights Under The EO*

Under section 21B(1) of the EO, employees and job applicants have the right to trade union membership and participation. The right of employees to trade union membership is also acknowledged in the Code of Labour Relations Practice published by the Labour Department (which does not have legal effect). In particular, under the EO an employee has the right to:

- Be or become a member or officer of a trade union registered under the TUO;
- Take part in the activities of the union at any appropriate time once (s)he has become a member; and
- Associate with other persons for the purpose of forming or applying for the registration of a trade union in accordance with the provisions of the TUO.

Please note, however, that employees do not have the right to be represented by their trade union members.

### *Rights Under The TUO*

Once a member of a registered trade union, an employee has the following rights:

- Limited immunity from civil, criminal, and tortious actions that are done in contemplation or furtherance of a trade dispute. “Trade dispute” is defined in the TUO as “any dispute or difference between employees and employers, or between employees and employees, connected with the employment or non-employment, or the terms of employment, or with the conditions of or affecting employment, of any person.” Accordingly, such immunity does not extend to independent contractors even if they are members of a trade union.

- Inspection of union documents. Union members have the right to inspect the account books and membership register of the union. They may also make a written application for free inspection of any documents required by law to be registered (e.g., annual statements).
- Right to take legal action. Union members may take legal action against any officer of the union who wilfully withholds or misapplies union funds or property.
- Appeal to the Court of First Instance. Union members may appeal against the decisions of the Registrar, for example, where the Registrar refuses to register a union or where he cancels a registration.

In relation to closed-shop arrangements, there is no statutory requirement in Hong Kong that an individual must have union membership as a requirement of employment.

## 7. Employment Protection

The EO provides protection from discrimination for employees who are part of a union.

The EO provides that no offer of employment may be made to a job applicant conditional upon the candidate either: (i) not becoming a member of a trade union; (ii) giving up any existing membership of a trade union; or (iii) not associating with persons for the purpose of forming a trade union. Contravention of this section is punishable by a fine of HK\$100,000.

It is an offence for an employer or any person acting on behalf of an employer to:

- (a) Prevent or deter, or do any act calculated to prevent or deter, an employee from exercising any of the rights conferred on him by section 21B(1); or

- (b) Terminate the contract of employment, penalize, or otherwise discriminate against an employee by reason of his exercising any such right.

Such an offence is punishable by a fine of HK\$100,000. There has been case law where employees have relied on this provision in the context of termination.

An employer is required by section 21B(1) of the EO to allow its employees at any ‘appropriate time’ to participate in the trade union activities. What constitutes appropriate time is determined by reference to any time that is outside working hours or, within working hours, for which the employee has been given permission to engage in union activities. Employees who engage in industrial action such as picketing or work-to-rule *within working hours* therefore may not be protected in all circumstances.

The EO also affords protection against summary dismissal. Under section 9(2) of the EO, the fact that an employee takes part in a strike does not entitle the employer to summarily dismiss him.

## 8. Collective Bargaining

Collective bargaining or collective bargaining agreements are not common in Hong Kong.

There is no statutory recognition of collective bargaining agreements. Moreover, case law in Hong Kong indicates the unlikelihood of the legal enforceability of collective bargaining agreements in the absence of express terms to that effect. The Hong Kong courts have considered the enforceability of collective bargaining agreements and in these cases have found the agreements to be unenforceable. The courts indicated that the agreements contained a mixture of language of policy and aspiration together with the language of obligation indicating that the parties did not intend to give it legal effect.

Employers are advised to be careful when negotiating collective bargaining agreements with unions and/or staff associations, so that they do not confer benefits in exchange for undertakings from the union which could prove to be unenforceable if tested.

Even if a trade union enters into an agreement with an employer, the employee will only be able to rely on the terms of that agreement if it forms part of the employee's contract of employment with the employer. The usual practice in Hong Kong, if collective bargaining takes place, is for unions and staff associations to negotiate changes to conditions of service that are then either incorporated into employment contracts or the employee handbook. Collective bargaining outcomes (as distinct from agreements) are therefore expressly enforced through individual employment contracts rather than by means of an agreement between union and employer.

## 9. Dissolution

Under Schedule 2 of the TUO, the rules of a trade union must provide for the method of dissolution of the trade union and the manner in which the funds will be disposed of upon dissolution. A union may then be dissolved in accordance with its rules.

Pursuant to section 32 of the TUO, when a trade union is dissolved, notice of the dissolution shall be sent to the Registrar by the trade union 14 days after the dissolution. Such notice should be signed by the secretary of the trade union and seven persons who were voting members at the date of the dissolution. Upon registration of such dissolution, the trade union will cease to be a body corporate.

## 10. Other provisions

### *Picketing*

If a trade dispute is not amicably resolved, the TUO sanctions the use of peaceful picketing at or near the place of work by persons on their own behalf, on behalf of a trade union, or on behalf of an individual employer. Peaceful picketing is legal for the purpose of peacefully

obtaining or communicating information or of peacefully persuading other persons to either work or abstain from working. However, any threat or intimidation in respect of the picketing is prohibited, as is any action that causes a breach of peace. Any person who contravenes this provision of the TUO is guilty of an offence and liable to a fine of HK\$1,000 and to imprisonment for six months.

### *Trade disputes*

The LRO governs trade disputes in the private sector. The LRO provides for various methods to resolve trade disputes such as through conciliation, mediation, and arbitration.

Where a trade dispute exists, the Commissioner for Labour (the “Commissioner”) may:

1. Inquire into the causes and circumstances of the trade dispute;
2. Take such steps as to him may seem expedient for the purpose of assisting the parties to reach a settlement of the trade dispute; and
3. Authorise a conciliation officer to initiate or undertake conciliation.

Where a conciliation officer has attempted conciliation but no settlement of the trade dispute has been reached, the Commissioner may authorise a special conciliation officer to initiate or undertake special conciliation.

If the dispute still fails to be settled, the Chief Executive of Hong Kong may either: (i) with the consent of the parties, refer the dispute to arbitration; (ii) refer the dispute to a board of inquiry; or (iii) take any other action as warranted.

Where a trade dispute exists, the Commissioner may (whether or not conciliation or special conciliation has been attempted) refer the dispute to mediation.

According to Part V of the LRO, a cooling off order may be made for a period of up to 60 days and is designed to require parties to an individual dispute to discontinue or defer industrial action. This part of the LRO is, however, not in operation and is not likely to come into operation anytime soon.

## Trade Unions in Hong Kong at a Glance

Applicable Legislation	Establishment Requirements	Registration Requirements	Consultation Requirements	Union Membership/ Closed Shop	Employment Protection	Collective Bargaining, Agreements and Action	Dissolution	Grievance Procedure/ Dispute Resolution
Trade Unions Ordinance  Trade Unions Registration Regulations  Employment Ordinance  Labour Relations Ordinance	Registration  Offence to be a part of an unregistered trade union.	<u>Trade Union</u> -Prescribed form -Within 30 days of establishment -Signed by at least seven voting members  <u>Trade Union Federation</u> - Prescribed form - Application signed by chairman and one other officer of each union - Accompanied by declaration	N/A	No mandatory requirement to become a union member  <u>Employees have the right to:</u> - become a member - take part in union activities - associate with persons for the purpose of forming a union  <u>Members' rights include:</u> - immunity	No discrimination against an employee in relation to a trade union or its activities  Employers required to allow employees at any appropriate time to participate in union activities  Protection against summary dismissal in certain	Not common in Hong Kong  No statutory recognition of collective bargaining agreements  Usual practice is for trade unions and staff associations to negotiate changes and incorporate them into individual contracts or handbook	Union rules must provide for method of dissolution  Notice to be sent to the Registrar 14 days after dissolution	N/A

The Global Employer: Focus on Trade Unions & Works Councils

Applicable Legislation	Establishment Requirements	Registration Requirements	Consultation Requirements	Union Membership/ Closed Shop	Employment Protection	Collective Bargaining, Agreements and Action	Dissolution	Grievance Procedure/ Dispute Resolution
		<u>Amalgamation</u> - Prescribed form - Application signed by chairman and one other officer of each union - New set of prepared rules to be included		from certain lawsuits - inspection of union documents - legal action - appeal	circumstances			

# Hungary

## 1. Introduction

The Hungarian Constitution grants to each person the right to establish and/or be a member of an organisation in order to exercise his or her economic and social rights. Consistent with this constitutional provision, Act XXII of 1992 on the Labour Code as amended (the “Labour Code”) provides detailed regulations on labour or trade unions and Works Councils (also referred to as factory councils). In addition to the Labour Code, other legislation, such as Act VII of 1989 on Strikes, as amended, and Act II of 1989 on the Freedom of Association as amended (“Association Act”), also provide regulation on unions and Works Councils.

## 2. Trade Unions

### 2.1 The General Role Of Trade Unions

The Labour Code defines a trade union as an employee organisation whose primary function is the promotion and protection of employees’ interests as they relate to the employment relationship.

According to the Association Act, at least 10 private individuals may establish a trade union by executing its statutes and electing the union’s managing and representative bodies. The trade union is established on the date on which it is registered with the competent court of law.

### 2.2 The Scope Of Trade Union Rights In Businesses

The Labour Code permits employees to establish trade unions within the organisation of the employer. A trade union may operate local organisations inside a company and may involve its members in such operation.

A trade union may inform its members of their rights and obligations concerning their material, social, cultural, living, and working

conditions and represent them against the employer and/or before state authorities in matters concerning labour relations and employment.

A trade union may represent its members, on the basis of a power of attorney, before a court of law or any other authority or organisation, on matters concerning their living and working conditions.

The employer may not refuse to allow a non-employee representative of a trade union to enter the employer's premises if at least one member of the trade union (that the non-employee represents) is employed by the employer. The trade union must inform the employer in advance in writing of any intention to enter the employer's premises. When on the employer's premises, the trade union representative must comply with all the regulations of the employer's order of business.

The employer must request the opinion of the trade union on its contemplated measures affecting a larger group of employees, in particular plans for reorganization, transformation of the employer, conversion of an organizational unit into an independent organization, and modernization. The trade union must deliver its opinion in connection with the employer's planned actions within a period of 15 days. Failure to do so is to be interpreted as granting consent to such action.

In the event of a legal succession, the legal predecessor and the legal successor of the employer are required to inform the trade union within 15 days prior to the legal succession, of the date or contemplated date of legal succession and of the reason for, and consequences of, the legal succession, and to initiate consultation on the planned action and arrangements.

Furthermore, the trade union may request from the employer information on all issues concerning the employees' employment-related economic and social welfare interests. The employer may not refuse to provide this information or refuse to provide a justification for its actions when requested by the trade union. The trade union

also may provide the employer with the union's position concerning the employer's actions or decisions and, further, to initiate negotiations in connection with those actions or decisions. If there is no Works Council operating within the company, the employer is obliged to inform the trade union of those matters of which the Works Councils are to be informed.

The trade union may also examine an employer's compliance with regulations relating to working conditions. The trade union may draw the attention of the relevant authorities to any mistakes or omissions observed in the course of the union's inspection, and if the authorities do not take the necessary measures in a timely fashion, the union may institute legal proceedings against the employer. In such a case, the authority conducting the proceedings must inform the trade union of the result of the proceedings.

The person acting on behalf of the trade union is required to keep confidential all the information that has been conveyed to him or her as confidential by the employer and may use it strictly for purposes determined in the Labour Code. The person acting on behalf of the trade union may disclose the information obtained in connection with his or her activity only to the extent by which the employer's lawful economic interests and the employees' personal rights are not jeopardized. This obligation applies to the above-specified person for an unlimited period of time.

The trade union may also object to an employer's unlawful action or omission that directly affects the employees or the organisations representing their interests. An objection must be delivered to the managing director of the employer within five days of, and no more than one month after, the date on which the trade union learned of the action or omission. If the employer disagrees with the objection, conciliation must be commenced within three business days. If the conciliation is unsuccessful within seven days after the objection has been made, then, within five days of the failure of the conciliation, the trade union may commence proceedings before a court of law. The court must decide on the legal dispute within 15 days.

A union's objection freezes the implementation of the action by the employer until the completion of the conciliation procedure or until the dispute has been decided by the court.

However, the trade union may not raise an objection in any matter in respect of which an employee may initiate a court action.

Additionally, an employer must ensure that its employees' trade union has the opportunity to present public information and announcements and data related to the trade union's activities in a manner that falls within the procedures of the employer or in another appropriate way. By agreement with the employer, the trade union may use the employer's premises after or during working hours for the purpose of its activities of interest representation.

An employer may not demand from any employee a statement concerning his or her trade union affiliation. Additionally, an employment relationship, or its continuation, may not be made dependent on: (i) whether or not the employee is a member of a trade union; (ii) whether the employee terminates a previous trade union membership; or (iii) whether the employee joins a trade union designated by the employer. It is also unlawful to terminate an employment relationship and/or to discriminate against an employee in any way due to his or her trade union affiliation or activities or to make any work-related entitlement or benefits dependent on affiliation or non-affiliation with a trade union.

The Labour Code requires an employer to exempt trade union officials from work for a certain period of time, according to a formula established in the Labour Code, which depends primarily on the number of employees who are members of the trade union. The employer must be informed in advance if a trade union official intends to be absent from work due to trade union related activities. Trade union officials are also entitled to receive an "absence fee" for the duration of such absence, which includes his or her base wages and

other ordinary supplementary payments to which that official is entitled.

The employer must also allow one day of extraordinary paid leave annually for employees who are members of a trade union for the purpose of union-organised training.

The Labour Code contains special rules protecting trade union officials. For example, the prior consent of a trade union body, which is above the relevant trade union official in the trade union's hierarchy, is required for the employer for the temporary assignment, the secondment for at least 15 days, the transfer to another workplace, the placement to another employer of a trade union official, and the termination of the employment relationship with an official by ordinary notice. The Labour Code requires the trade union to comment in writing on the above within eight days of the request for such comment.

Furthermore, the opinion of the appropriate trade union body must be requested before termination of a trade union official by extraordinary notice. The Labour Code requires the trade union to comment in writing concerning the above within three days of receipt of the employer's notice on its intention to terminate the employment of such an official with extraordinary notice.

The appropriate trade union body must also be notified in advance concerning the application of legal consequences for the serious violation by an official of any obligation originating from the employment relationship. The appropriate trade union body must also be notified in advance regarding the transfer of an official (in a position subject to transfer) to another workplace.

A trade union official is entitled to the above-described protection for the duration, and for a period of one year following the expiration, of his or her term, provided that the individual was a union official for at least six months.

### 2.3 The Collective Agreement

A collective (bargaining) agreement between the employer(s) or an organisation that represents the interests of the employer(s) and the trade union(s) regulates the rights and duties arising from the employment relationship, the manner of exercising and fulfilling the same, the procedural rules related thereto, and the relationship between the parties thereto. The trade union whose candidates received at least 50% of the votes in the Works Council election is deemed as the representative for such negotiations. If more than one Works Council is elected within the company, the results of each election are combined to determine representation rights. A trade union whose membership includes at least two-thirds of the employees of an employer in the same employment group is also deemed as a representative. If a trade union, qualifying as a representative union, requests the employer to enter into negotiations with that trade union concerning the collective agreement, the employer may not refuse to commence such negotiations.

Each year the employer must propose to negotiate the regulations on the remuneration for work set out in the collective agreement with the representative trade union.

Unless otherwise agreed by the parties, the collective agreement may be terminated by either party upon three months' notice, but it may not be terminated within six months after the execution thereof.

The parties of the collective agreement must jointly send it to the minister in charge of employment and labour for registration within 30 days following the date of conclusion. Furthermore, the parties are also required to provide the related data and information concerning the respective collective agreement, and they are also required to report to the minister any changes in the collective agreement (e.g., amendments, termination, etc.).

### 3. Works Councils

#### 3.1 Election Of A Works Council

The Labour Code provides that a Works Council must be elected at all companies or at all of the employer's independent premises or sites where the number of employees exceeds 50.

If the number of employees (in total or at any independent division of the company) is less than 51 but exceeds 15, no Works Council is required to be elected, but a workers' representative must be elected by the employees. The Labour Code's provisions regulating the rights and obligations of a Works Council apply equally to the workers' representative.

Works Council's members are elected for a three-year term. Depending on the number of employees at the time of the elections of the Works Council, the Works Council must be comprised of at least the following number of members:

<b>Number Of Employees</b>	<b>Minimum Number Of Works Council's Members Required</b>
Not Exceeding 100	3
Not Exceeding 300	5
Not Exceeding 500	7
Not Exceeding 1,000	9
Not Exceeding 2,000	11
Above 2,000	13

If the number of Works Council's members does not meet the above requirements over a six-month period, new Works Council's members must be elected to ensure that the above minimum requirements for Works Council's membership are met.

The Labour Code contains detailed provisions regarding the election of the Works Council's members and of the workers' representative.

An employee is eligible to be elected as a Works Council member if he or she is able to act in this capacity and has been employed by the employer for at least six months (not required for Works Councils in newly established companies).

An employee may *not* be elected as a Works Council's member if the worker:

1. Exercises the employer's rights with respect to other employees (e.g., the right to enter into and to terminate employment contracts);
2. Is a close relative (i.e., spouses, next of kin, spouse's next of kin, adopted persons, stepchildren, foster children, adoptive parents, stepparents, foster parents, brothers and sisters, and common-law spouses) of the employer or the executive officer of the employer; or
3. Is a member of the committee organising the Works Council's elections.

### 3.2 Financial And Other Benefits For The Works Council

An employer must ensure the Works Council has the opportunity to publish information and announcements related to its activities in a manner customary at the employer's facilities or in any other suitable manner.

A Works Council member is entitled to free time equal to 10% of his or her monthly base working hours, and the chairman of the Works Council is entitled to free time equal to 15% of his or her monthly base working hours, in order to perform Works Council related activities. The employer must also pay the Works Council's member

an “absence fee” in respect of this time, which includes the Council member’s base wage and other ordinary supplementary payments.

The employer must also pay the justified and necessary costs of the election and operation of the Works Council. The amount of such costs is jointly determined by the employer and the Works Council. In the case of a dispute in respect of such costs, a conciliation may be initiated by either party in writing, pursuant to the relevant Labour Code provisions.

Where the employer has more than 1,000 employees, the employer must remunerate the Works Council’s chairman. The amount of the remuneration is determined jointly by the Works Council and the employer. If the number of employees does not exceed 1,000, the employer may only pay remuneration to the Works Council’s chairman with the consent of the Works Council.

### 3.3 Functions And Rights Of A Works Council

#### ***The Right Of Joint Decision***

The Works Council has the right of joint decision with the employer in matters relating to the utilisation of financial assets designated for welfare purposes (e.g., certain social contributions) as specified in the collective agreement (if any) and in respect of the utilisation of institutions and real properties of this nature.

#### ***The Right To Express Opinions***

The employer must seek the opinion of the Works Council prior to making decisions regarding:

1. Measures affecting a larger group of employees, particularly those involving plans for reorganisation, transformation of the employer, conversion of an organisational unit into an independent organisation, privatisation, and modernisation;

2. Plans to establish a system of staff records, the range of data to be put on file, the contents of a data sheet to be filled out by the employees, and a staff policy plan;
3. Plans on employee training, ideas for utilising subsidies aimed at promoting employment, and relating to early retirement;
4. Plans for actions pertaining to the occupational rehabilitation of persons who suffered some degree of health impairment or whose capacity to work has changed;
5. Plans for measures relating to the retraining of workers with a changed working ability;
6. The plan for scheduling annual leave;
7. The introduction of new work organisational methods and performance requirements;
8. Drafts of internal regulations affecting the employees' substantive interests; and/or
9. Tenders announced by the employer accompanied by a financial or honorary reward.

The Works Council must deliver its opinion to the employer concerning the employer's planned measures listed above, within 15 days after the chairman of the Works Council, or another Council member designated in the Works Council's bylaws, receives written notification of the employer's contemplated decision or action. If the Works Council fails to make any comment, it is deemed to have consented to the proposed measure.

Although the Works Council's opinion is not binding on the employer, a decision on any of these items made by the employer without having sought the Works Council opinion in advance will be invalid.

### ***The Right To Information***

The employer must inform the Works Council about:

1. Basic issues affecting the employer's business situation, at least once every six months;
2. Any plans for a significant modification to the employer's activities or contemplated investments;
3. Changes in wages and earnings, the cash flow related to the payment of wages, the characteristics of the employment and the working conditions, and the utilisation of working hours, at least once every six months; and
4. Number and position of employees working from home, at least once every six months.

The Works Council must deliver its opinion to the employer, concerning the employer's planned measures listed above, within 15 days after the chairman of the Works Council, or another council member designated in the Works Council's bylaws, receives written notification of the employer's contemplated decision or action. If the Works Council fails to make any comment, it is deemed to have consented to the proposed measure.

Any measure taken by an employer in violation of the provisions is invalid. The Works Council may request a court to establish such invalidity. The court must decide on the dispute within 15 days in non-contentious proceedings.

The Works Council may inspect the employer's records in the process of exercising its right of joint decision and expression of opinion.

Additionally, the Works Council may request from the employer information on all issues related to the employees' economic and

social interests in connection with their employment. The employer may not refuse to provide such information. The Works Council, or one of its members, may disclose information and data obtained in the course of operations only if the disclosure does not endanger the employer's justified business interests or infringe the employees' personal rights.

Furthermore, the Works Council must be impartial in relation to a strike organised at the employer. The Works Council may not organise, support, or prevent a strike. The membership of a Works Council's member participating in a strike is suspended for the duration of the strike.

The provisions on the protection of trade union officials also apply for the protection of Works Council's members, where the rights of the trade union body are exercised by a Works Council. In case of a workers' representative, the rights of the trade union body are exercised by the community of employees, if the employee representative is not a trade union official.

#### 4. European Works Council

The Act XXI of 2003 on the establishment of European Works Councils (EWC) and the procedures of consultation and information of employees (the "Act") providing for the establishment and operation of European Works Councils has entered into force on the date of accession to the European Union.

A EWC may be established in a Community-level company or in a Community-level company group: (i) by the initiative of the Central Management of such company or such company group, or (ii) by the request of the employees (or by the representative bodies of the employees). If the EWC's establishment is initiated by the employees, a written request of at least 100 employees employed at least at two different business associations in two different Member States is required.

***Community-level company group*** means a company group which employs a total of at least 1,000 employees in the Member states, has at least two group companies in at least two different Member States and one of the group companies employs at least 150 employees in a Member State and the other group company also employs at least 150 employees in another Member State.

### ***Special negotiating body establishment procedure***

The Central Management is responsible for creating the financial means and other conditions necessary for establishing a EWC and also to negotiate with the employees' representatives regarding the establishment and operation of the EWC. Given this, as a first step, a European-level special negotiating body ("**SNB**") must be established which must include the employees' representatives. The SNB may consist of at least 3 members, with a maximum of 27 members. The SNB must include at least one member from each of the Member States where the Community-level company has a local entity or a business premises. Meeting these requirements, the SNB may be supplemented: (i) with one additional member from the Member State where at least 25% of the employees are employed, (ii) with two additional members from the Member State where at least 50% of the employees are employed, and (iii) with three additional members from the Member State where at least 25% of the employees are employed.

The European Works Council serves to ensure that employees possess the right to receive information and to be consulted by the employer in a formalized manner regarding the status of the company and the employees. The European Works Council has the right to request and receive general information from the company at least once a year and to be informed of certain particular circumstances affecting the employees.



## Indonesia

### 1. Introduction

The right to organize and bargain collectively has been recognized in Indonesia since the 1950s. Aside from having ratified various Conventions of the International Labor Organization (“**ILO**”), the Indonesian government has passed Law No. 21 of 2000 on Labor Unions (“**Labor Union Law**”), which regulates the types, establishment process, as well as rights and obligations of a labor union. In addition, Law No. 13 of 2003 on Labor (“**Labor Law**”) and various decrees and regulations of the Minister of Manpower and Transmigration also address labor unions and their activities, among other things:

1. Minister of Manpower and Transmigration Decree No. Kep-16/Men/2001 on the Procedure for Registration of Labor Union (“**Decree 16**”);
2. Minister of Manpower and Transmigration Decree No. Kep-48/Men/IV/2004 on the Procedure for Drafting and Publication of Company Regulation and Drafting and Registration of Collective Labor Agreement as amended by Minister of Manpower and Transmigration Regulation No. Per-8/Men/III/2006 (“**Decree 48**”);
3. Minister of Manpower and Transmigration Decree no. Kep-187/Men/IX/2004 on the Contributions for Membership to labor Union (“**Decree 187**”); and
4. Minister of Manpower and Transmigration Regulation No. Per-06/Men/IV/2005 on the Guidelines for Verification of Labor Union Membership (“**Decree 6**”).

## 2. Trade Unions

### 2.1 Definition

Article 4 of the Labor Union Law defines a labor union as an organization of workers with the purpose of protecting, defending, and advancing the rights and interests of its members and their families, and increasing their welfare. The employees of a single company or employees from different companies can establish a union. Under Article 6.5 of the Labor Union Law, 5 or more unions can establish a union federation, which works for the benefit of its member unions. Article 7.3 of the Labor Union Law provides that 3 or more union federations can unite and form a confederation to further advance union interests. Article 10 of the Labor Union Law permits labor unions, union federations, or union confederations to be formed based on the business sectors, the type of job, or other forms in accordance with the interest of the workers.

### 2.2 The Establishment Of A Union

Under Article 5.1 of the Labor Union Law, every employee has the right to form or join a union. However, the union cannot force the employees to join the organization. Neither the employer, a union, government, nor anyone else can pressure or interfere in the establishment of a union.

A union can be established by a minimum of 10 employees. The procedure to establish a union is simple, i.e., by holding a meeting in which the employees appoint the officers of the union and create the articles of association and bylaws.

There are many factors that drive employees to form a labor union or to join an existing labor union. In many cases, the reason for unionization does not significantly deviate from the purpose of a labor union mentioned above. The employees needed a collective, organized and structured medium to voice their concerns, demand their rights, protect their interests and increase their welfare. In a more extreme situation, the main reason for unionization is simply to

get the attention of the employer. Recently, we are aware of a group of sales and marketing employees in a company deciding to establish a new labor union despite the existence of one already. In this situation the employees felt it was necessary for them to have a more structured representation in the company. The existing labor union, unfortunately, was located at an out-of-town manufacturing site and consisted of blue-collar workers at that manufacturing site.

### 2.3 Registration Of A Union

A union does not have the power to exercise its rights (including but not limited to entering into a collective labor agreement) until it has registered itself with the local office of the Ministry of Manpower and Transmigration (“**MOMT**”). In order to have such power, under Article 18 of the Labor Union Law, a union has to notify the local office of the MOMT (at the municipal level) in writing for registration purposes. Under Decree 16, the local office of the MOMT must register the union and issue the registration number if it complies with the legal requirements regarding the establishment of a union, within 21 working days from the receipt of written notification from the union. For registration purposes, the union is obliged to submit the list of the founders, the articles of association and bylaws, and the list of officers to the local office of the MOMT.

The local office of the MOMT may delay the registration and the granting of the registration number if the union has not fulfilled the registration requirements. The local office of the MOMT must notify the union in writing regarding the reasons for the delay. Any amendment to the union’s articles of association and bylaws must also be provided to the local office of the MOMT no later than 30 days from the date of the amendment.

Because the registration of the union empowers the union to exercise its function, the employer is entitled to ask the union about its registration status. The employer may ask the union to provide the original copy of the registration. If the union refuses to provide its registration, the employer can obtain proof through the local office of

the MOMT (municipal level), as the registration is accessible and open to the public.

#### 2.4 Notification To The Employer

Under Article 23 of the Labor Union Law, the union is required to notify the employer in writing after it has registered with the local office of the MOMT. The employer does not have the right to object to the creation or establishment of the union.

#### 2.5 Membership Of A Union

Article 14 of the Labor Union Law provides that any employee (either managerial or non-managerial level) is entitled to join a union. However, under Article 15 of the Labor Union Law, certain employees cannot be elected as officers in a union because there would be a conflict of interest between their responsibilities to the employer and to the union (e.g., human resources managers, finance or accounting managers, and general managers).

An employee is only entitled to become a member of one union. An employee is entitled to withdraw from the labor union membership by submitting written notice. Since the membership is voluntary in nature, the union cannot prevent the employee's withdrawal.

The bylaws and articles of association may set forth standards for the union to terminate the membership.

#### 2.6 Rights Of A Registered Union

Under the Labor Union Law, a union that has properly registered with the MOMT is entitled:

1. to enter into a collective labor agreement (“**CLA**”) with the employer;
2. to represent workers in industrial disputes (including the termination of employment disputes);

3. to represent workers in a manpower institution;
4. to establish an entity or to engage in activities which relate to the improvement of the employees' welfare; and
5. to conduct other activities in the manpower area that are consistent with the existing laws and regulations.

The existing law permits the establishment of multiple unions within the same company based on geography, site location, job differences, and other factors. However, the Labor Law requires that a company have only one CLA, which is applicable to all employees in the company.

## 2.7 Union Membership Contributions

As provided under the Labor Union Law and Decree 187, the finances of the union originate from:

1. membership contributions in the amount stipulated in the articles of association or bylaws;
2. revenues resulting from the union's legal businesses; and
3. donations from members or other parties that are not binding.

Under Decree 187, it is possible for membership contributions to be made by deductions from the employees' salary. For this purpose, the union has to socialize the plan for collecting membership contributions by salary deduction and the use of the membership contributions to its members.

Under Government Regulation No. 8 of 1981 on Wage Protection ("GR 8") and Decree 187, a company can only deduct the employee's salary pursuant to a power of attorney from the employee. Without a power of attorney, the salary deduction is not only deemed void (Article 22(4) of GR 8), but the employer is also subject to a criminal

punishment of three months' detention or Rp. 100,000 (approximately US\$11) fine.

## 2.8 Restrictions For The Employer In Facing Unionization

Article 9 of the Labor Union Law stipulates that unions are established by the workers voluntarily, without “any pressure or interference” from the employer and others. The Labor Union Law does not specifically define the meaning of “pressure or interference.” ILO Convention No. 98 (which was ratified by Indonesia by issuing Law No. 19 of 1956), however, describes that acts that are designed to promote the establishment of the union under the domination of employers or employers' organizations, or to support the union by financial or other means, with the object of placing such organization under the control of employers or employers' organization shall be deemed to constitute acts of “interference.” For example, in the process of establishing a union, an employer's request that the employees meet only on the company's premises and during the company's working hours might constitute employer interference.

Article 28 of the Labor Union Law forbids anyone “to obstruct or force” a worker to “form or not to form”, “be an officer or not be an officer”, “be a member or not be a member”, or “engage in or not engage in union activities.” However, it limits the above restrictions by setting out categories of actions by which the worker may not be obstructed or forced. These activities are:

- terminating or suspending the employee;
- demoting or significantly modifying the employee's job responsibilities;
- failing to pay the employee his or her wages or to reduce his or her wages;
- intimidating in any way; and

- conducting a campaign against the establishment of a union.

Examples of employer's actions that are strictly prohibited are:

- threatening to fire workers if they are involved in union activities;
- threatening to close the company if the workers establish a union; and
- establishing or implementing a security force or system to spy on union activists.

## 2.9 Dissolution Of A Union

Under Article 37 and Article 38 of the Labor Union Law, a union can be dissolved in the following situations:

1. the union is declared dissolved by the members of the union pursuant to the union's articles of association and by laws;
2. the employer is closed down or has permanently terminated its operations, causing termination of employment of all its employees after all obligations of the employer toward its employees have been settled according to the prevailing laws and regulations (e.g., all payments in relation to termination of employment have been made to the employees);
3. the dissolution is declared by a court judgment in the event:
  - (a) the union's principles contravenes Pancasila (the Indonesian state ideology) and 1945 Constitution;
  - (b) the management and/or members of the union on behalf of the union is proven to have committed a crime against the state's security and is sentenced by a final and binding decision to imprisonment of at least 5 years.

## 2.10 Sanctions

Under Article 42 of the Labor Union Law, the penalty for violating Article 28 of the Labor Union can include imprisonment of between 1 and 5 years, and fines of between Rp.100,000,000 and Rp.500,000,000. Labor Inspectors from the MOMT have the authority to investigate alleged violations.

## Italy

### 1. Introduction

#### 1.1 The Beginning Of Modern And Corporatist Unions

The birth of modern Italian unions is generally considered to have been toward the end of the 19th century with the establishment of the *Camere del Lavoro*. As of 1889, unions and strikes were no longer a crime in Italy, although strikes continued to be regarded as a breach of contract (as opposed to an employee's right) under contract law. In 1906, the *Confederazione Generale del Lavoro*, the first large national trade union, was established, and in 1910, *Confindustria*, the first large employers' association, was formed.

In 1922, when fascism made its way into Italian history, a national fascist union was also formed, the *Confederazione nazionale delle Corporazioni sindacali*, and in 1925, *Confindustria* and the fascist union recognized each other as the exclusive representation of employees and employers respectively.

In 1926, the fascist government began shaping the corporatist system, whereby only one workers' union (the fascist union) was recognized by the government, which maintained strict control over it. Corporatist unions became entities belonging to the national government system and strikes were again considered a crime. Eventually, the corporatist system was completed when it was ruled that collective agreements drafted by the representatives of professional categories (those categories included in the corporatist system) were binding for all those belonging to such categories.

#### 1.2 Unions Under The Italian Republican Constitution

In 1943 the fascist regime in Italy collapsed, and in 1944 the corporatist system was abolished. The democratic Constitution of the Italian Republic was then enacted in 1948 and remains in force to this day. The Constitution sets forth the main principles of union law. It provides:

- Freedom of union activity is established;
- Only one duty may be imposed on unions (i.e., their registration in accordance with the law) upon the condition that they have an internal democratic organization;
- Registered unions are legal entities under the law and they may, acting as one body (where all unions are represented in proportion to the number of their respective members), negotiate and enter into collective agreements that are binding upon all employees in the same field; and
- Strikes are a constitutional right that may be exercised in accordance with the law.

However, to date, the statutory provisions necessary to implement such constitutional principles have not been enacted (with the exception of some statutory provisions concerning strikes affecting “essential services,” which were enacted in 1990 and amended in 2000). The lack of such provisions is primarily the result of historical developments in Italy.

In 1944, union activists agreed to reorganize a national Unitarian workers’ trade union, under the name of *Confederazione Generale Italiana del Lavoro* (“**CGIL**”). Subsequently however, in 1950, the growing cold war confrontation and ideological differences induced mainly catholic activists and members to leave the CGIL, which was then primarily a communist/socialist oriented organization, to establish the *Confederazione Italiana Sindacato Lavoratori* (“**CISL**”). Soon after, other workers and activists formed two additional unions, the *Unione Italiana del Lavoro* (“**UIL**”) and the *Confederazione Italiana Sindacati Nazionali Lavoratori* (“**CISNAL**”).

All unions opposed the enactment of laws implementing the Constitution with regard to registration (and internal democracy) of

trade unions and the enactment of laws regulating strikes. Unions feared that such laws would enable the government to control them and effectively limit strikes. CISL, UIL, and CISNAL, which had fewer affiliated employees than CGIL, also feared that a law providing for a national Unitarian representation of employees, in proportion to the number of members, would effectively benefit CGIL. The unions' position resulted in a lack of parliamentary support for initiatives aimed at implementing the constitutional model. Therefore, in the absence of statutes, union law has ultimately been created by case law, customary practices, and the internal rules of unions.

### 1.3 Collective Agreements (part 1)

Italy's Constitution envisaged a system where collective agreements negotiated by registered unions would be binding for the generality of employers and employees; however, absent any law on the registration of unions, collective agreements were binding only for those employers and employees that voluntarily accepted them.

As an interim measure, when the fascist regime ended, the collective agreements produced by corporatism were expressly excepted from the abolition of that system. However, absent an implementation of the Constitution, unions could not negotiate new collective agreements binding for the generality of employees.

In 1959, Parliament gave the government the power to make collective agreements enforceable as a matter of law, on a case-by-case basis, but the Constitutional Court stopped this practice, holding it inconsistent with the Constitution.

Eventually, courts found a way to pursue a general application of the new collective agreements, at least concerning their minimum wage provisions. The Constitution in fact provides that employees are entitled to salaries that are proportional to the quantity and quality of their work performance and sufficient to carry out a life with dignity. Courts argued that, even where collective agreements were not

applicable, the minimum wages provided by the agreements should be used as a test to measure whether actual salaries were sufficient to meet the Constitutional requirement.

#### 1.4 The Workers' Statute

Although trade unions certainly had played a role in Italy even before 1970, it was not until that year that a statute was passed setting forth a single and consistent body of rules applicable to industrial relations. Known as the *Statuto dei Lavoratori* ("Workers' Statute"), it remains the main source of statutory law concerning unions, as well as a fundamental law with regard to labor law in general.

With regard to industrial relations, the Workers' Statute sets forth the ground rules concerning freedom of union activity (prohibiting discrimination as well as employer-backed workers' unions) and the establishment and role of Works Councils (including a detailed review of Works Councils' rights at the workplace). The Workers' Statute also grants trade unions a general and effective judicial remedy to protect their rights.

The enactment of the Workers' Statute immediately followed the period (from 1968 to 1969) of the deepest industrial relations conflicts in Italy's postwar history, which may explain certain pro-labor provisions (e.g., the right of reinstatement in case of unjustified termination, except by low-headcount companies), as well as the fact that the provisions on establishing Works Councils expressly favored the main existing national unions.

#### 1.5 From A Single Trade Union To The Proliferation Of Trade Union Organizations

After an initial effort to create a united national confederation of trade unions, ideological differences led to the creation of independent, competing national organizations. Three of them (the CGIL, CISL, and UIL) slowly overcame the deep divisions of the 1950s and began to coordinate their actions over the years, until the signing in July 1972, of a *Patto Federativo* (Federative Pact). Ideological divisions

have, however, prevailed again occasionally, such as in 1984 and in 1999.

The greatest challenge to the three main national unions however came from workers' dissent from union policies and the consequent establishment of competing unions. The new unions that had success during the last three decades often represented only workers of specified business fields (although with high affiliation rates), are seldom organized in national federations of different trades, and were sometimes organized locally rather than nationally. "Spontaneous" organizations are sometimes formed over certain issues and later lose their strength or dissolve.

Legislation tended to favor unions representing workers on a broad basis (both regarding business fields and geographically) and with continuity. The Workers' Statute originally provided that Works Councils, *Rappresentanze Sindacali Aziendali* ("RSAs"), could be established "within the unions affiliated to the more representative national unions". Such "privilege" was subject to criticism, but survived (including judicial scrutiny) for more than 20 years, until 1995, when a national referendum abolished it, so that now RSAs may be established within the unions that have signed collective agreements implemented by the relevant employer.

Meanwhile, the main unions and employers' organizations tried to overcome this issue, and, in 1993, agreed on a system of election of Works Councils, *Rappresentanze Sindacali Unitarie*, ("RSUs"), where minor unions could also be represented, but still assuring some advantages to the major ones.

#### 1.6 "Concertazione", "Social Dialogue" And Projects Of Implementation Of Art 39 Of The Constitution. Reforms Of Collective Negotiation

During the 1980s and 1990s, the word "*concertazione*" (literally "tuning") was widely used to define a process whereby unions, employers' associations, and the government jointly discuss the main economic issues, with the aim of reaching a common understanding

on goals regarding growth, inflation, employment rates, productivity, salary increases, employment, and social security reforms. Under the Constitution, the government decisions may not be bound by contractual obligations. However, through the *concertazione*, the government attempts to adhere to the main principles agreed upon with unions (e.g., the laws on temporary work and private pension funds), while unions and employers' associations negotiate salaries and other collective bargaining issues (e.g., working hours), taking the goals of national economic policy into consideration.

Despite its political relevance, the goals agreed upon through *concertazione* have sometimes been perceived by workers as an imposition of limitations upon their claims, inducing them to turn to other unions to protect their interests. Moreover, *concertazione* implies that discussions on economic and social objectives take place at a national level and that unions and employers' associations are able to ensure compliance with the common goals identified during discussions.

During the course of time, especially since the late 1990s and the beginning of this century, some political parties and governments have opposed the concept of "*concertazione*" with the concept of "social dialogue". Social dialogue, following the model developed between social partners and promoted by the European Commission within the European Union (EU), is defined as a process consisting of consultations between unions and employers' associations, which submit their conclusions and proposals to the government, for subsequent action by the government.

The method of "social dialogue" is still applied to implement some EU labor directives. On the other hand, purely national statutes often set forth the main provisions and delegate to the social partners the negotiation of collective agreements to implement those provisions further providing that, if the social partner fail to reach an agreement within a reasonable time, regulation should be adopted by the Labor Ministry (or other relevant authority).

In the past 15 years, given the continuing uncertainties about the legal framework of industrial relations, a number of controversial bills have been discussed and reviewed in Parliament concerning reform of industrial relations that would set precise statutory rules for the election of Works Councils and the identification of the most representative unions -- both at the national and local levels -- and that would address the issue of enforceability of collective agreements for the generality of employees and employers.

Since 2001, the negotiation of collective agreements applicable to public administrations has been reserved by law for unions that meet certain representation requirements; the collective agreements entered into with such unions are binding for the relevant administrations and are therefore applicable to every civil servant. No statutes have instead been enacted concerning business organizations.

In 2011 (with an Agreement of June 28th, signed between Confindustria and, respectively, CGIL-CISL and UIL) the social partners provided that only unions representing more than 5% of the employees in a specific business field may negotiate and sign a national collective agreement covering employees of said business field.

### 1.7 Collective Agreements (part 2)

One of the most debated topics regarding regulation of industrial relations is the scope and organization of collective negotiation. The debate concerns the “levels” of collective negotiation and the scope of the negotiation at each level. One of the main issues is whether minimum salaries and the main employment terms should continue to be negotiated and agreed upon at the national level, and which other levels of negotiation (regional or even by individual companies) should exist and what should be discussed at such other levels.

On January 22, 2009, the main employers’ and employees’ confederations entered into an agreement setting forth a framework of rules for collective negotiation. The agreement provided that national

agreements are the cornerstone of collective negotiation and that collective agreements negotiated by a specific company or for a specific territory (so called “second level” agreements) may regulate matters delegated by national agreements, or matters that are not already governed by national provisions.

The January 22, 2009 agreement however, also marked the disagreement between the major employees’ unions (since CISL and UIL –but not CGIL- signed it); a disagreement that also concerned the negotiation and renewal of one of the major national collective agreements (the metalworkers collective agreement). Such disagreements stressed the fact that in the absence of a statute governing the authority of unions to negotiate collective agreements binding on all employees, the key to the Italian industrial relations had long been the ability of the main Italian unions to act jointly when negotiating the main national collective agreements (disagreements among such unions in fact generated uncertainty in the industrial relations -please also see below under **3.1**).

The disagreement was in part overcome with the Agreement of June 28, 2011 (signed not only by Confindustria, CISL and UIL, but also by formerly dissenting CGIL). With this agreement the social partners once again provided that it is the purpose of national collective agreements to set forth minimum terms and conditions of employment common to all employees, but also provided that at the company level the parties may negotiate on matters delegated by national agreements, and also, to a limited extent, deviate from the provisions of national collective agreements.

## 2. Trade Unions

### 2.1 The General Role Of Trade Unions

The activity of trade unions and employers’ associations may affect single businesses and categories of businesses, as well as the economic and social policies of the country as a whole. Absent a statute setting forth the role of unions and employers’ associations, each such organization determines its role (in the by-laws as well as

through actual practice), which is also subject to historical developments, court decisions, and occasional provisions of law.

Unions negotiate shop collective agreements (i.e., agreements relevant for one single company), collective agreements valid for a territory (e.g., a province or an industrial district) and national agreements (most often national agreements concern employees of a specific business field, but there are also “confederate” agreements (i.e., that concern workers of several different fields, each usually organized as a specific union “federation”).

Unions and employers’ associations contribute to the selection of a portion of the members of the *Consiglio Nazionale dell’Economia e del Lavoro* “National Council for the Economy and Labor” - **CNEL**), a governmental institution that, according to the Italian Constitution, has a consulting role for the government and the Parliament, and may submit bills of laws (even if it has never really had a decisive role). Unions and employers’ associations also contribute to the shaping of economic and social national policy, actively participating in the public debate over political issues.

Unions also directly intervene in economic areas affecting workers, such as express provisions of law allowing unions to promote the formation of pension funds. Cooperative companies and associations linked to unions were also among the founders of one of the major Italian non-profit temporary work agencies.

Unions, through dedicated organizations (*Istituti di Patronato*), whose activity is expressly acknowledged and subsidized by the law, also carry out counseling activities in social security and pension matters and, through other similar organizations (*Centri di Assistenza Fiscale*), provide assistance in tax matters.

Under the law, unions and employers’ associations designate their representatives in a number of governmental boards and committees, including: (i) the provincial commissions of conciliation, to which all employment disputes can be submitted for a mediation or arbitration

procedure; (ii) boards of directors of governmental social security agencies; (iii) committees of the public placement offices; and (iv) committees competent for work at home. Unions are consulted, under the law, with regard to the authorization of certain types of fixed-term employment contracts and may be requested by Labor Courts to provide information and remarks relevant to specific litigation, as well as to provide the official texts of collective agreements.

Employers' organizations, other than strict union-related matters, also carry out common study, information, and research activities (the most widely read Italian financial and business newspaper is owned and published by *Confindustria*), organize self-regulatory councils for specific business fields, and carry out lobbying activities.

## 2.2 Constitution Of A Trade Union

There are no specific provisions determining how unions should be established and organized. Therefore, unions are classified as “*associazioni*” (associations). The statutory provisions applicable to *associazioni* are quite flexible and substantially allow them to set up the organization deemed most appropriate in order to pursue their own objectives.

Contrary to what happens in other legal systems, a trade union does not need the recognition of either single employers or employers' associations in order to exist and carry out their activities. Employers are, however, free to refuse to negotiate with one or more unions, except in those cases where the law expressly requires a consultation or joint review.

Even if a general statutory definition of “trade union” does not exist, statutes have occasionally identified requirements to be met by unions in order to qualify for certain specific purposes. For example, the assets of the corporatist unions were mostly assigned to five unions (the CGIL, CISL, UIL, UGL and CIDA), with the remaining divided among unions with the most members, from throughout the nation and the various business fields, and that had frequently negotiated

collective labor agreements. Additionally, the designation of CNEL members should be made by unions selected according to substantially similar criteria.

Although the organizational models are not all the same, the main unions are organized under vertical and horizontal structures.

Workers are affiliated to a union specific to a certain business field (e.g., the metal workers business, the chemical business, etc.), and such union has a territorial organization, with provincial, regional, and national offices. Unions of different business fields are then united in a federation of unions and/or workers. Often the federation has its own territorial organization with provincial, regional, and national offices. Employers' associations have adopted a similar organizational structure.

### 2.3 The Scope Of Trade Union Rights In Businesses

The law expressly sets forth the right to carry out union activity within businesses (including the organization of workers' meetings and referenda among workers, the posting of public notices on a union notice board, the activities aimed at the affiliation of new members, and the collection of contributions for the unions). Such rights belong either to the Works Councils or to workers, and not to external union activists.

There are, however, circumstances in which the law provides rights to trade unions that are external to a business:

1. In case of a transfer of business, under the laws implementing the European Acquired Rights Directive (Council Directive 77/187/EEC of February 14, 1977), the purchaser and the seller must inform their Works Councils and the external unions at least 25 days before the planned transaction (the unions may then trigger a mandatory consultation process).

2. In case of a collective dismissal, under the laws implementing the EEC Council Directive 75/129/EEC of February 17, 1975, an employer must provide certain information regarding the collective dismissal to the Works Councils, if any, and to the external unions (the unions may then trigger a mandatory consultation process).
3. Some collective agreements provide that, in case of a collective transfer of workers, a notice must be given to unions and a consultation may be requested by them.
4. In case an employer applies for *cassa integrazione* (a type of social shock absorber, whereby employment contracts are temporarily suspended and a social indemnity is paid to workers instead of their wages), the employer must give prior notice to the Works Councils, if any, and to the external unions, which may request a joint review of the situation.
5. Council Directive 94/45/EC of September 22, 1994 (on the establishment of European Works Councils “EWC”) has been implemented by Legislative Decree n°74/2002. Along the guidelines of the Directive, the Legislative Decree provides for a special negotiating body, jointly appointed by the Works Councils and the external unions that have signed the applied NLCA, in charge of determining the structure, activities, prerogatives, and duration of an EWC.
6. Council Directive 2001/86/EC concerning the employees’ involvement in European Company (European Company, “EC”, is provided for by EU regulation n°2157/2001) has been implemented in Italy through Legislative Decree n°188/2005. Such Legislative Decree provides for a “delegation body,” formed by members elected or chosen by Works Councils together with unions stipulating the applicable collective agreements, which is in charge of negotiating the concrete modalities of employees’ involvement in the management of EC.

7. Legislative Decree n°25/2007, which has implemented Council Directive 2002/14/EC concerning employees' right of information and consultation, provides that employers employing more than 50 employees must inform and consult employees on the actual and future trend of the company's business, on the occupational situation, and on possible company's decisions that may affect the organization of the work and the employment contracts. Applicable collective agreements provide for the timing and the modalities of the above information and consultation procedure.
8. Legislative Decree No. 81/2008, which consolidates the laws on safety at work, grants some prerogatives to trade unions and in particular: a) in case of contracts, subcontracts, and supply agreements, requires that all costs borne by the contractor in order to implement safety at work's measures must be disclosed to local structures belonging to the more representative unions on a national basis upon request; and b) in companies or business units employing more than 15 employees, the workers' representative for safety at work is elected or appointed within the company's Works Council.

#### 2.4 The Function Of Trade Union Representatives

Italian statutory law neither precisely defines, nor gives a clear role to trade union representatives. The few existing provisions grant TRUs (of the unions connected with the relevant Works Councils) the right to attend workers' meetings within an employer's premises and further grants TRUs who are members of the provincial or national management boards of a union the right to paid leave in order to participate in the meetings of those boards (the number of paid leaves to which TRUs are entitled is not provided for by the law, but left to collective negotiation). TRUs holding provincial or national offices within a union are entitled, upon request, to unpaid leaves in order to carry out their union activities.

### 3. Works Councils

#### 3.1 General Requirements And Principles

The Workers' Statute originally provided that Works Councils (specifically RSAs) should be established in a substantially non-electoral and unilateral way by "initiative of the workers," but within the "most representative" trade union organizations at the national level, within each "productive unit" (i.e., each plant, office, division, or branch with a separate and autonomous identity from a geographical and organizational point of view, and that, together with other units, make up the whole employing establishment). Therefore, trade unions effectively could (and to a certain extent still can) appoint their own representatives to RSAs without the need for a general election by the workers. However, as a result of a referendum held in 1995, the original provision of the Workers' Statute was amended, granting the power to appoint RSAs to all trade unions that had signed collective agreements implemented by the employer.

With a collective agreement, the *Protocollo d'Intesa* (Protocol of Intents), signed on July 23, 1993, between *Confindustria* and the major national unions (INTERSIND, CGIL, CISL, UIL), a totally new concept of workers' representation at the workplace was introduced. The Protocol of Intents was followed by a more detailed collective agreement signed on December 1, 1993, among the same parties, that introduced electoral procedures to allow the workers to choose their internal representatives within the Works Councils in a more democratic manner. The new Works Councils were named *Rappresentanze Sindacali Unitarie* (Unitary Works Council, or "RSUs"), with the adjective "unitary" stressing the fact that all elected members were forming a single and cohesive representative body regardless of their trade union's affiliation.

The reasons for this epochal revolution in Italian industrial relations were an increasing lack of workers' support for the main national unions, their preference of the minor but increasingly more powerful

unions at a local level, and criticism of the original provisions of the Workers' Statute on the formation of Works Councils.

RSUs have mostly taken the place of the old RSAs in Italian industrial relations.

However some recent developments (in 2010 and 2011) in the negotiations affecting one of the largest Italian manufacturers (Fiat) have attracted much attention from the main players of industrial relations in Italy because of their potential broader impact. In order to negotiate terms and conditions partially deviating from those of the national collective agreement, a Fiat subsidiary did not join Confindustria. While some unions signed the relevant collective agreement with Fiat, one of the main ones (**CGIL**) refused to do so. As a result of the Fiat subsidiary not being affiliated with Confindustria and of no longer implementing the national collective agreement, the above described rules on RSUs no longer apply to Fiat and only the unions that signed the Fiat collective agreement (to the exclusion of the dissenting unions) are entitled to appoint RSAs. If the same pattern was replicated by many employers, only the unions that had been able to sign a collective agreement with a specific employer would be able to form a works council. This would constitute a landmark shift from a situation in which the major national unions were entitled to establish works councils within single businesses, regardless of whether they had a material number of affiliates in it, and regardless of the relations with the employer.

At the time of writing this document, this matter is in constant development. In July 2011 a Court held that the exclusion of the dissenting union in the Fiat case was not valid. At the same time, by means of an agreement signed on June 28th, 2011 between Confindustria and, respectively, CGIL-CISL and UIL, the social partners laid down the requirements under which agreements signed by RSUs or RSAs are binding on all employees, and even provided that RSAs appointment should be renewed every three years (no such requirement was set forth by law).

### 3.2 Election Of Works Councils

The Workers' Statute neither sets forth express provisions concerning the employees who may be appointed as RSAs, nor the duration of their appointment (even though on June 28th, 2011 a collective agreement provided that RSAs appointments should be renewed every three years –see section 3.1 above).

With regard to RSUs (i.e., the other type of works councils in Italy) the collective agreement of December 1, 1993 provides that RSUs may be established in the productive units where more than 15 workers are employed, by initiative of:

1. The unions that signed the Protocol on July 23, 1993;
2. Unions that signed the national collective bargaining agreement actually applied in the productive unit; and
3. Unions, formally established under the law, pursuant to articles of associations and bylaws, and that obtained the written support of at least five percent of the workers with voting rights.

Both the latter two categories of unions must expressly accept the contents of the collective agreement of December 1, 1993.

The establishment of an RSU (where all unions participating in an election are represented) entails the waiver of the single unions to their statutory right to form an RSA (and if an RSA already exists, the RSU will take its place).

RSUs may consist of a variable number of members, depending on the total number of workers employed in the relevant “productive unit”:

1. Three members for productive units with fewer than 200 workers;
2. Three members for every group or fraction of 300 workers in each productive unit with fewer than 3,000 workers; and

3. Three members for every group or fraction of 500 workers, in addition to those indicated in the previous point, in each productive unit with more than 3,000 workers.

Workshop agreements may provide for a larger number of representatives to be appointed. The total number of members of the RSU is elected as follows:

1. Two-thirds are elected by secret vote among the competing electoral lists by all the workers belonging to the productive unit; and
2. The remaining one-third is assigned to the unions that signed the national collective bargaining agreement actually applied in the productive unit (in proportion to votes cast in the elections).

### 3.3 Works Council Members

The Workers' Statute does not limit the term of office of RSA members, whereas under the collective agreement of December 1, 1993 members of RSUs remain in office for three years.

The Workers' Statute provides for specific rights and protection for RSA members/managers, and the collective agreement of December 1, 1993 extends such prerogatives to RSUs.

Upon at least 24 hours' prior notice to their employer, Works Councils' managers are entitled to a certain number of paid leaves (the amount of which varies in connection with the total workforce of the productive unit) in order to carry out the duties connected with their office. They are also entitled to a certain number of unpaid leaves to take part in union negotiations and external activities such as congresses and seminars.

In case of unlawful dismissal of a Works Council's manager, the Workers' Statute provides that the court may, upon joint petition of

the dismissed worker and his or her union, order the immediate reinstatement on a precautionary basis and before a final decision on the case whenever the court deems that the employer has not provided relevant or sufficient evidence of proof. In case of breach of the court's order, the employer must pay a fine to INPS (National Institute for Social Security) per each day of breach.

In case of transfer of a Works Council's manager to a different productive unit, the consent of the trade union to which he or she is affiliated is required.

### 3.4 Management Of Works Councils

The Workers' Statute provides that employers must provide Works Councils with a room on the premises or (according to interpretations) in the immediate surroundings of the productive unit. The room must be permanently assigned for the Works Council's use when the unit employs more than 200 workers. Apart from this provision, neither the Workers' Statute nor the collective agreement of December 1, 1993 lay down general management rules, and Works Councils are, in fact, free to establish their own organizational rules.

### 3.5 Functions And Rights Of Works Councils

The Workers' Statute grants RSAs (and the collective agreement of December 1, 1993, extends to RSUs) certain specific rights and powers, including:

1. The power to call meetings of workers (all or groups of them) to discuss any matter connected with trade union and working conditions (a limited amount of paid working time may be used to hold such meetings, while other meetings may take place outside working hours);
2. The power to hold internal referenda (such power must be jointly exercised by all RSAs if there is more than one); and

3. The right to post notices, communications, and other documents on a Works Council's notice board, which employers must set up within the productive unit.

### 3.6 Agreements Between Works Councils And Management

The Workers' Statute does not specify whether RSAs have a general right to negotiate collective agreements, probably because of the unresolved issue of implementing the constitutional provisions on unions and collective agreements. Traditionally RSAs have *de facto* negotiated shop agreements and, based on the absence of statutory provisions setting forth a hierarchy among different levels of collective agreements, case law has sometimes accepted that collective agreements negotiated by a single company may prevail over national ones.

The issue of collective agreements negotiated by works councils has also been regulated by collective agreements.

The collective agreement of December 1, 1993, formally acknowledged the power of RSUs to negotiate work shop agreements, although they must be "in conjunction with" the local representatives of the unions that sign the national collective agreements and within the terms, limits, and scope set forth by the national collective agreements applicable to the employer. Although this seems quite a cautious acknowledgement of an existing situation, the unions have, on this basis, increasingly delegated to Works Councils the "fine-tuning" of the provisions of the collective agreements to local needs (a "second level of negotiation" between the national and the individual levels). The collective agreement of January 22, 2009, outlining the framework of collective negotiation, followed the pattern from 1993, at least when confirming that the main provisions regulating remuneration and employment relationships must be set forth by national collective agreements.

The collective agreement of June 28th, 2011, between Confindustria and, respectively, CGIL-CISL and UIL, provided: (i) that national

collective agreements should also outline the matters that may be regulated by company-level collective negotiation; (ii) that company-level collective agreements are binding on all employees of the same company (regardless of their union affiliation) if the relevant collective agreement has been approved by a majority of works council members or anyway representing most unionized workers; (iii) that the national collective agreements may set forth the limits and the procedures under which collective agreements negotiated at company level, may deviate from the provisions of national collective agreements. If the national collective agreements do not provide otherwise, collective agreements negotiated at company-level may derogate to the national collective agreements provisions in order to manage downturns or in case of material investments in the company (in that event, deviations from the national set of rules may concern work performance, working time schedules and work organization).

### 3.7 Enforcement Issues

Article 28 of the Workers' Statute sets forth a general, strong protective bulwark for union activity. In case of any activity by an employer in contempt of the unions (i.e., aiming at hindering or limiting the exercise of union activity or rights, including the right to strike), local representatives of national trade unions may lodge a petition for an injunction (by which the employer is prevented from continuing the contested behavior and ordered to remove its consequences) with the Labor Court. Failure to comply with such an injunction may eventually result in a criminal offence, quite similar to criminal contempt of court. The general nature of this remedy also makes it applicable to any employer's activity affecting a Works Council's rights and prerogatives.

## 4. The Interaction Between A Works Council And A Trade Union

Another relevant and controversial issue is the identification of RSA managers, who are entitled to specific rights under the law, and the extent to which managers appointed by unions may be revoked by them. In the case of RSU members elected by workers, possible

disagreements between any of them and the unions may also raise the issue of their continued representation of workers.

The coordination of the activity of Works Councils and trade unions remains crucial, much of which is not strictly regulated by laws or agreements but keeps floating between the need of assuring the necessary autonomy to Works Councils, especially if elected by workers, and the need of trade unions to ensure a consistent negotiation and implementation of national agreements.

## 5. Trade Union And Works Council Employee Protection Rights - Strike

Among the various measures adopted by the trade unions to protect employees' rights, strikes may be deemed the most important one. As a constitutional right, a strike is neither punishable as a crime nor deemed a breach of the employment contract. Different types of strikes can be called (on-off strike, work to rule, wildcat strike, all-out strike, etc.).

Courts acknowledged that the constitutional right to strike is not limited to the negotiation of salary or other issues directly pertaining to employment terms and negotiations, but may also be exercised as a means of pressure regarding economic policy decisions by the government that directly affect workers' conditions. Strikes for mere political reasons (i.e., not even regarding issues directly related to workers' conditions), although not a crime, would be characterized as a breach of the employment contract.

### 5.1 Anti-Union Behavior

Unions have an effective remedy in court in cases of "anti-union behavior." Although such remedy is aimed at protecting unions' (and not employees') rights, unions may use it in connection with cases of alleged breach of provisions governing mandatory procedures of consultation/joint review with the unions (e.g., collective dismissal or transfer of business procedures), thus indirectly making it a tool to protect employees.

## 5.2 Checking And Safety Devices

Under the Workers' Statute, employers' decisions are subject to prior Works Council's approval if they concern the introduction of remote control devices (which, in any event, is allowed only for organizational, safety, and productive reasons, and not to check on workers) or the introduction and modalities of personal body checks (which, in any event, are allowed only within narrow limitations). In both of these cases, absent an agreement with Works Councils, employers may obtain an authorization from the Labor Inspectors, against which the Works Councils and the unions may lodge an appeal with the Labor Ministry.

## 5.3 Other Union Rights

Other union rights include:

1. In cases where a court upholds a claim of collective discrimination on the ground of sex, the employer must prepare a plan to remove the consequences of discrimination, and in so doing must take into account the remarks by the Works Councils or, absent those, by the most representative unions;
2. Under the Workers' Statute, Works Councils may check the quality of employers' canteens;
3. During disciplinary hearings, employees may be assisted by union representatives (to whom they are affiliated or appointed for the occasion);
4. A workers' representative for safety matters may file complaints with authorities in cases where the measures adopted by an employer to assure safety at the workplace are deemed inadequate (such representatives also have a number of other rights); and
5. Certain provisions strongly prohibit all discrimination on the grounds of union affiliation and activity.

## 6. Other Types Of Employee Representation

### 6.1 Internal Committees

Chronologically, the first Works Councils were the *Commissioni interne* (Internal Committees) established by collective agreements since the beginning of the 20th century, abolished during the fascist regime, and again re-established after the fall of that regime. The Internal Committees were panels including blue-collar workers (*operai*) and white-collar employees (*impiegati*) elected on the basis of separate lists. Internal Committees were aimed at keeping “good relationships” between workers and employees and between the different categories of workers (*operai and impiegati*). They also had other tasks typical of the Works Councils (monitoring the enforcement of labor laws, conciliation of disputes, consultation on a number of issues, etc.), but they had no power to negotiate collective agreements. Internal Committees never obtained formal recognition by law (although they are occasionally referred to in the Workers’ Statute). By an agreement of April 18, 1966, employers’ associations in different business fields and the main national trade unions again set forth a discipline of Internal Committees, confirming that they were not empowered to negotiate shop agreements. Internal Committees have progressively lost their importance and have almost disappeared.

### 6.2 Shop Councils

During the harsh industrial relations conflicts that took place at the end of the 1960s, groups of workers (most often carrying out the same type of duties, working within the same department/ office, or otherwise effectively united by similar interests) started spontaneously electing “delegates,” who, together with other “delegates” elected by workers of the same employer, formed the *Consigli di Fabbrica* (“Shop Councils” - **CdFs**). In 1972, the main national trade unions recognized the CdFs, giving them the statutory rights and prerogatives of RSAs. Moreover, the unions empowered CdFs to negotiate shop agreements with employers. Labor case law confirmed the existence of such negotiation power by CdFs, as well as their rights under the

provisions on RSAs. CdFs performed an active role until the beginning of the 1980s.

### 6.3 Additional Types Of Employee Representation

Other types of employee representation were developed in past decades by shop agreements, including “Canteen Committees” (to monitor the quality of canteen services) and “Experts” (to provide technical remarks in the negotiation of specific issues, such as assembly line timings, shifts, etc.), and may continue to play a role today.

The laws on safety at the workplace (implementing several relevant EU Directives) provide that workers should appoint a representative for safety matters (“**RSM**”):

- in case of employers with more than 15 employees, the RSM should be selected among the Works Council’s members; or
- in case of lack of Works Councils or in case of smaller employers, the RSM is directly elected by all workers.

With regard to safety matters, employers also have a number of duties to provide information to and consult with RSM members, who are entitled to receive adequate training, have access to documents and places, may make remarks and proposals to further safety at the workplace, and must be invited to the periodic meetings on the evaluation of risks. RSMs must also be assured the time (during paid working hours) and means necessary to carry out their functions, and the law also sets forth the minimum number of RSMs (one for employers with up to 200 employees; three for employers with between 200 and 1,000 employees; and six RSMs in all other cases).

Unions and employers have negotiated collective agreements specifically addressing the appointment and the activities of RSMs.

## Japan

### 1. Introduction

In Japan, since employees traditionally tend to have strong ties with their respective companies due to the “lifetime employment practice,” approximately 90% of Japanese trade unions consist of “enterprise unions,” which are formed in a specific enterprise, company, establishment, or factory. Although many enterprise unions in Japan are affiliated with each other through their membership in higher level industrial unions<sup>2</sup>, the role of these industrial unions is different from that of their counterparts in Europe and the United States, where industrial unions are the predominant form of labor union and have traditionally played an important role in protecting the interests of workers. The main reason for this difference is that the members of Japan’s industrial unions are enterprise unions rather than individual employees. As a result of this structure, it is generally considered that the influence of industrial unions is relatively weak preventing them from functioning efficiently to protect the interest of workers. As such, industry-wide labor disputes such as strikes organized by industrial unions are unheard of in Japan. Workers are therefore forced to be dependent on the enterprise unions to which they belong. However, as enterprise unions in Japan are thought to be more inclined to focus on the growth and expansion of the companies within which they are formed rather than prioritizing the interests of their employee members, it is widely thought that Japan’s labor union movement as a whole falls short of adequately fulfilling its role of protecting the interest of workers.

Most enterprise unions are established in large-sized companies, but typically not in smaller-sized companies. Therefore, trade unions are

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<sup>2</sup> Strictly speaking, “industrial unions” composed of individual workers within the same industry do exist in Japan. However, as such unions are now quite rare, “industrial unions” as used in this context means industrial affiliated unions, the members of which are enterprise unions rather than individual workers.

rarely formed in smaller companies, and the interests of such workers are often not sufficiently protected, thereby resulting in a great disparity of working conditions between those in large companies and those in other companies.

In addition to enterprise unions and industrial unions, general unions that are not associated with a specific industry or enterprise also exist in Japan. Generally, since many of the enterprise unions only accept regular full-time employees as their members, non-regular workers (e.g., part-time workers or workers with fixed term contracts) cannot join enterprise unions. As a result, general unions generally accept any workers and represent the interest of the workers who are not qualified to join enterprise or industry unions, or who have difficulty in joining enterprise or industry unions.

As indicated in the chart below, the number of trade unions and union members has been generally decreasing. On the other hand, with the recent trend of increase of non-regular workers, the number of non-regular workers who individually join general unions is increasing. Such a trend leads to acceleration of the activities of general unions, and they are increasingly playing an important role in civil case actions and collective bargaining.

Therefore, as a whole, the main activity of unions has gradually shifted to handling of individual labor disputes from that of collective labor disputes.

Further, in the past, managers traditionally did not join trade unions, but, beginning in the 1990s, there have been several cases in which managers – who had become the target of staff reductions due to business downturns – have organized trade unions within companies or joined unions beyond the framework of a single company. While, in many cases, employers tend not to recognize these entities as “true” trade unions under the Labor Union Law (Law No. 174 of 1949, the “Law”) and refuse to enter into negotiations with them, the Labor Relations Commissions and the courts tend to recognize many of these manager unions as true trade unions under the Law.

*Number Of Trade Unions/Union Members*

<b>Year</b>	<b>Total Trade Unions</b>	<b>Total Members Of Trade Unions</b>	<b>Ratio Of Total Union Members To Total Workers</b>
1970	60,954	11,604,770	35.4
1975	69,333	12,590,400	34.4
1980	72,693	12,369,262	30.8
1981	73,694	12,471,270	30.8
1982	74,091	12,525,529	30.5
1983	74,486	12,519,530	29.7
1984	74,579	12,463,755	29.1
1985	74,499	12,417,527	28.9
1986	74,183	12,342,853	28.2
1987	73,138	12,271,909	27.6
1988	72,792	12,227,223	26.8
1989	72,605	12,227,073	25.9
1990	72,202	12,264,509	25.2
1991	71,685	12,396,592	24.5
1992	71,881	12,540,691	24.4
1993	71,501	12,663,484	24.2
1994	71,674	12,698,847	24.1
1995	70,839	12,613,582	23.8
1996	70,699	12,451,149	23.2
1997	70,821	12,284,721	22.6
1998	70,084	12,092,879	22.4
1999	69,387	11,824,593	22.2
2000	68,737	11,538,557	21.5
2001	67,706	11,212,108	20.7
2002	65,642	10,800,608	20.2
2003	63,955	10,531,329	19.6
2004	62,805	10,309,413	19.2
2005	61,178	10,138,150	18.7
2006	59,019	10,040,580	18.2
2007	58,265	10,079,614	18.1
2008	57,197	10,064,823	18.1

2009	56,347	10,077,506	18.5
2010	55,910	10,053,624	18.5

## 2. Trade Unions

### 2.1 The General Role Of The Trade Union

Since industrial unions are no more than associated bodies of enterprise unions, wages and other labor condition standards are rarely decided on an industry-wide level, and instead are mostly decided by individual companies as an internal matter. Accordingly, in many cases, unions do not have enough bargaining power to negotiate with the employers. As a result, unions tend to use hard-hitting actions such as picketing and the occupation of a workplace, which could lead to a conclusion within a relatively short period of time.

Further, every spring, trade unions, at the same time and en mass, go on strike in order to demand wage increases and the like (called “*shunto*,” meaning a “spring strike”). However, these “*shunto*” rarely meet expectations anymore and are therefore becoming more and more meaningless.

### 2.2 Constitution Of The Trade Union

In order for a particular union to receive the minimum protections granted to trade unions under the Law (e.g., exemption from criminal and civil liability and protection through civil litigation against unfair treatment), a trade union should be independently formed (mainly of workers) for the main purpose of maintaining and improving work conditions and otherwise improving the economic status of workers. In addition to the foregoing, in order for the union to be eligible to enter into collective agreements with employers, a union must not: (i) have any person representing the interests of the employer participate in the union; (ii) receive financial support from the employer; or (iii) have a political or social movement as its main objective.

Since the Law does not provide any specific regulations concerning the organizational constitution of trade unions, workers can freely determine the organization. Additionally, a worker’s decision to join

or leave a trade union, in principle, is at the complete discretion of each individual worker. Because of this, many unions in Japan enter into collective agreements that provide that an employer shall not hire (or fire) anyone who has not joined the union (“union shop agreement”), and, usually, the Japanese courts will find that such union shop agreements are enforceable to a certain extent. As a general rule, however, despite the requirement that non-members be dismissed, most union shop agreements are imperfect (or flexible) ones that allow wide-ranging exceptions, which often leads to a lack of enforceability.

### 2.3 The Scope Of Trade Union Rights In Businesses

#### *Collective Bargaining*

The Law provides trade unions with an exemption from criminal liability for rightful acts such as collective bargaining, and employers, without a justified reason, are prohibited, as an unfair labor practice, from refusing to enter into collective bargaining. In Japan, due to the fact that trade unions adopt a “per company” structure, it is common for collective bargaining to also be conducted between individual enterprise unions and their individual companies.

Further, under the Law, employers are required to enter into collective bargaining with every trade union that meets the legal requirements as mentioned above, and therefore, when there are multiple trade unions within a specific company, the company is required to collectively bargain with all such trade unions that seek to do so.

An employer bears the duty of carrying out good-faith negotiations through collective bargaining, but judicial precedents have held that employers may break off collective bargaining when: (i) negotiations are deadlocked, and (ii) it has therefore become difficult to expect further progress in such negotiations, despite the employer’s continued pursuit of good-faith negotiations.

***Collective Actions***

In cases where a resolution of a problem cannot be reached through negotiations between an employer and a union, the employees may resort to a strike or other types of collective actions to force the employer to accept their assertions. Employers, on the other hand, are also legally permitted to take countermeasures, such as lockouts, to such actions. In Japanese labor disputes, most workers tend to participate in a strike or a work slowdown, during which it is common for workers to hold gatherings, demonstration marches, sit-ins, or pickets on the premises of the facility involved.

However, in recent years, the number of strikes initiated by trade unions has been decreasing, particularly those by trade unions in large companies.

*Number Of Collective Labor Disputes*

Year	Total Disputes	Accompanied With Dispute Acts					
		Total	Strikes For Half A Day Or More	Lockouts	Strikes For Less Than Half A Day	Slowdowns	Other
1965	3051	2359	1527	50	871	638	-
1970	4551	3783	2256	32	2356	101	1
1975	8435	7574	3385	25	5475	55	1
1980	4376	3737	1128	10	3038	37	5
1984	4480	3855	594	5	3475	13	2
1985	4826	4230	625	3	3834	7	4
1986	2002	1439	619	7	1031	17	4
1987	1839	1202	473	2	904	7	-
1988	1879	1347	496	5	1031	2	2
1989	1868	1433	359	8	1240	3	1
1990	2071	1698	283	2	1533	7	-
1991	1292	935	308	3	730	10	6
1992	1138	788	261	3	640	7	3
1993	1084	657	251	1	500	11	-
1994	1136	628	229	2	486	7	-

1995	1200	685	208	1	549	7	-
1996	1240	695	189	4	568	4	4
1997	1334	782	176	2	655	4	5
1998	1164	526	145	4	441	3	-
1999	1102	419	154	3	301	2	-
2000	958	305	118	1	216	2	-
2001	884	246	89	2	176	-	3
2002	1002	304	74	-	253	-	2
2003	872	174	47	-	145	-	-
2004	737	173	51	1	142	-	-
2005	708	129	50	-	99	-	-
2006	662	111	46	-	82	-	-
2007	636	156	54	-	118	-	1
2008	657	112	52	-	80	-	1
2009	780	92	48	-	59	-	2

### *Other Rights Of Trade Unions*

Under the Labor Standards Law (Law No. 49 of 1947, the “LSL”), an employer that intends to set forth certain systems, including flex-time, overtime work, and a holiday work system, is required to enter into a written agreement with a trade union in which more than half of the employees of the facility premises participate, or with an employee representative.

Further, the LSL requires an employer to provide the rules of employment and to submit them to the Labor Standards Inspection Office with an opinion from a trade union in which more than half of the employees of the facility premises participate or with an opinion from an employee representative.

#### 2.4 Collective Agreements

As mentioned above, since most of the trade unions in Japan are enterprise unions, it is also common for separate collective agreements to be entered into with each individual company. At the present time, among the trade unions that are eligible to enter into a collective agreement, approximately 90% have actually entered into collective agreements with the companies to which they belong.

Work conditions determined by a collective agreement are, in principle, to take direct effect between the company and the individual union members. Additionally, when the provisions of a collective agreement conflict with provisions in the rules of employment or an employment agreement, the provisions of the collective agreement, in principle, take precedence.

### 3. Works Councils

There are no provisions in Japanese law for Works Councils.

### 4. Trade Union Employee Protection Rights – Unfair Labor Practices

To provide a remedy for the rights of workers, the Law prohibits employers from acts that constitute unfair labor practices. Employers are prohibited from:

- Dismissing an employee or engaging in other disadvantageous treatment of an employee because he or she is a member of a trade union or has engaged in the lawful activities of a trade union or the like;
- Refusing to bargain collectively with the representatives of its workers without a justified reason;
- Controlling or intervening in the organization or operation of a trade union, or providing financial support necessary to the operation of a trade union, thereby causing the loss of the independence of the trade union; and,
- Dismissing an employee or engaging in other disadvantageous treatment of an employee for the reason that such employee had petitioned the Labor Relations Commission for relief from an unfair labor practice, or submitted or forwarded evidence during a

hearing on unfair labor practices or a labor dispute mediation by the Labor Relations Commission or the like.

When an employer has engaged in the above acts, an employee may seek an order of relief from the Labor Relations Commission or may demand compensation for damages, a declaratory order, or a preliminary injunction in court.

## 5. Other Types Of Employee Representation

While in Japan, working conditions of employees tend to be decided through collective bargaining between each enterprise union and the company to which it belongs, the procedures to negotiate the resolution of complaints over employee treatment and other labor relations problems are not limited to collective bargaining. In Japanese labor practices, many companies set forth a labor-management consultation system and grievance procedure to resolve such labor problems more peacefully than through collective bargaining.

### *Labor-Management Consultation System*

Since a labor-management consultation system is established in Japanese labor practice rather than by legislation and, therefore, is not defined under Japanese labor law, labor-management consultation systems vary. Types of labor-management consultation systems include:

- Pre-collective bargaining consultation sessions designed for a company and union each to obtain information and/or the intention of the other party before bargaining actually begins;
- Negotiation procedures that substitute for collective bargaining and are aimed at resolving issues;

- Procedures for employees to participate in decision making regarding the management of the company apart from the subject of the collective bargaining; and
- Procedures that provide for pre-event consultation concerning personnel matters in accordance with the provisions set forth in a collective agreement between a company and the enterprise union.

Many companies in which enterprise unions are formed enter into a collective agreement that provides that labor disputes arising between the company and employees shall be settled through labor-management consultation systems; therefore labor-management consultation systems play a major role in labor disputes in Japan.

### ***Grievance Procedure***

Grievance procedures are designed to deal with problems concerning the interpretation and application of a collective agreement between a company and the union, and other day-to-day employee grievances, and many companies and unions enter into collective agreements that provide for grievance procedures. However, in many cases, since the rules of grievance procedures set forth in collective agreements are rather simple, such grievance procedures are rarely used to settle labor disputes.

## **6. Diversity In Dispute Resolution Procedures For Individual Labor Disputes**

Despite the decrease of collective labor disputes, the number of civil cases filed with the district court regarding individual labor disputes (including provisional injunction cases) has dramatically increased from 1,054 cases in 1991 to 3,168 cases in 2004. Although these figures include collective labor disputes, it appears that most cases are related to individual labor disputes such as termination of employment and unpaid wages, which may reflect increasingly severe employment conditions and rapid changes in labor-related laws during the period.

In response to these changes, more expedited procedures specifically designed for individual labor disputes, that facilitate settlement between parties, have been introduced in addition to the traditional civil action procedures. These procedures are: (a) consultation and mediation procedure by administration under the Law on Promoting the Resolution of Individual Labor Disputes (Law No.112 of 2001); and (b) labor tribunal procedure under the Labor Tribunal Law (Law No.45 of 2004). After introduction of these procedures, the number of individual labor disputes has consistently increased. Particularly, the labor tribunal procedure is becoming a more and more popular path for individual employees to take when claiming against their employers. Unions can represent workers in the labor tribunal procedure with the approval of court.

### ***Consultation And Mediation Procedure By Administration***

As an extra-judicial procedure, the Law on Promoting the Resolution of Individual Labor Disputes provides consulting and information service by the Labor Office, advice and instruction by the Chief of the Labor Office, and mediation by “Dispute Coordinating Committee” for the purpose of fast and appropriate resolution of individual dispute by administrative office. The number of cases claimed by this system is as follows:

Year	Number of claims for advice and instruction.	Number of claims for mediation.
2001	714	764
2002	2,332	3,036
2003	4,377	5,352
2004	5,287	6,014
2005	6,369	6,888
2006	5,761	6,924
2007	6,652	7,146
2008	7,592	8,457
2009	7,778	7,821

### ***Labor Tribunal Procedure***

As a special judicial procedure in connection with the normal civil procedure, the Labor Tribunal System began on April 1, 2006. Due to the legislative intent of this system to provide fast, appropriate, and effective resolution based on each actual situation considering the relation of rights between employer and employee, the new system has the following characteristics: (a) the duration of trial is limited to within three trials, (b) trials are basically proceeded by oral arguments except for the documents submitted for the first trial, which consist of the written petition, answer, evidence, and description of evidence, and (c) the Labor Tribunal Committee (consisting of one judge and two members who have labor expertise) can render flexible judgment necessary to resolve the individual labor disputes. The number of motions to Labor Tribunal is as follows:

Year	The number of motions to Labor Tribunal
2006(April 1 to December 31)	877
2007	1,494
2008	2,052
2009	3,468

If a party raises an objection to the labor tribunal, the case will be tried as a regular civil case. However, almost 80% of the cases under the Labor Tribunal System have been resolved without proceeding to regular civil trial. It is expected that the number of motions to Labor Tribunal will continue to increase due to the system's effectiveness.

# Malaysia

## 1. Introduction

Trade unions in Malaysia first emerged in the 1920s when the Communist Party of Malaya encouraged unskilled workers to unionise. There was no legislation then relating to trade unions in Malaysia. In 1940 a Trade Unions Enactment was passed in the Federated Malay States, which was extended throughout the Federation in 1946. The enactment made it necessary for all trade unions to be registered.

The current legislative instruments regulating trade unions and trade union activities in Malaysia are the Trade Unions Act 1959 (**TUA**) and the Industrial Relations Act 1967 (**IRA**). The TUA regulates trade union activities; the IRA regulates employer-union relations.

### 1.1 Registration Of Trade Unions

All trade unions are required to register with the Director General of Trade Unions (**DGTU**) within one month of formation. Registration is not automatic, and the DGTU can refuse to register a trade union if it does not meet the requirements of the TUA.

Both employers and employees have the right to form unions based on the same rules, but trade unions can only be unions of employees or unions of employers and not a combination of both. The same rules apply to federations of trade unions.

### 1.2 Types Of Unions

Trade unions in Malaysia can be divided into three broad categories:

1. In-house trade unions;
2. “National” trade unions; and
3. Federations of trade unions.

An in-house trade union is set up in a particular establishment to look after the interests of members in that establishment only. “National” trade unions are grouped according to industry, trade, or occupation, and their membership is not restricted to a particular establishment but geographically (i.e., a national trade union can draw its members only from Peninsular Malaysia, or Sabah, or Sarawak).

A federation of trade unions is a combination of trade unions from similar industries, trades, or occupations. Where in doubt, the DGTU has the right to decide what are similar industries, trades, or occupations. Unlike trade unions, a union federation is not restricted geographically, it can be pan-Malaysian.

A major difference in the rules governing a union federation and a trade union lies in the taking of decisions by secret ballot. The provisions of the TUA relating to this apply to a federation of trade unions as if the individual members of the trade unions comprised in the federation were the members of that federation and not the unions, except in the matter of the election of officers, who shall be elected by secret ballot of the delegates representing the component unions.

## 2. Trade Unions

### 2.1 The General Role Of The Trade Union

A trade union is defined by the TUA as “any association or combination of workmen or employers ... within any particular establishment, trade, occupation, or industry or within any similar trades, occupations, or industries ... having among its objects one or more of the following:

1. The regulation of relations between workmen and employers, for the purposes of promoting good industrial relations between workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity;

2. The regulation of relations between workmen and workmen, or between employers and employers;
3. The representation of either workmen or employers in trade disputes;
4. The conducting of, or dealing with, trade disputes and matters related thereto; or
5. The promotion or organisation or financing of strikes or lock-outs in any trade or industry or the provision of pay or other benefits for its members during a strike or lock-out.”

This definition gives a trade union the power to assume a social role (regulating relations among its members), as well as an economic role (regulating relations between employers and employees) through collective bargaining, and that of protector of members’ rights (grievance processing and the conducting of trade disputes). It is also important to note that a trade union need not include the word “union” in its name. Some unions, in particular those whose members are professionals, call themselves associations.

## 2.2 Constitution Of The Trade Union

The constitution of a trade union is prescribed by Part V of the TUA. While the rules concern matters covering the administration of the union and its funds and the processes of decision-making, they do restrict the activities of trade unions. The TUA requires trade unions to make provision in its rules for the following:

1. The name of the trade union and its place of meeting;
2. The objects of the trade union, the purposes for which its funds shall be applicable, the conditions under which any member may be entitled to any benefit, and the penalties to be imposed on any member;

3. The manner of making, altering, amending, and rescinding rules;
4. The election, nomination, appointment, or removal of officers and of trustees, secretaries, treasurers, and employees, and the prohibition of the employment of all officers and employees of the trade union by any other trade union. (An officer or employee of a trade union must be a citizen of Malaysia. Office-bearers and employees of a political party are not eligible for election as executives of a trade union or to be employed by a trade union. The rules of a trade union shall provide for the appointment or election of trustees and for the filling of the vacancies so that there shall always be three trustees);
5. Custody and investment of the funds of the trade union, the designation of the persons responsible for managing funds, and the audit of its accounts;
6. The inspection of the books and membership list by any person having an interest in the funds of the trade union;
7. The manner of the dissolution of the trade union and the disposal of the funds available at the time of such dissolution;
8. The manner of establishing and dissolving any branch of the trade union and the manner in which any such branch and the accounts shall be managed;
9. Taking decisions by secret ballot on: (i) the election of delegates to meetings or to a federation of trade unions; (ii) the election of officers other than trustees; (iii) all matters relating to strikes or lock-outs; (iv) the imposition of a levy; (v) dissolution of the trade union or federation of trade unions; (vi) amendment of the rules where such amendment results in increasing the liability of the members to contribute or in decreasing the benefits to which they are entitled; and (vii) amalgamation with another trade union or transference of engagements to another trade union (amalgamation of trade unions can be implemented only if at least

one-half of the voting members of each union vote on the issue and at least 60% of the votes are in favour);

10. The procedure for holding ballots, securing of the secrecy of secret ballots, and preserving ballot papers;
11. The manner in which disputes shall be decided; and
12. Cessation of membership if members commence, participate, or act in furtherance of any strike in contravention of the TUA.

### 2.3 Membership Of A Trade Union

The membership of a trade union is open to employees above the age of 16. However, if the employee is also a student, he or she must be over the age of 18 to qualify for membership. Members below the age of 18 are not entitled to vote on certain matters, such as those relating to strikes and lockouts, imposition of a levy, and dissolution of the trade union.

Civil servants and employees of local authorities and statutory bodies, except those engaged in a confidential or security capacity or holding managerial or professional positions (who are prohibited from joining trade unions), may only join unions confined to the public service (by department or ministry) or a particular local authority or statutory body, respectively.

### 2.4 Scope Of Trade Union Rights In Businesses

Registration of a union gives it the legal right to exist, but recognition by an employer gives it the right to represent the employees. The IRA gives a union the right to submit a claim for recognition to an employer. An employer can duly accord such recognition. If recognition is not accorded, the employer must notify the trade union in writing the grounds for not according recognition. In the latter instance, or where the employer fails to respond to a claim of recognition by the trade union, the trade union may report the matter to the Director General of Industrial Relations (**DGIR**), who shall then

notify the Minister of the findings. Where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer. The decision by the Minister shall be final and shall not be questioned in any court. It is common practice for the Minister to order recognition if at least 50% of the workers in the relevant establishment are members of the union. However, this is not a prerequisite or a legal right to recognition.

In regulating the recognition process, Section 10 of the IRA prohibits an employer from declaring a lockout while recognition is being processed. Unions also have a responsibility to avoid going on strike during the process. If the claim for recognition is not successful, the union cannot make another claim in respect of the same employees for a period of six months. If the claim is successful, no other trade union may make a claim for recognition in respect of the same category of employees for a period of three years. Unlike recognition, there is, however, no process for de-recognition. In *Korea Development Corporation and Construction Workers Union* (Award 173 of 1983), the Industrial Court commented that, “once recognition has been accorded, the recognition stands for so long as the union exists, even though only one employee of the company is left as a member of the union.”

In addition to rights granted under the IRA, the TUA grants several rights and privileges to trade unions, including:

1. Immunity from suits for acts done in furtherance of a trade dispute where the basis of such suits is that the acts induced a person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person;
2. Immunity from liability for any tortious act alleged to have been committed by or on behalf of a trade union except one arising substantially out of the use of any specific property of a trade union unless such act was committed in furtherance of a trade dispute;

3. The privilege of having objects that are in restraint of trade deemed to be not unlawful; and
4. The right to sue and be sued in its registered name.

### 3. Works Councils

There is no provision in Malaysian law for Works Councils. Any group of workers set up with one or more of the objects stated in the TUA will be considered to be a trade union and must therefore register itself as a trade union and conform to all legislative requirements of trade unions. Some larger unions are well-structured organisations with a system of branches and representative committees set up according to their rules.

### 4. Collective Bargaining

Collective agreements are an important means of determining wages, terms of service, and working conditions in the private sector, and the process of collective bargaining is provided for in Part IV of the IRA.

#### 4.1 Bargaining Process

The bargaining process begins when a trade union submits a proposal for a collective agreement to an employer and invites the latter to commence collective bargaining. The employer has 14 days in which to reply to the invitation. If the employer accepts the invitation, collective bargaining must begin within 30 days. If the employer refuses to negotiate, or fails to reply, a trade dispute is deemed to exist and the union may notify the DGIR, who will take steps toward conciliation.

If there is a deadlock in the negotiations, either party can request the DGIR to conciliate. If the parties are still unable to agree on terms, the Minister of Human Resources may refer their dispute to the Industrial Court for arbitration.

## 4.2 The Collective Agreement

A collective agreement must be deposited within one month of signing, with the DGIR for recognition by the Industrial Court. Section 14 of the IRA requires that an agreement include, among others, the procedure for its modification and termination, and the procedure for the settlement of disputes arising from the implementation or interpretation of the agreement.

A collective agreement cannot contain any term or condition of employment that is less favourable than, or in contravention of, any workmen's laws in Malaysia, and it must not include matters that are considered managerial prerogatives, such as promotions, transfers, appointments, terminations for redundancy, dismissals, and assignment of duties. However, questions of a general nature relating to the procedures for promotion of workmen may be discussed.

Once taken cognisance of by the Industrial Court, the agreement becomes binding on all parties to the agreement and all employees employed in the undertaking, regardless of whether or not they are union members.

## 5. Trade Union Employee Protection Rights

The right of workers in Malaysia to form and join trade unions is protected in Section 5 of the IRA. The Act states that no employer shall:

1. Impose any condition in a contract of employment seeking to restrain the employee from joining a trade union or discontinue his or her membership in a trade union;
2. Refuse to employ a worker on the ground that he or she is a member of a trade union;
3. Discriminate against an employee in regard to employment, promotion, or working conditions on the ground that he or she is a member of a trade union;

4. Dismiss or threaten to dismiss, injure, or intimidate an employee in his or her employment or position to dissuade the employee from participating in a trade union; or
5. Induce a person to refrain from becoming or cease to be a member of a trade union by conferring or offering any advantage.

Workers also have the right not to be forced to join trade unions. A “closed shop” concept is not practised in Malaysia.



# Mexico

## 1. Introduction

### 1.1 Historical Background

Union organization in Mexico can be clearly linked to the European socialist movement of the 19th century, and there is clear evidence of Spanish influence in the organization of guilds and primitive union groups. Since colonial times, workers have been organized by groups of different trades and different work or employment areas and specialties. Therefore, unionism is not a creation of domestic ideology or socio-political philosophies, but rather the result of the global organization of labor and its influence in Mexico, and a natural and necessary form of expression and organization of an exploited social class.

The origins of more formal trade unions in Mexico can be traced to 1906 when the *Gran Círculo de Obreros Libres del Estado de Veracruz* was formed.

In the years prior to the 1910 Mexican Revolution, labor organizations expanded from guilds to factory unions, somewhat following the European model of organization. Additionally, two very important strikes occurred: the copper miners' strike in Cananea, Sonora, and the textile workers' strike in Rio Blanco, Veracruz. Hard repression against the striking workers was a common denominator in these strikes - union leaders, who were also active politicians at the time, were persecuted for their involvement in the process. As a result of this persecution, a more directed and political ideological labor movement was born.

Beginning in 1920, Mexico began to stabilize politically, and the backing of workers' organizations played a prominent role. Due to the political structure at the time, it became evident that in order to bring the working classes closer together, strong unions had to be created and politicized so that they could be incorporated into the

system of the “ruling” party, which is why Mexican labor legislation and its strike system are so unique.

As a result of the labor unions’ political success, they naturally began to obtain a more advantageous position vis-à-vis the employer through the ability to collectively negotiate benefits and salaries that would never be considered on an individual basis. In short, it meant that under Mexican law, the spirit and essence of a union and a union agreement was and is to achieve an economic balance between the different factors involved in production of goods and services (capital and labor). A union is, by law, the only entity with sufficient legal standing to represent workers, negotiate collectively, and execute a collective bargaining agreement in Mexico.

## 1.2 Overview

The Mexican Federal Labor Law (“**FLL**”) regulates employment relationships in Mexico. The FLL applies to all employees who provide their personal subordinated services in Mexico, regardless of nationality or the place the worker is employed. The FLL contains detailed provisions concerning the minimum employment conditions and rights that must be granted by the employer to its workforce.

The FLL establishes two general types of employment relationship: individual and collective. An individual employment relationship is created automatically upon a person being hired to perform a task in a subordinated condition (i.e., subject to the control of the employer), whether on a temporary basis or for an indefinite term.

Collective employment relationships are established when the employees are organized by a certified and duly registered trade union, and that union represents the employees in terms and scope of a collective bargaining agreement executed with such employer.

Chapter Seven of the FLL regulates the collective or union aspects of the employer-worker relationship. It contains rules in connection to

coalitions, unions, union federations and confederations, collective bargaining agreements, law-contracts, and internal labor regulations.

Chapter Seven also regulates situations of conflict and processes in the collective agreements, as well as suspension and termination of the collective employment relationship.

Other chapters of the FLL regulate the strike procedure before the labor courts.

## 2. Trade Unions

### 2.1 Coalitions

A coalition is the initiation of a trade or professional association, and its existence is guaranteed by the constitutional principle of freedom of association. It is legally defined as “the temporary agreement of a group of workers and employees oriented toward the defense of their common interests.” However, coalitions have enjoyed little popularity in Mexico.

### 2.2 Trade Union Definition

Unions in Mexico are voluntary workers’ organizations, incorporated for the research, improvement, and defense of their respective interests. Under the FLL, labor unions may be classified under:

1. Guilds, which are formed by workers of one particular profession, grade, or specialty;
2. Company unions, which are formed by workers rendering services to one particular employer or company;
3. Industrial unions, which are formed by workers performing services in two or more companies of the same industrial sector;

4. National industrial unions, which are formed by workers rendering services in one or more companies of the same type of industry located in two or more states; and
5. Miscellaneous specialty unions, which organize workers of different specialties, as long as no specialty has more than 20 workers.

### **Constitution Of The Trade Union**

In Mexico, trade unions (like any other legal entity or person, including businesses, civic associations, cooperatives, and all other non-governmental organizations) require a public act of registration by the state in order to function legally.

For unions subject to federal jurisdiction, the registry resides in the Ministry of Labor. In the case of those under state or local jurisdiction, registration is obtained by the State Conciliation and Arbitration Board (“**CAB**”). Under the law, granting of registrations is purely an administrative act as long as the union complies with filing requirements. However, unions are not subject to dissolution, suspension, or cancellation of their registration by a similar administrative act.

Union registration is key to collective bargaining. Any group of 20 or more workers, even if they are a minority of the workforce, may register their union with labor authorities and thus are able to conduct collective bargaining.

### **The Scope Of Trade Union Rights In Businesses**

Unions are free to form federations or confederations at the local or federal level. Union federations and confederations are basically associations of unions; their functions are purely of a political nature in a particular geographical area or in the country. However, the associations do not have the legal standing to negotiate or execute

collective bargaining agreements or to petition or declare a strike, which disqualifies them from any direct worker representation.

Unions have legal authority and standing to:

1. Acquire assets;
2. Acquire real estate, directly and immediately earmarked for the accomplishment of the purpose of the institution; and
3. Defend their rights and exercise any and all legal actions therewith before any type of authority.

Furthermore, unions have the right to draft their by-laws and articles of incorporation and internal rules, to freely elect their representatives, and to organize their administration and activity programs. Unions are typically represented by the General Secretary of the union as duly elected by its members and pursuant to the by-laws of each particular union.

With respect to third parties, unions are legal entities with very precise limitations as to their legal capacity. Commercial activities and intervention in religious matters are off limits to unions.

### 2.3 The Scope Of Trade Union Rights In Relation To Individual Workers

In Mexico, union dues or quotas are determined by the union's own constitution and by-laws. The FLL also allows for a union and the employer to agree on how and when such dues should be deducted from the salaries of union members and remitted to the union.

While no worker in Mexico may be legally obligated to join an organization, the FLL permits unions and employers to negotiate a "closed-shop agreement." Workers hired after such a clause is established must be union members prior to their employment.

The FLL also allows the parties to negotiate an “exclusion clause,” which requires an employer to dismiss a worker expelled from the union, when that union holds title to the collective bargaining agreement. Absent this clause, an employer or union may not dismiss a worker at-will. The FLL lists 15 specific permissible reasons for terminating a worker’s employment with cause.

## 2.4 The Right To Strike

The right to strike in Mexico is protected as a constitutional right and is regulated by the FLL. Therefore, a no-strike clause is legally prohibited in a collective bargaining agreement. In terms of the FLL, a strike is deemed to be the temporary suspension of work carried out by a union, but such strike is limited only to a mere and simple act of suspending work.

Legally, strikes should have a specific objective and may only occur in connection with the petition by a union to have an employer execute a new collective bargaining agreement or a contract revision, or, in case of a contract violation, during its term.

In all cases, the CAB must determine whether a strike complies with procedural requirements and whether it has the objective of ultimately achieving the economic balance between the factors involved in the production process and “harmonizing the rights of labor with those of capital” as legally required. If not, the CAB may declare a strike “non-existent” and require workers to return to work (replacement of striking employees is not allowed). If certain procedural requirements are not complied with, a strike can also be found to be illegal and workers ordered back to work.

### 2.4.1 Strike Procedure

A union intending to strike must comply with the following procedure as provided in the FLL:

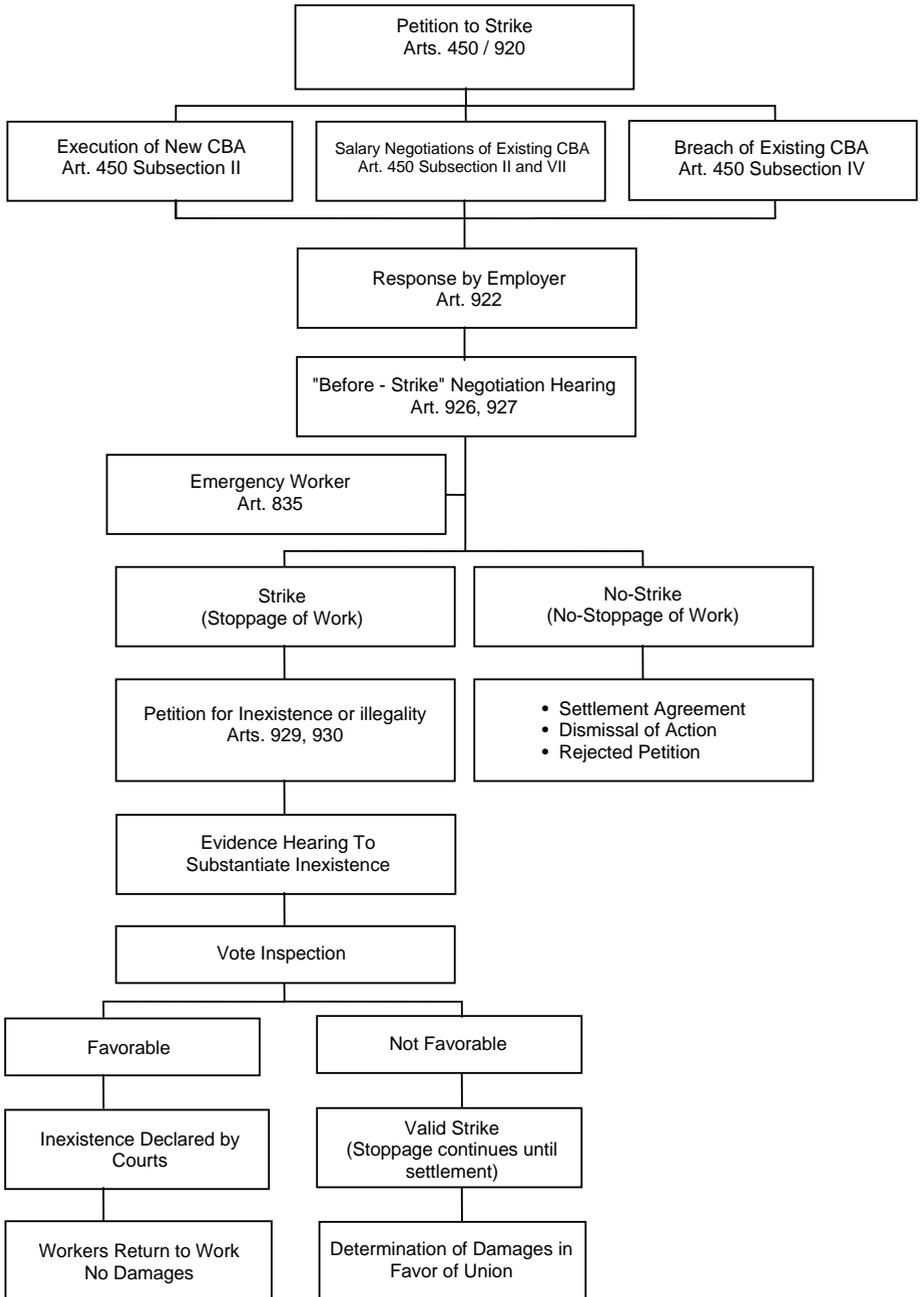
1. It has to file a strike call notice stating the objective of the same before the Labor Board;

2. In the strike call, the union has to enumerate the list of demands, announcing the intention of going on strike if the demands are not met; and
3. It has to establish the specific time and date for the suspension of work, which shall be given at least six days for non-public service industries, and 10 days for employers dedicated to a public service, prior to the date of strike. Such term shall run as of the date on which the Labor Board officially serves the employer with the union's petition.

After the Labor Board receives a strike call, it must appoint a conciliatory hearing before the date of the strike, in order to obtain a settlement agreement between the parties. If the parties do not reach an agreement, the union is allowed to proceed with the strike. At this stage, the Labor Board shall not rule with respect to the legality of the strike and shall act only as an observer in the conciliatory stage.

Once the strike takes place, the employer is not allowed to perform any kind of work and it is forbidden to cross the "picket line." The employees are not allowed to be inside the employer's premises during the time of strike.

### ***Strike Procedure Flow Chart***



\* Collective Bargaining Agreement (CBA)

#### 2.4.2 Legality Of A Strike

After the strike, the employer has the legal right to petition for a ruling on the legality or illegality of the strike. Strikes are not legal in the following cases:

1. If the suspension of work was started with consent from less than the majority of the unionized workers;
2. If the strike does not comply with the objectives referred to above;  
or
3. If the union did not comply with the strike procedure described above.

The employer has a period of 72 hours after the strike to petition for the Labor Board to have the strike formally declared illegal.

The Labor Board, after receiving the petition of the employer, must serve such petition to the union and appoint a hearing in which the union has to respond to the petition, and both parties are obligated to submit evidence in support of their corresponding allegations.

In order for the employer to prove the strike illegal, it must ask for an election in which the employees express their will on whether or not they approved of the strike.

#### 2.5 Enforcement Issues

The Federal Labor Ministry is the competent authority in Mexico for the enforcement and administration of social and labor related laws. The “judicial” organs charged with enforcing labor laws and resolving labor-management related disputes are the Conciliation and Arbitration Boards. They include a Federal Conciliation and Arbitration Board based in Mexico City, which has 18 special boards

for specific sectors, as well as decentralized boards located in different states of the Republic.

In each state there are central and decentralized boards for matters that fall under state or local jurisdiction. These boards resolve claims of unjustified dismissals and disputes over wages and working conditions. They also determine the legality of strikes and claims of employers' unilateral and illegal changes in terms and conditions of employment.

The Conciliation and Arbitration Boards are tripartite entities composed of a government representative appointed by the federal or state government, one representative from organized labor, and one representative of management elected by constituent organizations.

## 2.6 Agreements Between Unions And Management

The FLL defines the collective labor (bargaining) agreement as a mutual understanding of one (or more) union and one (or more) employer, or one or more employers' unions with one or more workers' unions, for the purpose of establishing the conditions under which labor is to be performed in one or more companies or employment establishments.

Mexican law, however, does not use the “duty to bargain” concept. Legally, an employer may refuse to bargain with a union that forms and seeks title to a collective bargaining agreement, seeks to revise salaries or benefits, or alleges violations to an existing collective bargaining agreement. If this occurs, the union has the recourse of striking to compel the employer to execute a union agreement, revise salaries and benefits, or remedy any violation, whichever the case may be.

By permitting the right to strike, Mexican law presumes that the force of events – not a formal legal duty – will compel bargaining.

An employer must appear before the relevant Conciliation and Arbitration Board if the union gives notice of a strike, which generates a bargaining dynamic with the involvement of the Conciliation and Arbitration Board.

Collective bargaining agreements are usually executed with no specific term or duration. However, salaries can only be negotiated yearly. All other contractual terms or additional benefits are negotiated at two-year intervals.

In order for a collective bargaining agreement to be enforceable, the agreement must be formalized in writing and must be filed at the Conciliation and Arbitration Board with jurisdiction over the industrial activity performed by the employer. In terms of the FLL, a collective bargaining agreement must, at a minimum, contain: (i) the name and domicile of the parties; (ii) the employment establishments covered by the agreement; (iii) the term of the agreement; (iv) the days of rest and vacation periods; (v) salaries; (vi) working schedules; (vii) regulations on training; and (viii) the rules for the constitution of the joint commissions on health, safety, and on job training as provided by the Federal Labor Law.

Mexican labor law also provides for “law-contracts” or compulsory collective agreements, with salaries and conditions of employment that are mandatory for all companies and workers in certain sectors of industry located in the country or within specified geographic regions. These law-contracts can apply in areas subject to state or federal jurisdiction, whether or not the covered workers and companies are unionized or participated in the actual bargaining. Organizations of employers’ associations and union groups in the affected area or industry are convened by the Labor Department or by the state government to establish and perform under such law-contracts. There are several law-contracts in Mexican branches of industry, including sugar, rubber, radio and television, and textiles.

In some sectors, however, economic pressure in recent years has led to concessions in certain contract provisions, diluting the mandatory effect of law-contracts.

### 3. Works Councils

There are no provisions in Mexican law for Works Councils.

### 4. Trade Union Employee Protection Rights

The Mexican Constitution explicitly guarantees freedom of association and the right to organize and to strike.

The Mexican Constitution also specifies basic conditions of labor regarding minimum wages, hours of work and work shifts, overtime pay, minors' labor, maternity leave, vacation and holidays, profit-sharing, housing, training, safety and health, just cause for discharge, equal pay for equal work, seniority promotions, and other minimum labor standards.

These minimum conditions of employment cannot be waived by individual workers or bargained away by unions, and all employers in Mexico must comply with such minimum standards, regardless of whether they are contained in a bargaining agreement or not.

Employers may voluntarily enhance the minimum benefits required by law or provide additional benefits as they deem convenient. It is also common for specific industries or service sectors to provide special benefits, such as productivity bonuses designed specifically for the needs of that sector. Benefits such as savings funds, punctuality and attendance bonuses, cafeteria and transportation subsidies, enhanced medical coverage, etc., are also provided voluntarily by many employers in order to remain competitive.

#### 4.1 Mandatory Employee Benefits And Social Benefits

The FLL mandates a series of minimum benefits that must be provided by the employer to its employees as of the time of the establishment of the employment relationship, both for individual and

collective relationships. Such minimum benefits consist of the following:

1. Profit sharing: all employers must distribute among their employees an amount equal to 10% of the employer's pre-tax profit, within 60 days after the employer is required to file its year-end income tax return. 50% of that amount is to be distributed in proportion to the number of days worked by each employee during the year, and the remainder according to the wages of each employee. Newly created companies are exempted from this obligation during the first year of operations.
2. Christmas bonus: all employers must pay their employees a year-end bonus equal to at least 15 days' wages, prior to December 20 of every year.
3. Paid holidays: there are seven paid legal holidays that must be observed. An employee required to work on any of these holidays must be paid overtime at the rate of at least three times his or her normal wage.
4. Vacation days and vacation premium: employees with more than one year of seniority are entitled to six days of paid vacation. Employers must pay vacation days at the normal wage, plus a premium of 25% of that wage. The six-day period is increased by two days per subsequent year of seniority, up to the fourth year, for a total of 12 days vacation. After the fourth year, vacation days are increased by two days every subsequent five years.
5. Training: all employers are required by law to provide training to their employees. The employer must have a training program approved by the Ministry of Labor. The program must be implemented by a Joint Commission for Training and Instruction, composed of an equal number of representatives of the employees and of the employer.

6. Minimum wage: the FLL establishes a minimum amount that must be paid to all employees in cash, without deductions or withholding, on a weekly basis. The minimum wage is determined from time to time by the National Minimum Wage Commission. The minimum wage varies for each of three economic regions into which the country is divided. A general minimum wage applies to all employees within each economic region, except those employees that qualify under certain categories defined by the FLL as professional categories for which a specific professional minimum wage applies.
7. Maximum hours and overtime pay: the maximum number of hours an employer may require its employees to work, without having to pay overtime, is 48 hours per week in the day shift, 45 in the mixed shift, and 42 in the night shift. The normal hours may be distributed throughout the week as necessary. The employer must pay the first nine hours of overtime at 200%, and overtime exceeding nine hours at 300%, of standard pay. An employer may not require its employees to work more than nine hours of overtime per week. At least one paid full day of rest per week must be observed. Sunday work is subject to a 25% premium, independent of any overtime premium that may apply.
8. Employment of minors: any worker under 18 years of age is considered an underage worker, and therefore subject to special treatment under law. Work to be rendered by a worker who is older than 14 but younger than 16 is subject to the control and protection of the Labor Inspection Office (this protection and control by the Labor Inspection Office mainly consists of a written authorization to work granted to individual workers). Furthermore, hiring people under 16 is prohibited for: (i) establishments that sell and allow consumption of intoxicating beverages on their premises; (ii) work that may affect their moral integrity or conduct; (iii) work to be carried out underground or underwater; (iv) dangerous or unhealthy work; (v) work exceeding the worker strength or that might hinder or retard normal physical development; (vi) work after 10 p.m.; and (vii)

industrial night work for workers between 16 and 18 years of age. Also according to the FLL, workers under 16 years of age shall not exceed six hours a day, which must be divided into periods not exceeding three hours. Workers under 18 years of age are also entitled to a rest period of at least one hour between the daily work periods. It is also prohibited to cause workers under the age of 16 to work overtime, or on Sundays or legal holidays, and they must receive an annual paid vacation of at least 18 days.

Furthermore, employers having workers under 16 years of age at their service are required to: (i) insist that they produce a medical certificate to the effect that they have the aptitude for the work; (ii) keep a special register available for inspection indicating the worker's date of birth, the kind of work he or she is engaged in, working hours, wages, and other general conditions of employment; (iii) assign the work in such a way that the workers have the necessary free time to comply with their school program; (iv) provide on-the-job training; and (v) provide the Labor Inspection Office such information and reports as it may require.

Additionally, those workers between the ages of 14 and 16 must undergo such medical examinations as may be periodically ordered by the Labor Inspection Office.

9. Health and safety: employers are required to provide a safe and sanitary environment for the workers. A Joint Health and Safety Commission must be created to investigate the causes of illness and accidents and to propose means to avoid them.
10. Paid maternity leave: all employers must provide their female employees with a fully paid maternity leave of six weeks prior to the approximate delivery date and six weeks thereafter. After this 12-week period, employers must offer such employees their former positions back, including any accrued rights, such as seniority and vacation pay. The employer's expense during such maternity leave will normally be covered by the Mexican Social Security Institute.

11. Employer social security contributions: in accordance with the Social Security Law, all employers must register their employees with the Mexican Institute of Social Security (“**IMSS**”). Such registration relieves the employer from any liability in connection with job-related accidents or illnesses and provides employees and their dependents certain benefits such as health, maternity insurance, disability, old age pension, and others. These benefits are provided by IMSS in part with funds received by employers in the form of Social Security contributions.
12. Employer’s contributions to the Workers’ Housing Fund: employers must contribute 5% of its employees’ salaries for the national Workers’ Housing Fund (“**INFONAVIT**”). In general terms, INFONAVIT shall provide workers with housing loans for purchase, construction, or improvement of housing.
13. Employer’s contributions to retirement savings fund: employers must make a contribution equivalent to 2% of the integrated wage of the worker as part of an individual worker retirement savings plan.

## Netherlands

### 1. Introduction

The Netherlands has a long tradition of consensus by a process of persuasion and consultation. Since 1945, central employees' and employers' organisations have participated in a national consultative body, known as the Joint Industrial Labour Council (*Stichting van de Arbeid*, or “**STAR**”), in which the social partners are equally represented for bargaining basic wages and labour conditions. The outcome of these bargaining sessions usually sets the trend for similar bargaining in each type of industry or trade (or large corporations). The STAR also advises, consults, and discusses with the government to jointly give direction to social and economic policies. The STAR can also make recommendations – by request or by other means – to the government on labour relations.

Another national body of importance in this respect is the Social and Economic Council (*Sociaal-Economische Raad*, or “**SER**”). The SER plays an advisory role to the government. This advisory board is established by law. The SER consists of employer, employee, and government representatives (known as “crown-appointed members” or “*kroonleden*”), in equal proportion. The SER can make recommendations on its own initiative or at the government's request on any important measure in social and economic fields. The advisory function of the SER is directed toward improving the quality of the decision-making process in social affairs and organising public support for policies. The SER also serves as a forum where parties can meet, lobby, and seek consensus on social and economic policies.

In the Netherlands, most trade unions are organised for a particular branch of industry or trade. Only a small number of the trade unions are organised on an enterprise level. The largest federation of trade unions in the Netherlands is the Federation of Dutch Trade Unions (*Federatie Nederlandse Vakbeweging* or “**FNV**”), followed by the National Federation of Christian Democratic Workers (*Christelijk Nationaal Vakverbond*, or “**CNV**”) and the Trade Unions Federation

of Middle and Senior Staff (*Middelbaar en Hoger Personeel*, or “**MHP**”).

The Netherlands is currently one of the least unionised countries in the European Union. In 1995, approximately 28% of the Dutch working population was unionised. This percentage decreased even further to 24% in 2004. The percentage is still decreasing and is estimated around 20% in 2010. The reasons for the low organisation percentage include the erosion of employment in the traditionally highly organised manufacturing industry, the decline in solidarity and group awareness among employees, changing patterns of work (households with two incomes), and the changing composition of the working population (e.g., more women, more workers with a higher level of education, and more categories of employees who are less attracted to unions).

## 2. Trade Unions

### 2.1 The General Role Of Trade Unions

Trade unions, as well as employers’ associations, are important lobbies in the Netherlands. Trade unions regularly enjoy the support of the Dutch Parliament, certain political parties (although without an official link) and social institutions.

There is no legal statute in the Dutch Constitution on trade unions. However, the freedom to unionise is based on Article 8 of the Constitution, which recognises and guarantees the freedom of association. The Netherlands has also signed a number of international treaties recognising trade union freedom (e.g., the European Social Charter).

In general, trade unions in the Netherlands are tasked with:

1. Representing the interests of their members in negotiations on labour conditions with employers or employers’ organisations to be included in a collective bargaining agreement (*collectieve arbeidsovereenkomst*, or “**CAO**”);

2. Representing the interests of their members in discussions with employers (especially on a social plan) in the event of a reorganisation or the closing down of an enterprise, especially pursuant to the Act on the Notification of Collective Dismissals (*Wet Melding Collectief Ontslag*) (“**WMCO**”);
3. Representing the interests of their members in merger control, pursuant to the SER Merger Code (SER *Fusiegedragsregels*);
4. Representing employees in boards and consultative bodies, such as the Social Security Boards, the Regional Employment Offices and the STAR;
5. Providing individual assistance to members (e.g., legal aid, tax advice, etc.);
6. Stimulating worker participation within enterprises, especially by proposing candidates for the Works Council pursuant to Article 9 of the Works Council Act and assisting Works Council’s members (in the Netherlands, there are no real formal representatives of trade unions on managerial bodies); and
7. Educating members by organising courses, etc.

Additionally, trade unions often start up what is known as a “*bedrijfsledengroep*” (members’ committee), which consists of organised members within a certain enterprise. In this manner, trade unions are kept informed of the situation in a certain enterprise, are able to learn more about the wishes of the employees and on how to possibly implement those wishes.

## 2.2 The Scope Of Trade Union Rights In Businesses

In the Netherlands, trade unions – as well as central employers’ organisations – participate in the STAR. Discussions in the STAR

mostly set the standard of bargaining in different types of industry or trade with the goal to achieve new CAOs.

Each trade union in the Netherlands is entitled to conclude CAOs under certain formal requirements: (1) a trade union must have full legal capacity, and (2) the union's articles of association must provide for the authority to enter into CAOs. Collective bargaining has been recognised since 1927, when the Act on Collective Bargaining Agreements (*Wet op de collectieve arbeidsovereenkomst*) was adopted. Based on the Act on the Declaration of General Bindingness and Non-Bindingness of CAOs (*Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*), the Minister of Social Affairs may declare, at the request of one or more parties to a particular CAO, that such CAO be "generally binding" for the entire sector of industry if it already applies to a substantial majority of the employers and employees in that sector. In this way, employers and employees within that industry sector that were not involved in the negotiations for the CAO will also be bound by the same terms and conditions as those applicable to employers who were, thus preventing businesses operating in the same sector from deriving a competitive advantage by offering poorer terms of employment.

The parties to a CAO are employers' associations (or individual employers) and trade unions. In principle, an employer may refuse to negotiate with (certain) trade unions. However, sufficiently representative trade unions may claim admission to negotiations in court proceedings. Furthermore, a strike could be used as a coercive measure to be allowed to the negotiating table, although Dutch employees are not easily inclined to strike.

CAOs are mostly concluded for a period of one or two years, but there is generally a continuous process of negotiation between the social partners. The most important bargaining is done at an industry-wide level. Provisions in a CAO may not deviate from obligatory law (e.g., the acts on minimum wage, equal treatment, etc.), but provisions in a

CAO may deviate from what is known as the “three-quarter obligatory law”. The parties may, for instance, agree:

- To the termination of an employment contract during illness, before the employee has been sick for more than two years;
- That the notice period will be shorter or longer than the normal notice period; and
- That the working hours may be longer than the standard statutory working hours.

The CAO applies to all employees that fall within the scope of a CAO, including non-union members. However, trade union members are obliged to accept the terms of employment in the CAO, while non-members do not have this obligation unless the CAO has been declared generally binding by the Minister of Social Affairs, or unless the CAO has been incorporated in the individual labour agreement. Very rarely are all employees within a company covered by the CAO. Most CAOs only apply to a certain job level and, therefore, up to a certain salary level.

CAOs contain mostly minimum rules and “normal provisions” regarding wages, additional pay, working time, vacation, health and safety, etc. More favourable terms can be agreed upon in individual labour agreements.

### ***The Right To Strike***

Dutch law does not contain any specific provisions on strikes. The court adjudicates how parties conduct themselves in conflict situations. The court will examine the conflict according to the European Social Charter ratified by the Netherlands in 1980. Section 6 (4) recognises the right of employees to strike, unless a CAO rules out strikes, typically with an absolute or conditional no-strike agreement. In principle, strikes are allowed only as a last resort after a

breakdown in serious negotiations. A strike is unlawful if serious negotiations have not first been held with the employer and if the employer has not been given due notice. Section 31 of the Charter imposes restrictions on the right of collective action, especially based on the protection of third parties' rights to freedom and the protection of the public order, national security and public health and morale. However, the courts are not easily inclined to invoke Section 31 of the Charter. Courts will typically assume that damages, even those suffered by third parties, are inherent in a strike. The losses need to be disproportionately large in order for a strike to be deemed unlawful. The size of the damages can also be affected by the length of a strike. Furthermore, strikers may not obstruct those willing to work. Picketing is therefore deemed unlawful.

Employees participating in a strike have no right to remuneration and social security benefits, although employees participating in strikes who are members of a union will be paid from union strike funds.

Based on the figures below, labour relations in the Netherlands can be characterised as harmonious. Trade unions and employers' associations have adopted a strategy of conflict avoidance. In comparison with other countries, trade unions rarely use the strike as a method to achieve their goals.

An important point is that three-quarters of the trade union members must vote in favour of the strike. As strikes are often used only as a warning, the number of strikes and lost working days is very low in the Netherlands, especially in comparison with figures for other EC countries.

<b>Strikes In The Netherlands</b> <b>(From The Central Bureau Of Statistics, April 2011 Statistics)</b>				
<i>Year</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>
<i>Number Of Strikes</i>	20	21	25	21
<i>Number Of Employees Involved (x 1,000)</i>	20,7	51,9	3,6	14,1

<i>Number Of Lost Working Days (x 1,000)</i>	26,4	120,6	4,6	59,2
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### ***Collective Redundancies***

Pursuant to the WMCO, if there is a planned dismissal of 20 or more employees within a period of three months and within one district that Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*) or “UWV” operates in (a “District”), the employer is obliged to inform the trade unions of the planned dismissal by sending the unions a copy of the written request to the UWV (some CAOs may oblige employers to inform the trade unions at an earlier stage).

The employer must discuss with the trade unions the reasons for the reorganisation and the consequences for the employees. According to Article 4 of the WMCO, the report to the UWV and the trade unions must include the following information:

1. The reasons for the planned collective dismissal;
2. The number of employees to be made redundant, with a breakdown of their job description, date of birth, sex, and date of commencement of employment;
3. The number of employees normally employed;
4. The proposed time scale for the dismissal of the affected employees;
5. The criteria used in the selection of employees to be dismissed;
6. How the severance payments are calculated; and
7. Whether a Works Council in the company will be involved.

There is a one-month waiting period that allows the employer and the trade unions to negotiate and gives the employer sufficient time to prepare a social plan. However, there is no legal obligation for the employer to negotiate the content of the social plan with the trade unions. Nevertheless, a social plan often forms an important part of the negotiations with the trade unions, as trade unions will base their support on the content of that plan. In case of bankruptcy, a waiting period does not have to be observed.

### ***The SER Merger Code***

The Social and Economic Council or the SER is an advisory public body, equally composed of members who represent the trade union federations, the employers' federations, and independent experts. The SER drew up the Merger Code in 1975, which is promoted by a SER Commission. The rules of the Merger Code were last amended in 2000. Even though the Code does not contain any rules of law, it is intended to safeguard the rights of affected employees and shareholders during mergers.

Article 3 of the Code obligates the management of an enterprise to notify the relevant trade unions before the decision regarding a merger has been made. This obligation only applies if one of the merging enterprises is settled in the Netherlands and has 50 or more employees. The trade unions are obliged to treat the notification confidentially. The trade unions have a right to obtain information concerning the motives and the consequences of the merger and to give their judgment on the merger from the employees' point of view. The trade unions are furthermore entitled to a face-to-face meeting with representatives of the company to discuss (among others) the consequences for the employees and possible ways to alleviate such consequences.

### 3. Works Councils

#### 3.1 General Requirements And Principles

Under Article 2(1) of the Dutch Works Council Act (*Wet op de ondernemingsraden*) (“**WOR**”), an employer who operates an undertaking for which 50 persons or more regularly work must establish a Works Council.

Part-time employees and employees who are hired out are also granted full participation in the undertaking for which they work, as long as they have an employment agreement with the employer. This right is also conferred upon employees who are hired in (including temporary employees). They are entitled to participate in the hiring undertaking’s Works Council, provided that they have worked there for at least 24 months (pursuant to Article 7:690 of the Dutch Civil Code) and have contributed in the activities of the undertaking. Thus, employees who are hired out (e.g., by means of secondment) are not only entitled to participate in the undertaking from which they are hired out, but also in the undertaking where they are actually performing their activities (subject to the 24-month rule).

Under the WOR:

- An “undertaking” is defined as “any organisational group that operates as an independent entity in society and in which work is performed pursuant to an employment contract or by public-law appointment”;
- An “entrepreneur” is “the natural person or legal entity that carries on an enterprise” (one entrepreneur may thus carry on various enterprises);
- The persons with voting rights for the Works Council are the persons who “worked for the undertaking” for six months in order to be able to vote or for one year in order to be elected; and

- Persons “employed by the undertaking” are those persons who have actually worked for the undertaking on the basis of: (i) a public-law appointment, (ii) an employment contract with the “entrepreneur that carries on the undertaking”, (iii) a temporary employment contract as defined in Article 7:690 *et seq.* of the Dutch Civil Code for at least 24 months, and (iv) persons who have an employment contract with the entrepreneur, but who work for an undertaking that is carried on by another entrepreneur.

An entrepreneur who maintains two or more undertakings employing at least 50 people can set up a Joint Works Council if it promotes the positive application of the WOR in the related businesses. The same applies to a group of entrepreneurs that maintains two or more businesses.

Setting up a Joint Works Council is usually done if an entrepreneur runs several businesses that are linked as far as nature, structure, and management are concerned, and to such a large extent that there does not seem any point in setting up separate Works Councils. A Joint Works Council may be set up provided that a primarily joint business policy is implemented, both in the economic and in the organisational sense. If no joint policy is implemented despite the fact that there are certain common interests, a Group or Central Works Council may be set up. If the Central Works Council functions for only a part of the undertaking, it is named a Group Works Council. In that case, the entrepreneurs involved must have a joint economic objective and conduct a joint management. The Group Works Councils and the Central Works Councils are authorised only in joint matters regarding the undertakings in question, regardless of whether the separate Works Councils are granted authority in those matters (Articles 3 and 33 WOR).

The first responsibility to set up a Works Council lies with the employer. If no Works Council is set up, each interested party and each trade union entitled to nominate members of the Works Council will have the right, after mediation and advice by the Industrial

Committee for Works Council Matters, to request the Cantonal Court to order the employer to set up a Works Council. The Cantonal Court may decide that the employer indeed has an obligation to set up a Works Council. If the employer fails to comply with that obligation, the employer will be liable under the Economic Offences Act (*Wet economische delicten*) and could face a maximum sentence of six months' imprisonment or a fine of EUR 16,750 in addition to other penalties that can be imposed and actions that can be taken.

### 3.2 Election Of Works Councils

Employees who have an employment contract for at least six months with an employer are entitled to vote in the Works Council elections. Temporary and seconded employees are not entitled to vote until they have performed activities for the employer for at least 24 months.

Employees who have worked for the employer for at least one year will be eligible for membership in the Works Council. Temporary and seconded employees will not be eligible until they have performed activities within the company for at least 24 months.

After consultation with the entrepreneur, the Works Council shall set the election date as well as the time at which voting shall commence and end. The Secretary of the Works Council shall give the entrepreneur, the employees, and any relevant associations of employees notice to that effect. It is custom that there shall be at least 13 weeks between the date of notice and the date on which the election is to be held.

At least 10 weeks before the election date, the Works Council shall draw up a list of employees who will be entitled to vote and/or who are eligible for election as of the election date and shall ensure that this list is known within the company.

Associations of employees may submit candidate lists up to six weeks before the election date. The Works Council must verify that the lists submitted and the candidates named on them meet the requirement set

by law and the SER Rules of Procedure. The Works Council must inform all employees of the candidate lists at least two weeks before the election date. A list can also be submitted directly by a group of employees if that group is composed of one-third or more of the voting employees of the business who are not members of an association, provided that at least 30 signatures have been placed on the list of candidates.

### 3.3 Works Council Members

A Works Council consists of members chosen directly by and from employees who work in the undertaking. The Works Council will have five members if the business has 50 to 100 employees, seven if the business has 100 to 200 employees, etc., with a maximum of 25 members in case the business employs 12,000 or more (Article 6 WOR). The Works Council elects a chairperson and one or more substitute chairpersons from its midst. The chairperson (or substitute chairperson) has the power to represent the Works Council in court.

### 3.4 Management Of Works Councils

A Works Council must draw up regulations on all matters which, by or pursuant to the law, have been delegated to or left for regulation by the Works Council. No provisions may be made in the regulations that are in breach of the law or frustrate a proper application of the WOR. Prior to adoption of the regulations the Works Council must give the employer an opportunity to state his views.

The Works Council regulations can also provide for an electoral group system, in which case the persons working in the business are divided into electoral groups: groups of employees or business divisions that elect a certain number of Works Council members from their midst.

Members of the Works Council resign collectively every three years, but are immediately eligible for re-election. The WOR specifies the provisions to be incorporated in the regulations, but the Works Council determines its own procedural methods. It can set up committees that can reasonably assist in the performance of the

council's duties. The Works Council can also invite one or more experts to attend a meeting of the council dealing with a specific subject matter.

### 3.5 Functions And Rights Of Works Councils

The WOR and several other statutes grant the Works Council a number of specific powers.

On the basis of Articles 158 and 268, Book 2 of the Dutch Civil Code, Works Councils in large public and private companies (*naamloze vennootschappen* and *besloten vennootschappen*) have certain powers with respect to the appointment of supervisory directors (e.g., the right to make recommendations or raise objections).

The most important powers of a Works Council include the right to information, the right to be consulted and the right of initiative, advisory powers, and the right of approval in certain circumstances. The Works Council also has specific promotional duties with regard to the working conditions of the establishment.

#### ***The Right To Information***

Articles 31 to 31e govern the Works Council's right to information. A newly elected Works Council is entitled to the current, basic information on the structure and organisation of the company and the legal entity that governs the company, as well as information on the group to which the company belongs (Article 31(2) WOR).

On the basis of Article 31, the company must provide the Works Council with written information about important legal and organisational aspects of the company, including:

- The company's legal form and Articles of Incorporation or Association;
- The name and address of the company or the (general) partners;

- A list of the legal entities that make up the group, the division of powers between these individual entities, and the legal entity that is actually in control of the company (e.g., in the form of a group structure diagram);
- A list of the other companies with which the company maintains permanent relations that may be essential to the company's continuity; and
- Insight into the organisational structure of the company.

The Works Council's right to information is limited to the information that can reasonably be linked to the performance of the Works Council's tasks. In its request for such information, the Works Council must clearly specify the matter for which it requires the information. Should the company feel that the Works Council does not reasonably need certain data or information, it can refuse to give the information. If, subsequently, the Works Council insists that it must have the information, it may, after consultations with the works committee (*bedrijfscommissie*), request the Cantonal Court to break the deadlock.

Furthermore, the entrepreneur must provide the Works Council with detailed information on the company's financial and economic policy at least twice a year (Article 31a) and with information on the company's social policy at least once a year (Article 31b, 31c, paragraph 1(g)). This information must be discussed in one or more consultative meetings (Article 24).

The Works Council is also entitled to receive information on the amount and content of the terms and conditions of employment that are provided to the several groups of employees within the business. The entrepreneur is also to provide information on the amount and content of the terms and conditions of employment of the management board. Last but not least, the Works Council is to be informed of the

total amount of compensation provided to the supervisory board (Article 35d WOR).

Apart from the right to the above information, the Works Council is also entitled to ask the company for information and data that the Works Council in all reasonableness requires performing its duties (Article 31(1)), which is known as the “active information right.”

Finally, the Works Council has other specific rights to information within the framework of its advisory powers and its power of approval (Articles 25(3), 27(2) and 30(3)).

### ***The Right To Be Consulted/The Right Of Initiative***

Consultations between the company and the Works Council take place in “consultative meetings.” The company and the Works Council are obliged to convene within two weeks after either the company or the Works Council has requested a meeting, specifying the reasons for its request. If necessary, following the mediation efforts and the advice of the works committee, the Cantonal Court can be petitioned to order both parties to meet, so that the two-week time period may be complied with (Article 23). The Works Council has the power to make proposals concerning any such matters and express its point of view (rights of initiative conferred under Article 23(2)).

On behalf of the entrepreneur, the managing director of the company must conduct the consultation. If there is more than one managing director, the directors must decide among themselves who will consult with the Works Council. The managing director may ask other managing directors or other individuals working for the company to assist him or her (Article 23(6)).

The conduct of affairs in the company must be discussed at least twice a year in a consultative meeting, although the Works Council may decide that this obligation need not be complied with (Article 24(2)).

The above obligations to attend the meeting do not apply to companies that are maintained by an entrepreneur that, alone or as part of a group of associated entrepreneurs together, maintains at least five companies for which a Works Council has been set up (Article 24(3)).

### ***Advisory Powers***

Certain decisions to be taken by the entrepreneur require prior advice from the Works Council. Pursuant to Article 25(1) of the Dutch Works Councils Act, such decisions include:

1. Transfer of control of the company or a part thereof;
2. Establishment, take-over, or relinquishment of control of another company, or entering into or making a major modification to or severing a permanent co-operative venture with another company, including entering into or effecting major changes of or severing of an important financial participation on the account of or for the benefit of another company;
3. Termination of the operations of a company or a major part thereof;
4. Major reductions or expansions or other changes to the company;
5. Major changes in the organisational structure of the company or in the division of powers within the company;
6. Changes in the location where the company conducts its business;
7. Recruitment or borrowing of personnel on a group basis;
8. Making major investments on behalf of the company;
9. Taking out a significant loan for the company;

10. Granting important loans and providing security for major debts of the entrepreneur;
11. Implementing or changing important technological facilities;
12. Taking important measures with respect to environmental matters;
13. Making provisions under the Dutch Disablement Insurance Act; and
14. Commissioning an outside expert to provide recommendations on one of the matters referred to above and formulating his or her terms of reference.

A Works Council's advisory rights do not, however, apply to take-overs, cooperative ventures, and other situations referred to under (10) or to the commissioning referred to under (2), if the other company is or will be established abroad (Article 25(1)).

The request for advice must be in writing and include a summary of the reasons for the decision, its expected consequences for the employees and the measures proposed in response (Article 25(3)).

The advice must be requested within a time frame that will allow it to have a significant impact on the decision to be made (Article 25(2)). The Works Council is not obliged to give its advice. If the Works Council wishes not to give its advice it must inform the employer thereof.

If the Works Council refuses to give advice or does not give advice within a reasonable time frame, the entrepreneur could also make a decision without the advice of the Works Council. However, if the entrepreneur has made a decision, the Works Council should be informed in writing as soon as possible. The Works Council can seek a court injunction.

The Works Council may not give its advice until after the matter has been discussed during at least one consultative meeting.

If, after the advice has been given, the entrepreneur decides to go through with the planned decision, it must so inform the Works Council in writing.

Should the decision deviate from the advice given by the Works Council, the entrepreneur will have to give a full account of the reasons. The entrepreneur is also obliged to postpone executing the decision for one month, unless the Works Council expresses its willingness to waive that obligation (Article 25(5) and (6)). Although there is no financial penalty if this one-month stay is not observed, the entrepreneur should not ignore this obligation, as the Works Council can start summary proceedings to force the entrepreneur to observe the one-month stay.

If the entrepreneur executes an “apparently unreasonable” decision and the Works Council is thus faced with a *fait accompli*, the Works Council can bring summary proceedings before the President of the Cantonal Court. The Works Council can thus prevent a lodged appeal (or an appeal to be lodged) with the Companies Chamber from having no effect if the disputed decision has already been executed by the entrepreneur. The possibility of initiating summary proceedings also exists if the Works Council has already filed a request at the Companies Chamber for (preliminary) orders.

During the one-month stay, the Works Council may lodge an appeal with the Companies Chamber of the Court of Appeal in Amsterdam pursuant to Article 26(1). An appeal may also be filed if the entrepreneur failed to request the advice of the Works Council.

The Works Council may lodge an appeal only on the ground that “the entrepreneur, after having weighed all interests involved, could not have reasonably made his decision” (Article 26(4)). Thus, the Companies Chamber may only judge the reasonableness of the manner in which the decision was reached. It can reject the decision

on substantial grounds only if the decision is “apparently unreasonable.”

The decision may also be “apparently unreasonable” if the formal procedure has been disregarded. In order to successfully appeal to the Companies Chamber in such cases, the interests of the Works Council, as protected by law, must have been considerably affected (e.g., if the company took the decision without requesting the advice of the Works Council).

In general, the entrepreneur may execute its decision after the one-month stay has expired. However, a possible preliminary order by the President of the Cantonal Court and preliminary orders by the Companies Chamber may have consequences for the decision and its execution (see Article 26(5) to (8)).

The Companies Chamber may, for example, impose an obligation on the entrepreneur to withdraw the decision in whole or in part and return to the status quo (Article 26(5a)). It can also prohibit the entrepreneur from performing acts or having acts performed with respect to the execution of the decision or portions thereof (Article 26(5)(b)).

In general, the rights of third parties cannot be affected by court orders or prohibitions (Article 26(5)).

Appeals may only be lodged against judgments given by the Companies Chamber with the Supreme Court (“appeals in cassation”) (Article 26(9)).

Apart from the advisory rights set forth in Article 25, the Works Council also must be given the opportunity to give advice on each of the entrepreneur’s proposed decisions to appoint or dismiss a director of the undertaking within the meaning of Article 1 WOR: “a person who, alone or jointly with others, directly controls an undertaking in the management of the work” (Article 30). The advice must be requested at such a time as to allow it to have a significant impact on

the projected decision. The employer shall inform the Works Council of the reasons for the decision and, in the case of an appointment, also provide information on the basis of which the Works Council can form an opinion on the relevant persons in connection with their future position in the undertaking.

With regard to the intended decision to appoint or dismiss a director, no one-month stay need be observed. Furthermore, if the advisory rights stated in Article 30 have not been observed, the Works Council has no right to appeal pursuant to Article 26.

### ***The Right Of Approval***

In a number of cases, the Works Council has been given the right to cooperate in decisions (Article 27(1) of the Dutch Works Councils Act). The Works Council should be requested to render its prior approval to specific intended decisions, particularly decisions to adopt, amend, or withdraw:

1. Pension insurance schemes, profit-sharing schemes, or saving schemes;
2. Arrangements on working hours or holidays;
3. Remuneration of job assessment schemes;
4. Regulations in the field of health, safety, and welfare;
5. Regulations in the field of appointment, dismissal, or promotion policy;
6. Regulations in the field of staff training;
7. Regulations in the field of staff assessment;
8. Regulations in the field of industrial social work;

9. Regulations in the field of job consultations;
10. Regulations in the field of handling complaints;
11. Regulations in the field of registration and protection of personal data of employees; and
12. Regulations with regard to the supervision and monitoring of employees.

The right of approval is not required if the substance of the matters has already been regulated in a collective bargaining agreement that applies to the company or when a public body sets out regulations (Article 27(1)).

A decision proposed by the entrepreneur on one of the matters set out in Article 27(1) must be submitted in writing to the Works Council, including the reasons for it and its consequences. The matter must be discussed during at least one consultative meeting. As soon as possible after the decision has been made by the Works Council, the entrepreneur must notify the Works Council of the decision it has made, the date on which it was made and the date on which the entrepreneur intends to execute the decision (Article 27(2)). If the entrepreneur has not obtained the required approval for the decision from the Works Council, it may ask the Cantonal Court to grant permission to execute the decision.

The Cantonal Court will grant permission only if the decision by the Works Council to withhold its approval is unreasonable or if weighty industrial, organisational, economic, or social interests necessitate the decision proposed by the entrepreneur.

A decision as referred to in Article 27(1) made without the required approval of the Works Council or the permission of the Cantonal Court is void, provided that the Works Council has invoked such consequence within the time period as provided by Article 27(5).

### ***Promotional Duties***

Finally, the Works Council has a duty to safeguard the supervision of working conditions (Article 28(1)), to promote the equal treatment of men and women and the inclusion of disabled and other minorities in the business (Article 28(3)), and to promote environmental care (Article 28(4)).

Meetings of the Works Council and its committees are held whenever possible during regular working hours. The employer has an obligation to allow the Works Council, its committees, and a designated “*ambtelijk secretaris*,” if any, to use all of the facilities that are at the employer’s disposal and that are reasonably useful for the performance of the duties of the Works Council and its committees. The facilities referred to above include the use of conference rooms, telephones, stationary, copy machines, postage meters, secretaries, etc. Furthermore, the entrepreneur should enable the employees to be consulted by the Works Council and its committees by providing time and facilities in so far as is reasonably necessary. If the entrepreneur does not want to cooperate, the Cantonal Court can be asked for a judgment.

The employer must also afford members of the Works Council and the committees a certain number of paid working hours per year (determined in mutual consultation between the employer and the Works Council) to consult and meet, to deal with affairs that are inherent in the performance of their duties, and to assess the working conditions within the business.

The employer is also obliged to afford members of the Works Council a certain number of paid working days per year (determined in mutual consultation between the employer and the Works Council) to follow such training courses as the members may deem appropriate for the performance of their duties.

The amount of available time referred to above must total at least 60 hours per year and at least five days per year, respectively, for

members of the Works Council, at least three days for members of the committees, and at least eight days for members of both the Works Council and the committee. The costs reasonably required for a proper performance of the duties of the Works Council and its committees will be at the employer's expense. The same applies to the costs of seeking advice from an expert and the costs of conducting litigation, provided that the employer is notified of such costs in advance.

In consultation with the Works Council, the employer can also fix the amount from year to year that can be spent by the Works Council and the committees at the Council's discretion on matters not related to the provisions set forth in Articles 17 and 18 WOR. Any costs exceeding this fixed amount will only be payable by the employer to the extent that it consents to such payment obligation. Such costs include the costs of meetings, conference rooms, telephone calls, copying, administrative charges, secretarial support, travel expenses, refreshments, training fees, expert consultancy fees and costs for consultative meetings. In the event of any litigation between the company and the Works Council, the Council cannot be ordered to pay the costs of the proceedings.

#### 4. The Interaction Between A Works Council And A Trade Union

In the majority of cases, a trade union is the advisor to the Works Council when negotiating with the employer over labour conditions and employment agreements. Collective labour agreements are also negotiated by the employer and the trade union.

Additionally, in relation to collective dismissals, the trade union advises the Works Council on the process and will help in negotiating the social plan in so far as the social plan is not being negotiated directly between the company and the trade unions.

## 5. Works Council Employee Protection Rights

The employer may not terminate the employment agreement of a member of the Works Council, the Works Council committee, or *ambtelijk secretaris* unless the person concerned consents in writing or if the employment agreement is terminated for an urgent, promptly stated reason or on the ground of a discontinuation of the business or the business unit in which the person concerned works. Furthermore, without the prior consent of the Cantonal Court, the employer may not terminate the employment agreement of a person included in the list of candidates or who was a member of the Works Council in the previous two years, who is a member of a committee set up by the Works Council, or who was a member of such a committee in the previous two years (Article 7:670 (a), 7:670 a, 7:670 b of the Dutch Civil Code).

Employees who take or have taken the initiative to set up a Works Council also receive legal protection against being placed in a worse position within the company.

The Cantonal Court will only grant permission to terminate such an employee if it reasonably appears that the termination has no relation whatsoever to the employee's inclusion in the list of candidates or his or her membership in the Works Council or one of its committees. Permission from the Cantonal Court to terminate such an employee will not be required if the employee consents to the termination in writing or if the employment agreement is terminated for an urgent, promptly stated reason or on the grounds of a discontinuation of the business or the business unit in which the person concerned performs his or her work.

The foregoing does not affect the employer's right to petition the Cantonal Court, but the court will only grant such a petition if it reasonably appears that the dissolution has no relation whatsoever to the employee's inclusion in the list of candidates or his or her membership of the Works Council or one of its committees.

## 6. Other Types Of Employee Representation

An undertaking with at least 10 but fewer than 50 employees that does not have a Works Council may set up a Personnel Representative Committee. Its advisory powers apply to proposed decisions that may result in a loss of jobs or in major changes in the work or working conditions of at least a quarter of the employees. The Personnel Representative Committee does not have the right to appeal to the Commercial Chamber; thus, if the Personnel Representative Committee has given negative advice, the undertaking may still implement the proposed decision without the Personnel Representative Committee being able to appeal against it.

If neither a Personnel Representative Committee nor a Works Council has been set up, the undertaking is obliged to give the persons working in the undertaking the opportunity to meet with the entrepreneur twice every calendar year (Article 35b).

A small undertaking (fewer than 10 employees) may also voluntarily set up a Personnel Representative Committee, which would have the same facilities at its disposal as Personnel Representative Committees in undertakings with 10 to 50 employees. However, its powers are limited to the power to consent with regard to the regulation of working hours.



# Philippines

## 1. Introduction

The 1987 the Philippine Constitution recognized and affirmed labor as a primary social economic force. As such, the rights of workers are protected and their welfare is promoted. The Constitution guarantees the right of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with the law.

## 2. Trade Unions

### 2.1 The General Role Of The Trade Union

Article 212(g) of the Philippine Labor Code defines a labor organization as any union or association of employees that exists in whole or in part for the purpose of collective bargaining or for dealing with employers in relation to the terms and conditions of employment.

Only a legitimate labor organization may enjoy collective bargaining rights. A labor organization that has not been registered with the Philippine Department of Labor and Employment (**DOLE**) cannot exercise such rights since it has no legal personality. Once registered, a legitimate labor organization acquires a separate juridical personality vested with certain rights under the law.

### 2.2 Constitution Of The Trade Union

Managerial employees are not eligible to join, assist, or form any labor organization. On the other hand, supervisory employees are not eligible for membership in a labor organization of the rank-and-file employees but may join, assist, or form separate labor organizations of their own. A rank-and-file union and a supervisors' union operating within the same establishment may join the same federation or national union. In all cases in which the law allows the formation of a union at the enterprise level, such union may be created either by independent registration or by chartering.

### ***Independent Registration***

Independent registration is obtained by the union organizers in an enterprise through their own action. The union, thus created, has a legal personality of its own and is called an independent union. An application for registration of an independent union must be supported by the following:

1. The names of its officers, their addresses, the principal address of the labor organization, minutes of the organization's meetings, and the list of workers who participated in such meetings;
2. The number of employees and names of all its members comprising at least 20% of the employees in the bargaining unit where it seeks to operate (a bargaining unit refers to a group of employees sharing mutual interests within a given employer unit, comprised of all or less than all of the entire body of employees in the employer unit, or any specific occupational or geographical grouping within the unit). However, the inclusion of employees outside the bargaining unit as union members shall not be a ground for the cancellation of the registration of the union. Such employees are automatically deemed removed from the union's membership list);
3. Two copies of its annual financial reports if the applicant union has been in existence for at least one year, unless it has not collected any amount from the members, in which case a statement to this effect must be included in the application; and
4. Four copies of its constitution and by-laws, minutes of its adoption or ratification, and the list of the members who participated in the adoption or ratification. However, the list of ratifying members may be dispensed with where the constitution and by-laws were ratified or adopted during the organizational meeting, in which case, the factual circumstances of the ratification shall be recorded in the minutes of the organizational meeting.

The application for registration and all the accompanying documents must be verified under oath by the secretary or treasurer and attested to by its president.

The application for registration must be filed with the regional office of the DOLE that has jurisdiction over the place where the applicant's principal office is located. It shall be processed by the Labor Relations Division at the regional office. The regional office shall act on the application within 10 days from receipt thereof. It may approve the application and issue a certificate of registration upon the applicant's payment of the prescribed registration fee or deny the application for the applicant's failure to comply with the requirements for registration.

If the documents supporting the application are not complete or do not contain the requisite attestation requirements, the regional office shall, within five days from receipt of the application, notify the applicant in writing of the requirements needed to complete the application. If the applicant fails to complete the requirements within 30 days from receipt of such notice, the application shall be denied without prejudice to a subsequent application.

In case of denial of the application for registration, the notice of denial shall be in writing stating in clear terms the reasons for the denial. Such denial may be appealed to the Bureau of Labor Relations within 10 days from receipt of notice of denial on the ground of grave abuse of discretion or violation of the Philippine Labor Code or its Implementing Rules.

The labor union is deemed registered and vested with legal personality on the date of issuance of its certificate of registration. Such legal personality cannot be subject to collateral attack, but may be questioned only in an independent petition for cancellation.

The cancellation of a labor union's certificate of registration can be made only through an independent petition for that purpose, after due hearing, and only upon the following grounds:

- Misrepresentation, false statement or fraud in connection with the adoption or ratification of the constitution and by-laws or amendments thereto, the minutes of ratification, and the list of members who took part in the ratification;
- Misrepresentation, false statement or fraud in connection with the election of officers, minutes of the election of officers, and the list of voters; or
- Voluntary cancellation by the organization itself, provided that in such a case, at least two-thirds of the organization's general membership votes, in a meeting duly called for that purpose, to dissolve the organization; provided, further, that an application to cancel registration is thereafter submitted by the board of the organization, attested to by the president.

However, despite a pending petition for cancellation of the certificate of registration of a labor union, a union still enjoys the rights vested upon it by law. As such, the Philippine Labor Code expressly provides that a petition for cancellation of union registration shall neither suspend the proceedings for certification election initiated by the union nor prevent the filing of a petition for certification election by such union. Moreover, even if union registration is cancelled, the law reserves for the union the right to seek just and equitable remedies in the appropriate courts.

### *Chartering*

Chartering takes place when a duly registered federation or national union issues a charter to a union in an enterprise, thereby indicating its direct creation of one of its local chapters. The union recipient of the charter is normally called a chapter. However, such chapter, from the

date of issuance of the charter, acquires legal personality only for the purpose of filing a petition for certification election. It shall be entitled to all other rights and privileges of a legitimate labor organization only upon the submission to the Bureau of Labor Relations (BLR) of the following documents in addition to its charter certificate:

- The names of the chapter's officers, their addresses, and the principal office of the chapter; and
- The chapter's constitution and by-laws, provided that where the chapter's constitution and by-laws are the same as that of the federation or the national union, this fact shall be indicated accordingly.

The additional supporting requirements shall be certified under oath by the secretary or treasurer of the chapter and attested to by its president.

### 2.3 The Scope Of Trade Union Rights In Businesses

In the Philippines, legitimate labor unions have the following rights:

1. To act as the representative of its members for the purpose of collective bargaining;
2. To be certified as the exclusive representative of all the employees in the appropriate collective bargaining unit for the purposes of collective bargaining;
3. To be furnished by the employer, upon written request, with its annual audited financial statements, including the balance sheet and the profit and loss statement, within 30 calendar days from the date of receipt of the request, after the union has been duly recognized by the employer or certified as the sole and exclusive bargaining representative of the employees in the bargaining unit,

or within 60 calendar days before the expiration of the existing collective bargaining agreement, or during the collective bargaining negotiation;

4. To own property, real or personal, for the use and benefit of the labor organization and its members;
5. To sue and be sued in its registered name;
6. To undertake all other activities designed to benefit the organization and its members, including cooperative, housing welfare, and other projects not contrary to law; and
7. Unless withdrawn by special law expressly repealing this privilege, to be free from taxes, duties, and other assessments relating to the income and properties of legitimate labor unions, including grants, endowments, gifts, donations, and contributions they may receive from fraternal and similar organizations, local or foreign, which are actually, directly, and exclusively used for their lawful purposes.

In addition, labor organizations have the right to engage in peaceful concerted activities, including the right to go on strike in accordance with the law. Any certified or duly recognized bargaining representative may declare a strike in cases of bargaining deadlocks and unfair labor practices.

Violations of collective bargaining agreements, except flagrant and/or malicious refusal to comply with its economic provisions, shall not be considered unfair labor practices and are therefore not sufficient reasons to hold a strike.

In the absence of a certified or duly recognized bargaining representative, any legitimate labor organization in the establishment may declare a strike, but only on account of an unfair labor practice.

No strike may be declared on the grounds of inter-union and intra-union disputes or of issues brought to voluntary or compulsory arbitration.

#### 2.4 The Function Of Trade Union Representatives

The law aims at employee participation in policy and decision-making processes in a company insofar as those processes will directly affect the workers' rights, benefits, and welfare.

The general function of a union is to represent its members particularly against an employer's unfair labor practices against it or any of its members, and to file actions for their benefit and behalf, without joining them to avoid the cumbersome procedure of joining each and every member as a separate party.

The labor organization designated or selected by the majority of the workers in an appropriate collective bargaining unit shall be the exclusive representative of the workers in that unit for the purpose of collective bargaining. The designation of a representative in a bargaining unit, however, does not deprive an individual worker or group of workers of the ability to exercise, at any time, their right to present grievances to the employer, with or without the intervention of the bargaining unit. The representative of the bargaining unit represents not only its members, but also non-members who are embraced within the bargaining unit.

An establishment may have one or several bargaining units that are represented by different labor organizations - one for every bargaining unit. It is possible that several labor organizations may seek the status of exclusive representation in one bargaining unit. In this case, the issue of exclusive representation for collective bargaining with the employer is resolved through a certification election.

A certification election is the process of determining, through secret ballot, the sole and exclusive bargaining agent of the workers in an appropriate bargaining unit for purposes of collective bargaining. The

purpose of a certification election is to determine the wishes of the majority of the workers in an appropriate bargaining unit – whether or not they wish to be represented by a labor organization, and if so, by which particular labor organization.

### 3. Works Councils

#### 3.1 General Requirements And Principles

Under Article 277(h) of the Philippine Labor Code, labor-management councils may be formed in establishments where no legitimate labor organization exists. These councils may be voluntarily formed for the purpose of promoting industrial peace. The DOLE, however, also encourages the establishment of labor-management councils in organized establishments.

The labor-management councils are envisioned to be a non-adversarial, consultative, and consensual forum where designated representatives of workers and the employer may regularly dialogue on matters affecting employment and other matters of mutual interest. The labor-management councils are intended to enable workers to participate in policy and decision-making processes in the establishment, insofar as such processes will directly affect the worker's rights, benefits, or welfare, except those that are covered by collective bargaining agreements or are traditional areas of bargaining.

#### 3.2 Election Of Works Councils

In organized establishments, the exclusive bargaining representative shall nominate the workers' representatives to the labor-management council. On the other hand, in establishments where no legitimate labor organizations exist, the workers' representative shall be elected directly by the workers at large.

#### 3.3 Functions Of Works Councils

The labor-management councils may, at their own initiative or in conjunction with the DOLE, formulate and develop programs and projects on productivity, occupational safety and health, improvement

of quality of work life, product quality improvement, and other similar schemes.

The DOLE shall assist the workers and the employers in the formation of labor-management councils. The DOLE likewise shall provide process facilitators during labor-management council meetings and shall monitor the activities of the councils.

### 3.4 Enforcement Issues

The National Conciliation and Mediation Board shall have original and exclusive authority to act, at its own initiative or upon request of either or both parties, on all disputes, grievances, or problems arising from or affecting labor-management relations, except those arising from the implementation or interpretation of collective bargaining agreements, which shall be the subject of a grievance procedure and/or voluntary arbitration.

## 4. Trade Union Employee Protection Rights

An employer is prohibited from interfering with the normal rights and responsibilities of a trade union. Under Article 248 of the Philippine Labor Code, such actions are considered unfair labor practices, which include:

1. Interfering with, restraining, or coercing employees in the exercise of their right to self-organization;
2. Requiring, as a condition of employment, that a person or an employee shall not join a labor organization or shall withdraw from one to which he or she belongs;
3. Contracting out services or functions being performed by union members when such will interfere with, restrain, or coerce employees in the exercise of their rights to self-organization;
4. Initiating, dominating, assisting, or otherwise interfering with the formation or administration of any labor organization, including

giving financial or other support to it or its organizers or supporters;

5. Discriminating with regard to wages, hours of work, and other terms and conditions of employment in order to encourage or discourage membership in any labor organization. (Nothing in the Labor Code, or in any other law, shall stop the parties from requiring membership in a recognized collective bargaining agent as a condition of employment, except those employees who are already members of another union at the time of the signing of the collective bargaining agreement. Employees of an appropriate collective bargaining unit who are not members of the recognized collective bargaining agent may be assessed a reasonable fee equivalent to the dues and other fees paid by members of the recognized collective bargaining agent, if such non-union members accept the benefits under the collective agreement, provided that the individual authorization required under Article 242, paragraph (o), of the Labor Code shall not apply to the non-members of the recognized collective bargaining agent);
6. Dismissing, discharging, or otherwise prejudicing or discriminating against an employee for having given or being about to give testimony under the Labor Code;
7. Violating the duty to bargain collectively as prescribed by the Labor Code;
8. Paying negotiation or attorneys fees to the union or its officers or agents as part of the settlement of any issue in collective bargaining or any other dispute; or
9. Violating a collective bargaining agreement.

The provisions of the preceding paragraph notwithstanding, the officers and agents of corporations, associations, or partnerships, who have actually participated in, authorized, or ratified unfair labor practices, may be held criminally liable.

## Poland

### 1. Introduction

Trade unions in Poland have a special place among social organizations and associations, mainly due to the role played by the Solidarity trade union during the social and political changes after 1980.

Works Councils are a relatively new institution in Polish Labour Law. Their role is not however significant since their opinion is not binding.

#### 1.1 Purpose And Practical Importance Of Union Representation

Trade unions are voluntary and self-governing organizations of workers, established to represent and protect their rights, as well as professional and social interests. Trade unions represent not only workers but also other persons who are entitled to join them. They also defend their members' dignity, rights, and material and moral interests, collectively as well as individually.

Trade unions also have the right to represent workers' interests on international forums through different forms of participation in the process of creating favourable work, welfare, and rest conditions.

#### 1.2 Purpose And Practical Importance Of Works Councils

Works Councils also represent employees, but their role in the Polish legal system is not as significant as that of trade unions. According to the current regulations, Works Councils must be informed and consulted about any important facts and decisions that may affect employment in a particular work place. Their existence gives employees an opportunity to participate in the main processes concerning their work place.

#### 1.3 Sources Of Collective Labour Law

In Poland, the sources of collective labour law are the following:

- The Polish Constitution – April 2, 1997, the Labour Code – June 26, 1974;
- The Trade Union Act - May 23, 1991;
- The Information and Consultation Act – April 7, 2006;
- The Dispute Resolution Act – May 23, 1991; and
- The European Works Councils Act transposing the EWC Directive into the Polish Labour Law on April 5, 2002.

## 2. Trade Unions

### 2.1 General Principles Of Polish Trade Union Law

Employees have a constitutional right in Poland to form and join a trade union. The Polish Constitution provides that the freedom to organize trade unions and other trade union rights may only be restricted by statutory provisions adopted in accordance with the international agreements that are binding for Poland.

The main law regulating trade unions in Poland provides that a trade union is a voluntary and autonomous organization of employees that is set up to represent and defend their rights, as well as professional and social interests. In its statutory activity, a trade union is independent from the employer, governmental, and self-governmental institutions and other organizations. The employer, governmental, and self-governmental institutions are obliged to treat all trade unions equally.

The main objectives of trade unions are to:

1. Represent employees;
2. Defend the employees' dignity, as well as their collective and individual rights of employees; and

3. Defend the collective and individual material or moral interests of employees.

Additionally, trade union law provides that trade unions are to participate in the creation of profitable conditions of work, existence, and rest.

Under trade union law, an employee may not suffer adverse consequences as a result of membership in a trade union. Nor may an employee be subject to adverse consequences if he or she refuses to join a trade union. Furthermore, an employer may not condition employment or subsequent promotion to a higher post on whether an employee is a member of a trade union. Moreover, an employer may not prohibit the creation of a trade union within its company.

According to Polish law, trade unions enjoy tax exemptions provided for associations. The legal rule is also that all income earned by a trade union from its economic activity be used to carry out its statutory tasks and cannot be distributed among its members.

## 2.2 Constitution Of A Trade Union

The right to establish and join trade unions is available to workers regardless of the basis for work relations. The following are entitled to join trade unions:

- Workers;
- Members of agricultural production cooperatives;
- Persons performing work on the basis of agency contracts, where they are not employers;
- Persons performing outwork;
- Retirees;

- Pensioners;
- Unemployed people; and
- Persons directed to workplaces to carry out alternative military service.

A workplace trade union organization can be established pursuant to a resolution on its establishment, passed by at least 10 persons entitled to establish trade unions. Persons who passed the resolution on the establishment of a trade union, pass statutes and elect a founding committee numbering three to seven persons.

A trade union' statutes set forth, in particular:

- The union name;
- The union seat;
- The territory of its operations and the scope of its activity;
- Union aims and tasks and the methods and forms of their realization;
- The rules for granting and terminating membership;
- Members' rights and obligations;
- The union organizational structure indicating which union organizational units have the legal person status;
- The method of union representation and persons authorized to undertake financial obligations on behalf of the union;
- Union bodies, procedures for the election and dismissal of their members and the scope of their authority and term of office;

- Sources of financing the trade union activities and the method of establishing membership fees;
- The rules for adopting and amending the statutes; and
- The method for dissolving the trade union and liquidating its assets.

Organizational units of a trade union are defined in its statutes and are established on the basis of resolutions of its statutory bodies. Trade unions operate at a place of employment in the form of a trade union organization. Trade union organizations may operate as company and multi-company trade union organizations.

1. Trade unions have the right to establish nationwide associations of trade unions (“federations”). The nationwide trade unions and the associations of trade unions have the right to establish nationwide inter-trade union organizations (“confederations”).
2. Union organizations, including federations and confederations, have the right to establish and join international worker organizations.

The scope of activity of workplace trade union organizations includes, in particular:

1. Issuing opinions in individual employee cases within the scope regulated by labour law;
2. Issuing opinions on employers and personnel self-government bodies in cases concerning collective interests and rights of employees;
3. Maintaining control over labour law compliance in the workplace, in particular work safety regulations;

4. Managing activities of the social labour inspection and cooperation with the state labour inspection; and
5. Interest in the welfare of retirees and pensioners.

The employer must provide to the workplace union organization the technical equipment and premises necessary for the union activities, under terms and conditions regulated by the employer and the trade unions in a separate contract.

### 2.3 Trade Union Registration Procedure

After passing the resolution on establishment of a trade union, its founding committee should register the union in the National Court Register.

Trade unions and their organizational units designated in the statute are given the legal person status on the registration date. Proceedings in registration cases are free from court fees.

If the founding committee does not file an application for registration within 30 days from the date of establishment of the union, the resolution on establishment of the union *will be null and void*.

The court removes the trade union from the Register where:

1. The body indicated by its statute adopted a resolution on the dissolution of the union;
2. The workplace in which the trade union has operated has been removed from the relevant register due to its liquidation or bankruptcy, or its organizational/legal transformation, rendering impossible continuation of union operations; and
3. The number of union members has been less than 10 for a period of over three months.

The registry court examines whether the documents attached to the application for making an entry in the Register are in conformance with the provisions of law, in terms of form and contents.

In case the application for making an entry in the Register or the documents whose submitting is compulsory, have not been submitted despite the elapse of the time limit set, the registry court may fine particular members of the union body with the sums set down in art. 1052 of the Code of Civil Procedure, based on the provisions of the National Court Register Act.

If, despite imposing fines the union body fails to fulfil its duties the registry court may refuse to make the entry or remove it ex officio.

#### 2.4 Trade Union Rights – Protection Of Collective Interests

As regards collective interests, trade unions represent all workers, regardless of their union membership. Based on trade union law, trade unions exercise general control over the observance of the law provisions regarding the interests of employees and their families.

Trade union organizations are empowered to:

- Give opinions on assumptions of new laws, and draft laws and secondary regulations to laws regulating matters related to trade union tasks, to be implemented either in Poland or the European Union – that right is reserved for national inter-trade organizations (confederations) and national trade unions representing workers of most workplaces. If the union opinion is rejected in whole or in part, the competent state administration or territorial local government agency should inform the union in writing of this fact, presenting the justification for such rejection. In case of discrepancies between opinions, the union may present its opinion during a session of Parliament commission or territorial local government commission.

- File motions for the issue or amendment of laws passed by Parliament or other legal acts that address matters related to trade union tasks – that right is reserved for national inter-trade organizations (confederations) and national trade unions representing workers of most workplaces. Motions concerning laws passed by Parliament should be directed by the union to members of Parliament or agencies with legislative initiative. In case of laws of lower status, applications should be directed to agencies authorised to issue them. State agencies to which applications have been filed must present, within 30 days, their opinion to the trade union, and in case of a negative opinion, also its justification.
- Publicly express their opinion on assumptions or draft laws and secondary regulations to laws regulating matters related to trade union tasks, in mass media including radio and television.
- Where a trade union believes that actions of state administration and/or local government agencies or the employer are not compliant with law or are contrary to the principles of justice, the union may request the competent agency to eliminate the stated inconsistencies by launching proper procedure.
- Trade unions maintain control over compliance with labour law and participate, according to terms and conditions set down by separate regulations, in supervision over compliance with work safety regulations.
- When demanded by the workplace union organization, the employer is obligated to give information necessary for conducting union activities, in particular information on work conditions and remuneration rules.
- The employer must agree with the workplace union organization regarding the regulations governing the use of the workplace social benefit fund, including application of funds to particular

aims and types of activity, and award of benefits to employees from the fund. Also, the workplace system (regulations) for remuneration and the related award and bonus regulations must be set down and amended in agreement with the workplace union organization. This also applies to the rules for dividing funds for remuneration of employees in state-owned units.

- In branches of employment not covered by collective agreements, regulation of employment and remuneration conditions requires consultation with trade unions. In cases when agreements or an opinion with trade organizations are required, the organizations must present a jointly agreed opinion. The method of agreeing and presenting the opinion by a joint union representation, to be established separately for each case, must be defined in an agreement concluded by the union organizations. If union organizations do not present a joint agreed opinion within 30 days in cases connected with the establishment of remuneration regulations, social benefit fund regulations, work regulations, or holiday leave regulations, as well as the settlement period and other regulations mentioned in separate regulations, decisions on such cases will be undertaken by the employer, after examination of individual union organization opinions.
- In case of justified suspicions that the life or health of employees is threatened, the workplace union organization may request the employer to conduct proper tests and notify at the same time the Regional Labour Inspector. Within 14 days from the date of receiving the request, the employer must inform the workplace union organization of its opinion. If tests are conducted, the employer must make their results available to the workplace union organization along with information as to how and when the identified threats will be eliminated. The notification of the workplace union organization of the rejection of the application referred to above, or failure by the employer to give an opinion on the application within 14 days from the date of its filing, authorizes the workplace union organization to conduct the

necessary tests at the expense of the employer. The intent to undertake tests, their scope, and expected costs should be notified in writing to the employer by the workplace union organization at least 14 days in advance. The employer may, within seven days from the date of receiving notification referred to above, request the proper regional labour inspector to evaluate how urgent tests are and their necessary scope. Conducting tests in defiance of the opinion of the labour inspector releases the employer from the obligation to cover the costs of tests.

- Conduct joint negotiations and conclude collective employment agreements, as well as other agreements provided for by labour law.

### ***Collective Agreements***

Under Polish law, a collective bargaining agreement may be concluded on an employer or multi-employer basis for either a definite or indefinite duration. An employer's collective bargaining agreement may not be less favourable to an employee than the applicable multi-employer collective bargaining agreement. During employer-level bargaining, the employer is obliged to provide relevant information on its economic situation. The representatives of trade union organizations are forbidden from disclosing any business-sensitive information received from the employer.

Once concluded, collective bargaining agreements are entered into the relevant official register. The employer is obliged to provide employees with details of the agreement and to explain it to them. The trade union organization must also be given copies of the agreement.

In case the provisions of the agreement are contrary to law, the registering body may:

1. Register the agreement without the contrary provisions with prior consent of the parties; and
2. Call upon the parties of the agreement to make proper changes to it within 14 days.

A collective agreement may not be negotiated for:

1. Civil servants;
2. Employees of state agencies employed by appointment or designation;
3. Employees at certain local government units employed by election, appointment or designation; or
4. Court judges and prosecutors.

Polish trade unions have the right to strike and take other industrial action to protect their interests.

### ***Dispute Resolution***

A collective dispute exists from the day when dispute notification is submitted to an employer. The employer then has three days to respond and commence negotiations and to notify the regional labour inspector of the dispute. If no agreement is reached, the parties must draw up a document setting out their respective positions. A strike may not be commenced earlier than 14 days from notification of the dispute. A strike is the ultimate means and may not be declared without prior exhaustion of possibilities of resolving the dispute according to the Collective Dispute Resolution Act.

It is necessary to obtain approval of the majority of voting employees if at least 50% of the employees participated in the ballot.

According to Polish law, only trade unions have the right to organize a strike.

Persons employed in positions or operating devices or installations where abandonment of work is hazardous for human health and life or the national security are prohibited from stopping their work due to a strike. In particular strikes may not be organised by personnel of the Internal Security Agency, the Intelligence Agency, the Police and Military units, the Penitentiary Guard, the Border Guard, the Customs Service, and the Fire Brigade. Employees of state and local administration authorities and agencies, courts of law, and prosecutor's offices have no right to strike either.

## 2.5 Trade Union Rights – Protection Of Individual Interests

In individual work related cases, trade unions represent the rights and interests of their members. When requested by a non-member worker, the trade union may undertake to defend his or her rights and interests before the employer.

In workplaces where more than one union organization exists, each of them protects the rights and represents the interests of its members.

Employees not associated in trade unions are able to protect their rights under the terms and conditions provided for employees who are union members, provided the chosen company trade union organization agrees to protect their employee rights.

Employers are obligated to inform in advance and consult with trade unions on a wide range of issues, including dismissal of trade union members or persons whose rights the trade union has agreed to protect.

This procedure of termination of an employee being a member of a trade union (or being protected by a trade union) includes the following steps:

- Before giving notice, the employer must notify, in writing, the trade union to which the employee belongs or which was selected by the employee to protect his or her rights that it intends to give notice and indicate the reason for the intended dismissal; and
- The trade union should present its opinion as to the planned dismissal within five days of receiving the notice. If the trade union fails to reply within the prescribed timeline, the employer may give notice to the employee concerned. If the trade union considers the dismissal of a given employee unfair and presents such an opinion within the given time period, the employer may either accept the objection or give the employee notice regardless of this objection.

An employer must also inform trade unions on automatic transfer of employees and inform and consult with trade unions on collective redundancies prior to any decision in this respect being taken.

## 2.6 The Obligations Of An Employer Towards Members Of Trade Union Statutory Bodies

The obligations of an employer towards members of trade union statutory bodies are as follows:

1. To grant an unpaid leave of absence to or to release from work a trade union official; and
2. To obtain consent of the management board of a trade union in order to terminate an employment agreement with members of a trade union who are entitled to special protection.

### ***Obligation To Grant Unpaid Leave Of Absence Or To Release From Work***

An employee elected to perform a function in a trade union outside the company, if such election results in the employee being employed by a different company, is entitled to get an unpaid leave of absence from

the original employer, upon the request of the trade union organization in which the employee is to perform his or her function.

If, following the unpaid leave of absence, the employee is willing to return to the previous employer, the period of his unpaid leave of absence is added to the work period based on which the employee's rights are established.

If an employee holding a position in a trade union is obliged to perform an emergency activity relevant to trade union activity outside the company, and this activity may not be performed outside working hours, the employee is entitled to be released from work while preserving his or her right to full remuneration for the time of the release.

Moreover, trade union law provides for a release from work of employees performing functions in the management board of the company trade union organization. Such release right is granted:

- In part to one employee in the monthly amount of hours equalling the number of members of the organization employed with the employer concerned, if the number of members of the organization employed with the employer concerned is fewer than 150; or
- In full to one employee, if the number of members of the organization employed with the employer concerned is between 150 and 500; and
- In full to two employees, if the number of members of the organization employed with the employer concerned is between 501 and 1000; and
- In full to three employees, if the number of members of the organization employed with the employer concerned is between 1001 and 2000; and

- To an additional employee, for each new thousand employees, if the number of members of the organization employed with the employer concerned is greater than 2000;
- Part-time release – in such circumstances such release right may be granted to a higher number of employees according to the rules determined above.

The release from work is granted to the employees upon a request of the company trade union and is granted with or without preservation of the right to remuneration, depending on the company trade union organization's request.

### ***Obligations Of An Employer In Case Of A Termination Of An Employment Agreement - Special Protected Employees***

Generally, an employer may not, without the prior consent of the management board of the company trade union organization:

- Give notice of termination nor terminate an employment agreement with:
  - a. A member of the management board of the company trade union organization, designated by name by a resolution of the management board of the company trade union organization; or
  - b. Another employee entitled to represent such company trade union organization towards the employer or towards a person performing acts within the scope of employment law on behalf of the employer; or
- Unilaterally change the terms of the employment agreement in a manner unfavourable for the employee referred to above.

Such protection is enjoyed by the above-mentioned employees during the period specified by the resolution of the management board, and after the expiration of such period, for a period equalling half of the period specified by the resolution of the management board, no longer, however, than one year after its expiration (the “Protection Period”).

The management board of a representative company trade union organization having up to 20 members is entitled to indicate to the employer two employees entitled to the Protection Period, and for a representative company trade union associating more than 20 members, two members, and additionally:

- One employee for each commenced unit of 10 employees who are members of this organization within the scope of 21 to 50 employees;
- One employee for each commenced unit of 20 employees who are members of this organization within the scope of 51 to 150 employees;
- One employee for each commenced unit of 30 employees who are members of this organization within the scope of 151 to 300 employees;
- One employee for each commenced unit of 40 employees who are members of this organization within the scope of 301 to 500 employees; and
- One employee for each commenced unit of 50 employees who are members of this organization for over 500 employees.

Trade union law provides that the management board of a representative company trade union organization indicates the number of employees entitled to the Protection Period:

- Up to the number calculated in accordance with the above-mentioned provisions; or
- Up to the number of persons occupying management posts with the employer, where the persons occupying such posts are:
  - a. A person individually directing the company and any substitutes thereof;
  - b. A person being a member of a collective management body of the company; or
  - c. Other persons designated to perform acts within the scope of employment law on behalf of the employer.

The management board of a non-representative company trade union organization should indicate by name one person to be entitled to the Protection Period.

During a period of six months following the establishment of the funding committee of a company trade union organization, the Protection Period may be granted to no more than three employees specified by name by a resolution of the funding committee.

If the management board or the funding committee of a trade union organization does not indicate the persons entitled to the Protection Period, the Protection Period is attributed to the president of the trade union or to the president of the funding committee, until such persons are indicated.

The opinion of the trade union regarding the termination is binding for the employer. Hence, if the management board of the company trade union organization gives no consent, the employer may not legally terminate the employment relationship.

## 2.7 Trade Union Organizations In Poland

Currently, the two largest trade union organizations are OPZZ (the Polish Alliance of Trade Unions) with headquarters in Warsaw, and NSZZ “*Solidarność*” (the Solidarity Independent and Self-Governing Trade Union – “**Solidarity**”), with a national committee in Gdańsk.

According to union data, OPZZ has nearly three million members (including 500,000 pensioners), while Solidarity unites 900,000 workers. Both OPZZ and Solidarity are members of the International Labour Organization. In addition, Solidarity is a member of the European Trade Union Confederation, uniting the largest European trade union organization, the International Confederation of Free Trade Unions, and is represented in the Union Advisory Committee at the OECD.

OPZZ and Solidarity represent employees at the Trilateral Committee for Social and Economic Affairs, the main Polish institution for social dialogue between employers, employees, and the government. Its main aim is to conduct negotiations on wages and social benefits, tax liabilities, draft budgets, and other issues important for social stability and harmony.

The smaller union organizations include the Solidarity ‘80 Independent and Self-Governing Trade Union, a splinter group which looks back to the union traditions of the early 1980s, as well as some unions representing specific trades, such as a miners’ union, a teachers’ union, a railway workers’ union, and a nurses’ and midwives’ union. A different role in the Polish trade union movement is played by the unions of private farmers and agricultural employees that protect the interests of rural residents.

### 3. Works Councils

On the basis of Polish law, all employers employing 50 or more employees are under a statutory obligation to inform their employees about the right to establish a Works Council (till March 23, 2008, this obligation was applicable to employers with 100 employees or more). If the total headcount in the company varies during a calendar year,

the company is considered to employ the relevant number of employees when for the six consecutive months the average number of employees was 50 persons.

Employers of 50 or more employees are also required to facilitate the establishment of a Works Council in the undertaking.

To form a Works Council, a valid request must be made by 10% or more of the total number of employees in the employer's organisation.

The statutory number of members of the Works Council depends on the total number of employees in the company, and is as follows:

- Three members - if there are 50 to 250 employees in the company;
- Five members - if there are 251 to 500 employees in the company;
- Seven members - if there are more than 500 employees in the company.

Works Councils must be informed and consulted about any important facts and decisions that may affect employment – such as changes in business activities, the employer's financial standing, staffing levels, business transfers, and any other anticipated decisions that might lead to material changes in work organization, or pay and conditions.

Under a separate agreement made by the company with the first established Works Council, the number of members of that body may be increased at the parties' discretion.

Work councils' members enjoy special protection against dismissal or alteration of their employment conditions for the duration of their term of office. Works Council's members are appointed for a term of four years, subject to specific cases where the term is shorter.

### ***European Works Councils***

European Works Councils Act has transposed the EWC Directive into the Polish Labour Law on April 5, 2002.

A company or a group of companies with “European dimension” must create an EWC where the company/group employs at least 1,000 employees and where at least two companies in the group employ a minimum of 150 employees in two different EU member states.

The jurisdiction of the EWC is limited to information and consultation on matters concerning the community scale undertaking or the group. The definition of consultation is “the organization of an exchange of views and the establishment of dialogue.”

## **4. Employer Associations**

There are four national, and many other industry, sector, or regional employers’ associations. The principal associations are the Confederation of Polish Employers, the Polish Confederation of Private Employers, the Business Centre Club, and the Polish Craft Association.

# Russia

## 1. Introduction

Russia has developed a comprehensive set of laws regulating labor relations between employers and employees. The 2002 Labor Code of the Russian Federation (“Labor Code”), as amended through 2008, and the 1996 Law of the Russian Federation “On Trade Unions and Their Rights, and Guarantees of Their Activities” (“Trade Union Law”), as amended, are the principal Russian statutes governing labor relations, and particularly the relationship between trade unions, collective workers, and the employer as well as the status of the trade unions, their rights, and their duties.

Although individual employment agreements are concluded between the management of an enterprise and each employee, the terms of the agreements cannot deviate from the minimum standards set by the Labor Code. Likewise, any collective agreement that is concluded between the management and its employees must also comply with the minimum guarantees established by the Labor Code. The Trade Union Law is the primary legislation specifically regulating the formation, rights, and obligations of trade unions in Russia.

In general, there is no such concept as a Works Council in Russia.

## 2. Trade Unions

The Russian Constitution guarantees the right to participate in trade unions to all citizens (Article 30). Articles 2 and 171 of the Labor Code specifically provide and guarantee this right to all employees. Chapter 58 of the Labor Code outlines the general rights and obligations of trade unions. These general provisions of the Labor Code have been subsequently detailed in the Trade Union Law.

### 2.1 The General Role Of Trade Unions

In Soviet times, trade unions were not truly independent from the employer but were de facto a part of the political system led by the

Communist Party. Their main role was to supervise social and welfare benefits and to enforce health and safety regulations. Although almost all employees at this time were trade union members, they did not view trade unions as being representative of their concerns. The formation of the Russian Federation on December 25, 1991, and the new form of private enterprise that developed as a result of the emergence of a market economy, have led to a situation where today trade unions have ceased to play a more active role at most Russian enterprises. Where trade unions are active (generally large state enterprises and enterprises in certain industry sectors), their primary function is to ensure that the management adheres to the terms of the respective collective labor agreement, provides safe working conditions for the employees, and generally treats the employees fairly and in compliance with Russian law.

The latest trend in Russia is formation of “white-collar” trade unions at banks, insurance companies and other non-industrial companies in order to complicate the employees’ dismissal for the employer, in case of staff redundancy.

## 2.2 The Constitution Of A Trade Union

According to the Trade Union Law, a trade union is a voluntary social association of citizens bound by joint industrial and professional interests and by their type of work, established for the purposes of representation and protection of their social and labor rights and interests.

There is no requirement that a trade union be formed at a company. A trade union may be established by at least three individuals who are at least 14 years old. Pursuant to Article 30 of the Russian Constitution, no one can be forced to join a local trade union organization if one is established at an enterprise. Moreover, Article 9 (2) of the Trade Union Law provides that an individual’s employment cannot be conditional upon his or her membership in a trade union.

Pursuant to Article 7 of the Trade Union Law, in order to establish a trade union, its founders must approve its charter or regulations and elect its governing bodies. The following categories of information should be included in the regulations:

- The name, goals, and tasks of the trade union;
- The categories and occupations covered by the trade union;
- The terms and procedure for establishing the trade union, for accepting members, and for allowing members to leave;
- The rights and duties of trade union members;
- The territory where the trade union will operate;
- The organizational structure of the trade union;
- The establishment and authorities of the various trade union bodies, as well as the term of their powers;
- The procedure for amending the rules;
- The procedure for paying membership fees;
- The methods through which the trade union may derive income and acquire property, as well as the procedure for the ongoing management of trade union property;
- The procedure for reorganizing and liquidating the trade union; and
- Other information related to trade union activity.

Russian legislation does not require that all trade union founders or members work with the same employer. Moreover, trade unions are

not obliged to inform the employer of their establishment. There may be several trade unions within one company and even within its subdivisions. It is illegal to require individuals when they are hired (or thereafter) to waive their right to form or participate in a trade union. Also, an employer is not entitled to request information from an employee regarding his or her participation in trade unions. There is no requirement for a trade union to be registered as a legal entity, but if the union wishes to possess the rights of a legal entity (i.e., to acquire and dispose of property, to have its own bank account, and to enter into civil law agreements), it needs to be registered as a legal entity. The procedure for registration of trade unions as legal entities is handled by the Russian Federal Ministry of Justice and is quite complicated. Therefore, most of the trade unions functioning at the level of a company (shop-floor or primary trade union organizations) are not registered as legal entities.

The initial (basic) level of trade unions is made up of primary (shop-floor) trade union organizations. Primary trade union organizations are normally members of the higher territorial or regional trade union of the relevant industry, and such territorial or regional trade unions are united by inter-regional unions or all-Russia unions. Trade unions may also establish associations. Trade unions or their associations may be formed either within a certain industry (e.g., automotive industry, food industry, etc.) or within a certain territory or region (e.g., Moscow region, Leningrad region, etc.). Generally, on the local level, the employer deals with the primary trade union organizations of its company.

Primary trade union organizations must operate either on the basis of their own regulations or on the basis of specific rules for primary trade union organizations that have been adopted by the main trade union organization.

### 2.3 The Scope Of Trade Union Rights In Businesses

Chapter II of the Trade Union Law establishes the general rights of trade unions. The goal of a trade union is to represent and protect the

rights and interests of its members and, in cases of collective rights and interests, the interests of all workers regardless of whether they are trade union members. In this latter case, the non-union employees must specifically authorize the trade union to represent their interests.

The Trade Union Law gives trade unions powers to influence labor-related decisions made by employers, in particular regarding the following:

- a) (i) Liquidation of a company or its subdivisions (including branches): (ii) changes in a company's form of ownership or corporate form: and (iii) a complete or partial suspension of production which may entail a reduction in the number of jobs or worsening of labor conditions. These actions may be implemented by the company only after having informed the relevant union at least three months in advance, and after having held negotiations with the trade unions in respect of the rights and interests of union members and those represented by the union.
- b) Trade unions have the right to put forward proposals to local authorities to postpone or temporarily suspend the implementation of measures involving mass redundancy of employees.
- c) Employees who serve as trade union officers cannot be disciplined, transferred, or dismissed by their employer without the union's consent.
- d) Certain decisions of the company affecting labor relations must take into account the opinion of the trade union in cases provided for by law, such as regulatory acts, internal regulations (local normative acts), or collective agreements.
- e) A trade union's labor inspectors may visit the company employing its members and carry out inspections for compliance with labor laws and work safety requirements.

Pursuant to the Labor Code, an employer is obliged to make certain managerial decisions affecting employees only after obtaining a so-called “motivated opinion” of the trade union body. For example, under Article 372 of the Labor Code, the employer shall provide drafts of policies, that is, local normative acts that affect the rights and duties of the employees and explanations thereof, to the primary trade union organization. The elected body of the primary trade union organization provides the employer with its motivated opinion on such act within five working days. If the union disagrees with the draft policies, the employer must either agree with this opinion or start conducting mutual consultations with the union within three days of receiving the opinion. If the employer and the union do not reach an agreement, the employer is entitled to issue the policies and the union is entitled to challenge them in court or at the State Labor Inspectorate (the government regulatory authority that supervises labor relations and compliance with Russian labor law). Also, the trade union may initiate a collective dispute procedure subject to the Labor Code requirements. If the employer does not request a motivated opinion of the union, the policies may be invalidated by court.

Russian employment legislation provides for extensive guarantees and benefits for trade union members, as well as for current and former trade union leaders.

Also, the employer must request from the primary trade union its motivated opinion in case of possible termination of a union member due to staff redundancy, non-compliance of the employee with the requirements of the position occupied confirmed by results of evaluation, or due to repeated violation of the labor legislation. The union must consider the request within seven days of receipt and provide its motivated opinion. If the employer disagrees with the opinion, it has to consult with the trade union within three working days; if agreement is not reached, the employer is still entitled to terminate the union member. However, the employee or the primary trade union may challenge such decision in court or at the State Labor Inspectorate. If the employer does not request a motivated opinion of

the union in the above case, a court or the State Labor Inspectorate may repeal the termination as illegal.

Although the motivated opinion of a trade union is not binding on the employer, from a practical point of view, negative motivated opinions may cause certain difficulties for the employer in terms of managing the day-to-day internal activities of the company. The bureaucratic procedure of applying for and discussing motivated opinions usually involves significant time and labor expenses for the company.

An employer is not entitled to terminate the elected leaders of the collective bodies of primary trade union organizations or the primary trade union organizations of the company's subdivisions for the reasons mentioned above without the prior written consent of the higher trade union body. The trade union may also make a decision to release an employee from his or her job duties due to his or her election to a trade union body. In this case the employment agreement between the employer and such employee is to be automatically terminated, and the employer is not to pay a salary to such employee. However, after the term of election expires, the employer is obliged to reinstate the employee in his or her former job or an equal job subject to the employee's written consent. Moreover, such employee may be terminated due to staff redundancy, due to non-compliance of the employee with the requirements for the position occupied confirmed by results of evaluation, or due to repeated violation of the labor legislation within two years of expiration of the term of his or her election to the trade union body, only subject to the prior written consent of the higher trade union body. However, primary trade unions do not often use such rights since in order to release their leaders from their main work they need to pay a salary to the leaders.

The employer is also obliged to provide certain benefits to trade unions to assist them in promoting their activities and to establish conditions for work of the trade union, e.g., to provide it with office space, means of communication, etc.

## 2.4 The Trade Union Representatives

A trade union representative is defined as a trade union organizer, group leader, leader of the trade union or a trade union association, or any other individual authorized to represent the trade union. To be a union representative, an employee must be a member of the trade union.

## 2.5 Collective Bargaining

The law does not require the employer and the employees to conclude a collective labor agreement; if neither the employer nor the employees initiate collective bargaining, a collective agreement is not concluded.

However, if either the employer or the employees initiate such negotiations, the party that has received an offer to start collective bargaining must enter into negotiations within seven calendar days. The parties should elect the representatives that will participate in the collective bargaining commission. The company's primary trade union is entitled to represent employees in negotiations with the employer and to initiate the collective bargaining process in order to enter into a collective bargaining agreement with the employer. However, only trade unions that represent more than 50% of the employees, or that were so authorized by a general employee meeting or an employee delegates conference, are entitled to do so.

If there are several trade unions in the company that jointly represent more than 50% of the employees, they are entitled to establish a joint body to represent the employees in the collective bargaining process. In the course of collective negotiations the unions have the right to represent employees subject to the limitations mentioned above and are entitled to negotiate a collective agreement and sign it without any final approval from the employees of the company.

In big companies where there are no trade unions, it is common to create a representative body acting on a standing basis. An elected body similar to a Works Council represents the interests of all

employees in the company and acts on the basis of a charter approved by a general meeting. It also enjoys the rights granted by the Labor Code. Among others, this body has the following rights: to participate in collective bargaining; to conclude a collective bargaining agreement on behalf of the employees; to express an opinion on adoption of local regulatory acts; to receive the information necessary for holding collective bargaining negotiations; and to exercise control regarding observance of collective bargaining agreements.

Article 39 of the Labor Code provides that employees participating in collective bargaining as representatives should be relieved of their employment duties, but are entitled to their average salary for a period to be agreed upon by the parties, but not for more than three months. Generally, these employees may not be subject to disciplinary action, transferred to another job, or dismissed by the employer during the negotiations without the prior consent of the general meeting that authorized them to act as the employees' representatives.

In general, a collective agreement should be concluded within three months from the date of entering into negotiations. However, if the employer and the employees cannot agree on all the issues discussed they should conclude a collective agreement on the terms agreed upon and draft a reconciliation protocol.

Any groundless rejection to conclude a collective agreement is considered a violation of law and may lead to the imposition of administrative fines. Article 5.30 of the Code of Administrative Offences of the Russian Federation envisages the liability of the employer or its officer for groundless refusal to conclude a collective agreement. The penalties range from RUB 3,000 to 5,000 (approximately from USD 105 to 175).

## 2.6 Collective Agreement

There is no mandatory requirement to conclude a collective bargaining agreement. The content and structure of a collective bargaining agreement shall be determined by the parties (Article 41 of

the Labor Code). In particular, it may set out the mutual obligations of the employer and the employees on the following issues:

- System of remuneration;
- Guarantees and benefits for employees;
- Improvements in working conditions and work safety arrangements;
- Procedure for amending the collective agreement;
- Renunciation of strikes if the parties comply with the terms of the collective agreement; and
- Other issues agreed upon by the parties.

The collective agreement usually provides for certain labor and social benefits for employees that exceed the minimum benefits guaranteed by applicable legislation.

Pursuant to Article 43 of the Labor Code, a collective agreement is concluded for a period of no more than three years, but the parties have the right to extend it for a period not exceeding another three years. A collective agreement applies to all employees of the company. However, a collective agreement concluded in a separate subdivision of a company (its branch or representative office) applies to employees of this separate subdivision only.

In the event of a company's reorganization, a collective agreement remains valid for the entire period of the reorganization. That means that in the event of a change of name, dismissal of a company executive, and/or a company's change of business, the collective agreement remains effective for the entire period of its validity. Upon a change of ownership, a collective agreement remains valid for three months after the ownership rights have been transferred.

A collective agreement may be amended in compliance with the procedure established for the conclusion of a collective agreement, or in compliance with the procedure established by a corresponding collective agreement.

## 2.7 Resolving Collective Disputes

Under the Labor Code, disputes between employees (their representatives) and the employer (its representatives) regarding establishing and changing the conditions of work, entering into, amending, or fulfillment of collective bargaining agreements, accords, and disputes regarding refusal of the employer to accept the motivated opinion of the union on local normative acts are considered as collective disputes.

The Labor Code establishes a procedure for the review of a collective labor dispute (settlement procedure). Under Article 401 of the Labor Code, a collective labor dispute should be considered by a settlement commission first, and then it may be considered by a settlement commission with the participation of a mediator and/or by the labor arbitration. A settlement commission must be formed within three days after a collective labor dispute arises and must include an equal number of members representing the employees and the employer. The employer should issue an order to form a settlement commission, and the employees' representative body should issue a resolution to the same effect. A settlement commission must consider a collective labor dispute within five business days from the date of the employer's order and employees' resolution. This period may be extended by the mutual consent of the parties. The parties to a collective labor dispute must not refrain from forming such commission or participating in it. If an agreement cannot be reached by a settlement commission, the employer and employees should start negotiations in order to invite a mediator and/or form a labor arbitration body. The mediator may be invited by the parties within three business days from the date of a reconciliation protocol. The mediator must review a collective labor dispute within seven business

days since he or she was invited/appointed. Within this period of time, the employer and employees should adopt either a decision or issue a settlement protocol.

As the representative of the employees, the primary trade union organizations usually represent employees in the course of collective disputes and settlement procedures. However, the trade union may not initiate a collective dispute itself since employees' demands may only be approved by an all-employee meeting (or an employee delegate conference). At the same time, if the union represents the employees in the course of such disputes, it is entitled to negotiate with the employer and sign a final settlement agreement.

## 2.8 Strikes

Pursuant to Article 37 of the Russian Constitution and Article 409 of the Labor Code, the employees' right to strike is recognized as a means of resolving a collective labor dispute. Employees or their representatives may organize a strike if: (i) settlement procedures have failed to end a labor dispute; (ii) the employer refuses to take part in a settlement procedure; (iii) the employer does not fulfill the agreement reached (if any) in the course of the settlement of a collective labor dispute; or (iv) the employer fails to abide by a labor arbitration decision.

The primary trade union organizations may raise the issue regarding calling a strike, but an order to begin a strike must be approved by an all-employee meeting (or an employees' delegates conference). The employer must provide premises and create the correct conditions for the employee meeting and cannot obstruct its being held. The meeting is considered to have a quorum if at least 50% of the company's employees (75% of delegates of a conference) participate. A decision to call a strike is considered to be adopted if at least 50% of the employees participating in the meeting voted in favor of it. However, if it is impossible to hold an employee meeting, the employees' representatives may approve a decision to call a strike by collecting

the signatures of more than half of the employees in support of the strike.

The Labor Code requires inclusion of the following information in a decision to call a strike: (i) a list of differences that constitute the grounds for calling and staging the strike; (ii) the date and time of commencement of the strike, its estimated duration, and number of participants in the strike; (iii) the name of the body leading the strike and a list of the employees' representatives authorized to participate in the conciliation procedures; and (iv) a suggestion on the minimum level of work to be performed at the company.

The employer should be notified in writing of the beginning of the strike no later than 10 business days in advance of the strike and must, in turn, notify the Federal Labor Service of the forthcoming strike. During the strike employer and employees must continue the settlement procedures for settlement of the collective labor dispute.

The employer or a prosecutor may apply to the court to declare the strike unlawful if it was called in non-compliance with the timing, procedures for calling it, and other requirements envisaged in the Labor Code. A strike may be recognized as unlawful by the Supreme Court of the respective constituent entity of the Russian Federation where the company is located. The body leading the strike must immediately inform the employees of the court's decision. The court's decision must be complied with immediately and employees must terminate the strike and resume work no later than the day following the date when a copy of the court's decision was delivered to the body leading the strike. If the employees continue a strike that was recognized unlawful by a court decision, they may be subject to disciplinary action for violation of labor discipline. The employees' representative body that called a strike and did not end it after receiving a court decision must reimburse the employer for damages caused by the unlawful strike. In certain cases the strike may be postponed or suspended by a court decision.

The employees' participation in a lawful strike is not considered to be a violation of labor discipline and a ground for employment termination. For the entire period of the strike, the employees involved should remain employed and keep their jobs. The employer does not have to pay a salary to the employees participating in the strike for the period of the strike except for those employees who perform a mandatory minimum of work. Employees who do not participate in the strike but are unable to perform their work because of the strike may state in writing that they remain idle as a result of the strike. These employees are entitled to a payment for the idle time. Pursuant to Article 157 of the Labor Code, idle time for which an employee is not responsible shall be paid at the rate of two thirds of the employee's basic salary calculated in proportion to the idle time. The employer may transfer these employees to other job positions. The employer is not allowed to dismiss employees due to their involvement in a collective labor dispute or a strike during the settlement of a dispute (including in the course of a strike).

# Singapore

## 1. Introduction

In Singapore, there is no provision in the law for Works Councils. However, trade unions play a significant role in Singapore in representing employees, and in working with the government and employers to promote good industrial relations.

## 2. Trade Unions

### 2.1 The General Role Of The Trade Union

The Trade Unions Act of July 1, 1941 (as amended), defines a trade union as an association of workers or employers that aims to regulate relations between workers and employers. The objectives of a trade union are stated as being to promote good industrial relations; (i) to improve workers' working conditions; (ii) to enhance the economic and social status of workers; and (iii) to raise productivity for the benefit of workers, employers, and the economy.

The majority of trade unions in Singapore are affiliated with the National Trade Union Congress (**NTUC**), which is a federation of trade unions. Affiliated trade unions are represented at the NTUC Delegates' Conference, which is held once every two years. During this conference, delegates review the work of the NTUC and map out future directions for the labour movement.

Employers can also register trade unions. The largest national employers' association is the Singapore National Employers' Federation (**SNEF**), with the support of more than 1,900 members. An employer trade union can represent an employer at the Ministry of Manpower in reconciliation matters.

### 2.2 Membership Of Trade Unions

Any employee who is over the age of 16 can be represented by a trade union and has a free choice in deciding whether or not to join a trade union.

Executives are required to form their own trade unions. The Industrial Relations Act of September 15, 1960 (as amended), provides that no trade union of employees, the majority of whose membership consists of employees in non-managerial or non-executive positions, may seek recognition in respect of employees in managerial or executive positions or serve a notice for collective bargaining in respect of such employees.

An employer can require, as a condition of an appointment or promotion of a person to a managerial or executive position, that the employee shall not continue to be an officer or member of a particular trade union unless membership of that trade union is restricted to employees in managerial or executive positions.

Government employees are generally prohibited from being trade union members unless the President of the Republic of Singapore so allows.

### 2.3 The Scope Of Trade Union Rights In Businesses

Under the Industrial Relations Act, a trade union must be formally recognised by the employer before it can represent the employees in collective bargaining. Collective bargaining agreements determine many of the terms and conditions of service for employees.

In order to become recognised, the trade union must first serve the employer with a claim for recognition. The employer is required, within seven working days after service of the claim, either to give recognition to the trade union or, if the claim is disputed, to notify the Commissioner for Labour in writing of the grounds for not giving recognition. Upon receipt of a notification from an employer, the Commissioner for Labour may inform the employer in writing that a secret ballot is to be conducted. After the secret ballot has been held, the Commissioner for Labour will communicate the results of the secret ballot to the employer and to the trade union. If the results of the ballot show that the majority of the employees are members of the

trade union, the employer is required to give recognition to that trade union within three working days following receipt of the ballot results.

Once a trade union has been recognised, it may serve on the employer a notice in the prescribed form inviting the employer to negotiate the terms of a collective agreement. An employer is also entitled to serve a notice of invitation on the trade union inviting it to negotiate. The party served with a notice should formally accept the invitation within seven days after service of the invitation by serving a notice of acceptance. If a notice of acceptance is not served within the time prescribed, the serving party may notify the Commissioner for Labour. The Commissioner will then attempt to persuade the uncooperative party to accept the invitation. If, after consultation, the Commissioner is satisfied that the party served with the notice refuses to negotiate, the Commissioner shall notify the Minister and the Registrar that a trade dispute exists.

If both parties are willing to negotiate, a collective agreement should be concluded within 14 days after the invitation was issued. Failing that, either party can refer the dispute to the Commissioner for Labour. A conciliation officer will be appointed and the parties will be encouraged to settle the dispute amicably through conciliation. If the parties are still unable to reach an agreement at this stage, the trade union and employer can voluntarily make a joint application to have the matter decided by the Industrial Arbitration Court. Rulings or awards made by the Industrial Arbitration Court are final and binding.

If a trade dispute concerns the payment of an annual wages supplement, an annual bonus or variable payments, or any matter arising out of or in connection with a transfer of employment, then either party can take the dispute to the Industrial Arbitration Court. The Minister of Manpower and the President also have power to direct disputes to the Industrial Arbitration Court for compulsory arbitration. Alternatively, the parties can, in cases of dispute, apply to appoint a referee to hear the dispute. Any party who is dissatisfied with the decision of the referee can then appeal to the Industrial Arbitration Court.

During negotiations of collective agreements, trade unions are usually represented by union officials or full-time industrial relations officers. Employers are usually represented by their industrial relations officers or personnel managers. Lawyers are not permitted to take part in the negotiations.

Some matters cannot be negotiated as they are considered to be within the prerogative of the employer. These matters are set out in the Industrial Relations Act and include:

- The promotion of an employee;
- The internal transfer of an employee on no less favourable terms and conditions of service;
- The right of an employer to hire any person;
- The retrenchment of an employee by reason of redundancy or reorganisation;
- The dismissal and reinstatement of an employee where the employee considers that he or she has been dismissed without just cause or excuse but does not allege victimization; and,
- The assignment or allocation of duties or specific tasks to an employee that are consistent or compatible with the terms of his or her employment.

Apart from these matters, the parties are free to negotiate all industrial matters, which include matters such as wages, allowances, bonuses, leave, medical and dental benefits, and insurance and retrenchment benefits, subject to the minimum requirements of the Employment Act.

When negotiations have been concluded, the collective agreement must be signed by both parties and sent to the Industrial Arbitration Court for certification within a week from the date of signature. A duly certified collective agreement is binding on the employer and the trade union named in the collective agreement, as well as their respective successors and members.

#### 2.4 Enforcement By Trade Unions

In Singapore, trade unions generally do not take industrial action, and strikes have not taken place in Singapore for many years. However, under the Trade Unions Act, a trade union can direct or order its members to conduct strikes or take industrial action in support of a trade dispute if a secret ballot shows that a majority of members affected support such action. However, once a trade dispute has been submitted to the Industrial Arbitration Court, the Trade Disputes Act prohibits a strike. A strike is a stoppage of work or a refusal to work or to accept work by a group of workers in any trade, industry, or occupation.

Strikes and industrial actions are unlawful if they are:

1. In support of a trade dispute that does not involve the striking workers;
2. In support of a trade dispute that has been duly submitted to the Industrial Arbitration Court; or
3. Intended to put pressure on the government either directly or by making life difficult for the community.

It is an offence for any person to persuade others to take part in or support an illegal industrial action.

In cases of strikes, even though the strike may be lawful, the stoppage of work could amount to a breach of contract and render the employees liable to dismissal.

Employees are allowed to picket under certain circumstances. Picketing is the action of any person who, in support of a trade dispute, places him or herself at or near the home of another person so as to peacefully obtain or give information, or to peacefully persuade or advise another person not to work. Picketing becomes unlawful when the number of persons picketing is so great or when the picketing is carried out in such a way as to cause intimidation, obstruction, or breach of the peace. Furthermore, any assembly of a large group of people or violence resulting from such assembly may amount to unlawful assembly or rioting, which may lead to criminal sanctions.

## 2.5 Tripartism

One of the principal objectives of trade unions is to promote harmonious and peaceful industrial relations. This has been successfully achieved through close collaboration between the government, employers, and trade unions. The three parties jointly deal with difficult manpower and industrial relations problems and formulate appropriate policies to support long-term national objectives. These include the yearly formulation and implementation of the National Wages Council (NWC) guidelines for wage adjustments.

The NWC was set up in 1972, and each year it reviews the state of the economy and advises the government on wage policies and wage guidelines. The NWC is composed of representatives from the government, employers, and trade unions. The NWC recommendations, when accepted by the government, serve as a basis for negotiation between employers and employees or their trade unions.

To tackle increasing retrenchment during the economic crisis in the late 1990s, the Tripartite Panel on Retrenched Workers was set up in February 1998 to advise companies on measures to minimise or avoid the laying off of workers. On the recommendation of the Tripartite

Panel, two programmes were implemented, namely the Retrenchment Advisory Programme and the Employment Assistance Programme. Under the Retrenchment Advisory Programme, employers are advised to consider alternatives to retrenchment, which include the implementation of a shorter workweek and temporary layoffs, as well as the upgrading of skills of their workers under the Skills Redevelopment Programme. If retrenchment is unavoidable, companies are advised on how they can carry out retrenchment exercises responsibly. Under the Employment Assistance Programme, the Ministry of Manpower, together with the NTUC, Community Development Councils, and self-help groups, assists job-seekers in securing employment as soon as possible.

### 3. Works Councils

In Singapore there is no provision in the law for Works Councils.

### 4. Trade Union Employee Protection Rights

If an employer tries to dissuade its employees from becoming members or officers of a trade union, its representatives can be fined and/or imprisoned if convicted in the District Court.

The Employment Act of August 15, 1968 (as amended), prohibits employers from seeking, through contracts with their employees, to prevent employees from becoming members or officers of a trade union, from participating in the activities of a registered trade union, or from forming a trade union. Furthermore, an employer that enters into such a contract of service or collective agreement shall be guilty of an offence. However, the Employment Act only applies to employees who are not employed in a managerial, executive, or confidential position.

In addition, the Industrial Relations Act provides that an employer cannot dismiss or discriminate against an employee solely on the ground that the employee is, or has the intention of joining a trade union. Any employee who is dismissed on account of his or her membership or proposed membership can, through the relevant trade

union, apply to the Industrial Arbitration Court for reinstatement or, alternatively, can bring a civil action against his or her employer in the District Court. An employee who has been discriminated against on account of his or her membership or proposed membership can, through the trade union, apply to the Industrial Arbitration Court for relief. The Industrial Arbitration Court was created in 1960 by the Industrial Relations Ordinance, 1960. It has the same powers as the High Court, and its main function is to deal with trade disputes.

# Spain

## 1. Introduction

Under the Spanish legal system, employees are represented before the management of a company by their representatives. Employee representation in Spain is structured in two different ways – union representatives and employee representatives – each of which has similar rights. This is particularly true in companies or work centres employing 250 employees or more.

### 1.1 Applicable Legislation

The Spanish Constitution recognises the freedom to join a union as a fundamental right. This implies the freedom to set up a union, as well as the individual's choice to join such union.

The Union Rights Act contains a detailed regulation on union affiliation, legal capacity of unions, union obligations and liabilities, status of “majority representation,” and remedies for any potential violation of union affiliation rights.

The Workers' Statute regulates labour representation bodies in Spain, including the election, duties, faculties, and rights of employees' representatives.

## 2. Trade Unions

### 2.1 Constitution Of A Trade Union

Employees affiliated with a trade union may set up union divisions (*secciones sindicales*) within a company to represent their interests before management. Furthermore, in companies or work centres with 250 employees or more, employees may elect their union representatives (*delegados sindicales*) by and among employees affiliated with a labour union. The number of such union representatives for each union division is related to the number of employees in the company or work centre, as follows:

<b>Number Of Employees In The Company</b>	<b>Number Of Union Delegates For Each Section</b>
Up to 250	1
250 to 750	1
751 to 2,000	2
2001 to 5000	3
More than 5,000	4

The number of union representatives may be increased if the company and employees' representatives or the collective bargaining agreement so stipulates.

## 2.2 The Scope Of Trade Union Rights In Businesses

Union representatives belonging to a trade union with the status of "majority representation" and those having union representatives in the company's representative bodies (Works Council or Employee Delegates), are entitled to the following rights:

1. To be provided by the company with a specific bulletin board on which all union-related information will be posted and made available to all employees;
2. To intervene in collective bargaining;
3. To have an adequate place in the company to perform union activities; and
4. To be represented in the company by union delegates.

According to the labour market reform of September 2010, in scenarios of substantial changes to working conditions, transfers or collective dismissals in companies that do not have employees'

representatives, the employees may grant their representation: (i) to a commission formed by a maximum of either three employees of the company that are elected by the employees; or (ii) three employees elected by the more representative, or representative trade union of its sector, and who are eligible to form part of the negotiating committee of the Collective Bargaining Agreement applicable to the Company.

Trade union representatives in the company not belonging to the Works Council are entitled to the following rights:

1. To be provided with the same information and documents as those provided to the Works Council;
2. To take part in the company's collective bargaining negotiation representing their union division;
3. To be heard by the company prior to a collective redundancy affecting employees in general and their affiliated members in particular;
4. To take part in the discussion and consultation in cases of redundancy;
5. To take part in the Works Council's meetings regarding safety and health matters, without voting rights; and
6. To be provided with the same time off as that provided to Works Council's members to carry out their representative duties.

### 2.3 The Rights Of Trade Union Delegates

Employers must give trade union delegates any necessary unpaid leave to perform their duties as union delegates and a compulsory leave of absence during the term they are elected as union delegates. When the term expires, the company must reinstate the delegates under the former terms and conditions they held before their leave. Their seniority is neither affected nor suspended.

With prior notification to the company, trade union delegates also have the right to go to work centres to perform their union activities.

### 3. Works Councils

#### 3.1 Constitution Of The Works Council

In companies with 50 employees or more, the company must establish a Works Council (*comité de empresa*) to act on behalf of employees and to negotiate with the company's management. The number of Works Council's members depends upon the number of employees in the company, as follows:

<b>Number Of Employees</b>	<b>Number Of Representatives</b>
50 to 100	5
101 to 250	9
251 to 500	13
501 to 750	17
751 to 1,000	21
More than 1,000	An Additional 2 Per 1,000 (Maximum Of 75)

Companies employing from 11 to 49 employees do not need to establish a Works Council, but may elect Employee Delegates (*delegados de personal*) to represent the employees' interests. In companies employing 11 to 29 employees, one representative is elected. In companies employing 30 to 49 employees, three representatives should be elected. Companies employing from six to 10 employees may also elect Employee Delegates if the employees so decide by majority agreement.

#### 3.2 The Scope Of Works Council Rights In Businesses

Work Councils and Employee Delegates have the following rights:

- To receive quarterly information on the evolution of the activity sector, production and sales in the company, production objectives of the company, and forecast of employment in the company;
- To receive a basic copy of all employment contracts in writing, including all pertinent information in the contract, except personal details affecting privacy, as well as extensions and modifications of these contracts, within 10 days after they have been entered into (senior managerial contracts are expressly excluded from this obligation of disclosure);
- To examine the balance sheet, the profit and loss account, the annual report, and in the case of limited liability companies, any other documents to be provided for the information of shareholders or partners, and in the same manner as this information is provided to the latter;
- To issue a report when the company makes decisions in connection with: (i) changes in the structure of the workforce or reductions thereof, whether total or partial, permanent or temporary, (ii) a working schedule reduction, (iii) total or partial transfer of a work-centre location, (iv) training programs in the company, (v) implementation or revision of organisational and control systems, and (vi) productivity matters, the introduction of bonus or incentives schemes, and job assessment procedures;
- To issue a report when a merger, take-over, or any other change in the legal status of the company may affect the volume of employment in the company;
- To be informed on labour contracts used by the company and the documents relating to termination of employment;
- To be informed of all serious sanctions (e.g., disciplinary dismissal) imposed by the company;

- To be informed at least quarterly of the level of absenteeism and its reasons, work accidents and occupational illness and their consequences, periodic or special studies on environmental labour matters, and the procedures for prevention of risks;
- To supervise the fulfilment of labour and social security legislation and any other applicable agreements in the company, and, when necessary, bring the corresponding legal action to the company or to the administrative or judicial authorities;
- To supervise and control the implementation of the health and safety regulations in the company or work-centre;
- To take part, as established in the collective bargaining, in the management of welfare schemes set up within the company for the benefit of the employees and/or their families;
- To cooperate with the company's management in introducing measures to maintain and increase productivity as agreed in the applicable collective agreement; and
- To inform all employees on all the above referenced matters, insofar as they have or may have direct or indirect effect on labour relations.

#### 4. Trade Union And Works Council Employee Protection Rights

Employees' representatives in Spain benefit from the following rights and guarantees:

- When there is a serious or very serious sanction against an employee representative (e.g., dismissal), an investigation procedure must be opened, during which the remaining members of the representation body (Works Council or Employee Delegates) and the affected employee are heard;

- Where such a dismissal is declared illegal by a labour court, the employee representative is entitled to choose either to be reinstated in his or her former position or to be dismissed receiving the legal severance compensation (in the event of other employees, the company will choose between both options);
- Where contracts are terminated due to an objective dismissal for economic, technical, organisational, or productive reasons, the employees' representatives are protected and therefore entitled to continue their jobs;
- During the four-year representative term and the year following its expiration, it will be extremely difficult to dismiss or sanction employee representatives as they have special employment protection;
- Employee representatives are free to express their opinion on matters falling within the scope of their duties; and
- Employee representatives are allowed a number of hours off per month to perform their duties (15 hours per month for companies with up to 100 employees, 20 hours from 101 to 250 employees, 30 hours from 251 to 500 employees, 35 hours from 501 to 750 employees, and 40 hours for more than 750 employees).



## Sweden

### 1. Introduction

The development of trade unionism in Sweden can be dated to the latter part of the 19th century. The trade union movement found a niche in the old craft guilds, such as typographers, bookbinders, carpenters, and bricklayers. Under the influence of socialism, trade unions joined blue-collar workers for a “joint struggle against capitalism.”

The first real trade union was established in 1869 in connection with a strike by bricklayers. Then, in the 1880s trade unionism finally caught on among Swedish blue-collar workers. Gradually, the local trade unions joined together to form nationwide organisations. The Swedish Confederation of Trade Unions (*Landsorganisationen* - “**LO**”) was established in 1898. The LO gathered all types of blue-collar workers, but was not interested in organising white-collar employees. White-collar employees considered themselves closer to their employers than to the blue-collar workers, and therefore did not respond to the word “socialism” and the call to join the struggle against capitalism, as had the blue-collar workers. Rather, white-collar workers preferred to stay politically neutral and to establish trade unions of their own.

White-collar trade unions became a force for the first time in the 1930s, when the Central Organisation of Salaried Employees (*Tjänstemännens Centralorganisation* - “**TCO**”) was established. The Swedish Confederation of Professional Associations (*Sveriges Akademikers Centralorganisation* - “**SACO**”) was founded in 1947 as a politically unaffiliated federation of independent trade unions and professional organisations.

The formation of employer organisations developed as a reaction to the organisation of the employees. However, the decisive factor for the establishment of the Swedish Employers’ Confederation (*Svenska*

*Arbetsgivarföreningen* - “**SAF**”) in 1902 was a countrywide, political, general strike for universal suffrage that same year.

Throughout the 1990s, the organisational structure of trade unions was modified, and new trade unions were established. The changes can be regarded as a reflection of the restructuring of the consultation system that has taken place over the last 20 years. Additionally, the process and parties involved in wage setting have been slowly decentralised. For many years Sweden had one of the most centralised collective bargaining wage systems in the world. However, today’s structure of unions – representing blue-collar workers, white-collar workers, and professionals separately – is slowly changing towards a more modern structure.

## 2. Trade Unions

### 2.1 The General Role Of Trade Unions

Trade unions are the foundation for modern Swedish collective labour law. Over time, trade unions have developed methods for collective regulation of the terms and conditions of employment. They have also carried through new legislation that has given them a stronger position and more extensive powers in relation to employers as well as to employees.

The Swedish labour market is heavily organised. The overall rate of unionisation is around 75% of the working population, however, recent statistics indicate that the rate is decreasing. The latest figures (2007) indicate that 76% of blue-collar workers and 75% of white-collar employees are organised into trade unions. Unionism is divided into three main federations: one for blue-collar employees, one for white-collar employees, and one for professionals. In the blue-collar sector, workers belong to some 20-odd industry-wide unions, most of which are industrial, federated into the LO. With a membership of about 1.7 million, the LO accounts for approximately 40% of all employees in Sweden. White-collar employees are unionised to a great extent as well. Industry-wide unions, mainly belonging to the

TCO, organise the majority of them. The TCO consists of 17 unions, with a total membership of 1.2 million employees.

Among professionals, the unionisation rate is somewhat lower in the private sector than in the public sector. The majority of unionised professionals belong to national craft unions amalgamated into a central federation (“**SACO**”), with a total membership of 580,000 employees. SACO consists of 24 associations. Its members are people who hold university degrees and other higher-education qualifications and are mainly divided between the government (36%), central government (22%), and private (40%) sectors.

## 2.2 Constitution Of A Trade Union

The Employment Co-determination in the Workplace Act (1976:580) defines an employee organisation as a combination of employees that, pursuant to its by-laws, is charged with safeguarding the interests of the employees in relation to the employer. Trade unions in Sweden are independent and democratic organisations. The right to establish a trade union is protected by the Swedish Constitution. Legally, trade unions are to be considered as non-profit associations. For example, the LO is structured by branch unions that are divided into local departments. The division of branch unions within the LO is built on the “industry union principle”, which means that all members within a certain industry belong to the same union. A determining factor for the internal legal relations and the functional allocations within trade unions is the organisation regulations. Branch unions are the parties to the collective bargaining agreement. A local department can agree on a local collective bargaining agreement with an employer, but will need the approval of the board of the branch union.

## 2.3 The Scope Of Trade Union Rights In Businesses

The rights for local unions to consult with an employer in certain cases are laid down in the Employment Co-determination in the Workplace Act. The Act grants trade unions a certain measure of influence over decisions affecting their members. The obligation to consult with the unions may cause delays for a company, even though

the unions' actual mutual consent is not necessary. However, in some cases, the unions can veto decisions that affect its members.

The first part of the Co-determination Act affirms the right of employers and employees to belong to employer's associations and trade unions respectively, and prohibits any direct or indirect restrictions on this right. Other important provisions in the Act give unions the following rights:

1. The extended right to consult: the extended right to consult requires an employer that is bound by a collective bargaining agreement to initiate consultations with the relevant local union before making a decision concerning major changes at the workplace in general or for individual employees who are members of the union.
2. The right to be informed: if an employer is bound by a collective bargaining agreement or - in the absence of any such agreement - if any of the employees are union members, the employer shall inform the relevant local union about financial and production aspects of the development of the company's operations and about personnel policy guidelines in force. Where bound by a collective bargaining agreement, the local unions are also entitled to inspect accounting records and other documents whenever necessary for the protection of their members' interests.
3. Interpretative precedence: the Act's special provisions for interpretation enable the union to impose its opinion in disputes concerning collective bargaining agreements on co-determination issues and concerning the duty to work, until a court decides otherwise.
4. Veto right: an employer that intends to engage a subcontractor or intends to outsource certain assignments must initiate negotiations with the union concerning the work in question so that the union has an opportunity to investigate whether the subcontractor is applying illegal employment conditions. In such cases, the central

union normally has the right of veto to prevent an employer from engaging a subcontractor who is believed to, inter alia, act in conflict with the general practice in the industry.

5. If an employer is not bound by any collective bargaining agreement, it is still obliged to consult with the relevant unions in certain cases if any of the employees are union members and the matters under question have a major impact on those employees. For example, the employer must consult with the relevant unions before terminating the employment of an employee who is a union member, irrespective of whether the termination is due to redundancy or personal circumstances. The employer must also consult with the unions before transferring part or all of its business.

#### 2.4 The Function Of Trade Union Representatives

Under the Trade Union Representatives (Status in the Workplace) Act (1974:358), if bound by a collective bargaining agreement with an employer, the local trade union branch is entitled to appoint trade union representatives at the employer's workplace. Furthermore, the union branch is, in principle, free to determine the number of representatives that are to be appointed in the workplace. Within rather wide limits, these representatives are also entitled to paid leave to perform their duties. The amount and timing of this leave is decided in consultation with the employer. Union activities that relate to the representative's own workplace may be performed without any loss of pay. To a limited extent, remuneration is payable by the employer for union activities outside working hours. In the event of a dispute between the employer and the union, the opinion of the union will prevail until there is a court decision.

The purpose of these rules is to facilitate union work for the trade union representative and for the trade union on the whole, as well as to activate the right of co-determination in small places of work.

### 3. Works Councils

Sweden does not recognize the concept of “Local Works Councils.” The employees’ influence over the company and the employees’ power to exercise the rights of employees are guaranteed by the Co-determination, Act and the Act on Board Representation for Employees in the Private Sector.

### 4. The Interaction Between A Works Council And A Trade Union

Given the fact that local Works Councils do not exist in Sweden, there is no interaction. For several decades, trade unions have been given far-reaching authority and the power to exercise the rights of employees.

### 5. Trade Union Employee Protection Rights

Trade union representatives may not be discriminated against or prevented from performing their union duties. On the contrary, trade union representatives should have access to certain premises or space for these activities and shall be granted a leave of absence for trade union purposes. Additionally, a trade union representative is entitled to reinforced employment protection if his or her work is considered to be especially important for the trade union at the workplace. Employers are prohibited from deteriorating the trade union representative’s employment conditions because of his or her assignment. This prohibition is in force both during the assignment as well as after the assignment has been completed.

### 6. Other Types Of Employee Representation

The Act on Board Representation for Employees in the Private Sector (1987:1245) generally applies to private companies with an average of at least 25 employees during the previous financial year. Under the Act, local trade unions bound by a collective bargaining agreement with an employer are entitled to appoint directors to the employer’s board of directors. The union is entitled to appoint two members and two deputies. In companies with 1,000 employees or more, the union

is entitled to appoint three members and three deputies. However, the number of employee members of the board may never exceed the number of other members of the board. The purpose of the Act is not to give employees control over the company, but to make it possible for them to gain insight into the management of the company and to exercise influence over it. The employee members of the board have the same rights and duties as other members of the board; however, they are not allowed to participate in matters regarding collective bargaining agreements and offensive actions.

The local unions have also been given particular rights under various labour law acts, such as the right to control the overtime worked under the Working Time Act, and the right to agree on deviations from certain sections of the Annual Leave Act.



## Taiwan

### 1. Introduction

In the Republic of China (Taiwan), all employees – except for those working in the military sector – can form unions. Nevertheless, the right to form a union was rarely exercised in the past decades. Until recently, in the wake of the labour force and the democratic reforms of the political environment and society, Taiwan's employees have become increasingly assertive in the employment sphere and as a result, unionization has gained steadily.

In Taiwan, the Union Act, and the Law Governing Collective Bargaining Agreements (**LGCBA**), govern and prescribe the right to form trade unions. The Union Act was promulgated in 1929 and was amended most recently in June 2010. The LGCBA, first passed in 1932, was amended in January 2008. However, the effective date of both the amendments is pending announcement by the Executive Yuan (Cabinet). These two laws differ from the Labour Standards Law, which sets forth the minimum standards employers must follow to protect employees' rights and interests. Under these two amendments, a union has greater power to request and negotiate with the employer than before. As such, it is highly recommended that all enterprises in Taiwan prepare for the amendments in advance.

The amendments to the Union Act recognize three kinds of unions: (1) corporate union; (2) industrial union; and (3) craft union. All of these employee organisations are considered trade unions, as opposed to Works Council organisations.

Employee representation by Works Councils was still a novel concept in Taiwan when a government-owned telecommunications company was to be privatised several years ago. Despite employee lobbying to adopt the concept of Works Councils, however, no rules or practice has been realised to date.

## 2. Trade Unions

### 2.1 The General Role Of The Trade Union

According to the amendments to the Union Act (Article 11 of the amendments to the Union Act), the main functions of trade unions in Taiwan are:

- a. To conclude, revise, or abolish a collective agreement;
- b. To handle labour-management disputes between the employee and the employer;
- c. To expedite the improvement of labour conditions and labour safety and health, and the promotion of the benefits of its members;
- d. To promote the formulation of and amendment to labour policy, and promulgation and revision of labour statutes or regulations;
- e. To provide employee training and education;
- f. To render job-placement assistance to its members;
- g. To organize recreational activities for its members;
- h. To handle disputes among labour unions, or among the members thereof;
- i. To undertake business in accordance with statutes and regulations; and
- j. To investigate the livelihood of a worker's family and to compile labour statistics;

Like the unions of many other countries, trade unions in Taiwan generally also play an important role in lobbying. In fact, the

government of Taiwan will usually obtain the informal consent of the unions before enacting or amending employment law provisions.

## 2.2 Constitution Of The Trade Union

According to the amendments to the Union Act, employees in the same municipal administrative area can only form one union (Article 9 Paragraph 2 of the amendments to the Union Act). A union shall be organized by the signatures of thirty or more employees as promoters (Article 11 Paragraph 1 of the amendments to the Union Act).

Employees of the same factory, of the same enterprise, of enterprises with controlling/subordinate relationships between each other in accordance with the Taiwan Company Act, or of financial holdings and its subsidiaries in accordance with the Taiwan Financial Holding Company Act can form a corporate union (Article 6 Paragraph 1 (1) of the amendments to the Union Act). Further, employees of the same industry can form an industrial union (Article 6 Paragraph 1 (2) of the amendments to the Union Act), and employees practicing the same craft can form a craft union (Article 6 Paragraph 1 (3) of the amendments to the Union Act). Under the amendments, an enterprise with five branches can form, at maximum, six corporate unions, one for the head office and one for each branch.

## 2.3 The Rights, Functions And Protection Of Union Representatives And Members

The amendments to the Union Act grant the president of the union the right to represent the union for any and all of its contact with third parties. In addition, the board of supervisors of a union or, if no such organization, the supervisors can examine the union's bookkeeping, as well as investigate its business as established according to the by-laws. Moreover, because Taiwan's courts do not specifically limit the qualifications of agents who represent litigating parties in civil lawsuits (including termination of employment, claims for payment of overtime worked, claims for payment of severance or pension benefits, etc.), union representatives may represent trade union members in employment lawsuit proceedings.

To protect the employees, the amendments to the Union Act provide that the employer or employees who exercise the right of management on behalf of the employer may not commit the following acts:

- a. Refuse to employ, dismiss, demote, reduce the salary of, or extend other unfair treatment to an employee who establishes or joins a labour union, attends the activities held by the labour union, or holds an office in the labour union;
- b. Require an employee or job applicant not to join the labour union or hold an office in the labour union as a condition to be hired;
- c. Refuse to employ, dismiss, demote, reduce the salary of, or extend other unfair treatment to an employee who asks to engage in collective bargaining or participates in matter relating to collective bargaining;
- d. Dismiss, demote, reduce the salary of, or extend other unfair treatment to an employee who attends or supports protesting activities; and
- e. Improperly influence, obstruct, or restrict the establishment, organization or the activities of the labour union.

In addition, union representatives are entitled to duty leave up to but not exceeding 50 hours per month. To perform his or her union duties, the president of the union may request this official leave of absence in half day or full day increments (Article 36 Paragraph 2 of the amendments to the Union Act).

#### 2.4 Collective Bargaining Agreement

The Amendment provides specific guidance on who may be authorized to sign a collective bargaining agreement and what the collective bargaining agreement should include. The Amendment also

establishes the binding force of collective bargaining agreements and prescribes penalties for violations of this law.

#### 2.4.1 Contracting Parties

The employer and the employees' union are the parties qualified to enter into a collective bargaining agreement. The union shall be a union of an enterprise or an industrial union that consists of at least one-half of the total people employed (Paragraph 3, Article 2).

Persons who represent the union in contract negotiations should either be appointed pursuant to the union's articles of association or by a resolution passed at the union members' general meeting or at the representatives' meeting. Furthermore, the appointment should be made in writing and by over one-half of the union members (Paragraph 1, Article 8).

Entry into a collective bargaining agreement will be deemed effective when ratified by more than one-half of the members present at either a union members' meeting or member representative meeting where two-thirds of the total voting members are present. Alternatively, a collective bargaining agreement can be approved in writing by over three-fourths of the members, provided that all members have been notified of the entry of such collective bargaining agreement. When this latter approval procedure is used, the agreement will take effect retroactively (Article 9).

#### 2.4.2 Contents Of Collective Bargaining Agreements

Collective bargaining agreements may specify matters regarding employee wages, employment termination, retirement, and union interference with the operations of an enterprise (Paragraph 1, Article 12). For employees who are not union members, employers are prohibited from applying or altering employment conditions or benefits in a manner that does not conform to the conditions specified in a collective bargaining agreement (Article 13). An employer may only employ workers who are union members if a collective bargaining agreement so provides (Article 14).

Where an employer is party to a collective bargaining agreement, or is a member of an employers' association that has entered into a collective bargaining agreement, the provisions of the agreement automatically become part of the employment contracts between the employer and its union member employees. Individual employment agreements with terms that deviate from the working conditions set forth in the collective bargaining agreement become invalid unless it can be shown that such terms are not, in fact, expressly prohibited by the collective bargaining agreements or are otherwise in favour of the employee(s) concerned (Article 19).

#### 2.4.3 Duration Of Collective Bargaining Agreements

Collective bargaining agreements may have one of three terms: fixed, non-fixed, and project-based. A fixed-term collective bargaining agreement is one whose term shall not exceed three years (Article 28). Under a non-fixed collective bargaining agreement, either party may terminate the agreement one year after it is entered into (Paragraph 1, Article 27). For project-based collective bargaining agreements, the term shall not exceed three years (Article 29).

In practice, companies may consider longer fixed-term collective bargaining agreements. The longer agreements provide more stability in dealing with employees and unions. However, if the term of the agreement is lengthy and material changes in economic conditions occur, either party may ask for revision or termination of the agreement (Article 31).

#### 2.4.4 Providing Documents For Negotiation

When a union requests to enter into collective bargaining agreement negotiations, the employer must respond within 60 days of the request and is obligated to provide information required for the negotiation (Paragraph 1, Article 6). Employers that fail to comply with this regulation will be subject to a penalty ranging from NT\$100,000 to NT\$500,000, provided that the employer's non-compliance is confirmed by a decision in accordance with the Settlement of Labour

Dispute Act. Additional penalties may be imposed where the employer repeats or continues non-compliance (Article 32).



# Thailand

## 1. Introduction

### 1.1 Constitutional Rights

The Thai Constitution recognises freedom of association. Individuals are free to form associations such as societies, unions, confederations, cooperatives, agricultural groups, non-governmental organisations, or any other kind of organisation. Restrictions on such freedom are permissible only to protect the public interest, to maintain public order and good morals, or to prevent economic monopoly.

### 1.2 The Labour Relations Act

The Labour Relations Act, B.E. 2518 (LRA) specifically regulates associations in the form of trade unions, employers' associations, and combinations of trade unions or those of the employer's associations. It expressly excludes employees of state enterprises from being members of a trade union. Nevertheless, employees of state enterprises may form a trade union pursuant to the State Enterprise Labour Relation Act (B.E. 2543).

The LRA also covers employee representation in general and governs, for example, the concept of works councils and providing for employee committees as an alternative to trade unions.

### 1.3 Employee Representation And Participation

Trade unions and works councils represent employees in bargaining with their employers and, to a certain extent, in the decision-making process of the employer. Employees are vested with the right to establish either a trade union or a works council, or both, and the employer may not interfere with their operation.

## 2. Trade Unions

A trade union, often called a "labour union" in Thailand, may be constituted only by virtue of the LRA. A trade union is defined as an organisation of employees established under the LRA. Only two

types of trade unions are feasible: a house union and an industrial union. Occupational or general unions are neither recognised nor permissible. In other words, a trade union must be formed by 10 promoters or more who are employees of the same employer or who are employees working in the same kind of business, regardless of the number of employers. An individual eligible for being a member of a trade union must have similar qualifications. Furthermore, the LRA differentiates trade unions on the basis of classes of employees. Supervisory or superior employees may not become members of a trade union of other classes of employees and vice versa.

A trade union established and registered under the LRA is a legal entity. It must have union rules and carry out activities in accordance with its registered objectives.

### 2.1 The General Role Of The Trade Union

A trade union is required to protect employment benefits and to promote good labour relations between the employer and the employees, and among the employees.

In reality, collective bargaining initiated by a trade union accounts for joint regulation; the terms and conditions of employment are not, therefore, created unilaterally by the employer. The joint regulation extends from the terms and conditions of individual employment contracts to job regulation and the working environment (e.g., disciplinary and grievance procedures), which provides a means whereby employees participate to some extent in the operation of a company.

### 2.2 Constitution Of The Trade Union

Ten or more employees of the same employer or of the same industry can act as promoters of a trade union by filing an application with the Unions Registrar at the Ministry of Labour, enclosing a draft of the union rules. The draft union rules must include:

1. name of the trade union;

2. objectives;
3. office address;
4. rules on membership;
5. rates of application fees and dues, and the manner of their payment;
6. regulations concerning the rights and duties of members;
7. rules on management, expenses, maintenance of funds and other property, accounts, and audits;
8. rules on decisions to strike and on decisions to enter into a collective agreement;
9. rules on the general meeting of members; and
10. rules on the composition of the union committee, its election, term, cessation, and meetings.

In registering a trade union, the Unions Registrar must ensure that the union promoters are qualified, that the union rules contain the requisite particulars, and that the objectives are as stipulated by the law and are not contrary to public order. If all these criteria are fulfilled, the Unions Registrar must register the trade union and issue a certificate of registration.

The union promoters must convene the first general meeting of union members within 120 days from the date of registration. During the meeting, the union promoters must consider and resolve to elect a union committee, deliver work to the committee, and approve the draft union rules.

The authorised committee members must apply to the Unions Registrar for registration of the union committee and the union rules within 14 days from the date of the first general meeting.

### 2.3 The Scope Of Trade Union Rights In Businesses

Employees, the trade union, union members, and union officers are immune from prosecution or being sued in a civil lawsuit when the trade union carries out, in the union members' interest, its rights to:

1. bargain with the employer to obtain justified rights and benefits for the union members;
2. cause a strike, or assist, persuade or encourage its members to strike;
3. publicise facts about a labour dispute; or
4. arrange for a rally or peaceful gathering for a strike.

This immunity does not, however, exempt an offender from criminal penalties in the case of harm to the public, life or body, freedom or reputation, and offences against property and related civil liability.

A trade union, via a resolution of the general meeting, may carry out the following activities:

1. amend the union rules;
2. perform any acts that may affect the common interests of its members;
3. elect union committee members and an auditor, and certify the balance sheet, annual report and union budget;
4. allocate funds or properties for the welfare of its member, or for public benefit;

5. dissolve the trade union;
6. amalgamate trade unions;
7. establish a labour federation or become a member of a labour federation; or
8. go on strike when a labour dispute cannot be settled and a resolution to go out on strike is approved by more than one-half of the total membership in a vote by secret ballot.

An employer is prohibited from, and liable to a criminal penalty for, interfering with the operation of the trade union.

#### 2.4 The Function Of Trade Union Representatives

Employees who are members of the union committee can take time off during working hours for the purpose of carrying out any duties concerned with negotiation, reconciliation, or determination of labour disputes, or attendance of meetings held by the authorities.

A trade union representative's primary role is the improvement of the union members' terms and conditions of employment through the mechanism of collective bargaining. Union committee members also have the power to represent the trade union to:

1. demand, negotiate, or enter into a collective agreement with the employer in the interest of union members;
2. ensure that the union members receive benefits as specified in the objectives of the union;
3. provide union members with information about employment opportunities;

4. provide a service of consultation to solve problems of work and management of work;
5. allocate monies or property for the welfare of the union members or for public benefit, as approved at the general meeting; and
6. collect membership fees and subscriptions at the rates prescribed in the regulations of the union.

### 3. Works Councils

#### 3.1 General Requirements And Principles

Works councils are referred to as employee committees in Thailand, and are voluntary. Nonetheless, an employee committee may be established only in a company with 50 or more employees. Employee committees are created to contribute to joint consultation for various matters in the company, such as joint problem solving and joint regulation. An employer is legally obliged to discuss particular matters with the employee committee if one has been formed. Nevertheless, the employee committee may not make decisions on those matters.

#### 3.2 Election Of An Employee Committee

Employees of the company can set up an employee committee. Its members are either elected by employees in the company or are appointed by the trade union. In cases where more than one-fifth of the total number of employees in the company are members of a trade union, the majority of the employee committee members must also be members of the trade union. If more than one-half of the total number of employees of the company are members of the trade union, the trade union may appoint all the members of the employee committee.

If an employee committee is to be established, the employer is required to arrange for and accommodate the election of the employee committee. The employee committee may start performing its functions as of the date of election.

The term of the employee committee is three years, although a member can be re-elected or re-appointed. An election or appointment of the entire committee before expiration of the term is required when:

1. the number of employees in that enterprise increases or reduces to a level exceeding one-half the total number of employees;
2. one-half or more of the committee members cease to hold the post;
3. more than one-half of all of the employees resolve to remove all the committee members; or,
4. the Labour Court orders a removal of all the committee members.

To ensure independence of the employee committee, employers are prohibited from giving the committee members any extra payment or benefits except their normal wages, overtime pay, holiday work pay, bonus, share in profits, or other benefits. However, the employer can request the Labour Court to order that a committee member or all members be removed from the post if that committee member or the employee committee does not carry out its duties in good faith, commits any act inappropriate and harmful to public order, or discloses confidential information of the employer.

### 3.3 Functions And Rights Of The Employee Committee

The employer is required to consult with the employee committee at least once every three months -- or as reasonably requested by one-half or more of the committee members or by the trade union – on matters relating to the welfare of the employees, terms and conditions in work rules, grievances of the employees, or reconciliation and resolution of a labour disagreement in the enterprise. If the employee committee finds that any actions that fall under this procedure are

unjustified or give rise to unreasonable harm to employees, it can request the Labour Court to provide remedy.

#### 4. Trade Union And Employee Committee Protection Rights

##### 4.1 Trade Unions

An employer is prohibited from, and liable to a criminal penalty for:

1. dismissing or putting pressure on a union member or a union committee member so that he or she can no longer continue to work because of his or her union membership or because he or she made a demand, bargained, went on strike, sued, or was a witness in legal proceedings or in a regulatory action, or prepared for such proceedings;
2. dismissing a union member or a union committee member during the term of a collective bargaining agreement, during the course of negotiating a labour demand or during a settlement or arbitration of a labour dispute, unless he or she was guilty of gross misconduct as specified by law; and
3. interfering with the commencement or termination of an employee's membership in a trade union.

##### 4.2 The Employee Committee

An employer is prohibited from, and liable to a criminal penalty for:

1. dismissing, reducing the wage, initiating a disciplinary action against, and obstructing the performance of the duties of a committee member, or causing the member to be unable to continue to work, unless prior approval from the Labour Court is obtained;
2. dismissing or putting pressure on a committee member so that he or she can no longer continue to work because he or she made a

demand, bargained, went on strike, sued, or was a witness in a legal proceeding or in a regulatory action, or preparing thereof; and

3. dismissing a committee member during the term of a collective bargaining agreement, during the course of negotiating a labour demand or during a settlement or arbitration of a labour dispute, unless he or she was guilty of gross misconduct as specified by law.

## 5. Other Types Of Employee Representation

Apart from trade unions and works councils (i.e., employee committees), Thai legislation is silent on other types of employee representation. Therefore, any other forms of employee representation may be applied insofar as they do not duplicate the nature and essence of a trade union or an employee committee, which are specifically regulated.

Joint consultative committees exist in a number of enterprises, which are formed at the initiative of either the management or the employees. The precise structure and design of a joint consultative committee depends primarily on the shape and character of the organisation in which it is operating.

Worker directors, or employee representation on employers' boards of directors, are not at all common in Thailand.



## United Kingdom

### 1. Introduction

The United Kingdom has seen a steady decline in the power of trade unions and in their membership since the miners' strikes of the 1980s. Legislation during the 1980s served to remove many trade union rights and immunities as well as the rights of their members. The ethos of that legislation has been compounded in recent years by an unprecedented growth in the number and scope of individual employment rights: for many employees, trade union membership may offer little additional benefit.

Under the previous Labour government (1997-2010), the scope, if not the power, of trade union influence widened somewhat. In particular, a statutory right to recognition was implemented. Nevertheless, from a peak of 13.2 million in 1979, trade union membership dwindled to around 6.5 million. Today, fewer than one in five employees in the private sector and three in five in the public sector are members. The election of a centre right / centrist Conservative - Liberal Democrat coalition government in 2010 is unlikely to improve the statutory position of trade unions, although it remains to be seen whether business' attempts to persuade the Government to water down the legislation still further, will bear any fruit.

UK legislation enabling the creation of Information and Consultation bodies, or National Works Councils, was introduced in 2004. While take-up by employees has not been great, there is some evidence that the existence of the statutory procedure has encouraged employers to establish or improve existing employee consultative bodies.

### 2. Trade Unions

#### 2.1 The General Role Of Trade Unions

The statutory definition of a trade union is set out in Section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). Under the **TULR(C)A**, a trade union is a permanent or

temporary organisation consisting wholly or mainly of workers of one or more descriptions, and one of its principal purposes is the regulation of relations between workers and employers. The scope of this latter point includes, but is not limited to, collective bargaining, meaning that an organisation with no negotiating function could theoretically be a trade union. Trade union structures are diverse – some are general unions and others target specialist areas – leading to overlap and competition, which arguably leads to improvements in services. In recent years, several medium sized unions have amalgamated to create much larger “super unions.”

Trade unions offer their members a variety of services, including representing them in various ways (particularly in disciplinary meetings), offering them legal and other advice, negotiating with employers on their behalf, and representing them in tribunals. Their role has grown much wider.

## 2.2 Constitution Of A Trade Union

A trade union is an unincorporated association and does not have legal personality in the United Kingdom. Therefore, it cannot own property in its own right, meaning that trustees must hold any property in trust for the members. Legislation, however, affords trade unions certain attributes of legal personality, such as the ability to enter into contracts.

The rules of a trade union define its constitution and stipulate the powers of its officers and officials. They also define the relationship between each member and the trade union, and between the members themselves. Each trade union has a rulebook, which normally deals with these matters, although it is possible for terms to be implied into the rulebook. The trade union’s customs and practices are also important in interpreting its rules. Courts will interpret the rules based on what they consider were the parties’ intentions and on how they believe the members would understand them. Most importantly, the rulebook should contain the right to amend the rules, or amendments may not be possible.

Although a trade union can generally decide upon its own rules, one of the rules that must be included in the rulebook is that a member may terminate his or her membership at any time with reasonable notice. Moreover, the rules of natural justice cannot be excluded and must be observed in all circumstances. Where a trade union is in breach of its rulebook, or is threatening such a breach, members may bring an action against both the trade union and the officials responsible for an injunction and/or damages.

When holding an election for a union office, a trade union must comply with its rulebook. Under the TULR(C)A, a trade union must hold elections for certain union offices, such as for the president and general secretary, at least every five years. It must also ensure that the person elected has not recently been convicted of certain offences.

### 2.3 The Scope Of Trade Union Rights In Businesses

Section 1 and Schedule 1 of the Employment Relations Act 1999 (**ERA**) gave independent trade unions a legal right to request recognition for collective bargaining purposes from employers. The procedure is now set out in Schedule A1 TULR(C)A. “Recognition” can be at different levels and for a variety of purposes, but at the basic level it means that an employer agrees to the trade union occupying a certain role in the undertaking. This right only applies to employers with at least 21 workers. Collective bargaining covers, at a minimum, pay, hours, and holidays, although the employer and trade union can agree on additional topics.

The aim of the legislation is for the employer and trade union to reach a voluntary agreement concerning recognition. This allows maximum flexibility, and such an agreement will not be legally enforceable unless the parties agree otherwise. However, the disadvantage for the trade union is that the employer can withdraw voluntary recognition at any time without legal sanctions. If an employer refuses voluntary recognition, the trade union may commence the statutory recognition procedure.

Under the statutory recognition procedure, the trade union applies to the Central Arbitration Committee (**CAC**) to assist in reaching an agreement with the employer. The first point to be agreed upon is the scope of bargaining unit (i.e., what employees fall into the category of workers for which the union will conduct collective bargaining). Initially, the CAC will check that the majority of members in the proposed bargaining unit are in favour of its recognition. If the CAC is unable to help the employer and trade union reach an agreement on the scope of the appropriate bargaining unit within 20 working days of accepting an application for assistance, the CAC itself must decide the appropriate bargaining unit.

Once the appropriate bargaining unit has been determined, the CAC can grant recognition rights to the trade union where the trade union demonstrates that the majority of workers in the bargaining unit support its application to be recognised. Otherwise, the CAC must notify the employer and trade union that a secret ballot of the workers in the bargaining unit will be held to decide the issue of recognition. The trade union on its own, or together with the employer, may decide that it does not wish a ballot to be held, in which case the recognition procedure will stop.

If a ballot is to be held, the CAC must appoint a Qualified Independent Person (**QIP**) to conduct it. The trade union can require information it supplies to be sent to the workers in the bargaining unit by the QIP. The trade union also has the right of reasonable access to the workers in the bargaining unit to try to persuade them to vote in favour of recognition. The CAC must order recognition where a majority of the workers voting and at least 40% of the workers in the bargaining unit vote in favour of recognition. If these tests are not satisfied, the CAC will refuse recognition, and that particular trade union cannot commence the statutory recognition procedure for substantially the same bargaining unit for three years.

Once the bargaining unit has been recognised, the trade union and employer have 30 working days to decide upon a recognition

agreement. Failing agreement, the CAC will help, and as a last resort, impose a legally binding structure. This can be enforced by an application to the court for an order of specific performance.

Where an independent trade union has been compulsorily recognised, or the CAC decided upon the recognition agreement, the trade union is protected for three years from a request for its de-recognition by the employer or by a worker. If the employer or a worker wants to derecognise the trade union and is unsuccessful in that application, the employer or worker must wait three years before trying again.

Section 70B TULR(C)A obliges an employer to consult with trade unions recognised under the statutory procedure set out above in respect of employee training. The employer must invite the union to send representatives to meetings to discuss the training of workers in the bargaining unit. The employer must provide specified information to the trade union before the meeting. In default, an Employment Tribunal may award up to two weeks' pay to each person in the bargaining unit. There is a further right to training reviews for the employees in the bargaining unit in the relevant workplace. Training should be reviewed every six months, provided that the trade union is recognised for the purposes of collective bargaining.

Additionally, and crucially, trade unions have the right to authorise and organise lawful industrial action, provided they adhere to strict and complex rules, particularly in relation to balloting members who will be asked to take industrial action, and providing relevant information to the employer. However, a union does not need to be recognised by the employer in order to lawfully call employees to take industrial action. Where the union fails to follow the rules, an employer may be able to obtain an injunction to stop the industrial action and the union may be liable to pay compensation up to a statutory cap. Over the past few years, several employers have obtained injunctions to prevent industrial action where the trade union has committed a relatively minor breach of the balloting and notification rules. However, there are signs that the tide is beginning

to turn, and that the Courts are now requiring a more substantial breach of the rules before granting injunctions.

## 2.4 The Function Of Trade Union Representatives

A trade union representative is elected by trade union members to represent some or all of the members in the collective bargaining process with their employer. The representative can be a member who is also an employee of the business, or an employee of the independent trade union itself, or any other member of the trade union. Any trade union member may put forward his or her candidacy for election, unless it would be reasonable to exclude him or her from so doing.

The representative's role is to ensure that all employees' views are properly represented rather than focusing on individual grievances. Representatives involved in collective bargaining are involved in the decision-making process; their role goes above and beyond mere consultation.

## 3. Works Councils

### 3.1 National Works Councils

The Information and Consultation of Employees Regulations 2004 give employees in businesses with 50 or more employees the right to require the employer to set up an employee information and consultation forum, which has the right to be informed and consulted on a regular basis about issues in the business for which they work. Consultative bodies established under these Regulations are typically called information and consultation bodies, or employee consultation forums, and have some similarities to continental European style National Works Councils, but are considerably less onerous from an employer's perspective.

The Regulations do not apply to businesses with fewer than 50 employees.

The Regulations apply to public and private undertakings situated in Great Britain that carry out an economic activity whether or not operating for gain.

The requirement to set up an information and consultation (**I&C**) forum is triggered when an employer receives a formal request from employees or if the employer chooses to start the process itself. An employee request to negotiate an I&C agreement must be made by at least 10% of the employees in the undertaking (subject to a minimum of 15 and a maximum of 2,500 employees).

Upon receipt of a valid request, an employer must negotiate an agreement unless there are one or more valid pre-existing agreements in place that cover the whole workforce and provide for the provision of information and consultation.

There is a three-year moratorium on employee requests where negotiated agreements are already in force, the standard I&C provisions apply, or an earlier employee request to negotiate a new I&C agreement, in place of a pre-existing agreement, was not endorsed by the workforce in a ballot.

Employers must initiate negotiations for an agreement no later than three months after a valid request is made.

Negotiations can last for up to six months, but the employer and representatives can agree to extend this period for as long as they like in order to reach an agreement.

A negotiated agreement must: i) set out the circumstances in which the employer will inform and consult its employees; ii) provide either for employee I&C representatives, or for information and consultation directly with employees (or both); iii) be in writing and dated; iv) cover all the employees of the undertaking; v) be signed by the employer; and vi) be approved by the employees.

Agreements may cover more than one undertaking or provide for different arrangements in different parts of an undertaking, such as individual establishments (sites), divisions, business units, or sections of the workforce.

The standard I&C provisions apply where negotiations fail to lead to an agreement or where an employer fails to initiate negotiations following a valid employee request.

Where the standard I&C provisions apply, employee I&C representatives must be elected and the employer must inform and consult with them in the way set out in the Regulations, that is: i) provide information on the recent and probable development of the undertaking's activities and economic situation; ii) inform and consult on the situation, structure, and probable development of employment within the undertaking and, in particular, on any threat to employment within the undertaking; and iii) provide information and consult *with a view to reaching agreement* on decisions likely to lead to substantial changes in work organisation or in contractual relations.

Consultation means giving enough time and information to allow I&C representatives to consider the matter and form a view, with genuine and conscientious consideration of that view by the employer. The standard I&C provisions require the employer to meet the I&C representatives at a level of management relevant to the subject under discussion and to give a reasoned response to any opinion they may give. There is no requirement to actually reach agreement with them, or to obtain a formal 'advice' from them.

Employers may, on confidentiality grounds, restrict information provided to I&C representatives in the legitimate interests of the undertaking. They may also withhold information from them altogether where its disclosure would be prejudicial to, or seriously harm, the functioning of the undertaking.

## Pre-Existing Agreements

Where employers already have in place one or more PEAs they may ballot the workforce to ascertain whether it endorses the request by employees. If they choose not to ballot the workforce, they will come under the obligation to negotiate a new agreement.

Where a ballot is held, and 40% of the workforce plus a majority of those who vote endorse the employee request, the employer would come under the obligation to negotiate a new agreement.

To be valid, PEAs must meet specific criteria set out in the Regulations.

### 3.2 European Works Councils

The European Works Councils (**EWC**) Directive sets out requirements for informing and consulting employees at the European level, in undertakings (which may include partnerships or other forms of organisation as well as companies) or groups with at least 1,000 employees across the member states and at least 150 employees in each of two or more of those member states.

The directive is implemented in the UK by the Transnational Information and Consultation of Employees Regulations 1999 (“**1999 Regulations**”), as amended by the Transnational Information and Consultation of Employees (Amendment) Regulation 2010 (“**2010 Regulations**”). They set out the procedures for negotiating a European Works Council agreement (or other European-level information and consultation procedure), informing and consulting with EWC members (or other employee representatives) and providing them with training and other means required to carry out their duties, enforcement mechanisms, provisions on confidential information, transitional provisions and exemptions, and statutory protections for employees.

An EWC agreement normally follows negotiations between management and the employees. The process is triggered either on management's own initiative or after a written request from at least 100 employees or their representatives in two or more Member States (no obligation exists if no request is received). The employees are represented in the negotiations by a "special negotiating body" (**SNB**) that consists of representatives of employees from all the EEA member states in which the undertaking has operations. The number of representatives is determined by where the undertaking's central management is located. For SNBs constituted prior to June 5, 2011 the UK Regulations prescribe one representative from each of the EEA countries in which the undertaking operates plus additional ones where 25% or more, 50% or more, and 75% or more of the European workforce is located in a member state, up to a total maximum of four. For SNBs constituted after June 5, 2011, each member state can elect one representative for each 10% (or fraction of 10%) of the total number of employees that they represent. The way in which the SNB members are selected is determined by the legislation of the member state where they are employed. UK members are selected by a ballot of the UK workforce unless there exists a consultative committee whose members were elected by a ballot of all the UK employees, and which performs an information and consultation function on their behalf. Where such a consultative committee does exist, it may appoint from within its members the UK representatives on the SNB.

The 1999 Regulations are largely concerned with the initial establishment of the SNB. The subsequent negotiations and the detail of the EWC agreements are for the most part left for agreement between the parties concerned, although the default model will be persuasive. However, amendments made by the 2010 Regulations impose more extensive obligations to supply particular information to the EWC in a particular way, and at a particular time, as well as introducing more detailed requirements as to the content and conduct of consultation. There is though an exemption for voluntary EWC agreements which were put in place before the Regulations applied to the particular undertaking, and for EWCs created or revised between

June 5, 2009 and June 5, 2011, which are not subject to many of the changes made by the 2010 Regulations.

If management refuses to negotiate within six months of receiving a request for an EWC, or if the parties fail to conclude an agreement on transnational information and consultation procedures within three years, an EWC must be set up in accordance with the “Statutory model” set in the Schedule to the Regulations. The Schedule lists topics on which the European Works Council has the right to be informed and consulted (e.g., the economic and financial situation of the business; its likely development; probable employment trends; the introduction of new working methods; and substantial organisational changes). As they are the default provisions, they typically become the benchmark against which the two sides negotiate the EWC agreement.

The Regulations provide that management may withhold information, or require the EWC to hold it in confidence, where “according to objective criteria it would seriously harm the functioning of the undertaking or be prejudicial to it” if it were revealed. EWC members can appeal to the CAC if they believe the management is withholding information or imposing confidentiality beyond what is permitted in the Regulations, and the CAC would then make a ruling on a case-by-case basis.

The employees and SNB/EWC members are given statutory protections when asserting their rights or performing duties under the Regulations.

The Regulations do not apply to undertakings which had already concluded voluntary agreements providing for the transnational information and consultation of the employees, and which covered the entire workforce in the EEA. Such agreements had to have been concluded before the undertaking became subject to the relevant regulations in any member state. Undertakings, which consider they have a valid voluntary agreement but that receive a request to

establish an EWC, may apply to the CAC for a declaration that the Regulations do not apply to them.

#### 4. Interaction Between Works Councils And Trade Unions

There are no formal works councils in the UK, the closest concept being an employee information and consultation forum. Employers which are heavily unionised will generally not have an I&C forum, since the trade union undertakes that role. However, many employers do have both, usually because a significant part of their workforce is not covered by the trade union recognition arrangement. The two bodies have different functions within the business, although there will be issues that both bodies need to be informed about or consulted about, including, for example, collective redundancies or TUPE transfers. Different employers will approach that in different ways, with some opting to consult with both bodies in a single meeting, and others keeping the two separate.

#### 5. Trade Union Employee Protection Rights

Under TULR(C)A section 146 a worker has the right not to be subjected to any detriment as an individual by an act, or any deliberate failure to act, by his or her employer if the act or failure takes place for the sole or main purpose of:

- Preventing or deterring him or her from being or seeking to become a trade union member, or penalising him or her for doing so;
- Preventing or deterring him or her from taking part in the activities of an independent trade union at an appropriate time or penalising him or her from doing so;
- Preventing or deterring him or her from making use of trade union services at an appropriate time, or penalising him or her for doing so; or

- Compelling him or her to be or become a member of any, or any particular, trade union.

Also, TULR(C)A section 145A gives workers a right not to have an offer made to them by their employer for the sole or main purpose of inducing the worker:

- Not to be, or seek to become, a trade union member;
- Not to take part in the activities of a trade union;
- Not to make use of trade union services; or
- To be or become a member of any, or any particular, trade union.

An employee who is taking part in *official and protected* industrial action (i.e., lawfully organised as described in TULR(C)A (section 219)) is automatically unfairly dismissed if the reason or principal reason for the dismissal was that the employee has taken part in protected industrial action, if the date of dismissal falls during a protected period of 12 weeks starting from the day the employee started taking part in the industrial action. The dismissal will also be unfair if it falls after the protected period if the employee did not participate in industrial action after the protected period or, where the employee continued to participate after the protected period, before the employer has taken reasonable steps to attempt to resolve the dispute.

Where the action is not protected or where it is unofficial, different rules apply.

The Employment Relations Act 1999 (Blacklists) Regulations 2010 prohibit the compilation, supply and/or use of lists of trade union members and those who participate in trade union activities, where the list is intended for use by employers or employment agencies for discriminatory purposes, such as employment vetting. Individuals

who suffer or may suffer loss as a result of the compilation, supply or use of a blacklist may bring a claim in the County Court for damages and other remedies, including injunctions. In addition, individuals who are refused employment, are dismissed or suffer a detriment for a reason related to a blacklist can bring a claim in the Employment Tribunal.

## 6. Other Types Of Employee Representation

### 6.1 Health And Safety

The “Framework Directive,” 89/391/EEC, requires employers to consult workers and/or their representatives, providing information on health and safety matters and allowing their participation in the discussion of such matters. In a unionised undertaking, the trade union may appoint an employee in the undertaking as a safety representative to review health, safety, and welfare arrangements. In a non-unionised undertaking, the employer must inform and consult either each employee individually or the employees’ elected representative. The method of election is not prescribed. In both cases, the safety representative is entitled to time off work to discharge his or her functions and has the right not to be dismissed or subjected to a detriment on the grounds of his or her role as a health and safety representative.

### 6.2 TUPE Transfers And Collective Redundancies

In a unionised undertaking, any recognised trade union representatives must be informed and consulted about certain aspects of a TUPE transfer (i.e., Transfer of Undertakings (Protection of Employment)) and about collective redundancies (i.e. where an employer proposes to dismiss 20 or more employees at one establishment within a rolling 90 day period).

In a non-unionised undertaking, the employer can either consult previously elected employee representatives who have the authority of affected employees or it can invite the affected employees to elect representatives specifically to represent them in this area. If they fail

within a reasonable time to do so, the employer should provide the relevant information to each individual affected employee. In each case, the representatives are entitled to time off work for training and have the right not to be dismissed or subjected to a detriment in their employment on the grounds of the representation. Failure to comply with the obligation may lead to the employer having to pay an award to each employee.

### 6.3 Working Time

The Working Time Regulations 1998 imposes certain limits on employees' working time, including, for example, the length of night work a worker may undertake and place minimums on the length of rest breaks and daily and weekly rest periods. Derogation is possible by trade union negotiated collective agreement or, in a non-unionised undertaking, by a written workforce agreement concluded between the employer and workers or their elected representatives. Workers whose employment terms and conditions were decided by collective bargaining are excluded from the latter type of agreement. The elected representatives and candidates for such positions are protected from dismissal and from being subjected to a detriment in relation to such activities.

### 6.4 Disciplinary And Grievance Hearings

Under the ERA 1999, all workers have the right, upon their reasonable request, to be accompanied by their choice of a "companion" when required by their employer to attend a disciplinary or grievance hearing. The "companion" can be a fellow worker or a trade union official, and in the latter case, the trade union does not need to be recognised. The chosen companion can address the hearing and confer with the worker during it, but cannot answer questions on the worker's behalf. The companion is entitled to paid time off work to accompany the worker and together with the worker has the right not to be dismissed or subjected to a detriment for doing so.



## United States

### 1. Introduction

Trade unions have impacted U.S. law and the economy for more than two centuries. In 1935, the U.S. Congress enacted, and President Franklin Roosevelt signed into law the National Labor Relations Act, (“**NLRA**”), 29 U.S.C. §§151 et. seq., a/k/a Wagner Act, as part of the “New Deal” legislation addressing the Great Depression. Amended in 1947 and again in 1959, the NLRA covers most private sector employers. Employees are free to choose whether to engage in “self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...[or] to refrain from any or all such activities...” (29 U.S.C. §157).

The percentage of union-represented private sector employees peaked in 1953 at 35.7%. In 2007, private sector union density was 7.5%. Private sector union density varies by state and generally reflects whether the state has a “right-to-work” law allowing employees to remain employed without paying union dues or fees where there is a union collective bargaining agreement in place requiring union membership and/or payment of union dues/fees (29 U.S.C. §164(b)). In 2007, the union density ranged from New York state’s 26.3% to North Carolina’s 3.9%. Investment and site selection decisions often consider union density statistics.

Under the NLRA, the term “employee” includes anyone employed by an employer but excludes “any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as supervisor, or any individual employed by an employer subject to the Railway Labor Act [a 1926 statute covering the railroad industry amended in 1936 to also cover airline industry employers]...or by any other person who is not an employer as herein

defined” (29 U.S.C. 152(3)). Notably, the definitions and exclusions of “independent contractor” and “supervisor” continue to generate much litigation under U.S. labor and employment laws. Employers and unions in the health care, high-technology, trucking, and insurance industries contest whether doctors, interns, residents, computer technicians, drivers and agents/brokers are independent contractors to be excluded from NLRA coverage and protections. Similarly, employers, as well as unions, may challenge the classification of individuals as “supervisor” in any case where exclusion may be contrary to their interests.

All private sector employers whether or not unionized, with the exception of agriculture, railroad and airline industry employers, are covered by the NLRA regardless of whether their employees are union represented. Unrepresented employees, like represented employees, have the right to engage in concerted activities (two or more employees acting together, or one employee acting on behalf of others) provided such activities are “protected”, not unlawful, violent, in breach of contract or indefensibly injurious to employer interests. The definition of a covered “employer” includes “any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization” (29 U.S.C. §152(2)). Occasionally, the exempt status of state political subdivisions or government- funded entities is contested. The National Labor Relations Board (“**NLRB**”), the federal agency administering, adjudicating, and enforcing the NLRA, may exercise its discretion to decline jurisdiction over enterprises considered to have an insubstantial effect on interstate commerce. The NLRB maintains certain minimum dollar volume standards by industry: non-retail annual outflow or inflow, direct or indirect across state lines of at least \$50,000; retail with a gross annual volume of at least \$500,000; interstate transportation of passengers or freight of at least \$50,000 annual gross revenue or value of services

performed. Where jurisdiction is declined, state statutory provisions may apply if parallel to the NLRA (29 U.S.C. §160(a)).

Specific, covered industries are treated uniquely. A health care industry employer is specifically defined and special provisions apply: (1) for initial contract bargaining following certification or voluntary recognition, a 30 day advance notice must be provided to the U.S. Federal Mediation and Conciliation Service (“**FMCS**”) and to any State mediation agency of any declaration of impasse; (2) a 90 day advance notice must be provided to the other party, and a 60 day notice to the FMCS and State agency in advance of the contract’s termination date where there is a desire to terminate or renegotiate the contract; and (3) a minimum ten day notice is required by a trade union before commencing any strike, picketing or other concerted refusal to work (29 U.S.C. §§152(14), 158(d),(g)). Because the construction industry is unique, it is exempt from the NLRA’s prohibition of hot cargo agreements (agreeing to do business only with certain unionized employers on the construction site) (29 U.S.C. §158(e)). Also, because construction employers hire employees for jobs of limited terms and generally perform services at multi-employer work sites, the NLRA permits pre-hire agreements with construction unions before employees are hired or before union majority status is established (29 U.S.C. §158(f)). The apparel and clothing industry is exempt from the NLRA’s secondary boycott and hot cargo provisions (29 U.S.C. §158(e)).

The NLRA defines “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work” (29 U.S.C. §152(5)). Employee committees, quality circles, employee involvement activities and/or codetermination programs are at risk of being deemed a labor organization where the employer is viewed as having dominated, interfered with, or supported the formation or administration of the “labor organization” (29 U.S.C. §158(a)(2)). Under NLRB caselaw,

“dealing with” is considered broader than the concept of bargaining, thus extending the reach of a “labor organization” as defined, and increasing the potential for an employer’s unlawful interference.

Of interest are the reported NLRB case decisions concerning the role of agency. The NLRA notes that in determining whether any person, individual, union or business entity is acting as an agent of another, “whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling” (29 U.S.C. §152(13)). While the NLRA’s definition of employer specifically includes reference to including “any person acting as an agent,” the definition of labor organization does include such reference (29 U.S.C. §§ 152(2), (5)). Reviewing courts apply common law principles in assessing evidence of express, implied or apparent authority. Unions are not found liable for every act of stewards and business representatives merely by virtue of their positions, and unions frequently escape liability for employees’ actions because proving agency is often illusive.

The NLRA is administered, adjudicated, and enforced by the NLRB. The NLRB is an independent federal agency with two principal functions: (1) to determine, through secret-ballot elections, whether employees in an appropriate unit wish to be represented by a trade union in dealing with their employers and, if so, by which union; and (2) to prevent and remedy unlawful unfair labor practices, by either employers or unions.

The NLRB is headquartered in Washington, D.C., and conducts its activities nationwide through 32 regional and 19 subregional and resident offices. General Counsel is independent of the NLRB and is responsible for the investigation and prosecution. The NLRB, a quasi-judicial body of five Members appointed by the U.S. President and confirmed by the U.S. Senate to staggered five year terms, decides cases on appeal from formal proceedings and decisions of Administrative Law Judges or Regional Director decisions regarding election matters, and approves requests for injunctions by the General Counsel. Board unfair labor practice decisions may be appealed to

federal appellate courts and the U.S. Supreme Court. The General Counsel, also appointed by the U.S. President and confirmed by the U.S. Senate to a four year term, is an independent prosecutor responsible for investigating and prosecuting unfair labor practice cases and for the general administration of the field offices.

## 2. Trade Unions

### 2.1 The General Role Of A Trade/Labor Union

United States trade or labor unions: (1) organize workplaces using traditional “bottoms up” methods and/or modern “top down” corporate campaign tactics; (2) serve as the exclusive bargaining representative for employees within an appropriate unit regarding wages, hour, and terms and conditions of employment; and (3) administer and enforce the collective bargaining agreement. “Bottoms up” organizing refers to leveraging existing employee discontent and workplace concerns to win majority support for union representation. “Top down” organizing is a frontal attack on a company’s reputation by using negative media attention and pressuring investors, corporate officers and board members, local, state and federal governments, and consumers to pressure the company to consent to union organizing without objection, and/or to persuade employees of unfair company treatment where little or none was perceived.

Unless and until a labor union organizes employees in an “appropriate unit” (sharing a community of interest and, presumptively at a single location depending on managerial design) by obtaining either: (1) a majority of votes cast in an NLRB conducted secret ballot election, or (2) an employer’s voluntary recognition of the union after proof of employee majority by signed cards or a petition, it has no legitimate authority or duty to represent employees and the employer has no obligation to extend recognition. However, in the rare case where an employer’s unfair labor practices are deemed “outrageous and pervasive,” the NLRB may order the parties to bargain provided the union achieved majority status at some point during the campaign or “critical period” prior to the scheduled election.

Organization of the workplace is the first and foremost task for unions. The NLRA and NLRB caselaw impose standards and procedures for how a trade union obtains the right to represent employees without employer or union interference, restraint, or coercion. Typically, a union solicits written support, files a formal petition with the NLRB signed by 30% or more of the targeted unit employees and then attempts to win an NLRB conducted secret-ballot election by a majority of votes cast by eligible employees. Elections are usually conducted within 42 calendar days of the petition filing. If the union wins the secret ballot election the results are certified by the NLRB, insulating the union to enable bargaining for a first contract for one year from rival union petitions or employee petitions to decertify the union. If the union loses the election, NLRB caselaw prevents the union from refileing an election petition in the same unit for one year. Alternatively, a union may present to the employer signed cards from a majority of unit employees desiring union representation, and the employer may voluntarily recognize the union or direct the union to file an election petition with the NLRB. In the past decade, unions have attempted to avoid contentious campaigns by pressuring employers to agree to remain neutral during the critical period leading up to a scheduled election or, alternatively, to agree to card-only recognition and remain neutral during the card signing. Card recognition protects the union from rival union or employee decertification petitions for a reasonable period.

Once employees are unionized and the union requests recognition by the employer, the union becomes the employees' exclusive bargaining representative and the employer is prohibited from dealing directly with any represented employee concerning terms and conditions of work. A represented employee may exercise his or her right to have a union representative present at any investigatory interview when the employee reasonably believes the investigation will result in discipline or discharge. The union's initial duty is to request the employer to meet, confer, and negotiate in good faith regarding "mandatory" subjects: wages, hours, and terms and conditions of work (29 U.S.C. §§158(a)(5), 8(b)(3), 8(d)). Topics other than the mandatory subjects are deemed either unlawful or permissive, in which case either party

may refuse to consider. While the NLRA neither requires a party to agree to a proposal or to make concessions, both parties must meet at reasonable times and confer in good faith (29 U.S.C. §158(d)).

To inform the bargaining or subsequent contract administration process, requested information must be provided in a timely manner. Requested information is subject to a liberal standard of relevance and necessity, and, in appropriate circumstances, may be treated as confidential or denied as privileged. Core financial data is not deemed necessary unless the employer pled financial inability to pay in rejecting a union bargaining demand. Once an agreement is reached, it must be reduced to writing if requested by either party. NLRB caselaw provides “contract bar” protection from rival union petitions or employee petitions to decertify the union for the length of the contract term not to exceed three years.

If no agreement is reached, economic leverage may be used by either party – a union strike and/or an employer lockout while continuing to operate with supervisory personnel and/or temporary replacements. If a good faith impasse was not achieved prior to the strike or lockout and unfair labor practice charges are filed, the NLRB, upon review, may order the parties to resume negotiations and require the employer to reinstate striking employees upon request. An employer that refuses to reinstate unfair labor practice strikers is subject to a backpay obligation.

A collective bargaining agreement sets forth the terms and conditions governing union represented employees’ employment. While agreements often vary by employer, workplace, locality, and industry, certain contract terms or clauses tend to be standard including: recognition (description of unit represented and covered by the contract); union security (describing required union membership and/or dues, fees and assessments); management rights (describing each specific management prerogative exempt from negotiation and union agreement); grievance/arbitration process (dispute resolution of employee discipline or termination and contract interpretation); wage rates; overtime rates; work schedules; seniority provisions; no-strike

and no-lockout; discipline and discharge (usually limited to good or just cause); “zipper” clause (agreement to preclude bargaining during the contract term over topics agreed-to, discussed but not agreed upon, and the effect of past practices); and term of agreement (commonly three years).

It is not uncommon for mid-term negotiations, if not prohibited by a “zipper” clause, to result in additional agreed-upon contractual language frequently included as “side agreements.” As a contract term nears expiration, the parties begin the process of negotiating a new contract. Should the contract expire before a new or “rollover” agreement is reached, the expired terms continue in effect except for a no-strike clause and the arbitration clause regarding any qualifying event arising post contract expiration. As of 2011, the Obama Board was considering whether the dues check-off and union security clauses rolled-over, as well.

Once a collective bargaining agreement is achieved, the union has a legal duty to administer and enforce the contract on behalf of the covered employees. This duty includes presenting legitimate grievances on behalf of disciplined and/or discharged employees and, if the contract language allows, matters regarding the interpretation of contract terms/language. Where the grievance cannot be resolved between the union and the employer, the trade union typically processes the grievance through binding arbitration by presenting the case on behalf of the employee before a neutral arbitrator agreed upon by the parties. The NLRA imposes on trade unions a strict duty of “fair representation” to represent each unit employee “fairly, impartially, and in good faith.” If a union fails to satisfy this duty, the employee can bring a lawsuit against the trade union in the U.S. District Court (29 U.S.C. §301). If the employer refuses to arbitrate and/or violates contract terms, the union may sue for breach of contract (29 U.S.C. §301).

With the expiration of a collectively bargained contract approaching, no party to the contract may terminate or modify it unless that party: (1) serves a written notice upon the other party at least 60 days in

advance of contract expiration (or if no termination date, 60 days prior to the time proposed to make such termination or modification); (2) offers to meet and confer to negotiate a new or revised contract; (3) notifies the FMCS and any State agency established to mediate disputes within 30 days after notice to the other party; and (4) continues the existing contract without resort to strike or lockout for 60 days after such notice is given to the other party or until expiration of the contract, whichever occurs later.

Distinct from single-employer bargaining is multi-employer bargaining with single or multiple unions. Establishment of a multi-employer unit and agreement to be bound by group bargaining is consensual by all parties, employers and unions. To withdraw from group bargaining, unequivocal written notice must be provided prior to the date for modification of the contract or prior to the date negotiations actually begin.

Where a joint employer relationship exists, typically in the case where temporary or leased employees work alongside regular employees, consent of both employers is necessary for the petitioned-for unit to be found appropriate. However, the treatment of joint employment has been the subject of litigation with NLRB precedent vacillating over time.

## 2.2 Constitution Of The Trade Union

Under the 1959 amendments, a/k/a Labor-Management Reporting and Disclosure Act, each union is required to adopt a constitution and by-laws, file same with the U.S. Secretary of Labor and report annually each fiscal year's assets and liabilities, receipts, salaries, disbursements, and loans including same for union officers and employees (29 U.S.C. §§411 et. seq.) . The law also requires labor organizations to ensure: equal rights; freedom of speech and assembly; transparency regarding dues, fees and assessments; protection of the right to sue; and safeguards against improper disciplinary action. Union constitutions and by-laws address these

protections and democratic processes in addition to detailing the union's management structure.

### 2.3 The Scope Of Trade Union Rights In Businesses

As part of its right to organize, a trade union has the right to approach employees, ask for support, obtain employee signatures on union authorization cards or an election petition, hold meetings, and distribute campaign literature. In addition, as part of the NLRB secret ballot election process, a union has the right, following the filing of an election petition, to obtain a list from the employer of the names and home addresses of each employee performing the job functions in the appropriate unit targeted by the union.

NLRB caselaw allows employers to prohibit non-employee union organizers from physically accessing company property or entering the workplace to speak with employees or to distribute union literature provided the employer maintains lawful no-public access, no-solicitation, and no-distribution policies. Lately, unions have pursued litigation, challenging whether the employer's premises may be public or quasi-public property in order to facilitate access by non-employee union organizers. For organizing activities by employees, the NLRA and NLRB caselaw prohibit employers from maintaining and enforcing rules restricting the distribution of pro-union literature or oral solicitation of trade union support from fellow employees at times other than actual working time or interfering with others engaged in work or in places other than actual working areas at any time.

Currently, a popular union organizing tactic to create employee interest in third-party representation is filing unfair labor practices claiming employer policies and rules in employee handbooks and policy manuals interfere, restrain or coerce employees in the exercise of their rights to organize and/or engage in concerted activities. Frequently challenged are: employer policies requiring confidentiality or limiting employee speech regarding wages; working conditions, or discipline; restricting certain off-duty conduct; limiting off-duty access; proscribing the wearing of buttons or insignias without a

lawful uniform appearance policy; limiting complaints only to management; prohibiting comments to the media or to customers; requiring the reporting of union activities and/or harassment; and disparate treatment of communications including restrictions on e-mail usage for union purposes but not for other, similar, non-work related entities or purposes.

Once a workplace is successfully organized by secret ballot or voluntary recognition, employers must bargain with the representative union concerning “mandatory” terms and conditions of employment addressing wages, hours, and working conditions. Moreover, a unionized employer cannot unilaterally implement changes to employment terms, including employment policies, affecting wages, hours, and working conditions, unless and until it has first bargained to agreement or lawful impasse with the representative trade union. During the term of a collective agreement, an employer must abide by the contract terms and not make changes to terms and conditions of work unless specifically provided for in the written agreement or with union agreement.

To avoid reopening negotiations during a contract’s term, or to circumvent a “zipper” clause precluding mid-term negotiations, it is common practice for employers to bargain for the inclusion of a “management rights” clause reserving the right to manage the workplace as long as the exercise of that right does not violate or conflict with the terms of the collective bargaining agreement. Presently, there continues to be a heated debate at the NLRB concerning the proper legal theory supporting reserved rights language. Management interests advance a common law contract theory of “reserved rights” while labor interests argue a “clear and unmistakable waiver” is required with specific language ceding union interest for each and every alleged, reserved, management right.

Depending on the terms of the collective bargaining agreement, trade unions may impose many demands and restrictions that affect an employer’s direct and indirect business costs and operations including: payroll deductions from employees’ pay to fund union dues and

contributions to benefit funds; procedures for selecting employees for promotion, overtime, and layoff; restrictions on discharge for good or just cause; limits or prohibitions on subcontracting and outsourcing; and restrictions on the sale or transfer of ownership. Trade unions have the right to raise challenges whenever they believe that an employer has violated the collective agreement by filing a grievance or a breach of contract action or, if the agreement does not contain a no-strike provision, call employees out on strike.

Occasionally, management must make fundamental business decisions, which appear to address only the economic profitability or scope or direction of the enterprise, including whether to remain in business. Such matters are generally not addressed by a collective agreement and do not appear to be a mandatory bargaining subject. Nonetheless, such decisions may require bargaining with the union representative regarding the effects of the decision. Other decisions, like relocating unit work, may pose a decision bargaining obligation depending on a detailed burden shifting analysis under NLRB caselaw. Failure to properly assess whether there exists a decision and/or effects bargaining obligation with strategic business decisions can result in an injunction and a costly order to reinstate the status quo ante.

Many collective bargaining agreements also contain provisions obligating employers to notify the trade union in the event of a corporate acquisition or mass layoff and, in some agreements, require the successor to be bound by the seller's/acquired company's collective bargaining agreement. NLRB caselaw generally binds a stock purchaser to the seller's collective agreement while an asset purchaser is bound if its new workforce is comprised of a majority of the seller's workforce in a continuing appropriate unit. A seller bound by a "successors and assigns" clause remains liable for any resulting breach, which often affects the pricing and finality of the transaction.

### 2.3.1 The Function Of Trade Union Representatives

In the United States, trade unions have various levels of representative agents and organizational bodies. At the workplace, unions generally designate certain employees as union stewards to act as the “eyes and ears” of the union on a day-to-day basis. Stewards typically have the authority to raise concerns with a supervisor or manager concerning issues affecting individual employees. In addition to stewards, trade unions directly employ persons to serve as union “business representatives” to interface with the employer. Business representatives are usually assigned to oversee union interests for particular employer workplaces and engage in systematic dialogue with the employer’s human resources, labor relations, or plant manager as designated by the company. On a practical level, the business representative is often viewed by the employer and the employees as the regular voice of the union for issues ranging from organizing to bargaining to strikes. Unions also have executive management and elected officials to conduct the union’s internal operations, administration, and relationships with other unions and affiliated labor federation and politicians.

Finally, most trade unions in the United States are organized in a hierarchical manner. Typically, there is a parent organization, known as the international organization. Under the parent can be a regional, state, or industry specific organization, and numerous local organizations, each having a specific geographical jurisdiction. Generally, collective bargaining agreements are executed between the employer and the local union organization. Each local union’s collective bargaining agreements tend to include some model contract language recommended by the international organization. Sometimes, employers are asked to sign two agreements – a master agreement with the international organization and a subordinate agreement with the local organization. During contract negotiations, especially for a first contract, the international union often provides assistance with skilled financial and legal advice.

### 3. Works Councils

Unlike many European countries, U.S. labor law does not specifically provide for works councils. The only statutorily created employee representative entity is a trade union or labor organization as defined (29 U.S.C. §152(5)). Furthermore, the duty to bargain does not mandate agreement and the scope of bargaining is both defined and limited (29 U.S.C. §§152(5), and 158(d)).

### 4. Employee Protections From Employer And Union Unfair Labor Practices

In addition to the rights of covered employees to engage in or refrain from union organizing and/or concerted activities for their mutual aid and protection, the NLRA protects employees from employer and union unfair labor practices. Employers are prohibited from:

1. Interfering with, restraining, or coercing employees in the exercise of their rights to organize or engage in concerted activities for their mutual aid or protection;
2. Dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to the union;
3. Discriminating in the hiring or tenure (discipline or discharge) or term or condition of employment to encourage or discourage union affiliation;
4. Discharging or otherwise discriminating against an employee for filing charges or giving testimony under the NLRA; and
5. Refusing to bargain in good faith with the union.

(29 U.S.C. §158(a)(1),(2),(3),(4),(5)).

The NLRA prohibits trade unions and their agents from:

1. Restraining or coercing employees in exercising their rights to refrain from union organizing or concerted activities for their mutual aid or protection without, however, impairing the union's right to prescribe its own rules regarding membership or an employer in the selection of its representatives for collective bargaining and/or adjusting grievances;
2. Causing or attempting to cause an employer to discriminate against an employee on some basis other than his failure to tender periodic dues and initiation fees as required if employed in a non "right-to-work" state;
3. Refusing to bargain with the employee;
4. Encouraging, threatening, coercing or restraining an employer by directing employees to strike or refuse to use or work on any goods or perform services or to force or require an employer to agree not to do business with or deal with the products of any other employer (hot cargo agreement), or to force bargaining with a union if another union is the certified representative (secondary boycotts), or to force an employer to assign particular work to employees in a particular labor organization rather than to employees in another union (jurisdictional dispute) provided that it is not unlawful for any person to refuse to enter upon the premises of any employer other than his own if the employees of such other employer are on strike ratified or approved by the striking employees' representative and required to be recognized by such employer and, provided further, it is not unlawful to publicize by means other than picketing to advise the public that a product(s) is produced by an employer with whom the labor union has a primary dispute and is distributed by another employer as long as the publicity does not induce employees of any employer, other than the primary, to refuse to handle or provide services for the distributing employer;
5. Requiring excessive or discriminatory fees for membership;

6. Requiring an employer to pay or deliver or agree to pay or deliver money or thing of value for services not performed or to be performed;
7. To picket, threaten to picket or cause to be picketed any employer where an object is forcing the employer to recognize or bargain with a union or forcing employees to accept or select the union as their collective bargaining representative where the employer has lawfully recognized another union and a question concerning representation cannot be raised or where there was a valid election within the preceding 12 months or where picketing has occurred for a period not to exceed 30 calendar days without an election petition filed (organizational or recognition picketing), with the exception of picketing or publicity to truthfully advise the public that an employer does not employ members of or have a contract with a labor organization, unless the effect of such picketing is to induce any employee of another employer not to handle any good or perform any services.

(29 U.S.C. §158(b)(1),(2),(3),(4),(5),(6),(7)).

## 5. Other Types Of Employee Representation

U.S. labor law rarely recognizes non-traditional labor union representation in the workplace. The NLRA prohibits employer domination or interference of, or financial support to, the formation or administration of any labor organization as defined (29 U.S.C. §158(a)(2)). Workplace committees and quality circles are often found unlawful by the NLRB because they were created by and controlled by management. However, where the group merely makes recommendations without employer counter responses (“dealing”) or where final, unreviewable authority is conferred, no employer domination or interference is present.

## Venezuela

### 1. Introduction

Article 95 of the Constitution of the Bolivarian Republic of Venezuela of 1999 (the “Constitution”) sets forth the freedom of unionization as a constitutional right of the employees, without distinctions and without previous authorization, to freely constitute the union organizations that they deem convenient for the defense of their rights and interests, as well as the right to join or not to join such organizations, in accordance with the law. The Constitution further provides that union organizations will not be subject to administrative intervention, suspension, or dissolution and that employees are protected against any interference or discrimination activity that is contrary to the exercise of this right.

In 1982 Venezuela ratified Convention 87 on the Freedom of Association and Protection of the Right to Organize (“Convention 87”), issued at the International Labor Organization (**ILO**). Convention 87 guarantees the right by both workers and employers, without distinction, to establish and, subject only to the rules of the corresponding organization, join organizations of their own choosing without previous authorization. It further provides that: (i) workers and employers’ organizations shall have the right to set forth their constitutions and rules, elect their representatives in full freedom, and organize their administration and activities and formulate their programs; (ii) public authorities shall refrain from restricting or impeding the lawful exercise of this right; and (iii) workers and employers’ organizations may not be dissolved or suspended by administrative authorities. Furthermore, in 1968 Venezuela ratified Convention 98 on the Right to Organize and Collective Bargaining (“Convention 98”), also issued at the ILO. Convention 98 sets forth the right by workers to enjoy protection against anti-union discrimination activities in respect of their employment, in particular, it provides that: (i) workers’ employment may not be subject to the condition that the worker refrain from joining a union or that the worker separates from a union; and (ii) workers are to be protected

against dismissal or other prejudice by reason of union membership or participation in union activities. Convention 98 further provides that workers and employers' organizations must be protected against any acts of interference by each other or each other's agents or members in their establishment, functioning, or administration. Acts designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means in order to place such organizations under the control of employers or employers' organizations, are deemed to constitute acts of interference.

According to Article 23 of the Constitution, treaties, pacts, and conventions relative to human rights, signed and ratified by Venezuela: (i) have constitutional hierarchy and prevail internally to the extent they contain provisions relating to their exercise and enjoyment which are more favorable than those provided for in the Constitution and the law of Venezuela; and (ii) are of immediate application by the courts and other public entities.

## 2. Trade Unions

### 2.1 Types of Unions

In Venezuela, the Organic Labor Law of 1997 (“**OLL**”) and its Regulations of 2006 (“**OLL Regulations**”) are the main pieces of legislation governing unionization.

According to the OLL, unions in Venezuela are voluntary organizations classified as worker unions and employer unions. In turn, worker unions or trade unions are classified as follows:

1. Company unions, those that organize workers of a given company or firm;
2. Professional unions, those that organize workers of a specific profession or occupation;

3. Industrial unions, those that organize workers of a specific type of industry; and
4. Sector unions, those that organize workers of a specific commercial, agricultural, production, or service sector.

Company unions may be formed with 20 or more workers providing services for the same employer; professional unions may be formed with 40 or more workers providing services in the same profession or occupation or in similar or related professions or occupations; industry unions may be formed with 40 or more workers providing services for companies of the same industry; and sector unions may be formed with 40 or more workers providing services for companies in the same sector. When trade unions are to have a regional or national character, they must be formed with 150 or more workers. Finally, independent workers may also join already existing professional, industry, or sector unions, and may organize their own unions with 100 or more independent workers. According to Article 40 of the OLL, independent workers are those who work without being in a situation of dependency with respect to one or more employers.

Unions are free to form federations, and federations may organize confederations. Five or more unions may form a federation, and three or more federations may form a confederation. Union federations and confederations may represent the organizations that integrate them, and have the same rights and powers corresponding to unions with respect to their members.

## 2.2 The General Role Of The Trade Union

According to the OLL, trade unions generally have, among others, the following purposes: (i) protect and defend the professional or general interests of their members before public authorities and entities; (ii) represent their members in collective bargaining and conflicts, and especially in arbitral and conciliation proceedings; (iii) promote, negotiate, enter into, review, and modify collective bargaining agreements and request their enforcement; (iv) represent and defend

their members and workers who so request even if they are not members, in the exercise of their rights and interests in administrative proceedings relating to them, in judicial proceedings without prejudice to the need to comply with all requirements for judicial representation, and in their relationships with their employer; (v) monitor compliance with provisions protecting the workers, especially pre-vision, social, and hygiene provisions; prevention, conditions, and work environment provisions; provisions on the construction of housing for the workers; and provisions relating to the creation and maintenance of social services and healthy and improvement activities during free time; and, among others, (vi) those provided for in their by-laws or resolved upon by their members, for the better achievement of their purposes.

### 2.3 Constitution Of The Trade Union

Trade unions are required to organize by registering themselves with the competent Labor Inspector's Office of the Ministry of the People's Power for Labor and Social Security (the "Ministry of Labor"). In order to do so, they must request their registration and enclose with their petition a copy of their Articles of Association, a copy of their by-laws, and the list of founding members, all signed by the Board of Directors. Workers organizing a union in a number sufficient to do so are protected against dismissal, deterioration of work conditions, and transfers immediately upon their filing with the Labor Inspector's Office of a document signed by them manifesting their desire to form a union. Any workers who subsequent to that manifest their intent to adhere to the formation of the union, will also be protected against dismissal, deterioration of work conditions, and transfers immediately upon their filing with the Labor Inspector's Office of a document notifying their adhesion. This protection is to last until 10 days after the registration or denial or registration of the union, but in any event cannot extend for more than three months. Workers who manifested their intent to form a union must file with the Labor Inspector's Office their formal request to register the union in formation, together with the corresponding documents, within the 30 days following the filing of their intent.

Within the 30 days following receipt of the workers' request for registration of the union, the Labor Inspector must register the union if all documents are in compliance with the legal requirements. If any requirement is missing, the Labor Inspector must notify the workers to allow them to cure the defect or provide the missing requirement within 30 days. If they fail to cure the defect or provide the missing requirement, the Labor Inspector will refrain from registering the union. Certain appeals may be exercised against this decision.

The Labor Inspector may refrain from registering the union only in the following cases: (i) if the union does not have as its purposes the ones provided for in the OLL; (ii) if the union has not been formed with the number of members provided for in the OLL; (iii) if the documents that must be attached to the registration petition are not attached or present deficiencies or omissions; and (iv) if the union to be registered is to have the same name of another union that has been already registered, or if the name of the union to be registered is so similar to that of another registered union that the similar names could induce confusion.

The union will acquire legal existence for all purposes of the OLL when registered with the Labor Inspector's Office.

#### 2.4 The Scope Of Trade Union Rights In Businesses

Trade unions may negotiate collective bargaining agreements (*convenciones colectivas de trabajo*). According to the OLL, trade unions are the only type of workers' organizations that may enter into collective bargaining agreements. Coalitions of workers, which are temporary associations of workers for the defense of their rights and interests, may not negotiate collective bargaining agreements but collective accords (*acuerdos colectivos*). According to the OLL Regulations, the existence of a collective accord may not impede the negotiation of a collective bargaining agreement. However, under certain conditions, the existence of a collective bargaining agreement will impede the successful processing of a collective bargaining agreement petition against the same employer.

For trade unions to be able to force the employer to negotiate a collective bargaining agreement at a decentralized level, they must have the support of the absolute majority of the workers interested in the negotiation. In addition, there are certain legal provisions under which the Ministry of Labor may call for a Regulatory Labor Meeting (*reunión normativa laboral*) or collective bargaining negotiation involving a sector of activity at a local, regional, or national level. The majority of the employers and workers of said sector activity must be involved in order for the Regulatory Labor Meeting to be validly called.

### 2.5 The Function Of Trade Union Representatives

Members of the unions' board of directors or union directors (*directivos sindicales*), are entitled to represent the union and to negotiate during the collective bargaining process. However, collective bargaining, collective conflicts, and other acts exceeding the simple administration require approval by the union's members meeting (*asamblea de miembros*), which is the unions' most powerful body. There are several rules in the Venezuelan labor legislation governing the functioning of unions' members meetings and board of directors.

## 3. Works Councils

At the time this article was written, there were no legal requirements in Venezuela mandating or regulating the establishment of Works Councils. However, a Bill of Law regarding Workers' Councils exists, and it is not clear whether or not it will be passed within the next few months or years.

In any event, the Organic Law on Prevention, Conditions and Work Environment provides for the election of Prevention Delegates (*Delegados de Prevención*) by the workers, whose primary functions relate to the promotion and monitoring of compliance with occupational health and safety rules at the workplace. These Delegates, together with the members appointed by the employer,

integrate the Occupational Health and Safety Committee that must comply with several functions relating to occupational health and safety.

#### 4. Trade Union Employee Protection Rights

Trade union directors are protected against dismissal, deterioration of work conditions, and transfers up to a certain number, which ranges from seven to 12 trade union directors, depending on the number of workers of the corresponding company. The by-laws of the trade union must indicate which of its board of director members will enjoy this protection. This protection lasts from the date of their election through the lapsing of three months after the expiration of the term for which they were elected. According to the OLL, this term is to be established in the unions' by-laws, but the same cannot exceed three years; however, according to the OLL, this provision is not applicable to federations and confederations.

#### 5. Other Types Of Employee Representation

The Venezuelan labor legislation also recognizes the coalitions of workers, which are temporary organizations not requiring registration, usually formed for the negotiation of specific agreements with the employer or for the attention of specific workers' concerns. They may enter into collective accords. However, various provisions in the Venezuelan labor legislation give priority to trade unions over workers' coalitions, and collective bargaining agreements (which are also preeminent over collective accords) may only be negotiated by trade unions.



## Vietnam

### 1. Introduction

Several laws regulate unions in Vietnam. The Law on Trade Unions was adopted by the National Assembly on June 30, 1990, and the Vietnam Trade Union Charter was adopted by the National Assembly of Trade Union Representatives on October 13, 2003. Vietnam also has a Labor Code that sets forth the rights and responsibilities of unions and employers.

The Vietnam General Confederation of Labor (“**VGCL**”) is currently in charge of revising the Trade Union Law. It is expected that the new law will consolidate and strengthen the operation of the entire union system, boosting the formation and functioning of grassroots unions and enhancing the protection of union officers in enterprises. The Trade Union Law will be submitted to the National Assembly for discussion by late 2011. It is anticipated that the new law will be adopted in May 2012.

### 2. Trade Unions

Employees working in an enterprise have the right to establish a corporate trade union, which is subject to the recognition, management, and supervision of the General Federation of Trade Unions. The General Federation of Trade Unions is a member of the political system of Vietnam and is under the management of the Communist Party of Vietnam.

A duly established corporate trade union can have a wide range of power and authority within a company. The union represents employees in the company and, under Articles 154 and 155 of the Labor Code and Article 9 of the Law on Trade Unions, may examine the employer’s compliance with the applicable laws and regulations in respect of employment matters. The employer must consult the trade union on the issuance of any internal labor regulations, salary and bonus schemes, termination of labor contracts, application of

disciplinary measures on the employees, and decisions on any matters that may affect the benefits of employees.

### **3. Employees' Right to Establish a Trade Union**

Regardless of the number of employees a company employs, if there are five or more employees in the company desiring to establish a trade union, such employees may establish a trade union in the company, and the Trade Union Federation, under Article 14 of the Vietnam Trade Union Charter, shall issue a decision recognizing and establishing the trade union.

### **4. Working Relation with the General Federation of Trade Unions**

The trade union must inform the Provincial Federation of Trade Unions of the selection of its chairman and executive committee for the authority's recognition. Where a corporate trade union is not yet established, the local Federation of Trade Unions, under Article 153 of the Labor Code, may nominate a Temporary Trade Union Executive Committee to protect the legal rights and interests of employees.

### **5. Employer's Obligations**

Employers are obligated to create favorable conditions for the prompt establishment of trade unions, recognize a legally established union, and work closely with and guarantee the means necessary for the union to operate. Any act that obstructs the establishment and activities of the union in the company is strictly prohibited by Article 154 of the Labor Code.







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