

# The Global Employer: Focus on Termination, Employment Discrimination, and Workplace Harassment Laws

2012



The Global Employer:  
Focus on Termination,  
Employment Discrimination, and  
Workplace Harassment Laws

Baker & McKenzie

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# Argentina

## 1. Introduction

The labor and employment rights that govern Argentina stem from the Argentine Constitution, international treaties approved by the National Congress, several federal statutes and acts passed by the National Congress (including the Employment Contract Law – “**ECL**”), as well as collective bargaining agreements and individual agreements.

The Argentine Constitution grants power to the federal government to enact employment and labor legislation applicable to all provinces. Under this authority, the National Congress has enacted comprehensive statutory regulations regarding employment. Most of the employment issues are dealt with in the employment legislation, which sets forth minimum standards. Collective bargaining agreements increase these standards, and become mandatory for the respective sector or industry. These minimum standards leave little space for individual agreements.

No legal formality is required to create an employment relationship. There is no need for the parties to execute offer letters or employment agreements, unless there is a fixed or contingent term of employment, or there is a need to address specific issues (e.g., the terms of an incentive compensation plan, specific provisions for working hours, employer policies, etc.). Once incorporated into the terms and conditions of employment, there is no room for changes to the detriment of the employee.

## 2. Terminations

### 2.1. Restrictions On Employers

The employment contract may terminate for the following reasons:

- Employee's resignation, loss of professional qualification, death, total disability, or retirement;

- Employer's dismissal of employee, with or without just cause, bankruptcy or death; or
- Expiration of an agreed term of employment, or mutual consent.

Employment is assumed to last for an indefinite term and can be terminated by the employer without penalty (i.e., the payment of a statutory severance) only for just cause.

However, there are certain exceptions to the indefinite term relationship under which employers may terminate an employee without penalty. These exceptions include the following:

- (i) *Probationary Period*: During the first 90 days of employment, employers may discharge their employees without just cause, with 15 days' prior notice and without need of any further payment and/or severance indemnity.
- (ii) *Fixed-Term Contracts*: Employers may only hire under a fixed-term contract when there is a specific and extraordinary reason and the expiry date can be foreseen (i.e., when the end of the term of the contract is fixed and certain), with a minimum of one month and a maximum hiring period of five years. In case of normal termination of a fixed-term contract exceeding a one-year term, the employee will be entitled to 50 percent of the indemnity for seniority payable under an indefinite term to employees who are terminated without just cause. Under the law the fixed-term employment contract may be renewed, but the total length of the relationship may not exceed five years. In practice, if more than one renewal is made, it will most likely be construed that the employer is mischaracterizing the form of hiring and hides an indefinite term. Furthermore, because these contracts are an exception to the indefinite term rule, the courts view these contracts with restrictive criteria.

- (iii) *Contingent–Temporary Contracts*: Employers may only hire under a contingent term when they have a specific and extraordinary reason and cannot foresee a certain expiry date.

With regard to contracts (ii) and (iii) above, upon the normal termination of the contract, either by the lapse of its term or completion of the service or work, respectively, the employee will not be entitled to a severance indemnity, unless: (a) the fixed-term employment contract has been executed for over one year, or (b) either the fixed-term contract or the contingent-term contract is terminated without just cause before the lapse of the term or the completion of the service or work, respectively (i.e., breach of contract). In case of breach of contract without just cause, the employee will be entitled to the regular severance of an indefinite-term employee, plus damages, usually set as the remaining salary until the end of the term of the contract.

Employers may terminate employment with just cause when the offense is so serious that it is impossible to continue with the relationship. The activities that may be considered offensive or prejudicial to the employer are determined according to the general principles of law and legal precedents. The employer must provide the employee with a written explanation of the cause for termination. The employee can challenge such termination in a judicial proceeding in which the employer bears the burden of proof. The courts are very strict when evaluating the merits of the just cause.

Except in the case of discrimination (whereby an employee may demand to be reinstated), employers are legally entitled to terminate any employment relationship at any time, and without just cause. In such case, an employer must pay a statutory severance. The particular protection for employment discrimination is described below.

In certain cases, discharged employees may be entitled to additional and specific payments. The law provides different solutions for the different cases..

For example, the law provides a legal protection and a presumption in favor of pregnant or nursing mothers and newly married employees who are dismissed without just cause, by awarding them with an entitled additional severance indemnity payment equal to one year of their salary.

There is also special compensation for a new mother when she resigns after the three-month maternity leave expires. In this case, she will be entitled to 25 percent of the mandatory severance pay based on seniority.

Employees on sick leave are entitled to receive their salaries until they are recovered or the leave expires.

In the case of breach of an agreed term of duration of employment, the discharged employee is entitled to damages which are usually measured as the wages that the employee was deprived of receiving, in addition to the ordinary severance.

The law also provides for a special protection to those employees who demand the proper registration of their salary or seniority, while employed, and the employer fails to register the remuneration or seniority within a 30-days term. In general terms, such employees become entitled to a special payment equivalent to 25 percent of those unrecorded periods.

Furthermore, if those employees are terminated without just cause within a two-year period, they become entitled to double the mandatory severance package.

However, those employees who fail to demand the proper registration of their salary or seniority while employed are only entitled to duplicate the item of the mandatory severance package based on seniority, upon their dismissal without just cause.

The statute for traveling salespersons provides a special payment for such employees with more than one year's service, attributable to the

salesperson's customers, equivalent to 25 percent of the statutory severance payable to the employee in the event of termination without cause (i.e., 25 percent of payments due to seniority and lack of notice) . This special indemnity is due whenever the employment relationship ends, and for whatever reason (e.g., resignation, dismissal with just cause, etc.). Thus, employers are obliged to pay this indemnity no matter the reason of termination, and should make a provision for this.

The law also protects those employees who are forced to file a legal action to pursue collection of their statutory severance, awarding them with an additional amount of 50 percent.

Furthermore, employees who do not receive their employment certificate upon termination of the relationship are entitled to receive an indemnity equivalent to three times their highest monthly and normal salary of the last year.

The law further protects employees when their employers fail to remit to the Federal Tax Authority and the Labor Union (if applicable) the amounts withheld from salaries. Should the employer fail to do so, either totally or partially, as of that date onwards and until the employer effectively makes such payment, the employer must pay the affected employee an amount equivalent to his/her last monthly salary.

Employers are also exposed to claims for additional compensation based on tort rules. Typical claims include sexual harassment, bullying (mobbing), discrimination, psychological distress or any other work related incident, accident or illness. Under these Civil Code provisions, employees may claim compensatory damages for pain, suffering and emotional distress. Employees have the burden of proving the damage, and their employer's liability. There is no statutory ceiling for such compensation.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Requested Notice

Employees on probation are entitled to 15 days' advance notice of the termination of their contract, or to receive a payment in lieu of notice of one half of the employee's monthly salary.

Employees with between three months' and five years' service should receive one month's notice of termination without just cause or be compensated with one month's salary.

Employees who have more than five years' service should receive two months' notice or be compensated with a payment equal to two months' salary in lieu of notice.

Where prior notice is given, employees are entitled during the notice period to a paid daily license of two working hours, which may be accumulated in one or more working days during which the employee can look for another job.

For employees who have completed the probationary period and the employer fails to provide notice, the payment in lieu of notice must include pay for the full month in which the termination takes effect (this is the concept of an integration payment), plus the pay in lieu of notice of one or two months' salary. Typically, employers tend to terminate the relationship near the month end to avoid having to pay this additional salary.

Finally, when employers make a payment in lieu of notice (including, where necessary, the integration payment), they must also add the prorated portion of the mandatory thirteenth salary by adding 8.33 percent to the pay in lieu of notice. This additional amount is computed because the thirteenth salary is part of the accrued salary, and therefore needs to be factored when computing the severance. For example, an employee discharged without cause with three years of service, at the middle of the month, would be entitled to receive (i) one month in lieu of prior notice, (ii) 1/12 of said payment due to the

thirteenth salary, (iii) half month as integration until the end of the month, (iv) and 1/12 of said integration due to the thirteenth salary.

Typically, employers do not provide prior notice and make the payment in lieu of notice instead.

This payment is subject to income taxes and is not subject to social security contributions or withholdings.

### 2.3. Termination Indemnities

In addition to the requirement to pay the accrued salaries, proportional thirteenth salary, unused vacations, and provide notice or pay in lieu of notice, the employer must also pay a termination indemnity, which is calculated based on years of service. The pay in lieu of notice and the seniority pay together constitute the mandatory severance package.

When employers terminate without just cause, or when employees are constructively terminated due to the employer's wrongdoing, employees become entitled to seniority pay of one month's gross salary for each year of service or any fraction thereof in excess of three months. The law provides that for purposes of computing the seniority pay, the computable salary is the highest regular salary received in any given month within the last twelve months.

The law also provides a minimum and a maximum cap. In no event may this seniority pay be less than one month's actual gross monthly salary.

There is a cap on the highest monthly salary that can be used for this calculation; it may not exceed three times the average remuneration agreed in the applicable collective bargaining agreement (CBA) for the employer or sector. If more than one CBA is applicable to employer's activities, the CBA that is most favorable to the employee will apply. This cap is applicable for both unionized and non-unionized employees. However, the Supreme Court of Justice ruled in the 2004 case "*Vizzoti, Carlos A. vs. AMSA S.A.*", that if the

application of the cap means that the reduction of the highest regular monthly salary of the employee is more than 33 percent, the cap is unreasonable and therefore unconstitutional. Consequently, it has been accepted as legal doctrine that in no event may the severance be less than 67 percent of the employee's monthly salary per year of service or a fraction thereof in excess of three months.

The Buenos Aires District Courts have taken the position that annual bonuses paid under objective evaluation criteria are not to be prorated and factored for seniority pay, and that the mandatory thirteenth salary is neither to be prorated and factored because it is not payable on a monthly basis.

On the contrary, the courts within the Province of Buenos Aires have decided that employers must also pay an additional 8.33 percent due to the prorated portion of the thirteenth salary because they consider that the thirteenth salary is vested on a daily basis, regardless of the deferred payment date. Therefore, it is important to show to the court that bonuses are vested when they comply a condition, such as reaching objective measurements that depend upon annual results or an annual evaluation, to justify that they are not vested on a daily basis.

This severance pay is not subject to income taxes or subject to social security contributions or withholdings.

Employers may be able to reduce to half the amount of the mandatory severance pay based on seniority by demonstrating that the termination was for a reason beyond the employer's control, unforeseen and alien to the employer (like a natural disaster or an act of government). In such case, the lay-offs must be in order of seniority and usually must comply with a special procedure before the labor authorities in the presence of the Labor Union, whereby the employer must give evidence of the critical situation. The law provides for a specific procedure when collective redundancies are based on a crisis with the aim of paying a reduced severance package, under which employers must provide evidence that the crisis was

beyond their control, unforeseen and alien to them. When these cases go to court, judges are very restrictive as regards the application of this exception.

#### 2.4. Laws On Separation Agreements, Waivers, And Releases

Separation agreements under mutual consent must be executed before a notary public or labor authority. In such cases, employers are not bound to a statutory severance formula. Employers and employees can agree to any amount. However, many courts have declared that these agreements hide the true intention of the employer of discharging employees without just cause and have ordered the employer to pay the statutory severance.

As regards waivers and releases, the law provides that any agreement that reduces or suppresses terms and conditions previously granted and hence incorporated into the relationship are null and not legally binding. Thus, employees cannot waive or release employers from payment of any due amount arising from an acquired right.

However, the law does authorize the parties to settle disputed rights, as opposed to acquired rights. The law provides that disputed rights can be settled before the labor or judicial authority, who must issue a grounded resolution approving (*homologating*) the terms of the agreements, when they are a just and fair settlement of the rights and interests of the parties. Employers should compensate their employees with something reasonable and based on the concurrence of the labor or judicial authority as regards the agreement. Once the labor or administrative authority approves the agreement, this resolution is treated as a firm and indisputable ruling.

#### 2.5. Litigation Considerations

Since employees' silence ought not to be construed as consenting to the terms of their employment, employers can be exposed to claims against them in connection with issues like unpaid overtime, salary differences due to a misclassification of the employee's position, changes in the remunerative structure without the employees' written

consent, unpaid commissions, non-registered employment, remuneration or seniority, etc. Furthermore, it is common to dispute issues like the amount of the statutory severance and the employee's right to collect the additional and specific payments discussed in the chapter "Restrictions on Employers"..

An issue of concern for employers is that benefits in kind like personal use of the company car or mobile phone have been declared unregistered salary, triggering penalties for improper registration of the employment relationship.

Another issue of concern for employers is that the courts have also declared that the intermediation of employment without a reason and without the requirements of the law is also defined as improper registration of the employment relationship (even when the employee was registered with the intermediary). Only the duly registered temporary employment agencies are authorized to offer temporary intermediation, for satisfying a specific need of the principal employer.

In general, the statute of limitations for employment and labor issues is two years. Therefore, employees or former employees may file a claim against their employers within two years. This term can be suspended or interrupted. In addition, it should be noted that employees can request the proper registration of their seniority or salaries at any time while their employment relationship is in force, and are entitled to collect any penalties due for irregular employment.

Within certain jurisdictions, such as the city of Buenos Aires, employees and their employers must first follow a settlement procedure before filing the complaint pleading. Many disputes are settled through these proceedings.

In employment claims, where there is any doubt about the merits of the evidence or the interpretation of the law, the courts must rule in favor of the employee.

The law also provides for an additional penalty in case the employer fails to pay the statutory severance within four working days of the termination, and forces the terminated employee to file a legal action. Such penalty is equivalent to 50 percent of the pay based on seniority.

Finally, the courts award to claimants the interest rate that banks charge when they borrow, plus expert witness fees, litigation tax and fees of the claimant's attorney, all of which can significantly increase the total financial exposure.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

Multiple laws protect employees from employment discrimination.

The Argentine Constitution states that all citizens are equal under the law and also sets out the rule of equal pay for equal work. The courts have held that the equal treatment rule should be understood as equal rights under the same circumstances, and that judges have the authority to decide when equal or different circumstances exist. Furthermore, the Constitution incorporates certain international human rights treaties to the rank of constitutional rights, many of which defer to the non-discrimination principle. The Constitution sets forth a procedure to secure immediate resolution when a constitutional right is jeopardized, including any kind of discrimination. Finally, the Constitution authorizes Congress to pass laws that include positive actions that guarantee equal rights, opportunities and treatment.

Argentina is a member of the International Labor Organization and has approved several international labor conventions, including the Discrimination (Employment and Occupation) Convention of 1958 N° 111, and the Equal Remuneration Convention of 1951 N° 100.

As regards local law, the Anti-Discrimination Law N° 23,592 specifically prohibits any discriminatory practice, which includes discrimination based not only on race, religion, nationality, ideology,

political affiliation, union opinion, and sex, but also economic standing, social condition and/or physical characteristics.

In addition, there are specific laws that address protection against discrimination due to certain medical conditions, such as diabetes, AIDS, and epilepsy.

Law N° 22,431, amended by Law N° 25,689, imposes on all governmental agencies and private companies with concession of public services to hire physically disabled individuals so that they comprise no less than 4 percent of the employee headcount. In addition, that law sets forth a tax benefit (special deduction for income or capital tax equivalent to 70 percent of individuals' remuneration) when employers hire physically disabled individuals.

The ECL also contains numerous references to the anti-discrimination principle, such as the prohibition set forth in Section 17 against discrimination on the basis of gender, race, nationality, religion, union and/or political membership, and age. Under Section 73, employers cannot force employees to declare their opinion about political, religious or union issues. Section 81 provides that employers must treat their employees equally, and that there is no violation of the principle when employees are treated differently based on their productivity, attitude towards work, etc.

There are multiple provisions for the protection of women, such as Section 172 that prohibits a collective bargaining agreement from being based on gender or civil status, and rules that all salary scales must be based on the principle of equal pay for equal work. Section 177 includes a general prohibition on working 45 days before and after birth, and giving the woman the option to reduce the leave of absence before birth to 30 days and extend the absence after birth to 60 days. During this leave, the social security system pays the woman an allowance equal to her salary.

As regards union representatives and union stewards, the Union Association Law N° 23,551 states that employers cannot discharge

stewards or representatives, nor can they change their stewards' work conditions, within the term of one year after the end of their representation.

### 3.2. Employee Remedies And Potential Employer Liability For Employment Discrimination

Discrimination is an offense to the victim that can lead to different consequences, including a claim of reinstatement, salary differences, grounded termination, and even civil damages for personal suffering. Argentine law does not have specific provisions related to punitive damages.

Under the Anti-Discrimination Law N° 23,592, those who impede, obstruct or restrict or in any way reduce the exercise, under equal basis, of the fundamental rights and warranties acknowledged in the Constitution, shall be obliged, upon the victim's request, to withdraw the effect of the discriminatory act or to cease in its performance, and to compensate the victim for moral and material damages. The law mentions as specific examples discrimination based on race, religion, nationality, ideology, political affiliation, union opinion, sex, economic standing, social condition and/or physical characteristics. Under this law, the discriminated person may request reinstatement or any other precautionary action to withdraw the effect of the discriminatory act or to cease in its performance. Reinstated employees are entitled to back wages.

Employees also have the option to terminate the employment relationship due to the employers' offense (under constructive dismissal) and claim the mandatory severance payments from the employer. Under the provisions of the Civil Code, any adversely affected employees may also claim compensation for pain and suffering (or emotional distress).

This law also increases the punishment when a crime is committed due to certain instances of discrimination, like persecution or racism, and other forms of discrimination against one's religion or nationality,

or with the intent to totally or partially destroy a national, ethnic, racial or religious group.

There is specific protection for union representatives and stewards. The Union Association Law N° 23,551 states that employers must follow a special judicial procedure in order to dismiss or suspend union representatives and stewards with cause. Employers cannot terminate without cause or change the working conditions of the stewards. However, if the judicial procedure is not followed, the union representative may choose between being reinstated to his/her job by means of interim measures, or terminating the employment relationship and receive, apart from the mandatory severance package, a penalty made up of the salary that he/she would have received up to the end of his/her representation period, plus salary for one additional year. The law also imposes a fine due to unfair union practice.

In addition, under the ECL, employees who receive unequal treatment without justified cause are entitled to pursue any outstanding salary that they should have received. Should employers refuse to pay such balance, affected employees may terminate their employment and pursue the regular severance, by way of constructive termination.

Section 178 of the ECL grants to the pregnant employee a protection against arbitrary dismissal, with a presumption that admits proof of the contrary (i.e., just cause, shut-down of facilities, etc.) that the dismissal is related to the pregnancy or birth when the dismissal notice is given within seven and a half months prior or after birth, as long as the employee is aware of her pregnancy and she is to give birth. According to Section 182, if employees are dismissed within those periods they will be entitled to thirteen monthly salaries, considering the normal and regular monthly salary.

Section 180 also prohibits any kind of discrimination based on the act of matrimony, and Section 181 sets forth a presumption of discriminatory dismissal when the employee is dismissed without just cause within three months before or six months after the marriage. According to Section 182, employees are entitled in these cases to

thirteen monthly salaries, based on the normal and regular monthly salary. The courts have extended this protection to men, when employees show that the termination was due to their marital status.

In practice, employees usually pursue the statutory severance and penalties. Claims of reinstatement and lost wages are typically limited to the cases of union leaders.

Under Section 1113 of the Civil Code, employers are directly liable for damages caused by their employees. In cases of discrimination, the only defense employers can use is that the case has been unforeseen and unavoidable, per Section 514 of the Civil Code.

### 3.3. Practical Advice To Employers On Avoiding Employment Discrimination

In order to minimize employers' liability resulting from discrimination offenses, employers should demonstrate that they have taken reasonable steps to prevent any type of discrimination against their employees. They may institute policies, instructions and/or complaint procedures against all forms of discrimination and other appropriate remedial measures.

Employers do not have statutory procedures or judicial guidelines to follow when they commit a discriminatory act. It is advisable that employers immediately initiate an internal investigation to find out the truth and collect evidence. Once the evidence is collected and discrimination is confirmed, management should decide disciplinary actions and/or a dismissal with just cause of the erring party.

Argentine law provides that both parties must prioritize the continuity of the relationship. Like any other serious offense, the victim must give the employer the opportunity to be informed in order to resolve the situation. When employers fail to take any measure, employees are then entitled to terminate the employment contract, or to request reinstatement, and/or to file any other judicial claim.

Employers may grant special treatment to certain employees in special situations, as explained above, but it is prudent to keep appropriate records of any such decision in order to avoid unjustified claims of discriminatory practices.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Sexual harassment and bullying (“mobbing”) in the workplace are becoming pressing legal issues for employers in Argentina.

The general provisions provide that employers must watch for the safety and health of their employees in the workplace, avoiding situations in which certain employees may affect other employees’ mental health.

There is a special reference to sexual harassment on the statute for the public administration. Sexual harassment is defined as a coercive action of a government official who in the exercise of his/her functions takes advantage of his/her work position, inducing another person to consent to his or her sexual requirements, even if the sexual act is not consummated.

There is no special legal statute or regulation dealing with this issue for the private sector. This lack of regulation in the private sector is filled by the application of general principles of civil and labor law, along with the opinion of legal experts and commentators. Under the Civil Code, those who arbitrarily interfere in someone else’s life by tormenting him/her emotionally or physically, or intruding in his/her privacy will be obliged to cease in such activities, and to give fair compensation. Legal commentators and rulings have addressed cases of sexual harassment and bullying in the workplace. They have defined sexual harassment as the act of pursuing, pestering or bothering a lower-ranked employee in order to obtain a sexual favor, through repetitive conduct, under the pressure or threat of being discriminated against or segregated from the workplace due to his/her refusal to accept the demands. They opine that an invitation or

proposal to a lower-ranked employee without the threat of being discriminated against or segregated from the workplace is not sexual harassment. The general opinion is also that employees who have accepted the proposal are presumed to have accepted a form of seduction, unless for some reason, the employees have been seriously affected. However, office affairs may lead to charges of favoritism or unfair and biased practices.

The sexual aggressor's conduct is considered illegal where he or she offends his or her victim by undermining him or her and restrains his or her freedom of sexual choice. Employers may be held liable for such harassment. Under civil law rules, employers are liable for any act performed by their employees that results in damage.

Law N° 26,485 declares the ways in which the Argentine State shall protect women against discrimination, violence, unfair treatment, etc., and has a specific reference to the right to be protected against any kind of sexual harassment.

Finally, the sexual harassment may constitute a crime under Law N° 25,087, which provides that those who sexually abuse someone through violence, threat, coercion, intimidation, or abuse of their employment relationship, of authority or of power, taking advantage of the fact that the victim, by any cause, could not be able to willingly consent to the action, shall be punished with a prison term ranging from six months to four years. The punishment shall be increased from four to ten years when the abuse, due to its duration or circumstances in which it has been done, configures a serious outrage of sexual submission for the victim.

#### 4.2. Employee Remedies And Potential Employer Liability For Sexual Harassment

Besides the possibility of constituting a crime under Law N° 25,087, Law N° 26,485 that addresses the integral protection of women includes a specific judicial procedure in order to obtain protection,

including interim measures. The law further provides the right to obtain legal counsel provided by the State.

Employees should report the incident to the employer (when the employer is not the person responsible for the harassment), and offended employees may terminate the relationship due to the lack of adequate measures to prevent a new incident.

Employers are directly liable if they are the individuals acting as harassers, or indirectly responsible if the harassers are its employees.

Offended employees may seek additional compensation based in the tort rules of civil law. Employees may seek compensatory damages for medical attention, along with pain, suffering and emotional distress. Argentina's current legislation does not provide for punitive damages.

#### 4.3. Practical Advice To Employers On Avoiding Sexual Harassment Problems

Usually, when the courts extend liability to an employer, that is on the basis that the employer was aware of the harassment and failed to adopt measures to punish the harasser. The courts typically extend find against employers when it is found that they were aware of or consented to the harassment.

In order to avoid this extension of the liability, employers should explain to the staff their policy and procedures to deal with such cases, and exercise active supervision on how management is treating employees. Employers should also establish a proper channel for filing complaints, and then immediately investigate the charges, with the highest degree of objectivity, collecting as much conclusive evidence as possible and respecting the privacy of the involved parties, as well as the rights of the defense of the accused.

Even so, under the terms of Section 1113 of the Civil Code (objective liability for employee's actions), the courts may nevertheless find

employers liable if they empowered someone and failed to control him or her, or if they should have known about the risk they were creating, even if they did not actually or constructively know about it.



## Australia

### 1. Introduction

Australia has a Federal legislative framework for the regulation of the employment relationship found in the Fair Work Act (the “**Act**”). In addition to the provisions of the Act, an Australian employee may also have access to State and Territory Courts with respect to common law remedies and protection from illegal discrimination in the event of termination of employment.

For many Australian employees, the fairness or otherwise of the decision of the employer to terminate the employment and the procedures associated with such termination are matters that can be reviewed by a labor tribunal by the name of Fair Work Australia (“**FWA**”). Before effecting any termination of employment in Australia, the employer must determine whether or not the employee has access to FWA to challenge the termination on the grounds of substantive or procedural fairness.

Where an employee is able to access FWA to challenge the fairness of a particular termination, the tribunal may reinstate the employee or (as an alternative) award compensation up to a maximum level of six months’ remuneration if the requisite unfairness or harshness is found.

Where an employee, as a result of the nature of their position and/or level of remuneration, does not have access to unfair dismissal remedies in FWA, there are other legal remedies that may be available with respect to protection from discrimination, Adverse Action and Common Law remedies mainly concerning breach of contract.

To determine whether an Australian employee has access to the remedy of unfair dismissal, the employer must determine whether or not an employee’s position is covered by the terms of any Modern Industrial Award (“**Modern Award**” or **MA**”). Modern Awards were created by FWA in January 2010. Modern Awards apply to specific industries and job functions and contain the minimum terms and

conditions for a particular industry. Whilst management and professional employees are largely not covered by Modern Awards, the employer should always check whether or not the employee's classification is covered by a Modern Award prior to implementing a termination of employment.

All employees covered by Modern Awards, irrespective of their level of income, have access to the unfair dismissal remedy through FWA.

Where an employee is not covered by a Modern Award and the employee's base salary is in excess of a set limit, the employee is exempt from the unfair dismissal provisions. The base salary threshold as of July 1, 2011 was AUD 118,100 per annum, however, this figure is indexed annually and increases year-by-year. Exempt employees will not be able to challenge the fairness or otherwise of the termination of their employment, however they enjoy the same level of protection from discrimination and/or Adverse Action as all other Australian employees.

## 2. Notice of Termination

Australian employees enjoy the benefit of a statutory scale for notice of termination contained in the Act in the following terms:

<b>Period of Service</b>	<b>Period of Notice or Payment in Lieu Thereof</b>
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than five 5 years	3 weeks
More than 5 years	4 weeks

Note: The minimum periods of notice set out above are increased by one week in cases where the employee has been in continuous employment for over two years and is over 45 years of age.

Notwithstanding the existence of the statutory minimum notice scale above, all Australian employees should be issued a written contract of employment or letter of employment containing an agreed notice of termination provision, which is at least equal to, or exceeds the statutory scale. This is often referred to as contractual notice.

Contractual notice may be well in excess of the statutory scale for executive employees. For more senior employees, the failure to agree upon and/or impose a contractual notice period may have consequences on termination, as it may permit the employee to claim reasonable notice of termination as a function of the implied term of reasonable notice.

At Common Law an employer can only unilaterally terminate the employment relationship by giving the employee a period of notice of termination (or payment in lieu). The only exception to this requirement is where the employee is guilty of gross or serious misconduct (which includes fraud or gross negligence).

In circumstances where no period of notice has been agreed upon by the employee and the employer in writing, Common Law will imply an obligation that the employer provide a “reasonable” period of notice of termination. What constitutes reasonable notice requires an examination by the Court of the circumstances surrounding each particular termination. Although the Courts have not adopted any specific formula to determine the reasonableness of a notice period, the Courts have considered various factors, including the following:

- the employee’s position within the organisation;
- the length of service of the employee;
- the qualifications required for the position held by the employee and the qualifications actually held by the employee;
- the employee’s salary;

- the normal retiring age for an employee holding the position in question; and
- the length of time that is likely to elapse before the employee obtains equivalent or other suitable employment and their likely remuneration.

An employer may, with the employee's agreement, make a payment to the employee equivalent to the remuneration due during the notice period and terminate the relationship immediately. Such a payment is referred to as a "payment in lieu of notice".

### 3. Redundancy

Effective January 1, 2010, all Australian employees are entitled to additional severance payments where their employment is terminated because their position within the employer's organisation disappears through no fault of their own. This is referred to as a "redundancy".

Under Australian law an employee's position is considered to be redundant if:

- the employer has made a definite decision that the employer no longer wishes the job the employee has been doing to be done by anyone;
- the decision is not due to the ordinary turnover of labour;
- the decision leads to the termination of the employee's employment; and
- the termination of the employee is not on account of any personal act or default on the part of the employee.

Where a termination occurs in these circumstances, the Act provides for additional termination payments, known as "redundancy payments", which are calculated according to the employee's length

of service. Modern Awards also contain consultation requirements with employees and the relevant unions.

The statutory scale for redundancy payments in the Act introduced on January 1, 2010 is as follows:

<b>Period of continuous Service</b>	<b>Redundancy Pay</b>
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

#### 4. Procedural Fairness and Unfair Dismissals

At Common Law, an employer can terminate the services of an employee without giving reasons, provided that the appropriate period of notice is given in accordance with the applicable contract. However, this position has been altered by the Act, which establishes certain minimum procedural standards an employer must follow prior to terminating the services of an employee who is eligible to claim unfair dismissal.

The basic requirement is that an employer may not terminate the services of an employee in circumstances where the termination is harsh, unjust or unreasonable. In determining this question, FWA will consider (among other matters):

- whether or not a reason was provided by the employer for the termination, and whether or not the employee was provided with an opportunity to respond to this reason;
- whether or not there was a valid reason for the termination connected with the employee's capacity or conduct, or based on the operational requirements of the employer; and
- whether or not warnings of unsatisfactory performance were provided to the employee prior to the termination.

The legislative requirements and the case law require employers to:

- provide eligible employees with specific details of any concerns with their conduct or performance and give them an opportunity to respond to the same;
- provide eligible employees with sufficient warning that if their conduct or performance does not improve then their employment may be terminated;
- where appropriate, counsel or train employees on how their conduct or performance can be improved; OR
- provide employees with a final opportunity to respond before terminating their services.

Where FWA finds that a termination was unfair, it can order reinstatement of the employee. It also has the power to order the payment of compensation of up to six months' remuneration.

## 5. Unlawful Termination/Adverse Action

The Act also specifically precludes termination of employment (including redundancies) for various reasons, including:

- temporary absence from work because of illness or injury;

- union membership;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- absence from work during maternity or parental leave;
- victimisation; and
- Adverse Action as a result of an employee making any form of internal or external complaint and/or exercise of a workplace right.

It is unlawful to terminate a person's employment for any of the reasons set out above, regardless of the employee's level of remuneration, and where the dismissed employee alleges a breach of the Act, there is a reverse onus on the ex-employer to establish that the termination did not include any one of the illegal grounds. The remedy of unlawful dismissal/adverse action is available to all employees, irrespective of income or award status. These matters are determined by the Federal Court and/or the Federal Magistrates Court and may involve penalties and financial restitution to the employee, which is not capped.



## Austria

### 1. Introduction

Austrian labor law consists of several legal provisions regarding employment, contained in various laws. A contract of employment is deemed to exist if a person (employee) undertakes to provide services to another (employer) for a specific period of time. Employees are personally and economically dependent on the employer. Labor law contains legislation on employment contracts (individual labor law), on industrial relations (collective labor law), procedural law and terms on health and safety at work. Labor law's primary objective is to offset the social imbalance between employees and employers. It is thus an essential part of social policy.

Austrian employment legislation has traditionally drawn a distinction between waged (“*Arbeiter*”) and salaried (“*Angestellte*”) employees. Salaried employees are generally covered by legislation, while most of the provisions for waged employees are contained in collective bargaining agreements. Senior executives and directors have a special position in labor law and certain protective laws do not apply to them to the same extent as to other employees.

Austrian Labor Law still recognizes a distinction between waged and salaried employees. To be qualified as a salaried employee, the employee must perform office work or activities of a commercial nature, or more complex activities of a non-commercial nature that require particular training. Any other employees are considered to be waged employees. However, as far as statutory law is concerned, the distinction between salaried and waged employees has lost much of its significance. It still has consequences for social insurance, works councils, membership of trade unions, compensation rules, termination, and notice periods. In this chapter, “employee” refers to salaried employees only.

After 1945, Austria enacted legislation to enhance the protection of employee's rights. The purpose of this protective legislation was to lay down measures to protect the life, health and morals of employees by preventing industrial accidents and employee illness, and to guarantee working conditions corresponding to the state of the art of technology and medicine. Furthermore, Austria has implemented an Equal Treatment Act ("*Gleichbehandlungsgesetz*"), providing general protection against all types of discrimination by the employer.

### *Statute Law, Collective Bargaining And Other Agreements*

Numerous statutes regulate Austrian labor relations and the individual rights and duties of employer and employee. The most important is the Austrian Constitutional Act on Industrial Relations ("*Arbeitsverfassungsgesetz*"), which provides a framework regulating the interaction between employees and employers. Furthermore, almost all employers and employees are subject to collective bargaining agreements. These agreements are concluded between the employer and employees' organizations for certain services or industry sectors. They regulate most of the terms and conditions of employment and are legally binding upon the individual employers and employees. While collective bargaining agreements usually cannot alter statutory provisions to the detriment of the employee, they have, for all other purposes, the same legal force as a statute. All individuals covered by the agreement may enforce any right arising under such agreement, just as with statutory or contractual rights. Collective bargaining agreements are concluded on a nationwide basis, setting uniform minimum standards of employment.

The most important area of participation of the works council is in the conclusion of single plant bargaining agreements ("*Betriebsvereinbarung*"). A single plant bargaining agreement is a special agreement concluded between the works council and the employer on certain issues permitted by law or by a higher-level collective bargaining agreement. It is binding on all employees in a company or, in case of larger organizations, on a certain group of the employees in the business. An entity operating more than one

business may therefore be a party to more than one single plant bargaining agreement, whereas it may only be subject to one collective bargaining agreement.

## 2. Terminations And Dismissals

### 2.1. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

Individual termination of employment may be unilateral, subject to a notice period or by mutual consent. This period varies according to length of service, the type of work performed and an individual's conduct. Termination usually does not require any cause or any specific form; it is sufficient that the employee receives notice of the termination.

According to Austrian labor law, an employer must observe a scale of notice periods for termination ("*Kündigung*") of an employee's employment, which may be lengthened under the terms of a collective bargaining agreement or individual employment agreement. Notice periods ranges from six weeks' notice for up to two years of service to five months' notice after 25 years or more service. In any case, the notice period may not be derogated from to the detriment of the employee. Unless otherwise agreed, the employment may only end upon completion of each calendar quarter. This rule may be changed by individual agreement so that employment may instead end on the fifteenth day or at the end of each calendar month.

The employee may terminate the employment at the end of any given month by adhering to a notice period of one month. However, this effective notice period may be extended by individual agreement for a period of up to six months. It is common practice of employers to release the employee from duty for the duration of all or part of the notice period (garden leave or "*Dienstfreistellung*"). During this period, the employee remains entitled to receive full salary and employee benefits.

Furthermore, employees may immediately terminate their employment contract if they become physically incapable of continuing their work or if the employer does not pay their salary or fails to comply with occupational health and safety regulations, or commits some other fundamental or material breach of the employee's terms and conditions of employment. It is particularly important that the resignation takes place without undue delay. Otherwise, the employee may be deemed to have waived his or her right to terminate the employment.

An employer may immediately dismiss an employee for reasons of insubordination, disloyalty and other types of gross misconduct, or in the case of violation of the duty of good faith. If an employer issues a notice of dismissal (or "*Entlassung*"), the employment will normally end immediately. However, if the employee initiates and wins a claim under the rules for protection against termination, he or she will be entitled to either full payment for the notice period applying to ordinary termination, or to have the termination cancelled.

Where an employer wishes to terminate or dismiss a protected class of employee, it may normally only do so with good cause and where a labor court has approved of the termination. The main protected groups are members of and candidates for the works council, pregnant employees up to four months after giving birth, employees on maternity leave and parents working part-time, employees doing their compulsory military service, and disabled employees.

## 2.2. Restrictions On Employers

### *General Protection Against Ordinary Termination*

According to the statutory provisions of Austrian labor law, all employees are entitled to protection against ordinary termination. This protection, however, is limited to specific provisions and requirements. As a general rule, the works council may contest the termination by filing a legal action with the labor court. If no works council is established, the right to contest the termination rests with

each individual employee. If such action is successful, the termination is invalid (and therefore cancelled), and the employee will be reinstated and entitled to full salary and benefits for the duration of the labor court proceedings.

Before any termination of employment, an employer must notify the works council of the intended termination. The works council may then comment on the termination within one week. After this period the employer may proceed with the intended termination. If this pre-notification requirement is violated, the “termination” is null and void.

Should the works council approve of the termination, the affected employee may not contest it in court - except for an illegal termination - and the termination will become effective. If an employee nevertheless wishes to contest a termination that has been approved by the works council, the employee must do so within two weeks by filing a lawsuit before the labor court. In cases where the company’s employees have not elected a works council, the rules involving approval of such works council will not apply.

The court may nullify a termination if it was issued because of illegal reasons, such as the fact that it concerns a pregnant employee. It may also rule against a termination because it is socially unjustified, which means that it infringes substantially upon the interests of the particular employee and, in a balance of interests test, has not been sufficiently justified by the employer.

The most common reason for termination by an employer is that there are economic difficulties preventing continuation of the employment contract. The other principal reason for termination is based upon the behavior or performance of the employee, such as the violation of an employment contract (in case the events are not serious enough to justify an immediate dismissal).

### *Protection Against Dismissal*

The employer has to notify the works council immediately after dismissing an employee and, upon request of the works council, must consult with it within three working days from the intended notification. The dismissal may be challenged in court if the employer has not given any reason justifying the dismissal and if the dismissal is unjust because of social reasons. However, in some cases, the dismissal may not be challenged if the works council has approved of it. The consequences of a legal action against dismissal are identical to the consequences of legal action against termination. The court will nullify the dismissal, and the employer will be obliged to pay the outstanding remuneration and the employee has to return to work.

### *Collective Redundancy*

In the event of an intended mass layoff, the employer has to notify the local office of the Labor Market Service (“*Arbeitsmarktservice*”) in writing that such terminations are intended within a 30-day-term. This provision applies if at least five employees are to be made redundant in a business with more than 20 and fewer than 100 employees; or at least five percent of the employees in a business with between 100 and 600 employees; or at least 30 employees in a business with more than 600 employees, or at least five employees aged 50 or over in any business.

This notification must take place at least 30 days before the first notice is issued or a mutual termination agreement is concluded. Without such prior notification, any termination would be invalid. Furthermore, during the 30-day period following the date of notification, no notice may be issued and no termination by mutual consent may be agreed, unless the approval of the Labor Market Service has been obtained. Any such mass layoff is likely to trigger an entitlement to a so-called “social plan” (as described below).

Furthermore, the employer must notify the works council before implementing certain measures (defined as “major changes”) in the

business. This includes any collective redundancy program. Once notified, the works council may submit a proposal on how to prevent, remove or mitigate any negative effects of such program on employees. In case more than 20 employees are employed and the measures to be taken will result in considerable disadvantages for all or a considerable part of the workforce, the works council may request a so-called “social plan”. Such social plan has the purpose of preventing, removing or mitigating any disadvantages resulting from the intended “major changes”.

### 2.3. Laws On Separation Agreements, Waivers And Releases

As a general principle, concluding an agreement on amicable dissolution may terminate an employment relationship. Such agreement can be concluded by mutual consent at any time. In the absence of any specific statutory provisions governing such a case, the general provisions on cancellation of contracts apply. The amicable dissolution is not subject to any specific form requirement. Such requirements only exist for termination of those categories of employee who enjoy special protection. The amicable dissolution is the most common way of terminating an employment relationship because neither the restrictions nor the statutory notice period (in the case of a termination by the employer) have to be observed.

### 2.4. Termination Indemnities/Severance Payments

Severance payments are extraordinary statutory payments paid upon termination of employment in order to mitigate the consequences of termination. However, severance payments are not due if it is the employee who terminates the contract, prematurely resigns without cause or is dismissed for good reasons. If an employment relationship commenced before January 1st, 2003, its termination by the employer without good cause will automatically require the payment of statutory severance compensation. The amount of severance compensation depends on the length of service in the company. It ranges from a minimum payment of three months’ salary to twelve months’ salary after 25 years of service.

For employment relationships that commenced after January 1st, 2003, the statutory severance compensation is payable through a state-run fund, as the result of a new system of severance payments that came into effect in 2003. These provisions, which are applicable to all new employment contracts starting on or after January 1st, 2003, require that the employer provide termination indemnities to an individually defined contribution fund (or “*Betriebliche Vorsorgekasse*” – commonly known as the “BV”). Moreover, transfers of existing severance payment claims (under the old system) to the new system are permitted. The employer may either transfer the complete claims or freeze the old claims and make all future contributions to the new fund. In order to transfer existing claims, a mutual agreement is required between employer and employee.

### 3. Employment Discrimination

Although statutory prohibitions against employment discrimination have increased significantly in Europe as well as in Austria, they are far from being as relevant to personnel decisions as they are in the United States. Employment discrimination cases are not frequently asserted in Austria, primarily because Austrian labor law already provides for substantial protective rules for employees. Therefore, no administrative process for asserting a discrimination complaint exists, such as it does in the United States. Employees may instead proceed directly to court with such a claim.

#### 3.1. Laws On Employment Discrimination

Although the provisions of the Austrian Equal Treatment Act (“*Gleichbehandlungsgesetz*”) equally protect both women and men from discrimination at work based on gender grounds, they are principally geared to women’s needs and its effects are predominantly for the benefit of women. However, there have been continuous aspirations to ensure that men and women are treated equally in the workplace, as the facts of daily life show that it is women who are still suffering discrimination compared to their male fellow-employees, both in terms of their job, on-the-job education and training as well as professional advancement.

The Austrian Equal Treatment Act and other similar laws are intended to remedy this situation. Any discriminating differentiation without objective justification is prohibited. Indirect discrimination is also prohibited. Indirect discrimination occurs where a rule is applied without distinction to men and women, where the disadvantage actually affect significantly more women than men (e.g. in case of part-time work).

The Equal Treatment Act defines various prohibited unequal treatment scenarios, for example, where an employment contract is concluded or terminated, or, in connection with the fixing of the remuneration, the granting of voluntary fringe benefits, involvement in on-the-job education and training, promotion or other working conditions.

Through major amendments, the Equal Treatment Act has been adapted to comply with the provisions of the European Commission's Equal Treatment Directive N° 76/207. The Equal Treatment Act now prohibits any discrimination, be it indirect or direct, by the employer based on the employee's gender with regard to hiring, working conditions, compensation, fringe benefits, promotion, schooling and training, and termination. Furthermore, the provisions of the Equal Treatment Act prohibit sexual harassment by the employer and regulate the consequences upon failure of the employer to prevent sexual harassment by third parties.

In order to ensure equal pay between men and women, large companies are obliged to publish internally anonymized, biannual wage/salary reports ("*Einkommensberichte*"). These reports have to contain the median or average wage/salary of men and women, separately for each occupational group (according to the remuneration model within the company or the applicable collective bargaining agreement). The duty to publish these reports has not been enacted for all corporations at the same time. In 2011, companies with more than 1000 employees have to publish a wage/salary report. Then, every year until 2014, even smaller companies will be obliged to do so (i.e., companies with more than 500 employees in 2012, with more than 250 employees in 2013, and with more than 150 employees in

2014). Corporations with up to 150 employees are not obliged to publish wage/salary reports at all. The reports have to be addressed to the local works council. If there is no works council, the report has to be freely accessible at the respective company.

Additionally, job advertisements must contain information on the minimum salary to be paid under the applicable collective bargaining agreement for the vacant position and payments above such minimum salary, if any. From January 2012, violations of this obligation may lead to an administrative fine.

Race discrimination in Austria is also prohibited by the Equal Treatment Act, and an employer is liable for such discrimination. However, it is rare and there have been no recently reported cases dealing with race discrimination.

Neither have there been any major cases dealing with disability discrimination, because most of Austrian law already provides for substantial statutory protections for disabled employees. In particular, an employment relationship (if it has lasted more than six months) may be terminated only after the approval of the committee for disabled persons, because disabled persons are one of the protected groups in case of termination. Indeed, it can be assumed that this process sufficiently protects the rights of disabled employees, since disability discrimination claims are rare.

### 3.2. Employee Remedies/Potential Employer Liability For Employment Discrimination

Any violation of the equal treatment principle entitles an employee having suffered discrimination to lodge claims for damages, or for the discriminating situation to cease. However, various time limits must be observed, depending on the type of discrimination. The Austrian Equal Treatment Act is enforced by the Equal Treatment Commission (“*Gleichbehandlungskommission*”), which is part of the Federal Ministry of Labor, Social Agendas and Consumer Protection. Additionally, an employee who is or has been subjected to

discrimination may sue the employer directly for damages in court in case of a violation of the statute.

However, in a lawsuit, the employee has to claim demonstrably the discriminating situation. The burden of proof is therefore on the person having suffered discrimination, which does not encourage the persons affected. On the contrary, persons who have suffered or continue to suffer a form of discrimination often tend to accept their situation and terminate the employment themselves. Therefore, the new laws are an attempt to change the behavior of the victims and the jurisdiction of the courts.

#### 4. Sexual Harassment

Section 6 of the Austrian Equal Treatment Act defines sexual harassment and regulates the consequences of such unlawful behavior. Unlawful discrimination on the grounds of gender must also be acknowledged, in such case where a female or male employee becomes the victim of sexual harassment during her or his employment. It is irrelevant in this context whether the employer himself/herself is the harasser, or whether he or she acts culpably by denying the employee concerned protection against harassment by third parties (colleagues or customers).

Sexual harassment means any sexually related conduct affecting a person's dignity that is undesirable, inappropriate, or indecent for the female or male employee concerned and that creates either an intimidating or humiliating working environment or subsequently results in disadvantages on the job as a result of the victim's reaction (rejection or tolerance).

The harasser has to compensate any monetary damage of the victim resulting from the sexual harassment. Further, the victim has the right to receive adequate compensation because of the suffered humiliation. This compensation has to be adequate, but must at least amount to EUR 1,000. In a case where the employer was aware of the harassment and did not react sufficiently in order to prevent such

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behavior, the victim may also demand compensation from the  
employer.

## Azerbaijan

### 1. Introduction

All labor issues in Azerbaijan, in particular termination and discrimination matters, are mainly regulated by the Labor Code of the Republic of Azerbaijan, effective July 1, 1999 (the “Labor Code”). Other significant legislation in this area includes the laws on Employment, on Trade Unions and on Social Insurance.

Additionally, Azerbaijan is a signatory to a number of international conventions adopted under the auspices of the International Labor Organization (**ILO**). International conventions to which Azerbaijan is a party form part of Azerbaijan’s legal system and prevail over national (domestic) laws in case of conflict.

The ILO conventions ratified by Azerbaijan and most relevant to employment discrimination are: the Equal Remuneration Convention (1951), the Discrimination (Employment and Occupation) Convention (1958), and the Employment Policy Convention (1964). As of June 2008, Azerbaijan has not acceded to ILO’s Termination of Employment Convention (1982), and therefore employment termination issues are regulated by domestic law, particularly the Labor Code.

### 2. Termination

#### 2.1. Termination Of Employment

Termination of employment is arguably the most complicated process in Azerbaijan’s labor law, with comprehensive guidelines aimed predominantly at protection of employees. Certain socially vulnerable categories of staff may only be dismissed on an employer’s initiative in exceptional circumstances.

The Labor Code lays down minimum standards for both employer and employee that must be strictly followed. Therefore, unlike other jurisdictions and areas of law (such as civil law), the parties’ ability to

agree to additional grounds for termination is significantly limited. Conceptually, the principles governing Azerbaijani labor law are fundamentally different from those in civil law where parties have more freedom in determining the terms and conditions of the contract. For this reason and to avoid confusion, the term “agreement” is preferred for employment relations because the term “contract” is predominantly used in civil law context.

In general, an employment agreement may be terminated:

- On the employer’s initiative on the grounds set out in the Labor Code (described in more detail below);
- On the employee’s initiative;
- By mutual consent of the parties, provided that the employment agreement included termination on this basis;
- On the expiry of a fixed term employment agreement, unless the employment relationship effectively continues for more than a week after expiration and neither party expresses a desire to discontinue the relationship;
- On an employee’s refusal to accept, or the employer’s inability to provide terms of employment satisfactory to both parties following a legitimate change in working conditions intended to improve productivity;
- For managerial personnel (directors, their deputies, chief account and heads of key departments with managerial responsibilities only) due to a change in ownership of the enterprise;
- Due to circumstances beyond the control of the parties; or

- Due to circumstances determined by the parties in the employment agreement but only to the extent permitted by law and in line with the minimum standards.

By law, this list of grounds for termination of employment is exhaustive. Many of these are further divided into more detailed sub-categories, creating a comprehensive system of legal rules for different types of termination. The restrictions examined hereafter are, however, limited to the restrictions imposed on termination on an employer's initiative only.

## 2.2. Restrictions On Employers

As for termination of an employment agreement on an employer's initiative, the law requires employers to:

- (i) strictly comply with grounds for termination;
- (ii) diligently follow the termination procedure; and
- (iii) provide a justification.

By comparison, when regulating termination on an employee's initiative, the Labor Code speaks only of the "procedure" for termination (Article 69), although certain grounds for termination are listed in the same Article 69, but only for specific circumstances.

The Labor Code prohibits termination of an employment agreement with certain employees even in cases of gross violation of employment duties. Pursuant to Article 79 of the Labor Code, except for termination in case of liquidation of an enterprise or expiry of the term of a fixed term employment agreement, the employment agreement may not be terminated with the following employees or in the following situations:

- With pregnant women and women who have children under the age of three or men raising children under three alone (this

provision covers both naturally born and legally adopted children);

- With employees whose sole source of income comes from the enterprise where they work and who are raising children younger than school age (this provision also covers both naturally born and legally adopted children);
- With employees who have temporarily lost their employability (due, for example, to an injury not causing permanent disability);
- With employees suffering from diabetes if the disease is a reason for termination;
- For participating in trade unions or political parties;
- With employees supporting people with severe disability or children under 18 with special health needs, or
- During the employee's absence due to vacation, business trips or participation in collective bargaining.

Under the Labor Code, an employment agreement may only be terminated on the employer's initiative due to:

- (i) Liquidation of the enterprise;
- (ii) Staff redundancy (downsizing);
- (iii) The employee's failure to meet the specified skill levels as confirmed by a decision of a skills assessment body; and
- (iv) The employee's failure to perform work duties or obligations under the employment agreement including specific cases of gross violation as set out in the Labor Code.

### *Liquidation of an Enterprise*

The Labor Code does not define what “liquidation of an enterprise” means. Under the Civil Code of the Republic of Azerbaijan (the “Civil Code”), an enterprise is deemed “wound up” when it ceases to exist without a legal successor. Such liquidation is normally registered with relevant state authorities. Consequently, employment agreements may not be terminated on this ground in the event of privatization of an enterprise (in which case the newly incorporated enterprise will, by law, be the legal successor) or as a result of a change in corporate legal structure (for example, conversion from a limited liability company into a joint stock company). In the latter case, the employment agreement may be terminated due to downsizing, if such downsizing is justified.

In the event of a change of ownership (e.g., via merger or acquisition), only those employment agreements with the director(s) of the enterprise, their deputies, chief account and heads of key departments with managerial responsibilities may be terminated.

Finally, an employer must provide at least three months’ notice to the relevant trade union prior to the expected liquidation, and the parties must consult with each other to mitigate the negative impact of termination of employment.

### *Downsizing*

Downsizing may result, for example, from an employer’s decision to reduce costs, or from merger of two different entities sharing similar overheads.

Generally, an employer is free to determine the members of staff who are subject to redundancy based on their qualification levels and past performance. Certain employees, however, have priority rights to remain employed during any redundancy. These are members of families of *shahids* (martyrs – civilians killed in a 1990 military operation against protesters of the Soviet regime as well as people

who died or are missing in the fight for the freedom, sovereignty and territorial integrity of Azerbaijan), war veterans, spouses of soldiers and officers, individuals raising two or more children under the age of 16, individuals who were disabled or who contracted work-related diseases at that enterprise, employees with the status of refugee or displaced person, and other employees as provided in collective bargaining contracts and employment agreements.

Furthermore, before proceeding with a downsizing, an employer must consider the possibility of transferring the affected employees to a different job within the same enterprise in line with their professional qualifications.

In the case of downsizing, the following process must be followed:

- (i) To terminate an employee who is a member of a trade union, the employer must obtain the trade union's consent. While the employer may challenge the trade union's refusal to approve the downsizing in court, the employee remains employed (and is paid) during the litigation.
- (ii) The employer must notify the affected employees at least two months prior to the expected termination of the employment agreement (this notice period may be substituted by two months' average salary if agreed by the parties);
- (iii) During the two months' notice period, the affected employee must be given free time (at least one paid day off per week) to look for another job;
- (iv) All effected employees must be paid a one-off severance amount of not less than an average monthly salary, including benefits and bonuses;
- (v) Upon completion of the steps outlined above, the employer must issue a final *order* (written notice) of termination to the relevant trade union, which must review the entire redundancy

process and make a determination as to whether the process was adequately followed and whether the employer may proceed with the termination;

- (vi) If a dismissed person remains unemployed for another two months following termination of the employment agreement, as confirmed by a letter of the relevant state unemployment agency, he or she must be paid not less than two month's average monthly salary; and
- (vii) Downsizing is also complicated upon the change of a major shareholder. For three months following an acquisition, the new owner's ability to downsize the labor force is limited:

<b>Total number of employees</b>	<b>Percentage of employees that may be terminated within 3 months of acquisition</b>
100 – 500	50%
500 – 1000	40%
More than 1000	30%

### *Termination Following a Skills Assessment*

Under the Labor Code, an employer may appoint a skills assessment body, comprised of experienced staff members and trade union representatives, to perform a skills appraisal of employees. A skills assessment process is designed to review employee skills and knowledge *in general*, and their professional suitability to perform assigned duties or fitness for a particular position. A skills assessment, therefore, is not a forum for reviewing specific instances of violation of employment duties, such reviews being part of the disciplinary process.

An employee may not be assessed more than once in three years. Certain staff members, such as those working in a given position for

less than a year, may not be assessed at all. Additionally, a person confirmed as suitable at least three times for his or her assigned duties at the same enterprise may not be re-assessed for the same position.

A decision of an assessment body, e.g., about a person's unsuitability for a particular job, is not mandatory for an employer. Such decision, however, is a legitimate ground for termination of an employment agreement unless there is a possibility (e.g., vacancy) at an enterprise to transfer the employee to another job in line with his or her skill-base.

### *Failure to Duly Perform Work Duties*

Failure to duly perform or violating employment duties may be in two forms: (i) a gross violation of employment duties in the specific cases set out in the Labor Code; or (ii) other (presumably less serious) violations of employment duties and the terms of the employment agreement.

The cases of gross violation are expressly set out in the Labor Code (Article 72):

- Absence from work for an entire day without justifiable cause, except for cases of personal illness or illness or death of close relatives;
- Reporting to work under the influence of alcohol, narcotics or other intoxicating substances;
- Causing financial damage to an owner of the enterprise as a result of the employee's culpable act or omission;
- Causing injury or death to fellow employees, due to failure to adhere to safety rules which results from an employee's culpable act or omission;

- Deliberate disclosure of sensitive (confidential) information or failure to observe rules designed to protect those;
- Causing serious damage to the lawful interests of the employer, enterprise or enterprise owner resulting from gross mistakes or illegal acts committed during working hours;
- Repeated violation of work duties during six months after disciplinary sanctions have already been imposed; or
- Commission of a crime or administrative offense in the workplace and during working hours.

In cases of gross violation, an employer has the right to terminate the employment agreement immediately. Other cases of less serious violation could involve any breach of labor law or the employment agreement, which could give rise to disciplinary action, including termination if termination is proportionate to the gravity of the breach.

#### *A Potential Additional Ground for Termination*

The Labor Code contains a rather controversial and much criticized provision in Article 57.4 that could potentially be interpreted as giving the right to terminate an employment agreement despite the fact that this article does not appear in any other provision of the Labor Code dealing with termination. Article 57 deals with the terms of employment in general and changes to such terms that can only be made by mutual consent. Article 57.4, however, provides that if an employer is unable (presumably for justifiable reasons) to provide an employee with a pre-agreed job, the employer must offer an alternative position matching the employee's professional qualifications. In these circumstances, an employee may only refuse to accept the new job if it does not pay the same average salary as was initially offered for the previous position. Therefore, it would seem that if an employer is unable to pay the same average salary for the alternative position offered, the employment agreement could be

terminated. There is at least one court case where the courts implemented the provision in this manner.

### 2.3. Notice Provisions / Consequences Of A Failure To Provide The Required Notice

Strict adherence, not only to the grounds for termination but also to the termination procedures, is necessary for a termination to be valid. From this standpoint, any failure to comply with the notice requirements may render the termination void. The notice requirements applicable in case of downsizing and liquidation of an enterprise have been fully outlined above. The Labor Code does not provide for any prior notice in case of termination for cause, i.e., for failure to perform work duties, including gross violation of labor law or the employment agreement.

Finally, if a probationary period was set out in an employment agreement (which may not exceed three months), either party may terminate the agreement during the probationary period by serving at least three days' written notice.

### 2.4. Termination Indemnities

In cases of termination due to a change in working conditions, loss of employability due to permanent disability or when an employee is summoned for military service, compensation of not less than two months' average salary must be paid by an employer.

When terminating the employment of managerial personnel due to a change in ownership of the enterprise, such managerial personnel must be paid at least three times their average monthly salary. Compensation in the same amount is payable to the heirs of a deceased employee.

When terminating for redundancy, severance pay and other payments are due as described above.

When terminating for cause, no compensation is due to the employee, other than for the time actually worked, if employment was terminated for a culpable or wrongful act or omission at work during working hours. An employer may under certain circumstances hold an employee materially (financially) liable for the unlawful act (or omission) that caused actual damage or loss to the employer.

## 2.5. Laws On Separation Agreements, Waivers And Releases

An agreement on termination of employment is only valid if such termination ground was provided in the employment agreement itself. In practice, the parties often fail to include such additional termination ground (i.e., termination based on mutual consent) in an employment agreement. This can be overcome by a subsequent amendment that can be combined into a single amendment/termination document to reduce paperwork.

The minimum employment standards set out in the law (minimum salary, work hours, vacation entitlements, etc.) are mandatory statutory requirements that cannot be altered by the parties. This interpretation is based on a long history of labor law practice as well as a plain reading of various provisions of the Labor Code, specifically Article 43.3. Additionally, unlike civil law, labor law does not give parties latitude in determining the terms and conditions of an employment agreement. Therefore, any waiver or release of claim, even if properly documented in written form, would be void. It appears, however, that this rule would not impact the parties' right to waive their claim in a civil law context (e.g., when dealing with compensation for actual monetary damage incurred in the course of employment). Under the Civil Code, the waiver of a claim is only valid if and to the extent that such waiver does not impact the rights of an interested third party.

## 2.6. Litigation Considerations

The vast majority of wrongful termination court claims involve violation of work duties. To ensure the fullest protection, an

employer should retain proof of the violation (preferably in written form).

If a particular case involves a less serious violation of employment duties, the employer's burden of proof is more onerous. There is no clear guideline in the Labor Code as to what might constitute a (less serious) violation of employment duties. Based on a plain reading of the Labor Code as well as a review of court cases, an employer is advised to: (i) keep employees informed of all pertinent rules and regulations; (ii) make such rules and regulations part of the employment agreement where possible; (iii) properly document the facts of the violation; (iv) keep track of all past violations; and (v) do all other things expected of a reasonable and prudent business person.

### 3. Employee Discrimination

#### 3.1. Laws On Employment Discrimination

The Constitution of Azerbaijan provides in Article 25 that every person shall have equal rights and freedoms irrespective of race, nationality, religion, sex, origin, property status, social position, convictions, political party, trade union organization, and social unity affiliation.

The Labor Code “categorically” prohibits in Article 16 any form of discrimination at any stage of employment. Apart from the traditional listing of specific grounds for discrimination (such as race, age, gender, etc.), the Labor Code expands the discrimination rules by excluding all forms of preference or privilege not connected with professional skills or the employee's performance. Strictly speaking, however, Article 16 is not applicable to job applicants who would by definition, fall outside the scope of the Labor Code. Therefore, as to regulation of discrimination in hiring employees, one must additionally look at other laws of general application, such as the Constitution. The Labor Code further clarifies that certain benefits given to socially vulnerable employees (employees under the age of 18, women, etc.) are not to be considered as discrimination.

#### 4. Sexual Harassment

The Labor Code was amended, effective from November 27, 2007, to include new provisions relating to sexual harassment. In accordance with these revisions, an employer is obliged to take all necessary measures to ensure protection of employees from sexual harassment. Additional steps relating to enhancement of such measures and to the improvement of staff awareness of sexual harassment may also be included in collective contracts.

As a general rule, an employee is required to give thirty days' notice when terminating his or her employment agreement. The latest revisions to the Labor Code, however, provide an employee with the right to immediately terminate his or her employment agreement in the case of sexual harassment. Further, an employer is financially liable for damages resulting from sexual harassment.

Finally, the Criminal Code of Azerbaijan contains a rather broad provision relating to sexual harassment via blackmail or using other forms of influence that can be interpreted as applying to manager-employee relationships. Such acts would be deemed a crime subject to up to three years' imprisonment.



## Belgium

### 1. Introduction

Almost all aspects of labour relations in Belgium are covered by statutes and collective bargaining agreements. Flexibility is only available to the extent permitted by the statutory and regulatory framework. The governing provisions are, in order of prevalence: (i) the mandatory legal provisions (including EU Regulations, international treaties and implementing decrees), (ii) national collective bargaining agreements, (iii) business sector collective bargaining agreements, (iv) plant collective bargaining agreements, (v) written employment contracts, (vi) non-mandatory legal provisions, and (vii) oral individual agreements.

The main statutes are:

- The law of July 3, 1978, concerning employment contracts.
- The law of December 5, 1968, concerning collective bargaining agreements and joint employers' and workmen's boards.
- The law of April 12, 1965, concerning the protection of employees' salaries.
- The Employment Act of March 16, 1971 (working time regulations).
- The law of April 8, 1965, concerning the establishment of working regulations.
- The Royal Decree of June 28, 1971, concerning annual vacation.
- The law of January 4, 1974, concerning legal holidays.

- The law of July 24, 1987, concerning interim labour and loan arrangements covering employees.
- The law of June 26, 2002, concerning plant closure.
- Collective bargaining agreement n°24 concerning collective lay-offs / Royal Decree of May 24, 1976, concerning collective lay-off / Law of February 13, 1998.
- Collective bargaining agreement n°32bis concerning the transfer of business undertakings.
- Flemish language decree of July 19, 1973 / Walloon language decree of June 30, 1982 / Royal Decree of July 18, 1996, on the use of languages (Brussels Region).
- The law of May 7, 1999, on equal treatment between male and female employees in labour relations.
- The laws of May 10, 2007, regarding measures against discrimination.

Labour law disputes are, with a limited number of exceptions, within the jurisdiction of the Labour Courts. The Labour Courts are composed of three judges, among whom are two lay judges (designated by Royal Decree on the proposal of employers' associations and the unions). Litigation involving employment disputes - especially in the framework of individual terminations - is common and part of doing business. Several laws provide for specific recourse to the Labour Courts if parties fail to reach an agreement as part of the dispute resolution process. Because the Civil Procedure rules provide only for very limited discovery, and witness testimony is only allowed in exceptional circumstances, recourse to the Courts is made only where relatively routine procedures are involved. Over the years, the amount of litigation involving individual terminations has

been declining because case law has become well established on most issues.

## 2. Terminations

### 2.1. Restrictions On Employers

As a general rule, an individual termination of an employment contract is not subject to any prior administrative approval / notification or consultation process.

Employment contracts of white-collar employees can in principle be terminated at will by the employer subject to a prior notice or payment of an indemnity in lieu of notice. Additional damages for wrongful dismissal will only be awarded in exceptional circumstances provided the employee can prove: (i) that the employer abused the termination rights or acted improperly in the termination process, and (ii) that such improper behaviour caused harm that is distinct from the termination as such and is not indemnified by the redundancy payments.

Employment contracts of blue-collar workers can also be terminated at will, subject to a prior notice or payment of an indemnity in lieu of notice. In terms of unfair dismissal allegations the burden of proof is reversed. The employer must be able to prove that the termination was justified by reference to the (in)aptitude or behaviour of the blue-collar worker or the needs of the enterprise or division. If the burden of proof cannot be met, the blue-collar worker is entitled to an additional unfair dismissal indemnity equal to six months' salary.

There are numerous exceptions to the general principles:

- Specific legal protection exists for the following employees: effective and substitute members of the Workers Council, Committee for Prevention and Security at the Work Place; non-elected candidates for the social elections; members of the union delegation; pregnant employees; employees on professional, educational or parental leave of absence;

employees who filed a complaint for discrimination or harassment; prevention advisor / labour physician; or employees in charge of the supervision of toxic waste;

- In addition, termination is prohibited during suspension of the employment contract for local political offices; and dismissal is prohibited where it is attributed to the introduction of new technologies;
- Protections exist where the terminations involve collective lay-off / plant closing.

The special protection takes the form of enhanced termination indemnities if the employer cannot prove that the termination is unrelated to the specific situation or condition of the employee (e.g., pregnancy), need for prior consultation (termination because of introduction of new technologies), need for prior annulment of the protection subject to substantial indemnities if not obtained before the termination (Workers Council / Committee for Prevention and Safety at the Work Place protection) or a combination of prior consultation requirements and additional indemnities (collective lay-off / plant closing).

Parties can, in accordance with the Rome I Regulation, have the employment contract validly governed by foreign legislation. Because Belgian labour law rules governing terminations are mandatory in nature, the foreign legislation will be set aside when less favourable for the employee. All employees - including expatriate personnel - benefit from the application of the Belgian labour law rules when terminated while employed in Belgium.

## 2.2. Notice Provisions / Consequences Of A Failure To Provide The Required Notice

Fixed term employment contracts can only be terminated before their term upon the payment of an indemnity in lieu of notice equal to the salary and fringe benefits over the non-expired portion of the fixed

term at the time of termination. The indemnity is limited to twice the amount of the indemnity in lieu of notice that would have been payable if the employee would have been engaged for an indefinite period.

Indefinite term employment contracts can be terminated by both the employer and employee with a prior notice of termination. The notice letter must state the notice period and starting date. In case of termination by the employer the notice letter must be forwarded by registered mail or notified by bailiff's writ. The employee can hand deliver the notice letter to the employer provided receipt will be acknowledged. The notice will, for white-collar employees - unless notified during a trial period, only start running on the first day of the month following the one in which effective notification occurred. The notice will begin for blue-collar workers on the Monday following the week in which notification took place. In case of notification by registered mail, effective notification is only deemed to have occurred on the third working day following the date of dispatch.

For blue-collar workers and white-collar employees whose employment contracts have already started **before January 1, 2012**, the notice requirements are as follows:

#### *Dismissal Of White-Collar Employees*

- During the trial period (if applicable): 7 days subject to full entitlement to the salary for the first month of employment if termination occurs before completion of such minimum employment period.
- Gross annual compensation not exceeding currently EUR 31,467 : 3 months for each commenced period of 5 years' employment.
- Gross annual compensation exceeding currently EUR 31,467 : to be agreed upon at the time of termination between the

employer and employee or, failing an agreement, to be determined by the Labour Court at the request of the most diligent party; in practice the notice period will be determined unilaterally by the employer subject to the right of the employee to claim an indemnity in lieu of notice for the shortfall. Labour Courts will determine the applicable notice period by reference to the service years at the time of termination and assessment of the chances for the employee to find new comparable employment having regard to the age, function and compensation level; as a general rule of thumb, employees will be given 1.2/1.3 months per year of length of service; corrections are to be made when the employee combines limited seniority with a substantial compensation package.

- Gross annual compensation exceeding currently EUR 62,934 : parties can validly agree in the individual employment contract on the notice the employer is to observe provided the contract is signed no later than the date of commencement of the employment and the notice equals at least 3 months for each commenced period of 5 years' employment; failing such specific agreement, the rules that apply for employees whose gross annual compensation exceeds currently EUR 31,467 are governing.
- Termination at the occasion or after the legal retirement age: the notice period for the employer is reduced to 3 months if the seniority of the employee amounts to no more than 5 years and 6 months if his/her seniority exceeds 5 years provided the notice is notified no sooner than 3 (or, if applicable, 6) months before the legal retirement age (65 years).

### *Resignation Of White-Collar Employees*

- During the trial period (if applicable): 7 days.

- Gross annual compensation not exceeding currently EUR 31,467:
  - seniority does not exceed 5 years: 6 weeks
  - seniority exceeds 5 years: 3 months.
  
- Gross annual compensation exceeding currently EUR 31,467 : to be agreed upon at the time of termination or by the Labour Court in case of dispute subject to a maximum period of 4 months (gross annual compensation between currently EUR 31,467 and EUR 62,934 ) or 6 months (gross annual compensation in excess of currently EUR 62,934 ).
  
- Counter-notice: during a notice notified by the employer, the employee can give a counter-notice of one month (gross annual compensation < currently EUR 31,467 ), two months (gross annual compensation between currently EUR 31,467 and EUR 62,934 ) or maximum four months (gross annual compensation > currently EUR 62,934 ).

The compensation thresholds are revised (indexed) on an annual basis effective as from January 1 of each year.

#### *Dismissal Of Blue-Collar Workers*

<b>Service Years</b>	<b>Notice</b>
Less than 6 months:	28 days
Between 6 months and 5 years:	35 days
Between 5 and 10 years:	42 days
Between 10 and 15 years:	56 days
Between 15 and 20 years:	84 days
More than 20 years:	112 days

For a number of business sectors the applicable notice periods have been enhanced by Royal Decree or business sector collective bargaining agreements.

### *Resignation Of Blue-Collar Workers*

<b>Seniority</b>	<b>Notice</b>
Less than 20 years:	14 days
20 or more years:	28 days

The employment contract for a blue-collar worker can provide for a trial period of a maximum of fourteen days. Within the trial period the contract can be terminated without notice on (or as from) the 7th day by both parties.

Notice periods, when notified by the employee, are suspended during (prolonged with) periods of leave of absence (illness / vacation). If the contract is terminated by the employer (dismissal), the employee has the right, during the notice period, to remain absent from work for job interviews during two half days per week over the last six months of the notice and one half day per week in the preceding period.

Failure to give or observe the required notice entitles the other party to an indemnity in lieu of notice.

For blue-collar workers and white-collar employees whose employment contracts have an agreed start date on or **after January 1, 2012**, a new termination law has modified some of the aforementioned notice requirements as follows. These new notice requirements also apply if parties to an existing employment contract enter into a new contract starting on January 1, 2012 or after and if there is an interruption of more than 7 days between both contracts.

### *Dismissal Of White-Collar Employees*

- Gross annual compensation not exceeding currently EUR 31,467: (no change) – 3 months for each commenced period of 5 years employment.

- Gross annual compensation exceeding currently EUR 31,467 :

<u>Service years</u>	<u>Notice</u>
Less than 3 years:	91 days
3 years to less than 4 years:	120 days
4 years to less than 5 years:	150 days
5 years to less than 6 years:	182 days
At least 6 years:	30 days for each commenced year

**As from January 1, 2014:**

<u>Service years</u>	<u>Notice</u>
Less than 3 years:	91 days
3 years to less than 4 years:	116 days
4 years to less than 5 years:	145 days
5 years to less than 6 years:	182 days
At least 6 years:	29 days for each commenced year

- Gross annual compensation exceeding currently EUR 62,934 : (no change) – parties can validly agree in the individual employment contract on the notice the employer is to observe provided the contract is signed no later than the date of commencement of the employment and the notice equals at least 3 months for each commenced period of 5 years’ employment; failing such specific agreement, the rules that apply for employees whose gross annual compensation exceeds currently EUR 31,467 are governing.

*Resignation Of White-Collar Employees*

- Gross annual compensation not exceeding currently EUR 31,467 : (no change)
  - seniority does not exceed 5 years: 6 weeks
  - seniority exceeds 5 years: 3 months.

- Gross annual compensation exceeding currently EUR 31,467 :

<b><u>Service years</u></b>	<b><u>Notice</u></b>
Less than 5 years:	45 days
5 years to less than 10 years:	90 days
10 years and more:	135 days

- Gross annual compensation exceeding currently EUR 62,934 :

<b><u>Service years</u></b>	<b><u>Notice</u></b>
Less than 5 years:	45 days
5 years to less than 10 years:	90 days
10 years to less than 15 years:	135 days
15 years and more:	180 days

The compensation thresholds are revised (indexed) on an annual basis effective as from January 1 of each year.

#### *Dismissal Of Blue-Collar Workers*

Notice periods for blue-collar workers increase by 15 percent.

<b><u>Service years</u></b>	<b><u>Notice</u></b>
Less than 6 months:	28 days
Between 6 months and 5 years:	40 days
Between 5 and 10 years:	48 days
Between 10 and 15 years:	64 days
Between 15 and 20 years:	97 days
More than 20 years:	129 days

Derogatory business sector notice periods that are already in effect before January 1, 2012 will continue to apply after January 1, 2012. Each business sector will have to evaluate by January 1, 2013 whether or not to apply the same 15 percent increase on its derogatory notice periods.

*Resignation Of Blue-Collar Workers*

(No change)

<u>Seniority</u>	<u>Notice</u>
Less than 20 years:	14 days
20 or more years:	28 days

Under the new law, past services that a blue-collar worker or white-collar employee has accrued for the employer as an interim worker must be added to the employee's seniority, up to a maximum of one year, for the purpose of calculating the notice period. It is however required that the employee was hired by the employer no more than 7 days after the period of interim work to perform the same function. Successive periods of interim work can be taken into account provided the interruption(s) between these periods are of no more than 7 days.

### 2.3. Unlawful Discrimination Between Blue-Collar Workers And White-Collar Employees

The difference of treatment in notice periods between blue- and white-collar employees in Belgium has been criticized for a long time. In a 1993 ruling, the Constitutional Court barely found such difference of treatment legally justified. At that time, the Constitutional Court could however live with it, considering a gradual harmonization of the statuses of blue-collar workers and white-collar employees more appropriate than an abrupt elimination of any discrimination between both categories of employees.

It is in that context of narrowing the difference of treatment in notice periods between blue-collar workers and white-collar employees that the Belgian Legislator enacted the new termination rules, which were only meant as a step towards harmonization.

In a ruling of July 7, 2011, the Constitutional Court rejected such step-by-step approach. Having regard to the new termination rules, the court deemed the difference of treatment in notice periods between

blue-collar workers and white-collar employees constitutive of unlawful discrimination and set a deadline until July 8, 2013 on the Belgian Legislator to take appropriate remedial action.

#### 2.4. Termination Indemnities

In individual termination cases the employee, or as the case may be the employer, is entitled to an indemnity in lieu of notice if no notice or an inadequate notice has been observed by the other party.

The indemnity in lieu of notice is calculated on the basis of the gross annual compensation at the time of termination including all benefits (end of the year premium, extra vacation pay, variable salary [commissions / bonus] earned over the last twelve months of employment, employer's contributions to extralegal pension / medical schemes, meal vouchers, benefits in-kind such as private use of a company car).

Sales representatives can in addition claim an entitlement to a clientele (goodwill) indemnity provided they have a seniority of at least one year at the time of termination and can demonstrate to have contributed new customers. Case law holds that a minimum contribution of even a few customers (irrespective of turnover) is sufficient to yield the entitlement. The clientele indemnity equals three months' compensation (i.e., salary and benefits) if the seniority does not exceed five years. It is increased with one month for each commenced period of five years employment after the initial five years. The clientele indemnity is exempt from social security contributions. If the employment contract provides for a non-compete covenant, the burden of proof is reversed (i.e., the employer must prove that the sales representative did not develop any new customers). The entitlement can be contested if the employer can prove that the dismissal caused no prejudice. It is extremely difficult to meet the burden of proof (e.g., case law does not accept hiring by a competitor and solicitation of the same customers as sufficient evidence, but requires in addition proof that the customers placed orders with the competitor).

Employees who enjoy special protection are entitled to specific termination indemnities, which can in certain cases be cumulated with the normally applicable termination entitlements. For example:

- Pregnant employees: additional indemnity equal to six months compensation, unless the employer can prove that the reason for the termination was unrelated to the pregnancy and physical condition of the employee;
- Members / substitute members of the Workers Council - Committee for Prevention and Protection at the Work Place - non elected candidates: failing prior annulment of the protection for technical and economic reasons or prior recognition of a serious cause by the Labour Court, the entitlement equals 2, 3 or 4 years in function of the service years (i.e., less than ten, between ten and twenty or more than twenty) plus, subject to a rejected request for re-integration, an additional indemnity equal to the compensation over the non-expired portion of the current mandate.

Additional indemnities are provided for in case of collective lay-off (supplements to the unemployment benefits for employees whose notice or indemnity in lieu of notice does not exceed seven months) and closing of a plant or division (currently EUR 147.83 per year of service and EUR 147.83 per year of age above forty five) (maximum nineteen years). The applicable amounts are revised annually.

## 2.5. Termination For Serious Misconduct

There is no entitlement to any prior notice or indemnity in lieu of notice in case of justified termination for serious cause.

The ultimate determination as to whether or not a shortcoming provides sufficient support for a serious cause termination is with the Labour Court. The notion is applied very restrictively and only accepted in extreme circumstances (theft / false reports / competing activities) when applied to employee termination cases. Serious cause

termination is in addition subject to formal requirements that need to be strictly complied with (termination within three working days following discovery of the wrongdoing / notification of all relevant factual details by registered mail within three working days following the termination). For employees who enjoy special protection because of Workers Council / Committee for Prevention and Security at the Work Place membership or their capacity of non-elected candidates at the social elections, serious cause termination is subject to prior acceptance by the Labour Court.

## 2.6. Law On Separation Agreements, Waivers And Releases

Parties can validly:

- Terminate the employment relationship by mutual consent; and
- Agree on the terms and conditions of termination once notification of the termination has occurred.

If the termination is accompanied by a prior notice, it is generally accepted that the waiver or release can only be validly obtained after the effective date of the notice letter.

The terms and conditions of termination can provide less than the legal requirements. Once an employee is in a position to exercise his/her rights, the employee can waive them in whole or in part.

The rule that separation agreements can only be validly concluded after termination applies for both the employer and employee. Labour Courts will not honour undertakings of the employer in terms of notice or indemnities in lieu of notice - even if they are more beneficial for the employee - and will apply their standard criteria, unless the undertaking covers employees whose gross annual compensation exceeds currently EUR 62,934, has been concluded at the latest at the time of commencement of the employment, and meets the legal requirements.

Waivers and releases must be sufficiently specific, i.e., will only be deemed to cover the potential rights and entitlements that are specifically mentioned.

## 2.7. Litigation Considerations

While litigation involving termination disputes is not unusual, the need for dispute resolution by the Labour Courts has declined over the years. This is particularly true when the only issues concern the notice period that should have been observed and/or the gross annual compensation on which the indemnity in lieu of notice is to be calculated. The outcome of such litigation can in most cases be predicted within a reasonable range and most individual termination cases are covered by out of court settlements. This is even more predictable under the new termination law that introduces fixed notice periods for all categories of white-collar employees.

There is no review of the terms and conditions of settlement by the Labour Court, i.e., even when the settlement is concluded in the course of the procedure.

Litigation involving an employment dispute takes on the average between fifteen and twenty-four months to be tried before the Labour Court, and about the same time if an appeal is lodged with the Labour Court of Appeals.

Potential litigation is not a consideration that has a prevailing impact on the negotiation process because procedural costs are limited.

As a result of a recent change in the legislation, attorney's fees are recoverable by the party who is successful, as fixed by a scale that depends upon the value of the claims.

### 3. Employment Discrimination

Anti-employment discrimination provisions are found, notably, in:

- The law of March 2, 2002, on non-discrimination vis-à-vis part-time workers;
- The law of June 5, 2002, on non-discrimination vis-à-vis fixed term employees;
- The law of May 10, 2007, aimed at combating certain forms of discrimination;
- The law of May 10, 2007, aimed at combating discrimination between men and women; and
- The law of May 10, 2007, aimed at combating racism and xenophobia.

The anti-discrimination provisions stated in the laws of May 10, 2007, cover all employment aspects (i.e., interview, hiring process, terms and conditions of employment, equal pay, promotion opportunities, fringes benefits, termination, etc.).

Under the law of May 10, 2007, aimed at combating certain forms of discrimination, direct and indirect discrimination is prohibited.

Direct discrimination occurs when a direct distinction exists, i.e., when, on the basis of age, sex, social origin, language, sexual orientation, marital status, birth, wealth, religious or philosophical beliefs, political beliefs, present or future health situation, handicap, physical or genetic characteristic, a person is treated less favorably than another person in a comparable situation.

Indirect discrimination occurs where a provision, criterion or practice that is apparently neutral has, as such, an adverse effect on persons to whom one of the above discrimination reasons apply.

In principle direct distinction based on age, sexual orientation, religion or philosophical beliefs can only be justified by a determinant and essential professional requirement. By derogation, in employment relationship matters, a direct distinction based on age is not a direct discrimination provided objectively and reasonably justified by a legitimate objective, such as a legitimate employment policy or employment market objectives or any comparable legitimate objective, and provided that the means to achieve such purpose are reasonable and necessary.

Indirect distinction is not unlawful if objectively justified by a legitimate purpose and provided the means to achieve such purpose are appropriate and necessary.

Specific derogations to the above rules exist.

It is worth mentioning that if the employee / applicant can show some elements that indicate the existence of prohibited discrimination, it is up to the employer to prove that there is no discrimination. So, there is a reversal of the burden of proof.

Violation of the statute is sanctioned by criminal penalties, i.e., imprisonment between one month and one year (increased in certain circumstances) and/or criminal fines.

There are also specific civil sanctions, including, for example, nullity of the provisions that are discriminatory. Furthermore, the employee can claim civil damages equal to six months' salary (three months in certain situations) or compensation for the effective damages that he/she can prove to have incurred.

The Law of May 10, 2007, aimed at combating discrimination between men and women incorporates provisions that are similar to the above provisions (except for the justification of the direct discrimination, which can only be justified by determinant professional requirements).

The same applies to the Law of May 10, 2007, aimed at combating racism and xenophobia.

## 4. Sexual Harassment

### 4.1. Sexual And Moral Harassment or Violence at Work

Sexual and moral harassment and violence at work is notably covered by the law of June 11, 2002.

- Violence at work is defined as “any factual situation where an employee ... is persecuted, threatened or mentally or physically aggressed during the performance of the employment”.
- Moral harassment (“bullying or mobbing”) is defined as “abuses and repeated behaviors of any origin, internal or external to the enterprise ... which include notably unilateral conducts, words, intimidations, acts, gestures or writings having as their purpose or effect to negatively affect the personality, the dignity or the physical or mental integrity of an employee ... during the performance of the employment, to jeopardize the employee’s employment or to create an intimidating, hostile, degrading, humiliating or offensive environment”.
- Sexual harassment at work is defined as “any form of verbal, non-verbal or physical conduct of a sexual nature with as object an effect to the dignity of a person or to create intimidating, hostile, degrading, humiliating or offensive environment at the work place”.

The employer must appoint a “Prevention Counselor” (“*Conseiller en Prévention*”) who must fulfill certain educational requirements. He/she may be chosen from inside the enterprise (but so only in enterprises with a headcount over fifty) or outside the enterprise. The unions (if represented in the enterprise) are involved in his/her

appointment. The employer may designate one or several “Trustworthy Persons” (“*Personne de Confiance*”) who assist the Prevention Counselor.

The Prevention Counselor is in charge of receiving complaints from the victims and suggesting solutions to the employer. He/she is also in charge of reporting on the acts of violence or harassment that he/she knows about to a specific body called the Committee for Prevention and Protection of Work. That report is available to the official in charge of the supervision of the implementation of the law. It contains only statistical information and cites no names.

The law provides for a very specific procedure to be followed in case of harassment or violence at work.



## Brazil

### 1. Introduction

Brazil's legal system encompasses local, state, and federal laws, which follow the federal hierarchy, with federal law prevailing above all others. The labor courts are responsible for the uniform enforcement of federal laws regarding employment relations, and different opinions or interpretations occurring at the local or regional level are subject to a general and nationwide interpretation by the Supreme Labor Court. Particular cases involving constitutional issues can also be taken a step further to the Federal Supreme Court.

In 1940, the former President of Brazil had all existing federal regulations on labor and employment matters combined into one single code. The result was the Consolidation of Labor Laws (the "Labor Code"), in force since 1943, containing more than 900 articles. Since then, hundreds of other laws, decrees, ordinances, and other types of regulations have been enacted to deal with literally every aspect of the employer-employee relationship. Even the Constitution of Brazil, enacted in 1988, contains an entire chapter dealing with "social rights" (i.e., the rights of employees), which elevate certain rights such as maternity and paternity leave, annual paid vacation, and several others to a constitutional level.

The provisions of the Labor Code, as well as all the other regulations in force today, apply to all employees, regardless of their functions - from the janitor to the president or CEO of a company - and are deemed to be of public interest. Consequently, the rights and benefits of employees provided by the various regulations and the Labor Code are mandatory and may not be waived. In fact, Article 9 of the Labor Code specifies that: "Actions aiming at disparaging, impeding or defrauding the application of the precepts contained in this Consolidation will be null and void." In addition, Article 203 of Brazilian Penal Code provides for imprisonment of one to twelve months for those who "frustrate, by fraud or violence, any right contemplated in the labor regulations."

## 2. Terminations

### 2.1. Restrictions On Employers

Brazil's Labor Code provides that an employment relationship exists whenever an individual renders services for compensation to another individual, a company, or other legal entity on a continuous basis, under the command of such other individual, company, or legal entity. As a consequence, a written employment agreement is not required to evidence such relationship, as it can result from verbal arrangements or even from implied circumstances. Perhaps because the Labor Code and other regulations provide for virtually all employment conditions, written employment agreements are generally used for higher level employees to deal only with certain specific matters such as special compensation and fringe benefits. Collective employment agreements are generally not used in Brazil.

Employment in Brazil is normally for an indefinite term. Employment agreements can be entered into for a definite term in limited circumstances. In some cases, the employer and employee can agree to a minimum guaranteed term of employment, but such special conditions must be stated in a written agreement. An indefinite term employment arrangement can be terminated by either party, but unlike the "at will" employment rule existing in some countries, the employee is entitled to severance payments when dismissed by the employer.

The Constitution of Brazil protects employees against "arbitrary or without cause dismissal" by means of specific regulation. It also provides that if an employment agreement is terminated arbitrarily or without cause, the employer must pay a fine in an amount equal to fifty percent of the money existing in the employee's Severance Fund account – forty percent to the employee and ten percent to the federal government. Severance Funds must be created by the employer for each employee by depositing an amount equal to 8 percent of the employee's monthly compensation in a special blocked bank account, opened in the name of the employee for that particular purpose. The

amounts deposited in these funds, accrued by interest and adjusted for inflation, may be withdrawn by the employee upon retirement, as well as in certain other cases such as termination by the employer without cause.

There are certain tenure circumstances in which an employer is prevented from terminating the employment relationship arbitrarily or without cause, such as when an employee is an elected member of the board of the employees' union or a member of the employer's Internal Committee for Prevention of Accidents (“**CIPA**”). Employees also cannot be terminated while on vacation or sick leave.

Collective bargaining agreements between the employees' union and employers' association also can provide certain special cases of tenure to protect employment. For example, the agreement may restrict the employer from terminating an employment relationship when the employee is less than 2 years from retirement. The law requires that the employees' union and the employers' association enter into annual collective bargaining agreements dealing with general employment conditions, the most important of which is salary raises. If no such agreement is entered into, either party can file a collective bargaining claim to provoke collective negotiations.

An employer may dismiss a worker at any time for duly evidenced just cause. Brazilian labor law sets forth a clear distinction between termination “with cause” and “without cause”, and the Labor Code provides for the legal causes for termination by employers and employees.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

An employment agreement in force for an indefinite term can be terminated by either party without cause by giving notice of at least 30 days in advance. Failure by the employer to give such notice causes the relationship to be extended for one more month for the purposes of payment of the employee's compensation and the severance

indemnification. If the employee terminates the employment, lack of notice would entitle the employer to discount an amount equal to the employee's monthly compensation from the severance payments then due. Certain collective bargaining agreements also provide that dismissal by a company of an employee over forty five years old, who has been with the company for five years or more, requires a longer termination notice (i.e., generally of forty five to fifty days).

### 2.3. Termination Indemnities

Upon termination of the employment relationship by the employer without cause, or termination by the employee with cause, the employer must pay the employee severance payments based on the employee's monthly salary. "Salary," for the purposes of severance, means the employee's full monthly compensation, including base salary plus the monthly value of all benefits extended by the employer (either by law or by the employer's personnel policies). The "termination date" considered in severance calculations is the actual date of termination or one month thereafter in cases where the employer failed to give written termination notice to the employee.

Severance payments usually include:

- (i) Salary due until the date of termination;
- (ii) Accrued vacations equal to one month's salary per year of employment. In Brazil, employees are entitled to thirty days of paid vacation each year. When termination occurs before a full year is completed, the vacation time must be calculated on a pro rata basis. Pursuant to the Labor Code, vacation must be taken within twelve months following the anniversary date of employment and the employer is entitled to choose the proper time. However, if the employee does not take vacation in the next twelve months, his or her vacation time is doubled;
- (iii) Vacation bonus, equal to one-third of one month's salary. In case of pro rated or "doubled" vacations, the bonus must be

calculated on the amount actually paid to the employee for vacation;

- (iv) (Accrued Christmas bonus (commonly called a “thirteenth salary”) equal to 1/12th of the employee’s monthly salary per month of employment (or a fraction thereof equal to at least fifteen days), counted from the relevant January 1st to the date of termination;
- (v) Fifty percent of the funds existing in the employee’s Severance Fund bank account on the date of termination, or the amounts that should exist on the date of termination in the case where the employee has already taken money from the fund (after June 29, 2001, in case of termination without cause, the companies are not only required to pay to the employee a fine of 40 percent of all amounts existing in the employee’s FGTS account on the day of termination, but also a social contribution created by the federal government, in the amount of 10 percent over the FGTS balance, for the purpose of updating the FGTS funds); and
- (vi) Severance Fund additional contributions of all payments referred to in the preceding paragraphs (i) and (iv).

In addition, if the employment agreement is terminated during the month immediately preceding the one in which the employee’s salary is to be raised as a mandatory result of a collective bargaining agreement, the employer must pay the employee an additional amount equivalent to one monthly salary. Often there may be other additional severance payments due to the employee, such as those outlined in the employment conditions contained in a written employment agreement or a collective bargaining agreement.

#### 2.4. Laws On Separation Agreements, Waivers, And Releases

As set forth in the Labor Code, termination of an employment relationship requires certain formal procedures if the employee has

worked for the employer for more than one year. In such circumstances, the parties must submit a termination form describing all severance payments mentioned above, as applicable, to a representative of the employee's union or the Labor Department. Payment is made by the employer in the presence of the appropriate representative. Upon executing the termination form, the employee automatically gives a full release of his or her rights on the payments described therein, but any other right or benefit related to the employment period not particularly contemplated can be claimed within five years counted from the date it is due or two years after termination, whichever comes first. A separate release signed by the employee would not substitute for the termination form.

## 2.5. Litigation Considerations

Brazilian Labor Courts are very protective with respect to the employees and what is consistent with the Labor Law principles.

With respect to the typical litigation expenses, we highlight that in Brazil there are usually no costs for the employee to file a labor claim. Employees are usually exempt of court costs and their attorney's work based on a success fee only. If the claimant receives the benefit of free legal aid, no preliminary deposits are required to file appeals, as it happens for the companies (defendants).

However, it is important to stress that the exemption of court costs and appeal fees depends on the existence of certain conditions established in Brazilian Law, such as certificate of poverty prepared by the party and with assistance by a lawyer of the Labor Union that represents the employee's category. However, this is only applicable in cases in which the party has the benefit of legal aid.

There are no penalties imposed by Brazilian legislation on the parties related to litigation.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

The following practices are prohibited:

- Advertising an employment offer in which there is a reference to sex, age, color or family situation requirements;
- Refusing employment or promotion, or dismissing on the basis of sex, age, color, family situation or pregnancy;
- Raising compensation or promoting on the basis of sex, age, color or family situation;
- Denying registration for job competition in private companies based on sex, age, color, family situation or pregnancy;
- Pregnancy discrimination;
- Discrimination against union members, including dismissal of employees who are union leaders or candidates for leadership; and
- Requiring female employees to submit to intimate inspections.

Employees who perform the same work, for the same employer, at the same place, must be paid equal salaries. Equal wages are required when work requiring identical levels of productivity and technical skills is performed by persons whose difference in the periods of their respective employment is less than two years.

The most significant laws on employment discrimination include:

- The Federal Constitution, which contains many articles prohibiting discrimination; the most important articles are 5(X), 3(IV) and 5(XLI);

- The Civil Code, in articles 186 and 187, which provides that whoever causes any moral harassment, commits an unlawful act;
- Federal Law 7716/89, which provides for imprisonment of two to five years for those who deny or prevent someone's employment for racial discrimination;
- Federal Law 9029/95, which sets forth a penalty of imprisonment of one to two years for an employer or prospective employer that requests any type of medical certification to evidence that a female employee or employee candidate is not pregnant;
- Federal Decree 2682/98 that puts the International Labor Organization ("ILO") Convention 168, which deals with the "promotion of employment and protection against unemployment," into force in Brazil;
- Federal Law 9,799/99, which prohibits any form of female discrimination in the workplace;
- Federal Law 7783/99, which provides that if a strike is not ruled abusive, workers involved in the strike may not be dismissed; and
- Federal Law 12288/10, which establishes the Racial Equity Statute.

In addition, Brazil's Labor Code and the Constitution contemplate other general anti-discrimination rules, such as:

- A pregnant employee may not be dismissed until up to 5 months after giving birth (in addition to being entitled to a 120-day maternity leave). A male employee is entitled to a 5-day paternity leave upon the birth;

- Two employees working for the same employer in the same city and in the same function must receive the same compensation, unless a difference in seniority of at least 2 years exists between them;
- A foreign employee discharging similar functions as those of a Brazilian employee may not receive higher compensation than the Brazilian employee unless there is a difference in seniority in favor of the foreign employee of at least 2 years; and
- In the case of a reduction of force, the termination of a foreign employee should precede the termination of a Brazilian employee performing similar functions.

#### 4. Employee Discrimination

##### 4.1. Employee Remedies And Potential Employer Liability For Employment Discrimination

In cases of racial discrimination or demand for medical certification to attest to non-pregnancy, criminal action is taken directly by the District Attorney upon receipt of a complaint from the offended party or a notice from any third party. In all other cases, the employee can seek remedies in the labor courts.

Remedies can vary from an injunction to stop the discrimination up to termination of the employment relationship by the employee, for cause, which obligates the employer to pay severance indemnities.

More importantly, employees may seek “moral damages” for the pain, suffering, and emotional distress. There is no special pattern for the courts to establish the amount of moral damages and, as a consequence, the amounts vary from court to court. In these cases, the company will have to prove that the situation alleged by the employee did not happen.

Punitive damages are not available in Brazil.

#### 4.2. Practical Advice To Employers On Avoiding Employment Discrimination Problems

In Brazil, employers are best advised to absolutely avoid discriminatory practices, as there is virtually no defense for the violation of discrimination laws. A discriminatory action on the part of the employer can provoke immediate reaction by the affected employee as well as the employee's union, which would advocate the employee's rights in court either directly or through the District Attorney.

There are cases where the termination of the employment relationship or denial of promotion may reflect a disguised discriminatory action. This type of action is a particular focus of District Attorneys and unions; therefore employers should have, and enforce a code of conduct with consistent policies in connection with the evaluation and termination of employees that could be used in defense against such allegations of discrimination.

### 5. Sexual Harassment

#### 5.1. Laws On Sexual Harassment

Federal Decree 1973/96 put into force the Inter-American Convention to Prevent, Punish, and Extinguish Violence Against Women in connection with any type of physical, sexual, and psychological violence against women. The Convention requires adopting nations to adopt specific measures and programs that recognize women's rights to a violence-free environment, and that change the community's social and cultural standards as they relate to workplace violence. The Convention also makes it incumbent upon those nations that have adopted it to create civil, criminal, and administrative regulations to prevent and punish violence against women, as well as to create a judicial and administrative structure to secure the recovery of damages and other compensation by a woman who has been subject to violence.

Law 10.224 enacted in 2001 defined sexual harassment as a crime, fulfilling the lack of regulations in this matter. As per this Law, sexual harassment was defined as “to impose upon someone with the purpose of obtaining favors of a sexual nature, abusing the relationship of authority or superiority inherent to the discharge of one’s position or function.” In the workplace, sexual harassment is also connected with the hierarchy between the agent and the offended person. Unfortunately, to date, the Labor Code has not been amended to include sexual harassment among those express causes for termination of the employment by the employee.

## 5.2. Employee Remedies And Potential Employer Liability For Sexual Harassment

Whether or not it is expressly provided in the Labor Code that sexual harassment is a cause for termination of the employment by the employee, sexual harassment in the workplace can be considered a violation of the employment relationship by the employer, entitling the employee to terminate it for cause and claim moral damages.

It also gives grounds to the commencement of a criminal action for “improper conduct.” Article 65 of Law on Misdemeanors (Decree-Law 3688/41) sets forth a penalty of imprisonment of fifteen days to two months for anyone who “imposes upon someone or disturbs someone’s peace by ill will or censured motive.”

As a consequence, the employee would be entitled to receive all severance payments, plus moral damages, while the harasser could be subject to criminal sanctions or jail sentence.

With regard to the employer’s liability, they are liable for their conduct, as well as for the conduct of their representatives/employees when exercising their duties. Thus, employers are responsible for any damages caused by them to their employees if they acted in a negligent or wrongful manner. Employers, in this sense, will have an obligation to repair such damage by paying an indemnification for moral and/or material damages. Furthermore, they are also liable for

their employees' act and, in that sense, in case a negative conduct is practiced by an employee against another, the employer may also be held liable. However, depending on the circumstances, it might be possible to file a lawsuit against the representative/employee who caused the damage to recover the company losses.

### 5.3. Moral Harassment

In Brazil, the claims for bullying (moral harassment) are becoming more and more common. It is worth noting that although there is no federal law regulating moral harassment of employees of private companies, in the city of Sao Paulo there is a law (13,288/01) that defines and regulates moral harassment, but this law is, in principle, only applicable to employees of governmental companies and agencies.

Notwithstanding the foregoing, the concept of moral harassment has been frequently discussed by the attorneys in Brazil, including in the labor courts. Moral harassment has been defined as a series of acts that intend to expose the harassed employee to uncomfortable and humiliating situations. It can be made through direct written or oral communications or by spreading a rumor or gossip that adversely affects the employee. Typical examples of bullying are: (i) to force the employee to resign due to tenured job; (ii) excessive and unjustified demands; (iii) humiliation in termination processes; (iv) constant threats to the employee; and (v) the constant questioning by the employee's direct superior of his or her capacity.

Whether or not it is expressly provided in the Labor Code that moral harassment is a cause for termination of the employment by the employee, it may be possible for the employee to terminate his or her employment agreement with cause (article 483, items "a", "b" and "d" of the Labor Code). The moral harassment also authorizes the employer to dismiss the harasser for cause due to his or her illegal act (Article 482, item "b" of the Labor Code). In addition, the harassed employee can also file a claim against the company for moral and

material damages caused by the harassment suffered (Article 5, items “v” and “x” of the Federal Constitution).

Due to the foregoing, the Brazilian employers shall take all the necessary measures to prevent and stop moral harassment under the penalty of being later condemned on the payment of moral damages. It is the company’s obligation to take care and command its employees, avoiding the practice of any illegal act inside the company’s premises.

#### 5.4. Practical Advice To Employers On Avoiding Harassment Problems

In order to avoid liability for improper conduct among its employees, an employer should include clear provisions in the company’s code of conduct prohibiting sexual and any other type of harassment. The code of conduct should outline the procedures an offended employee can follow under such circumstances. Therefore, employers should deal seriously with harassment within the company and provide the necessary means to avoid or promptly remedy any such conduct.



## Canada

### 1. Introduction

Employment relationships in Canada are, for the most part, governed by the applicable laws of the province in which the work takes place. While there are federal statutes that govern private sector employment relationships in Canada, their application is restricted to employment under, or in connection with, work that falls within the legislative authority of the Federal Parliament (such as banking and interprovincial transportation). Each province has also enacted a number of other statutes that, in some form or other, govern or influence the employment relationship.

### 2. Terminations

#### 2.1. Restrictions On Employers

All jurisdictions in Canada have an Employment or Labour Standards Act that sets out minimum requirements in regard to employment terminations. In Canada, all employment relationships are contractual. Collective agreements with trade unions are the most common form of written employer-employee contracts. However, whether there is a union or not, or the employee is a common worker or president of a large company, his or her employment is pursuant to a contract. The contract may be written or unwritten.

If a contract is written, the employer and employee can agree to any provisions that are not in violation of law. Most of the provisions of the various Employment or Labour Standards Acts are required minimums and cannot be taken away from an employee by the provisions of an employment contract. A contract does allow the parties, however, to deal with many matters that would not otherwise be part of their arrangement or that might be treated differently if a clear agreement between the parties did not exist.

The advantage of a written contract is that it provides clear evidence of the agreement made between the parties. Employment contracts can deal with as many aspects of the relationship as the parties wish to specifically set out. In special circumstances, employment contracts can be detailed and lengthy documents. In most circumstances, though, such contracts are actually quite short and deal only with those matters that have often proven to cause problems.

Unless special provisions exist in the employment contract, employees can be terminated either with notice or for cause. What constitutes cause may be specifically outlined in the employment contract and is typically outlined in collective bargaining agreements. For example, a salesman may be required by contract to achieve a ten percent annual increase in sales. The contract may also set out what period of absence from employment for any reason, or for certain reasons, constitutes cause for termination. In most cases, however, general rules as to what constitutes cause will be applied, including:

- (i) Dishonesty (in most circumstances);
- (ii) Intoxication, depending on the circumstances and the effect of the intoxication upon job performance;
- (iii) Illness, if it leads to so much absence that the employee is not fulfilling obligations (however, statutory requirements prohibit discrimination based on disability - see below);
- (iv) Insolence, depending upon the circumstances;
- (v) Incompetence (the employer must be prepared to show what level of competence was expected, that this level of competence was known to the employee as being expected, and that it was not met); and
- (vi) A conflict of interest.

The employer's inability to continue the employment for economic reasons is not cause for termination without notice, nor is a change in methods of production or operations.

Reasons that might otherwise be sufficient cause will cease to be so if the employer has condoned the employee's conduct. Therefore, an employer cannot suddenly terminate an employee for insolence where that level of insolence had been tolerated many times in the past. An employer that has condoned certain employee actions in the past, but that does not wish to continue to condone those actions, must inform the employee of this change in advance. Condoning unacceptable behavior or performance is a problem particularly where an employer wishes to discharge an employee for incompetence. In incompetence cases, the employer will usually have been found to have condoned the level of performance that the employee has been delivering. For example, where an employee has been doing the same job for years at the same level of performance, or where an employee has been given raises and promotions, it is difficult for the employer to allege incompetence, as the court will usually conclude that the employer condoned the employee's performance.

There are also actions employers can take that may be considered termination by a court even though the employer did not perceive them that way. These "deemed terminations" include circumstances in which an employee is required to move to another location (unless provided for in a written employment contract); a significant change in salary or benefits; a significant change in responsibilities or in reporting positions; demotions; or forced resignations. If an action is determined to be a deemed termination, the employee is entitled to reasonable notice or pay in lieu thereof as in any other non-culpable discharge. However, employees seldom pursue remedies in these circumstances, as doing so means giving up their job. The law of deemed terminations is set out in court decisions and continues to develop. Therefore, precise guidelines cannot be set out and employers must be alert to the problems that can develop if employees do not approve of such changes.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

Any notice of termination must be in writing, and delivered personally to the employee or sent by registered mail. In the absence of a specific contractual provision, Canadian courts generally require employers to give lengthy periods of notice of termination to middle ranking and senior employees. However, regardless of his or her position, every employee must be given “reasonable notice” unless the termination is “for cause.” If the applicable contract does not define “reasonable notice,” it is not unusual for the courts to impose a one-year period, and some courts have required a notice of termination period as long as twenty-four months. Often, a court’s decision is based on the length of time it believes the employee will need to find a similar job, considering the employee’s age, profession, experience, position, and length of service.

If the courts determine that the appropriate amount of notice has not been given, the employer must pay severance in its place. The pay required is the amount the employee would have earned during the notice period, including benefits and regular bonuses (discretionary bonuses are not included). However, the employee is under a duty to try to mitigate his or her actual losses. Accordingly, the employee must seek other employment and any income received from other employment would be deducted from the amount of severance owed by the employer.

Where an employment contract specifically sets out the required period of notice, the courts will accept the contractual provision unless it is considered to be unreasonable. For example, an employee who the courts may have found to be entitled to a twelve-month to fifteen-month notice may be entitled to as little as a three-month notice pursuant to a written agreement. Contractual periods of notice therefore reduce costs to employers and make termination a more affordable solution when problems occur in the employer-employee relationship.

However, notice periods provided for in a written contract must be reasonable and, at a minimum, equal to the notice of termination required by the relevant Employment or Labour Standards Acts. Minimum statutory notice periods may vary between provinces, although many are similar to those in the Ontario Employment Standards Act. The Ontario Employment Standards Act bases the minimum required notice period for individual employees on the employee's length of service as follows:

<b>Length of Service</b>	<b>Notice Requirement</b>
3 months, but less than 1 year	1 week
1 year, but less than 3 years	2 weeks
3 years, but less than 4 years	3 weeks
4 years, but less than 5 years	4 weeks
5 years, but less than 6 years	5 weeks
6 years, but less than 7 years	6 weeks
7 years, but less than 8 years	7 weeks
8 years or more	8 weeks

Statutory notice requirements do not apply to certain categories of employees. These categories include workers who are:

- (i) Employed for a definite term or task for less than one year (having successive one-year periods does not preserve the exemption);
- (ii) Temporarily laid off;
- (iii) Guilty of willful misconduct, disobedience or willful neglect of duty;
- (iv) Whose employment has been made impossible by an unforeseeable event, such as a plant burning down;

- (v) Employed in construction, alteration, repair, or demolition of buildings, roofs, sewers, water or gas mains, pipelines, tunnels, bridges, or canals, and certain related construction;
- (vi) Employed under a call-in arrangement where they can decide whether or not to work each time called; and
- (vii) Of an established retirement age. However, most provinces prohibit mandatory retirement based upon age under their human rights legislation.

In cases where more than fifty employees are terminated at the same time, all employees are entitled to the same amount of notice. The required notice period varies with the number of employees being terminated. For example, under the Ontario Employment Standards Act, the requirements are:

<b>Number of Employees</b>	<b>Notice Requirement</b>
50 to 100	8 weeks
200 to 499	12 weeks
500 or more	16 weeks

In Ontario, the statutory notice period for mass terminations cannot begin until the Ministry of Labour receives a disclosure statement outlining, among other things:

- (i) The economic factors responsible for the pending terminations;
- (ii) The consultative process involving the employer, employees, and the community that is intended or in place to deal with the terminations;
- (iii) A statistical profile of each employee involved noting age, sex, occupation, and length of service; and

- (iv) Any proposed adjustment programs to aid the affected employees.

The Minister has the authority to require that the employer participate in certain job relocation programs. Officials of the Ministry of Labour, the Ministry of Industry and Tourism, and the Federal Department of Human Resources Development will follow up the employer's notice to varying degrees, depending on the social and political impact of the mass termination. These officials may determine whether they can help the employer overcome any financial problems and thus avoid the terminations. At the same time, they will establish programs designed to help the workers find new jobs. These relocation programs can involve the participation of the employer, government representatives, and a third party, often a local businessperson. In certain circumstances, the employer may be asked or required to offset the cost of these programs.

In instances where ten percent or less of the employees in an establishment are dismissed for reasons other than plant closure or reduced operations, only the individual notice requirement applies. Special rules also apply to employers with seniority systems that allow for bumping rights, as contained in most collective agreements. In such cases, if bumping could result, the employer may post a notice as to who is being dismissed, setting out their seniority, job classification, and proposed termination date. This posted notice then becomes notice to anyone bumped.

### 2.3. Termination Indemnities

In Ontario, although not in most other Canadian jurisdictions, in addition to the requirement to provide notice or pay in lieu of notice, the employer must also pay severance if:

- (i) The employee has at least 5 years of service and
- (ii) The employer has an annual payroll in Ontario of CAD 2.5 million

Severance pay is also required where more than fifty employees are dismissed as a result of the closure of all or part of a business. However, in such cases, the CAD2 .5 million requirement does not apply.

Where the severance is initially considered a layoff, it will be deemed to be a dismissal if the lay-off period exceeds thirty-five weeks in a period of fifty-two consecutive weeks.

The amount of severance pay required by legislation is one week's pay per year of service to a maximum of twenty-six weeks' pay. The formula also provides for partial years of service. For example, an employee with ten and a half years' of service will be entitled to severance pay of ten and a half times his or her weekly wage rate. All periods of employment must be counted, even those followed by a break in employment. In order to meet its severance pay commitments in a manageable fashion, an employer may apply to the Minister of Labour for approval to make payments in installments over a maximum period of three years. Employees who resign after receiving a notice of termination are still entitled to severance pay, as long as the employer is provided with two weeks' written notice of resignation, and the last working day falls within the statutory notice period.

Employees who are rehired by the same employer within 13 weeks of termination are considered to have never been terminated in determining their length of service for the purpose of giving notice of termination at some future date. However, any severance pay actually paid will be a credit against any future obligation. Special agreements may be reached with a trade union regarding an employer's severance pay obligations, in which case such arrangements govern in place of the Act's requirements.

#### 2.4. Litigation Considerations

Until the 1960's, it was not unusual for a dismissed employee to take whatever the employer offered and find another job. Today, more and

more employees discharged either for cause, or with what they believe to be too short a notice period or too little severance pay, are seeking legal advice and threatening to sue their employers. A large number of these cases are settled with the employer making an additional payment rather than risk the expense of losing a lawsuit. Settlement amounts are usually kept low as the employee typically has a similar desire not to risk losing a suit or having the stigma associated with suing a former employer.

Employers, therefore, must carefully prepare their strategy in a termination situation before communicating their decision to the employee. In some cases, especially where the dismissal of executives is motivated by economic circumstances, companies engage the services of specialised management consultants to assist in the dismissal and aid the employee in finding a new job. This discharges some of the company's moral responsibility to the employee and lessens any possible claim for damages as a result of the dismissal.

Employers considering discharging an employee for cause should also be aware that it can be very difficult to prove the existence of cause in court, particularly when there is no specific written contract to show inadequate performance. If incompetence or poor performance is the reason for the termination, the employer should be prepared to show that the employee was made aware of the standard expected and was warned about the consequence of failing to meet it. In order to prove these warnings in court, they should be in writing, along with an acknowledgement of receipt by the employee. If the employer intends to dismiss an employee for cause, the employer should start preparing for a lawsuit even before the employee is dismissed. It is important that the employer prepare evidence of the employee's failures as early as possible in the process. For example, supervisors and fellow employees with complaints against the employee should be told to record their complaints in writing. Documents regarding the employee's performance should be gathered, reviewed, and safely stored.

### 3. Employee Discrimination

#### 3.1. Employment Discrimination Laws

Prohibitions on discrimination is one of the fastest changing areas of employment law in Canada. In recent years, Canada's appellate courts have been called upon to rule on such seemingly diverse issues as whether mandatory drug testing in employment relationships is permissible; whether government benefits that refuse to recognize same sex relationships are legal; and whether women are entitled to disability insurance benefits during normal pregnancies. Adjudication of these and other difficult legal questions shows no signs of abating in the foreseeable future. Additional recent developments in Canadian labour legislation include the introduction of compassionate care leave and benefits in some provinces and the elimination of mandatory retirement provisions in most provinces.

In Canada, jurisdiction over employment law, including human rights laws, generally lies with each of the provinces. In addition, the Federal government has authority over industries that have a national significance, such as atomic energy, banking, broadcasting, airlines, and railways.

All provinces in Canada have detailed human rights statutes designed to protect employees from discrimination in employment on various grounds. These statutes contain some important differences, and therefore, care must be taken in reading them. Generally, however, most Canadian human rights statutes prohibit discrimination on the basis of race, colour, ancestry, place of origin, ethnic origin or citizenship, creed, sex, sexual orientation, age, record of offences, marital or family status, and disability.

Legislation also provides specific and expanded definitions for some of these terms. For example, under the Ontario Human Rights Code:

- “Sex” includes the state of being pregnant, thereby protecting pregnant employees from discrimination in employment on the basis of sex;
- “Disability” generally includes any physical or mental impairment (some cases have held that an impairment must be chronic to qualify as a disability, and thus the common flu has been held not to constitute a disability under the Ontario Code), as well as injuries for which workers’ compensation benefits were either awarded or claimed;
- “Record of Offences” means a non-criminal conviction (e.g., careless driving) or a criminal conviction which has not been pardoned; and,
- “Age” is defined as over the age of eighteen.

Age discrimination is a growing issue in Canada as a result of changing demographics in the workforce. Canadian labour laws do not specify a mandatory retirement age for employees. In principle, older people have the right to be offered the same opportunities in employment, promotion and training as all other workers. Employers cannot refuse to hire, train or promote people simply because they are older.

In the Federal Jurisdiction, mandatory retirement is permitted. Specific laws differ across provinces but most provincial human rights legislation finds the practice of mandatory retirement discriminatory in enterprises under provincial or territorial jurisdiction. This is true in Alberta, Manitoba, Newfoundland and Labrador, Ontario, Prince Edward Island, Yukon, British Columbia, Saskatchewan, Nova Scotia, the Northwest Territories and Nunavut. In New Brunswick, the human rights legislation does not consider it discriminatory to terminate employment because of the terms or conditions of a *bona fide* retirement or pension plan. If there is no such plan, employees

who are forced to retire can file a complaint for age discrimination under the human rights legislation.

In Quebec, a civil law jurisdiction, it is discriminatory to force an employee to retire because of age under Quebec labour standards legislation. The employee's right to work beyond a certain age or number of years of service does not preclude an employer from dismissing, suspending or transferring an employee for good and sufficient reason.

Some specific occupations are also regulated by laws and policies that set an age limit. Also, under provincial human rights laws, there is no discrimination when there are *bona fide* and reasonable requirements for an employment or occupation.

In addition to being protected from discrimination, employees are also protected from harassment in their employment. "Harassment" is often defined as engaging in activity that the employer knows, or reasonably ought to know, is unwelcome. To be prohibited, harassment must be tied to a protected category.

Generally, legislation provides protection against discrimination for job applicants as well as employees. For example, the Ontario Code prohibits employers from discrimination in employment advertisements or applications. Employers are also prohibited from asking questions in job interviews that directly or indirectly discriminate against an applicant on prohibited grounds of discrimination. In Ontario, the Human Rights Commission has extensive policies on how it believes employers should prepare employment application forms and conduct interviews.

Canadian human rights laws define, and restrict, two types of discrimination: direct discrimination and constructive, or systemic, discrimination. Both types of discrimination are illegal, unless an employer can rely on certain limited defences. Direct discrimination occurs when an employer makes a decision because the person belongs to a protected group, such as not hiring a candidate because of

his or her race or ethnic origin. Constructive, or systemic, discrimination occurs when a factor or condition exists that has the effect of discriminating against a protected category. For example, an employer operating a plant without a wheelchair ramp may be guilty of constructive discrimination should the absence of the ramp prevent a disabled individual from applying for a position. In this type of case, the employer may not intend to exclude disabled employees, but the situation has a direct negative impact on those employees. Human rights laws provide that individuals in these types of circumstances are entitled to the same protection they would have received had the prospective employer made a conscious effort not to hire them because they were disabled or otherwise belonged to a protected group.

### 3.2. Potential Employer Liability/Employee Remedies For Employment Discrimination

In cases of alleged discrimination, human rights commissions may take action. Human rights commissions have substantial powers to enforce and administer human rights statutes. Their powers include:

- (i) The ability to pursue complaints “on their own motion” (i.e., regardless of whether an individual or organisation files a complaint);
- (ii) The authority to fully investigate complaints, which includes the power to interview employees and other witnesses, require employers to provide access to personnel files and other documents, and to remove files for the purpose of copying them; and
- (iii) The power to settle complaints.

If a complaint is adjudicated, adjudicators have substantial remedial authority, which is premised on putting a complainant in the position he or she would have been had the employer not breached the statute.

This authority includes the power to order reinstatement of employees found to have been dismissed contrary to the statute.

Adjudicators also have significant authority regarding monetary remedies. In recent cases where employers were found to have terminated employees based on age, adjudicators have awarded damages to employees that were equal to what they would likely have earned in continued employment through to normal retirement age, including pay and benefits. Employers may also be subject to fines for discrimination. Provisions exist for monetary fines against individuals or organisations found to have engaged in particularly egregious violations of the law. Such fines are uncommon, however, and generally only result after a quasi-criminal conviction (e.g., the Ontario Human Rights Code requires the consent of the Attorney General of Ontario to pursue such an action).

### 3.3. Practical Advice For Employers On Avoiding Employment Discrimination Problems

In Canada, human rights laws generally provide employers with a defence to alleged employment discrimination occurring under certain limited conditions. The laws provide that employers may discriminate when the individual in question cannot perform the essential duties of the position in question (although employers must show that they have attempted to accommodate the individual's situation up to the point of "undue hardship"). For example, Section 17(1) of the Ontario Human Rights Code, which deals specifically with discrimination on the basis of a disability, states that: "A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap." This type of defence is called a "bona fide occupational requirement" (**BFOR**). A BFOR permits discrimination where the requirement is necessary for the performance of the job, and the individual cannot do the job because he or she cannot perform the BFOR. For example, a delivery service may require a driver's licence as a BFOR for a delivery position. A blind individual could be legally excluded as a candidate for the

position, subject to accommodation requirements, since he or she would not be able to acquire a driver's licence.

Human rights statutes do not typically define BFORs. However, there is a substantial body of case law regarding the meaning of the concept. In most cases, court decisions have shown that in order to successfully rely on a BFOR defence, an employer must prove it implemented the BFOR in good faith and that the BFOR was necessary for the efficient and economical performance of the job without endangering the employee being accommodated, other employees, or the general public. Many courts have struggled to elaborate the components of this test. At a practical level, BFOR defences can be broken down into BFORs based on safety, economic considerations, and efficiency considerations.

To use a BFOR defence successfully, an employer must first establish that it accommodated the employee's situation up to the point of "undue hardship." In Canada, and particularly in Ontario, an employer must demonstrate substantially more than mere business inconvenience before it can satisfy its obligation to accommodate employees in categories that are protected from discrimination. Nowhere is this seen more clearly than in cases where employees claim that they have been improperly discriminated against on the basis of disability.

For example, the Ontario Human Rights Commission has published a very extensive policy that sets forth the Commission's view on what employers must demonstrate to show undue hardship in situations requiring accommodation of employees with disabilities. Under this policy, an employer will not have demonstrated accommodation up to the point of undue hardship unless implementing particular accommodative measures would substantially affect the viability of the enterprise. To successfully show attempts at reasonable accommodation, an employer must demonstrate that it has carefully listened to the employee, evaluated the reasons for the requested accommodation, assessed the requested accommodation and its

potential impact on the company and other employees, and attempted to find a solution to the situation.

Regarding age discrimination in Ontario, there is still a limited ability for employers to maintain a mandatory retirement policy for certain workers. Employers must justify such policies, by proving that:

- The policy is reasonably connected to the job function;
- The mandatory retirement policy is applied in the honest belief that it is necessary for legitimate work-related purposes, such as safety concerns; and
- The policy is reasonably necessary to accomplish the legitimate work-related purposes, even with accommodation of the mature worker to the point of the employer's undue hardship.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

In Canada, all employees have a legally protected right to work in an environment where their dignity is respected and they are free of harassment. This protection is based on detailed and comprehensive human rights laws passed in each province, territory, or by the federal government. Most employees are subject to the human rights laws of the province in which they reside and work. However, employees who work in those sectors that fall within federal jurisdiction, such as banking, telecommunications, airlines, and railroads, are protected by the federal *Canadian Human Rights Act*.

The protection against sexual harassment can be found as a direct prohibition in the statute and in the anti-discrimination provisions of the various human rights laws. Several provinces, including Ontario and Quebec, as well as the federal government, have specifically provided in their human rights statutes that sexual harassment in the

workplace is a human rights violation. For example, the Ontario Human Rights Code provides that every employee has a right to freedom from sexual harassment in the workplace by the employer, an agent of the employer, or by another employee. The Act also states that every person has a right to be free from:

- (i) Sexual solicitation or advances made by a person in a position to confer, grant, or deny a benefit or advancement to the person, where the person making the solicitation or advance knows or reasonably ought to know that it is unwelcome; or
- (ii) A reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance, where the reprisal is made or threatened by a person in a position to confer, grant, or deny a benefit or advancement to the person.

In those jurisdictions where the statute does not contain a specific prohibition against sexual harassment, employees are still protected against sexual harassment by the provisions in each jurisdiction that prohibit sex discrimination in the workplace. Courts and tribunals in Canada have uniformly found harassment to be a form of discrimination and, therefore, sexual harassment to be a form of sex discrimination. In addition, Canadian courts and tribunals have been guided by certain statutory definitions of sexual harassment. For example, the Canada Labour Code defines sexual harassment as any conduct, comment, gesture, or contact of a sexual nature that: (a) is likely to cause offence or humiliation to any employee; or (b) might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

Sexual harassment is generally found to fall within two categories. The first, “quid pro quo” sexual harassment, is conduct between two workplace parties that makes the workplace intolerable for one of those two individuals. The second is sexual harassment created as a consequence of a “poisoned work environment.” Both can and often occur simultaneously.

“Quid pro quo” sexual harassment is any course of conduct or comment of a sexual nature that places or might be perceived to place a condition of a sexual nature on employment or on any employment opportunity. The second form of sexual harassment is more subtle and is described as a “poisoned work environment” in Canada (or in the United States, as a “hostile environment”).

A “poisoned work environment” is created by any course of conduct or comments of a sexual nature that is likely to cause offence or humiliation. A poisoned work environment includes leering or staring; displays of obscene posters; graffiti of a sexually explicit nature; sexually suggestive remarks or gestures; unwanted touching, patting, or pinching; and sexually degrading language.

#### 4.2. Employee Remedies For Sexual Harassment

Where a person believes he or she has been a victim of sexual harassment, that person has the right to file a complaint with a provincial or federal administrative agency (Human Rights Commission), which has been established exclusively for the enforcement of human rights. Upon the filing of the complaint, the Human Rights Commission will investigate to determine the validity of the complaint and whether it will order a full inquiry into it. Where an inquiry is ordered and the complaint is verified, the victim can be awarded compensatory damages and restitution.

In Ontario, a new system has been introduced that will have the effect when fully implemented, to have all complaints heard by the Human Rights Tribunal. The role of the Human Rights Commission will be diminished and they will no longer investigate or determine the validity of complaints.

Victims can also receive compensation for “mental anguish,” which is akin to an award of punitive damages. In Ontario, mental anguish awards are capped at CAD 10,000. In addition, boards of inquiry have broad authority to order anything that would achieve compliance with the law. Such orders may include reinstatement of a victim’s

employment, promotions, hiring, change of a victim's supervisor, implementation of workplace policies, letters of apology, etc. Victims who are in a unionized workplace may also have the right under their collective agreement to file a grievance alleging sexual harassment. An independent arbitrator would have the authority under the collective agreement to interpret and apply the human rights laws of that jurisdiction. A non-unionized victim of sexual harassment also may seek redress in the civil courts in the context of a wrongful dismissal claim. Although sexual harassment is not in itself actionable in the courts, a victim may seek punitive damages where the employer is alleged to have acted in bad faith in the termination of employment.

The majority of claims for sexual harassment are settled between the victim, employer, and Human Rights Commission without the necessity of formal inquiries.

#### 4.3. Potential Employer Liability for Sexual Harassment

Employers are required to provide workplaces that do not discriminate and are free of harassment. Employers are, therefore, required to put in place measures to prevent sexual harassment in the work environment. An employer can also be held liable for the inappropriate conduct of its officers, supervisory personnel, and agents. This responsibility is the result of vicarious liability on the employer. The employer may also become liable for sexual harassment where the "harasser" is a non-supervisory employee or if the inappropriate conduct is of a customer or client if the employer becomes aware of the offending conduct but fails to take reasonable steps to bring it to an end.

#### 4.4. Practical Advice to Employers on Avoiding Sexual Harassment Problems

In order for an employer to meet the strict statutory requirements to provide a work environment free of harassment, as well as provide a due diligence defence should a complaint arise, the employer must take positive steps and action in its workplace. The critical element in

a pro-active workplace strategy is the development and implementation of a harassment policy. The purpose of such a policy is to demonstrate the employer's commitment to a harassment-free workplace, educate employees on harassment issues, and advise employees on the consequences of engaging in inappropriate conduct. The essential elements of an effective and defensible sexual harassment policy will:

- (i) Include a statement of the employer's principles with regard to creating and maintaining a harassment-free work environment;
- (ii) Define sexual harassment;
- (iii) Identify the types of conduct that constitute sexual harassment;
- (iv) Include a commitment to take disciplinary action against harassers;
- (v) Provide an effective internal complaint procedure and a description of the steps to follow;
- (vi) Provide a commitment to respect the confidentiality of the complainant as much as possible; and
- (vii) Provide a commitment to take immediate remedial action.

In addition, the employer must take steps to implement the sexual harassment policy, which includes employee training on the policy, distribution of the written policy to new and existing employees, inclusion of the policy in the employee handbook and posting the policy in common areas.

#### 4.5. Particular Statutory Protections - Anti-Reprisals

There are a number of statutory protections that prohibit termination of employees for certain protected types of conduct. For example:

- Occupational Health and Safety legislation protects the right of employees to report unsafe working conditions;
- Environmental Protection legislation protects the right of employees to report offences, including “spills” of waste into the environment; and
- Election Acts protect the right of employees to have certain hours free from work to cast a vote in an election.

There is also legislation specific to certain professions that protect their right to engage in certain types of conduct.



## China

### 1. Introduction

The People's Republic of China ("the **PRC**" or "China") has a civil law legal system. China's employment law is therefore based on statutory law, which is primarily adjudicated in labor arbitration tribunals and People's Courts.

Prior to January 1, 2008, the most comprehensive piece of national employment legislation was the Labor Law of the PRC ("Labor Law"), which became effective January 1, 1995. In order to address the increasing labor unrest and widespread media reports of employer abuse of employee rights, the National People's Congress passed the Employment Contract Law ("Employment Contract Law"), which went into effect on January 1, 2008.

While the Labor Law, which is still in effect, remains the foundational piece of legislation for the PRC's employment law regime, the Employment Contract Law made significant changes to the existing legal framework. Among the most significant changes are: specific penalties for not signing employment contracts with employees; limits on the use of fixed-term contracts; specific employee consultation procedures in order to adopt company rules, policies and regulations; and greater protection for employees who are hired through employment service agencies. Aside from the Labor Law and Employment Contract Law, China has passed supplementing and related legislation at both the national and local levels.

Among the most significant national laws and regulations, in addition to those mentioned above, are the following:

- Law of the People's Republic of China on the Promotion of Employment, effective January 1, 2008.

- Law of the PRC on the Mediation and Arbitration of Employment Disputes (“Employment Disputes Law”), effective May 1, 2008.
- Labor Union Law of the PRC (“Labor Union Law”), effective April 3, 1992, and amended on October 27, 2001;
- Social Insurance Law of the PRC (“Social Insurance Law”), effective July 1, 2011;
- Law of the People’s Republic of China for the Protection of Disabled Persons (“Disabled Persons Law”), effective May 15, 1991, and amended on July 1, 2008;
- Law of the PRC Concerning Protection of the Rights and Interests of Women (“Women Rights Law”), effective October 1, 1992, and amended on December 1, 2005;
- Law of the PRC Concerning the Protection of Minors (“Minors Protection Law”), effective January 1, 1992, and amended on June 1, 2006; and
- Regulations Prohibiting the Use of Child Labor (the “Child Labor Regulations”), effective December 1, 2002.

Examples of significant local regulations include the following:

- Shanghai Municipality Labor Contract Provisions, effective May 1, 2002;
- Beijing Municipality Labor Contract Regulations, effective February 1, 2002; and
- Guangdong Province Labor Contract Regulations, effective May 1, 2002, and amended on May 13, 2003.

## 2. Terminations

### 2.1. Restrictions On Employers

In the PRC, all employees generally must enter into written employment contracts with their employers. Grounds for terminating those contracts, or to resolve employment disputes, are outlined in the Labor Law, Employment Contract Law, and related regulations. The basic national rules on termination are summarized below; local regulations often supplement these rules and should also be consulted before dismissing employees in China.

#### *Expiration Or Ending Of Contracts*

In China, the concept of “at-will employment” does not exist but the parties can decide whether an employment contract will have a fixed term or an open term. Employment contracts (regardless of whether they are open-term or fixed-term) can only be lawfully terminated by the employer on one of the statutory grounds. Thus, employers in China are advised to use fixed term employment contracts that contain an expiration date, since then employers at least have the option of letting the fixed-term expire in cases where they have no good grounds for early termination. The Employment Contract Law and Labor Law both provide that fixed term contracts automatically end upon the expiry date. The Employment Contract Law also lists other circumstances upon which a contract will end, such as death of an employee or liquidation of the company.

Under the Employment Contract Law, however, an employer only has the option of signing two fixed-term contracts with an employee before an open-term contract must be signed. Further, it appears that the employee can demand an open-term contract at the end of the second fixed-term (though some cities, such as Shanghai, may take a more employer-friendly approach and allow the employer to decide to let the contract expire at the end of the second fixed-term). This means that in most cities an employer must decide at the end of the

first fixed-term contract whether to keep the employee long term, or let him/her go at that time.

Under the Employment Contract Law, severance is payable upon the expiration of a fixed-term employment contract unless the employee does not agree to renew the contract when the terms and conditions offered by the employer are the same as or better than those stipulated in the current contract. One unclear issue is how severance should be calculated when employment contracts signed prior to January 1, 2008, expire after that date. Based on the grandfathering language in Article 97 of that law, severance generally would only need to be calculated based on years of service following January 1, 2008, and not any prior period of service since severance was not payable upon expiration under previous law. However, local regulations in some cities may require severance to be payable upon expiration even prior to 2008, so relevant local regulations need to be checked.

### *Mutual Termination*

An employment contract also can be terminated by mutual agreement between the employer and the employee. Where the employer initiates the mutual termination, the employer must pay severance.

### *Termination –When Notice And Severance Required*

An employer can terminate the employment contract by giving thirty days' prior written notice (or payment in lieu of notice) and paying severance to the employee in the following circumstances:

- (i) The employee has fallen ill or sustained an injury not caused by the employment and, at the end of the “medical treatment period”, can neither engage in the original work nor in other work arranged by the employer.
- (ii) The employee is incompetent and remains so even after training or assignment to another post.

- (iii) Performance of the original employment contract becomes impossible due to a major change in the objective circumstances upon which the employment contract was originally based, and consultations between the parties fail to produce agreement on an amendment of the employment contract (this is referred to as the “Objective Circumstances Test.”).

### *Termination During Probation*

An employee in his or her probation period may be dismissed if he or she does not satisfy the conditions of his or her recruitment. In such terminations, prior notice and payment of severance are not required. The permissible length of probationary periods is determined by the duration of the relevant employment contracts. If an employment contract has a term of not less than three months but less than one year, the probation period may not exceed 1 month; if an employment contract has a term of not less than one year but less than three years, the probation period may not exceed 2 months; and if an employment contract has a term of not less than three years or is open-ended, the probation period may not exceed 6 months. Employees also are permitted to resign during probation by giving three days’ notice; after probation, they are generally required to provide at least thirty days notice, and more in certain cases.

### *Summary Dismissal For Misconduct*

In the following limited instances, an employer can terminate an employment contract due to employee misconduct, without notice and without paying the employee severance:

- (i) If the employee seriously violates the employer’s rules or regulations provided that the relevant rules or regulations must have been validly formulated and adopted in accordance with legal rules. Under the Employment Contract Law, if an employer wishes to adopt certain HR-related rules, it must

follow a specified employee consultation procedure. The procedure is as follows:

- The employer should organize meetings with the employee representative council (**ERC**) (similar to a Works Council in the EU) or employees at-large to discuss the company rules (without management being present).
- The company should ask ERC or employees at-large to put forward proposals or comments regarding the company rules.
- The employer must consult with labor union or elected employee representatives regarding the company rules and employee proposals.
- The company rules should be publicly communicated to all employees.

If an employer takes an action against an employee based on a set of company rules (e.g., termination for a serious violation of the company rules), but the company rules were not adopted according to the above procedure, the employee can challenge the legal basis for such action.

- (ii) If the employee commits serious dereliction of duty or graft resulting in major harm to the employer's interests. "Major harm to the employer's interests" may be defined by the enterprise's internal rules or regulations. "Graft" generally refers to actions by an employee that take advantage of his or her position of employment for illegal ends; the classic example is employee embezzlement.
- (iii) If the employee is "prosecuted according to the law." Examples of this ground are explained under Article 29 of the Opinion on the Labor Law.

- (iv) If the employee has an employment relationship with a second employer that materially affects his or her employment relationship with the first employer, and the employee refuses to rectify the matter after the first employer brings the problem to his or her attention.
- (v) If the employee used coercion or deception, or took advantage of the employer's difficulties to make the employer sign the employment contract. However, given that an employer is generally in a stronger bargaining position than an employee, employers might face a greater burden when trying to rely on this ground as the basis for summary dismissal.

### *Lay-Offs*

When an employer needs to reduce its workforce by twenty or more persons or by a number of persons that is fewer than twenty but accounts for 10 percent or more of the total number of the enterprise's employees, the employer may conduct layoffs, under Article 41 of the Employment Contract Law, in any of the following circumstances:

- (i) The employer is to undergo restructuring in accordance with the Enterprise Bankruptcy Law;
- (ii) The employer is experiencing serious difficulties in its production and operations;
- (iii) The enterprise is to switch production, introduce a major technological innovation or revise its business method and, after amending the employment contracts, still needs to reduce its workforce; or
- (iv) The employer is to undergo a material change affecting the objective economic circumstances relied upon at the time of the conclusion of the relevant employment contracts, rendering them impossible to perform.

### *Protections From Termination*

In the following instances, an employer is restricted from using a reduction in workforce or from terminating an employee's employment based on one of the grounds requiring notice and severance:

- When an employee suffers from an occupational disease or has sustained an injury caused by the employment, and is confirmed to have lost or partially lost the ability to work.
- The employee is in a statutory medical treatment period for a non-work-related illness or injury.
- The employee is pregnant, or during the one year period after giving birth to the child (constituting her confinement and the nursing periods).
- The employee is engaged in operations exposing him to occupational disease hazards and has not undergone a pre-departure occupational health check-up, or is suspected of having contracted an occupational disease and is being diagnosed or under medical observations.
- The employee has worked for the employer continuously for at least fifteen years and is less than 5 years away from his or her legal retirement age.
- The employee is still in his or her term as a union chairman, vice-chairman, or union committee member.
- The employee is still in his or her term as collective bargaining representative during collective bargaining negotiations.
- Other circumstances stipulated in legislation.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

In addition to the notice requirements discussed above, Article 21 of the Labor Union Law requires that the labor union be notified prior to any unilateral termination of employees by an employer. The union then has the right to challenge any terminations it views as improper, and the employer is required to listen to the union's opinion and to notify the labor union in writing as to how it handled the matter.

Article 43 of the Employment Contract Law provides that when an employer is to terminate an employment contract unilaterally, it shall give the labor union advance notice of the reason therefor. If the employer violates laws, administrative statutes or the employment contract, the labor union has the right to demand that the employer rectify the matter. The employer must study the labor union's opinions and notify the labor union in writing as to the outcome of its handling of the matter.

This requirement is not yet widely enforced, but in theory it creates practical difficulties for employers. One potential difficulty is that it can hamper employers' ability to efficiently terminate, particularly in the case of summary dismissal, since the rule arguably suggests that the union should have time to challenge the termination before it is effectuated. The second is that it is not clear under the Labor Law or the Employment Contract Law how an employer should proceed if it does not have its own labor union. Court rulings in some localities suggest that in this case the employer must notify a higher-level organ of the union of the employer's locality, but this is not a settled issue under legislation and no practice norm has yet developed.

## 2.3. Termination Indemnities

Where severance is required, the entitlement is generally calculated as one month's average wages for each year of service. In terms of calculating the years of service, if an employee has worked for a period of less than 6 months, the employee would be entitled to half-month's wage for that period of service, but if the employee has

worked for a period of between 6 months and 1 year, then that period shall be considered a full year of service for severance calculation purposes so that the employee would be entitled to a full month's wages. Severance payments are normally due in a lump sum payment on the day that the procedures for the handover of work have been completed.

The average month's wage is calculated by taking the total amount of compensation paid to the employee during his or her final twelve months of employment (including base salary, overtime, bonuses, subsidies, allowances, and commissions) and dividing this amount by twelve. In addition, under the Employment Contract Law, if an employee's monthly wage exceeds 300 percent of the average monthly wage in the municipality where he works, his average monthly wage amount (for severance calculation purposes) will be capped at 300 percent of the local average monthly wage, and he would only be entitled to a maximum of 12 months' wages as severance payment.

The Employment Contract Law includes a grandfather provision under which, for any period of service prior to January 1, 2008, severance will be calculated under the old formula existing prior to that date, and the new formula under the Employment Contract Law would be applied for any period of service after January 1, 2008.

Additional compensation may be required in some circumstances. For example, in terminations for an inability to work due to non-work-related illness or injury, employers must pay a medical subsidy of at least 6 months of wages upon termination. Additional subsidies are required where employees' illnesses or injuries are serious or terminal.

#### 2.4. Law On Separation Agreements, Waivers, And Releases

It is advisable for employers and employees to enter into written mutual termination agreements that set out all of the terms of final payments, that recite or refer to confidentiality obligations and

restrictive covenants affecting the employee, and that include a release of employer liability on the employee's part.

It is not uncommon for employers to seek a release from liability from employees in other cases of termination as well. Under a Supreme People's Court interpretation, such release agreements should be treated as valid and enforceable unless: (i) they violate the law, (ii) deception, threats, or taking advantage of another's desperate situation was involved; or (iii) a major misunderstanding or gross unfairness was involved.

## 2.5. Litigation Considerations

There are four different methods that employers and employees generally use in the PRC to resolve employment disputes:

- Consultation;
- Mediation;
- Arbitration; and
- Litigation.

Settlement is the preferred method of labor dispute resolution in China, and consequently employers and employees should consult with one another as the first step in attempting to resolve disputes in China.

If the issue cannot be settled through consultation, the employer and employee may engage in mediation through a mediation commission set up within the employing enterprise. Mediation is not mandatory, and either the employer or the employee can apply for arbitration without going through mediation. The labor dispute mediation commission is composed of representatives from the employees and enterprise management (usually the board chairman or general manager). If the company has a labor union, a union official will

generally be the employee representative. Since mediation can be a cumbersome process, employers often skip over mediation in the event of any dispute, although the government has passed regulations encouraging all companies to establish a mediation mechanism within their companies.

The next stage is labor arbitration. If mediation fails to resolve the dispute, or either party chooses to skip the mediation process, the employer or employee may apply to the local labor dispute arbitration commission for arbitration.

Under the Employment Disputes Law, the party requesting arbitration should submit a written application to the labor dispute commission within one year from the day when the employment dispute arose, which is the day on which the party knew or should have known of the infringement of rights. The commission will decide whether or not to accept a case within five days from the date of receipt of the application. If a case is accepted, the commission will form a labor dispute arbitration tribunal of 1-3 arbitrators.

During the arbitration, the parties may submit their statements, counterclaims, and evidentiary support. Since settlement is preferred even at this stage, the arbitration tribunal will ask the parties if they would like to try again to reach a settlement on their own or if they would like the tribunal to mediate a settlement. If a settlement is reached through mediation at this stage, the tribunal will issue a mediation letter that is legally effective from the date it was served to the parties and is enforceable by the People's Court from the date it has been served on the parties. An arbitral award will be issued if no settlement agreement or mediation letter was issued. The deadline for issuance of an arbitral award is normally forty-five days from the receipt of the application for arbitration, and an extension of up to fifteen days may be granted for more complicated cases, subject to the approval of the Employment Dispute Arbitration Commission.

If either party is dissatisfied with the arbitration award, it may file an appeal with the relevant local People's Court within fifteen days from

the date of receipt of the written arbitral award. If a party neither files a suit within the statutory term nor performs according to the arbitral award, the other party may apply to the People's Court for enforcement.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination And Employee Protections

##### *Non-Discrimination Principles*

Employers in China must comply with the following general principles established under the Labor Law:

- No discrimination based on nationality, race, sex, or religious affiliation;
- Equal employment rights for men and women; and
- Equal pay for equal work.

Discrimination based on handicapped status is also prohibited under the Disabled Persons Law. In addition, under the Employment Promotion Law, discrimination against migrant workers or individuals who are carriers of infectious diseases is prohibited unless there are laws or regulations prohibiting workers with certain diseases from engaging in certain types of work. The Employment Promotion Law is the most recent legislation addressing the employment discrimination issue. The Employment Promotion Law expressly declares that each level of government shall establish a fair employment environment, eliminate employment discrimination and provide support and aid to people who encounter difficulty in employment.

### *Legally Protected Groups*

The Labor Law and related regulations protect employees with disabilities, and women and minors in the employment arena. The legal principles are better developed in these areas than in the general non-discrimination arena.

(i) Disabled Employees

The Disabled Persons Law specifies that disabled employees should be provided with job types and posts that are “suitable” for them. The law prohibits discrimination against disabled employees in their “recruitment, employment, change to permanent status, promotion, evaluation, remuneration, fringe benefits, work insurance, etc.”, and requires employers to provide disabled employees with work conditions and work protections appropriate to the special characteristics of their disability.

(ii) Female Employees

The Women Rights Law specifically protects women against discrimination in employment and provides for equal employment and promotion rights. The Labor Law and the Women Rights Law provide that unless work is not suitable for women (as defined by statute), an employer should not, for the reason of gender, refuse to employ women or increase the recruitment standards for women. The law requires that men and women be treated equally on matters of promotion and assessment of professional skills. Further, the Women Rights Law specifies that men and women should be paid equally for equal work and should enjoy the same housing and welfare benefits.

The law also sets out specific parameters designated to protect the safety and health of women during employment. The law restricts the level of physical labor to which a female

employee can be assigned. The levels are set out in the “Physical Intensity of Labor Classification System,” a set of regulations promulgated by the State. Those tasks considered too labor intensive for women include work in mines, pits, and steel factories.

Women are also protected by the Women Rights Law during their menstrual, pregnancy, confinement, and nursing periods. During these periods, women are further restricted as to the types of tasks they can perform (e.g., they cannot be assigned to operations at heights or low temperatures, to physical labor, etc.). During pregnancy, female workers past seven months also cannot work extra hours or night shifts. Employers are prohibited from dismissing or terminating a female worker during pregnancy, maternity leave, or nursing. The general maternity leave entitlement for women is ninety days, commencing fifteen days before the baby is due. However, the ninety-day entitlement can be increased in a number of circumstances, such as for labor difficulties, multiple births, and caesarean sections.

(iii) Children and Minors

The Labor Law, Minors Protection Law and Child Labor Regulations prohibit employers from recruiting, employing or introducing jobs to children less than sixteen years of age. Limited exceptions apply to the cases of child entertainers or athletes; in these cases, steps must be taken to ensure the physical safety, and physical and mental health of the children. The Child Labor Regulations remove other exceptions that existed under prior regulations, which permitted children under sixteen to engage in “family labor” and “supplementary labor approved by local authorities.” The rules also indicate that local governments no longer have the authority to determine that certain kinds of child labor may be allowed. In order to help ensure compliance, employers are

required to examine the identity cards of employees and to retain all recruitment and inspection records.

The legislation also sets out stipulations on types of work, working hours, labor intensity, and protection measures employers must follow when employing minors (individuals above sixteen but below eighteen years of age). For example, the Minors Protection Law prohibits employers from assigning minors to work considered toxic, harmful, or dangerous. The Labor Law specifies that minor employees should not be assigned to work in mines and pits, work involving dangerous poisoning or harm, or work requiring intense physical labor as specified by the State. The Labor Law also requires employers to conduct regular physical examinations of minor employees.

### 3.2. Potential Employer Liability For Employment Discrimination

#### *General Liability*

Several articles of the Labor Law, the Employment Promotion Law and local rules afford protection to employees in general and therefore apply in the non-discrimination context. An employer can face the following if it engages in prohibited discrimination or violates protections for employees afforded under the Labor Law or regulations:

- The government may stop or order rectification of the violating acts;
- The employee or potential employee may bring a claim for unlawful discrimination;
- The employer must compensate its disabled employees for harm caused to them by the employer's rules or regulations that violate relevant legislation; and/or

- The employer must be punished in accordance with law for infringing lawful rights and interests of employees.

### *Specific Liability For Violation Of The Rights Of Legally Protected Groups*

- (i) Violation of Protections for, or Discrimination Against, Disabled Employees

The Law on Protection of the Disabled provides enforcement and penalty mechanisms in addition to those provided under the Labor Law:

- Article 64 gives a disabled person the right to take an employer to court or to ask the government to handle a situation where the employer engages in discrimination.
- Article 67 provides for criminal penalties in certain extreme cases.

- (ii) Female and Minor Employees

Under the Regulations for the Monitoring of Labor Protection, the labor administration in charge may order rectification and impose a fine of up to RMB 5000 if an employer arranges for a female employee to engage in certain types of work prohibited by law.

In addition to the above, violations of the Child Labor Regulations may result in penalties including fines; revocation of the employer's business license; liability for all medical and living expenses if minors become ill or are injured; compensation to the minor's direct relatives if the minor dies or becomes handicapped, in accordance with national

occupational injury insurance regulations; and/or criminal penalties in accordance with the PRC Criminal Law.

### 3.3. Practical Advice To Employers On Avoiding Employment Discrimination Problems

Employers should ensure that their contracts, policies, and practices are in accordance with both national and local legislation concerning non-discrimination and protections for the disabled, women and children. Senior management is advised to make sure that their written policies - such as employee handbooks - reflect the legal rules and that management teams realize and observe the relevant requirements. Depending on the local rules and practice, contracts and policies may have to be pre-approved, certified by local authorities, or recorded with local authorities.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment And Employee Remedies For Sexual Harassment

The Women's Right Law as amended in August 2005 explicitly prohibits sexual harassment. Article 40 specifically provides that the "sexual harassment of women is prohibited, and the victim is entitled to complain to her employer and the relevant government bodies."

While Article 40 presents a step toward protecting women in China from sexual harassment, it is not very specific and far from sufficient to fully protect a woman's rights to equality, freedom from discrimination and personal dignity and reputation. Article 40 does not define what types of behavior are considered to be sexual harassment, nor does it specify the punishments for sexual harassment. Thus, even though the Women's Rights Law provides that a victim of sexual harassment can use the courts to seek administrative punishment or civil liability against her harasser, in reality the lack of detailed provisions makes it difficult to successfully prosecute a claim of sexual harassment.

Having said that, some local regulations also prohibit sexual harassment. For example, the Shanghai Women's Rights Measures contain provisions prohibiting five types of sexual harassment (i.e., verbal harassment; written harassment; image harassment; and electronic message harassment) and the Measures also provide for certain punishments for those who have engaged in sexual harassment. Claims so far have mainly been made by individual plaintiffs against colleagues, rather than against employers of the plaintiffs and defendants.

#### 4.2. Potential Employer Liability For Sexual Harassment

The national Women's Right's Law does not specify whether employers (as opposed to the individual harasser) are also liable in the case of sexual harassment. However, some local regulations, such as the Shanghai Women's Rights Measures, specify that employers are responsible for setting up a system to prevent sexual harassment and allow female employees to submit complaints about harassment. Therefore, under these local measures, employers can also face liability if they have taken insufficient measures to protect female employees from sexual harassment.

#### 4.3. Practical Advice To Employers On Avoiding Sexual Harassment Problems

In light of the fact that employers may face liability for harassment, employers should provide training to employees about sexual harassment, and establish a system under which female employees feel free to submit complaints of harassment and feel confident that the company will take action against such harassment. They should also adopt company rules and policies prohibiting sexual harassment that give the company the right to take disciplinary action, up to and including termination, in the event an employee engages in sexual harassment.



## Colombia

### 1. Introduction

In Colombia, the Labor Code (Law 141, enacted in 1961) regulates private employment relations within the principles and guidelines established in Articles 25, 53 and 54, among others, of the 1991 Constitution. The Labor Code develops the principles to be applied in labor relations, which may be of an individual (labor agreements, vacations, social security, etc.), or of a collective (association rights, collective bargaining, etc.) nature.

Most of the employment issues are dealt with in the employment legislation, which sets forth minimum standards. Collective bargaining agreements increase these standards, and become mandatory for the respective sector or industry. These minimum standards leave little space for individual agreements.

The 1991 Constitution prohibits discrimination against anyone by reason of age, skin color, gender, religious beliefs, or political opinions. In particular, Articles 25 and 334 provide that work is a right and a social obligation, entitled to special protection from the State, and establishes the duty of the State to intervene in such a way that employment is guaranteed to the fullest extent possible.

As a result, Colombian labor legislation is generally favorable to employees. Laws such as Law 100, 1993, Law 50 of 1990 and Law 797, 2003 have enforced constitutional principles by providing mechanisms that assure equity within labor relations, and by amending and updating dispositions contained in the Labor Code to cover the current world and national context.

Law 789, 2002 reformed the Labor Code in subjects such as the payment of indemnities (severance) upon unilateral termination or dismissal by the employer. However, what constitutes just cause for purposes of unilateral termination by either of the parties has not changed, nor have the means of terminating labor agreements.

## 2. Termination

### 2.1. Termination Indemnities

The Labor Code establishes that a labor agreement may be terminated by the unilateral decision of any of the parties with or without a proven just cause. The labor agreement can also terminate by mutual consent. The Colombian Labor Law does not require a notice period to the employee regarding the date of the effective termination of the employment agreement, except for terminations for just cause, as set out below.

Irrespective of the cause for termination, employers must pay employees all outstanding mandatory amounts due to the employee immediately upon termination. Such amounts vary depending on the kind of salary agreed between the parties. Colombian labor law allows two types of salary arrangements: 1) the so-called traditional structure, under which salary and social benefits are paid separately; and 2) the so-called integral salary structure, under which the mandatory benefits are already deemed to be included pro-rata in the monthly salary payments.

The integral salary must be agreed upon in writing and it is only applicable to employees earning more than 13 minimum legal monthly salaries. The minimum monthly integral salary was COP 6.962.800 for 2011. Upon termination of employment, employees in the traditional salary structure are entitled to the following minimum legal benefits: pending salaries, unemployment aid, interest on unemployment aid, semester bonus, and pending vacations. Employees under the integral structure salary would only be entitled to pending salaries and vacations.

However, depending on the employee's case, additional payments may arise at the termination of employment, including:

- (a) Extralegal benefits owed;

- (b) If employment is terminated without just cause, a severance for dismissal would have to be paid and, in the case of termination by mutual consent, it is a common practice to recognize a settlement bonus and additional extralegal benefits;
- (c) If the employee was never a part of the social security system, the employer would have to recognize pension payments plus moratorium interest and health expenses;
- (d) The failure to pay salary and social benefits can also generate a delayed payment indemnity after termination of employment if payment has not taken place, equivalent to one day of salary per each day of delay for a period of 24 months. If payment is not made after 24 months, moratorium interests shall apply at the maximum rate defined by government authorities. The salary and social benefits are certain and indisputable rights of the employees, and therefore they cannot be waived; and
- (e) If the unemployment aid was not deposited in an unemployment aid fund by the dates required by law, the employee subject to ordinary salary would be entitled to an additional indemnity. This indemnity is equivalent to the payment of one day of salary for each day of delay in the deposit of the accrued unemployment aid, counted from February 15 of each calendar year, up to the date of termination of employment or until the date of the deposit, whichever occurs first. The failure of the employer to pay interest on unemployment aid on a timely basis requires that the payment of the interest be calculated at a rate of 24 percent of the severance aid.

It is important to point out that the obligation to pay the failure indemnities is not automatic. The employer's behavior or reasons for not paying the social benefit must be considered by the judge and ultimately qualified as "bad faith". The decision will depend on the

judge's criteria when evaluating whether the employer acted in good or bad faith, which is a subjective matter. The employer has the burden of proving that it acted in good faith; that the failure to pay was not an intentional act to avoid the law and that there were legitimate reasons for not making the unemployment aid deposit.

There is no uniform position in Colombian courts concerning what is considered to be "good faith"; similar cases have been evaluated differently. There have been cases in which companies have been acquitted and other cases where a similar argument has resulted in an employer receiving an automatic judgment against it for the failure indemnity.

The statute of limitations for labor matters is three years; the employee's right to claim payment of unemployment aid, interest on unemployment aid and failure indemnities is three years from the date in which the obligation becomes due. A simple claim by the employee, which is received by the employer, making reference to the payment owed, delays the limitation period once, and the three years commences again as of the date of the employee's claim.

In all terminations the employer must deliver the following retirement documents to the employee: (i) labor certificate indicating date of entry, type of agreement, last salary earned and date of termination, (ii) an order for the medical retirement exam; (iii) the final liquidation of separation benefits (including the legal indemnity for dismissal, if applicable); (iv) an order to cash the amounts accumulated for unemployment aid on the unemployment fund; and (v) copy of the written records of the payment vouchers of social security quotations and payroll taxes, performed in favor of the employee during the last three months of services. If the vouchers for the last month of services arrive one month late, the employer must send them to the former employee's home address through certified courier.

## 2.2. Legal Reasons To Terminate The Employment Agreement

The law varies depending upon the motives for ending the labor agreement. The most common motives are as follows:

### *Termination Of Employment With Just Cause*

Just causes for terminating a labor agreement unilaterally are those established by Article 7, Decree 2351, 1965, or those offences of the employee defined by the employer as grave actions that give rise to dismissal (such offences are usually provided in the work regulations, in the labor agreement or any other labor regulation). Just causes must be stated in writing at the time of termination, employers cannot invoke other causes later.

When the labor agreement terminates with just cause, the party that makes the decision is not legally obliged to pay an indemnity for dismissal. Depending on the case, termination of employment with just cause must be handled with care and might require a previous special proceeding or further consideration with labor attorneys. Employers must have serious evidence to demonstrate the just cause, and should keep all the documents necessary to support their decision in the event of a judicial claim. The employer will have to prove the reasons for termination while the employee only has to inform the judge that the just cause did not exist.

The following are the just causes stipulated in the Colombian Labor Code for termination of employment that can be invoked by the employer:

- (a) When the employee has deceived the employer, presenting false certificates for his admission or for the purpose of obtaining an improper advantage.
- (b) Any act of violence, insult, bad treatment or serious insubordination on the part of the employee, during his work,

against his employer, members of the latter's family, the directive personnel or fellow workers.

- (c) Any serious act of violence, insult or bad treatment by the employee, outside of work hours, against the employer, members of his family, or against his representatives or partners, shop foremen or watchmen.
- (d) Any material damage willfully caused to buildings, works, machinery, raw materials, instruments and other objects connected with the work, and any grave negligence that endangers the security of persons or things.
- (e) Any immoral or wrongful act committed by the employee in the workshop, establishment or place of work, or in the development of his duties.
- (f) Any grave violation of the obligations or special prohibitions imposed upon the employee, in accordance with Sections 58 and 60 of the Labor Code, or any serious offense or fault classified as such in pacts, collective agreements, arbitration awards, individual labor agreements or work regulations.
- (g) The imprisonment of the employee for more than 30 days, unless he is subsequently acquitted, or his correctional arrest for more than eight days, or even for a lower period, when the reason is sufficient in itself to justify the termination of the labor agreement.
- (h) When the employee reveals technical or commercial secrets of the employer or discloses matters of a reserved nature that harms the employer.
- (i) Deficient work in relation to the capacity of the worker, and to the average yield in analogous work, when not corrected within a reasonable time, notwithstanding notification duly given.

- (j) The systematic non-performance on the part of the employee, without any valid reason, of his contractual or legal obligations.
- (k) Any vice of the employee that disturbs the discipline of the establishment.
- (l) The systematic failure of the employee to accept the preventive, prophylactic or curative measures prescribed by the employer's physician or by the authorities to avoid diseases or accidents.
- (m) The ineptitude of the employee to perform his work.
- (n) The discovery that a retirement or disability pension is being paid to the employee, whilst at the service of the employer. This just cause can be alleged immediately or in the future. The Supreme Court has declared that immediate termination after knowing the pension status of the affected employee is not required and that the employer does not lose its right if it fails to allege it immediately. The law establishes that there must be express recognition of the pensioner status and that the employee should also be receiving effective payment from the system.
- (o) Any contagious or chronic disease of the employee, not of a professional nature, as well as any other disease or wound that means that the employee cannot work for over 180 days. However, the dismissal of the employee for this reason may only be effective upon expiry of the period mentioned, and does not exonerate the employer from the obligation to pay the legal and contractual benefits and indemnities arising from the sickness. In practice, if the employer decides to terminate the employment agreement unilaterally, it can face judicial actions since the Constitutional Court has widely established that employees suffering from illness, physical disabilities or health problems, regardless of the origin, enjoy special

protection by way of immediate application of the Constitution and rules of legal order, through the so-called integrated regulatory system. In this sense, there is strengthened job security for people with physical disabilities.

In the circumstances set out at (i) to (o) above, in order to be able to terminate the labor agreement, the employer must give the employee advanced notice of no less than 15 days. Be aware that the employer must not fail to comply with this notice requirement under any circumstance.

In some cases, special procedures have been established by law to terminate unilaterally a labor agreement with cause. For example, Article 2 of Decree 1373/1996 stipulates that in order to terminate the labor agreement with just cause due to an employee's unsatisfactory performance, the employer must send two formal written notices to the employee, twice, separated by eight business days. Such notices must indicate the reasons why the employer considers that the employee's performance is inadequate. Failing to follow this procedure can lead to claims for not complying with due process.

### *Termination Of Employment Without Proven Just Cause*

When an employer terminates a labor agreement without the existence of a proven just cause, the employer is obliged to notify the employee of its decision and pay the corresponding legal indemnity. In order to have appropriate evidence, and for probationary purposes, this notification should be made in writing. From a legal point of view, no special format has to be followed and no minimum prior notice is required.

If an employee is terminated without one of the proven just causes expressly set forth in the law, the employee is entitled to an indemnity for unilateral termination by the employer. The amount of this indemnity varies depending on the salary level of the employee and the duration of his/her labor agreement.

For agreements entered into for an indefinite term, the severance applies as follows:

- (i) For employees who earn less than ten minimum legal monthly salaries (for 2011, COP 5.356.000), the indemnity is equivalent to 30 days of salary for the first year of service and 20 additional days of salary for each additional year of service and proportionally for fractions of the year.
- (ii) For employees who earn ten minimum legal monthly salaries or more, the indemnity is equivalent to 20 days of salary for the first year of service and 15 additional days of salary for each additional day of salary for each additional year of service and proportionally for fractions of the year.
- (iii) For employees who had more than ten years of service as December 27, 2002, the indemnity is equivalent to 45 days salary for the first year of service and 40 additional days of salary for each year subsequent to the first and proportionally for fractions of the year.
- (iv) For employees who had 10 or more years of service on December 31, 1990, who have not waived their right to reinstatement action, the indemnity is equivalent to 45 days for the first year of service and 30 additional days of salary for each year subsequent to the first, and proportionally per fraction of year.
- (v) For agreements entered into for a fixed period of duration or for the duration of a specific job, the indemnity is equivalent to the salaries corresponding to the unexpired period of the agreement, but in the case of agreements for the duration of the job, the indemnity cannot be less than 15 days salary.

Historically, this legal indemnity has been considered as a complete payment to compensate the employee for his/her condition of unemployment. Nonetheless, the Colombian Constitutional Court

stated that the amount of the legal indemnity recognized for wrongful termination of the labor agreement was not a definite or final payment and that employees could file a complaint pursuing an additional indemnity if they proved further damages caused by the unilateral termination of employment.

Although no lawsuits have been filed as a consequence of this controversial decision, it appears that labor judges will follow traditional rules of liability in order to determine the existence of an additional detriment. Under this scenario, the employee will have to demonstrate, among other things, the existence and value of the damage, and the relation between dismissal and damage, which is very difficult to prove in normal circumstances. Nonetheless, as a consequence of this decision, every dismissal carries the high risk of a lawsuit, with all its representation and administrative costs.

#### *Termination By Mutual Consent*

The employment agreement may also be terminated by mutual consent. Formalizing the agreement with a private transaction agreement or a public settlement agreement is advisable. These agreements include the employee's consent in writing to the termination, and the execution of a final full release and settlement agreement. If they are subscribed before a labor court or labor inspector in Colombia, they are deemed public.

By means of a settlement agreement, the employee fully releases the employer from any labor-related judicial claim with the effect of *res judicata*, which means that any future claim from the employee for facts related to the labor relationship that was terminated by mutual consent would have to be dismissed by a Labor Judge if all minimum labor rights were duly paid.

If the parties terminate the labor agreement by mutual consent, the employer is not obliged to pay an indemnity for unilateral termination (because there would not be a dismissal). In this event, the employer is only obliged to pay social and termination benefits. However,

under certain conditions it might be reasonable to offer a retirement bonus to the employee, which might be equivalent to the indemnity for dismissal. Such sum is denominated as a settlement bonus in the termination agreement for purposes of identifying it as any sum or benefit not paid to the employees during the course of the labor relationship due to an involuntary omission. In any case, the employer has the right to pay additional benefits at its sole discretion to further motivate the employee to provide his or her consent to the mutual consent arrangement.

In this event, written notice of termination is not necessary. The parties sign the private agreement or the settlement agreement before the labor authority, and the employer delivers the retirement documents.

### *Restrictions On Employers*

There are certain circumstances in which the employer cannot freely terminate employment agreements using the rights granted in Colombian regulations. Those circumstances include, but are not limited to: (a) collective dismissal; (b) the right for reinstatement for those workers who by January 1, 1991, had more than ten years of service under the same labor agreement; and (c) where prior authorization from the Court or the Ministry of Social Protection is required for certain special protected employees (i.e., pregnant women, founders of a union, members of the board of directors or the claims committee of a union, disabled employees, and labor harassment claimers).

Unless the employer has a strong legal cause to terminate privileged employees, the employees can seek reinstatement to their current job position. In practice, this means that termination of the employees must be sought through a settlement agreement under which termination takes place by mutual consent.

For example, the voluntary reorganization of the employer's business is not deemed a legal just cause for termination of employment, thus

the collective dismissal of employees requires the prior clearance from the Ministry of Social Protection. The employer must continue employing the employees and pay their wages and other labor benefits until such clearance is obtained.

The Ministry of Social Protection, in practice, does not grant such authorization without first thoroughly examining the claim, so as to be certain that the reorganization is supported by the facts and that the employer has been complying in full with all labor obligations during the last three years. Ordinarily, even if the documentation is properly submitted, this is not a “beneficial” decision from a political point of view because the Ministry can take more than six months to approve the collective discharge.

Once permission from the Ministry of Social Protection is granted, the employer would be legally authorized to unilaterally terminate the employees and would only have to pay to the employees’ mandatory indemnity obligations resulting from termination. No extralegal or other settlement benefits need to be recognized, and the employment agreements can terminate with a simple notification letter. If the Company or the employer has an endowment of less than one thousand times the minimum legal salary, the amount of the legal indemnity can be reduced to 50 percent of the amount mentioned under the rules for termination of employment without proven just cause above.

Employees with special privileges, that is to say employees who cannot be dismissed without just cause, preserve their legal protection if the employer maintains active positions or business units functioning in which those employees could perform their work, even if there is permission from the Ministry of Social Protection to proceed with collective dismissal. Employees with special privileges include those with union privilege, those with maternity privilege, the seriously ill, disabled employees, and those with the right to exercise the reinstatement action (in this last case, workers who by January 1, 1991, had more than 10 years of services under the same labor agreement). The Supreme Court of Justice has established that such

legal protection is not applicable when the employer closes down its operation in a permanent way with permission of the Ministry of Social Protection, taking into account that it is physically impossible to reinstate the employee because no job positions are available.

### 2.3. Laws On Separation Agreement, Waivers And Releases

The advisable way to terminate the employment agreement is by mutual consent, with ratification of the termination agreement in a public settlement hearing before the Labor Court and payment of a retirement bonus to the employee.

After the termination of the employment agreement by any reason (with or without just cause), it is also possible to execute a settlement agreement before a labor competent authority to obtain a full release of the employer's liability.

In Colombia any person has the right to file a claim, even if termination of the employment was formalized by means of a settlement agreement and the Ministry of Social Protection authorized the dismissal. A labor judge would have to study and resolve the case. However, where the employees have signed settlement agreements, the probability of seeing a judicial complaint is much more remote. According to existing judicial rulings, the claim should be dismissed if the settlement agreement was duly executed.

Unilateral dismissal may leave the door open for a claim related to moral and economic damages caused by termination. The Colombian Constitutional Court has allowed those kinds of claims when employees prove that their unemployment has caused them serious damages. Even though these claims are not common, and it is difficult for the employees to prove the damages, these trials can be long and expensive.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

Colombian legislation provides that if an employee is affected by discriminatory actions and is harmed in his/her fundamental rights, he/she can use an extraordinary action called a “Tutela action,” which provides a speedier mechanism for the protection of the fundamental right. The Law does not mention a list of discriminatory actions or affected subjects, except for older workers or disabled individuals.

The interest shown by employers in avoiding discriminatory actions has become so significant that in 2002, Law 789 was enacted to create a special regime of payroll taxes to stimulate the recruitment processes of certain segments of the population (i.e., single mothers or disabled persons).

In addition, Law 931 of 2004 prohibits employers from having any regulation, policy or agreement limiting the participation of older people in a recruitment process or violating their right to equality and work. From an evidentiary point of view, it is difficult for an employment candidate to prove that a private company has discriminated based on the candidate’s age.

Law 1429, enacted in 2010, establishes several incentives to employment generation. According to this Law, employers that hire new employees under the age of 28, displaced people, individuals in reintegration processes, people with disabilities, and women over 40 years old who have not been employed during the previous 12 months, can take several labor payments corresponding to the new jobs, as a tax discount for determining income tax and supplementary taxes.

Such legislation encourages employer companies to hire employees based upon their work or academic capacities and experience, excluding any requirement based on their physical qualities (such as youth).

### 3.2. Employee Remedies And Potential Employer Liability for Employment Discrimination

Employers should be careful when recruiting. For example, when drawing up organizational charts and creating job profiles, employers should take into account older applicants who are still in good physical condition, possess traits to join the job market, the maturity to handle specific situations and the knowledge and skills to perform certain activities.

In recruitment, it is important to bear in mind that according to Law 13, 1972, employers cannot ask the employee about marital status, number of children, religion or political party. Also, according to Decree 2150, 1995, the employer cannot require a military certificate and, pursuant to the rulings of the Constitutional Court, an AIDS exam (and other serious illness exams) cannot be required for a job. As mentioned before, in any of these cases, the affected individual may use the so-called Tutela action, to assure a due process and prevent discriminatory actions in the recruitment procedure.

## 4. Sexual And Labor Harassment

### 4.1. Laws On Harassment

The Colombian Congress issued Law 1010, effective since 2006, which prevents and penalizes conduct that would constitute labor harassment within the execution of public and private labor relationships.

Labor harassment is defined as: “all persistent and confirmable conduct, exerted on an employee worker by an employer, an immediate or mediate hierarchic head or superior, a fellow employee or a subordinate, directed to inspire fear, intimidation, terror and distresses, to cause labor damage, to undermine the employee, or to induce the resignation of the same one.”

According to Law 1010, labor harassment can take place through various means such as labor mistreatment, persecution, discrimination, obstruction, inequity and lack of protection.

The Law identifies several types of conduct that constitutes labor harassment, along with extenuating and aggravating conduct. It also provides two types of mechanisms to tackle the conduct that constitutes labor harassment: (i) preventive, and (ii) corrective. Employers must adopt an internal, confidential, effective and conciliatory procedure to deal with harassment conduct that can occur in the workplace. The law establishes some guarantees that exist against revengeful acts that can take place against those who make the complaint or act as a witness.

Although these legal provisions can help to create a healthier employment atmosphere and its purpose is valid, they can also become an obstacle for the development of the labor relationship. Harassment, for example, can be subject to multiple interpretations. Perhaps the emerging case law will clarify the situation.

#### 4.2. Employee Remedies And Potential Employer Liability For Harassment

When a case of labor harassment occurs, the employer should respond immediately. Employers should adopt and apply policies to comply with Law 1010. Internal mechanisms and policies must be drafted in such a way that they seek to maintain relations based on dignity and respect.

For the government, and specifically for the Ministry of Social Protection, this law is an invitation to look forward to a healthier labor atmosphere. The private sector, on the other hand, sees the norm with distrust, believing that it can represent a clear limitation of the employers' ability to instruct their employees, thus obstructing the employers' day-to-day operations. In any event, employers must create a suitable environment to listen to employees regarding the adaptation of the internal work regulations.

Sexual harassment is not a well developed concept in Colombia. No case law exists that develops and explains the mechanisms that may be adopted for this type of conduct. Furthermore, no regulation of sexual harassment has been issued.

If moral or physical damages are caused by conduct such as sexual harassment, the affected individual can sue the perpetrator, but the legal process could take a long time to be resolved. If the affected individual takes criminal action, the perpetrator would be solely responsible for those damages. The employer company would not be liable, unless the affected individual claims labor harassment and it is proven, before the labor authority, to be the employers' responsibility.



## Czech Republic

### 1. Introduction

The Czech Labor Code (Act No. 262/2006 Coll.) (“Labor Code”) came into effect on January 1, 2007, and currently constitutes the principal legislative act governing employment relationships in the Czech Republic. Significant changes of the Labor Code became effective on January 1, 2012.

Most of the provisions in the labor legislation are mandatory, and they safeguard observance by employers of the most important principles, such as the principle of equal treatment and the prohibition of discrimination. On the other hand, the Labor Code respects the freedom of contract of the parties and, thus, employment relationships may be altered by provisions of the employment agreement provided that the basic rights and working conditions of the employees set forth in the Labor Code are observed. This applies, particularly, to the termination of an employment relationship.

### 2. Terminations

Under the Czech Republic Labor Code, an employment relationship may be terminated:

- By agreement;
- By notice of termination;
- By immediate cancellation; or
- By termination during the probationary period.

An employment relationship agreed upon for a fixed term also terminates with expiry of such fixed term.

An employment relationship with a foreigner also terminates:

- On the day when the foreigner's residence in the territory of the Czech Republic or his/her work permit is to end (if such permit is required);
- On the day when a sentence imposing punishment of expulsion from the territory of the Czech Republic takes legal effect; or
- By expiry of the term for which the work permit was issued (if such a permit is required).

#### *Termination by Agreement*

If an employer and employee agree to terminate the employment relationship, the employment relationship ends on the agreed upon day. The agreement to terminate an employment relationship must be made by the employer and employee in writing (otherwise it is invalid). The employer and the employee must each receive one copy of the termination agreement.

#### *Termination by Notice*

Either an employer or an employee may terminate an employment relationship by a notice of termination. The notice of termination must be given in writing and delivered to the other party; otherwise it is invalid.

An employee may serve a notice of termination upon an employer for any reason or without giving any reason.

##### (i) Notice Period

If a notice of termination has been given, the employment relationship ends with the expiry of the notice period. The notice period is a

minimum of two months for both the employer and employee. Generally, the notice period begins with the first day of the calendar month following delivery of the notice of termination and ends with the last day of the appropriate calendar month. A notice of termination that has been delivered to the other party may only be revoked with that party's agreement. Revocation of a notice of termination and agreement with its revocation must be executed in writing.

(ii) Reasons for Termination

An employer may give an employee a notice of termination only for reasons explicitly stated in Section 52 of the Labor Code. Grounds for termination must be specified in the notice in such a way that they are not interchangeable with other reasons (otherwise the termination is invalid), and the reasons for termination may not be subsequently changed. Section 52 of the Labor Code sets out the following reasons for termination of an employment contract by an employer's notice (letter references are identical to the Labor Code):

- (a) If the employer or a portion of the employer's organization is dissolved;
- (b) If the employer or a portion of the employer's organization is relocated;
- (c) If the employee becomes redundant because of a decision by the employer to change the employer's tasks or technical set-up, to reduce the number of employees for the purpose of raising work productivity, or to make other organizational changes;
- (d) If the employee cannot (based on a doctor's opinion issued by a facility of labor-medical care or based on a decision by a relevant State administration authority that revises the doctor's opinion) continue to perform his or her previous work due to a work injury, occupational disease or due to

being threatened by this disease, or if the employee has reached the highest allowable exposure at the work place determined by a binding expert opinion of the appropriate health service authority;

- (e) If the employee has lost, on a long-term basis, the ability to continue to perform his/her previous work because of health condition (based on a doctor's opinion issued by a facility of labor-medical care or based on a decision by a relevant State administration authority that revises the doctor's opinion);
- (f) If the employee does not meet the qualifications stipulated by statutory provisions for performance of the agreed-upon work or, through no fault of the employer, does not fulfill the requirements for proper performance of this work; if the failure to fulfill these requirements takes the form of unsatisfactory work results, the employee may be given a notice of termination only if he/she was called upon in writing by the employer within the previous 12 months to eliminate such deficiencies and the employee did not do so within a reasonable period;
- (g) If there are reasons for which the employer could immediately cancel the employment relationship with the employee, or if there is a serious breach of obligations arising from legal regulations relating to work performed by the employee; for ongoing but less serious breaches of legal regulations relating to work performed by the employee, the employee may be served with a notice if, during the previous six months in connection with this breach of obligations arising from legal regulations relating to performed work, he/she was notified in writing of the possibility of being given a notice of termination; and

- (h) In case of violation of regime of temporarily unfit-for-work insured person in especially gross manner (termination notice for such violation must be served to the employee within 1 month from the date of learning of the violation; however, at the latest, within 1 year from the date when such reason for termination notice occurred).
- (iii) Prohibition to Serve Notice of Termination

An employer may not serve a notice of termination during the following “protected periods;” however, during such protected period it is not prohibited from concluding an agreement on termination of employment with an employee:

- During a period when the employee is designated as temporarily incapable of work (if the employee did not bring about this incapability intentionally or if such incapability did not arise as an immediate result of a state of inebriation or addictive drug abuse), and during the period from when a proposal for institutional treatment is submitted or from the date of commencement of rehabilitative treatment to the day when such treatments are completed (this period is extended for six months after discharge from the institutional treatment in the event of tuberculosis);
- During a period when the employee has been provided with a long-term leave of absence to serve in a public office or during the period of the employee’s military service or exceptional military service (from the date of receipt of the order to serve until the expiry of two weeks from termination of the service);
- During a period when the employee is pregnant, on parental or maternity leave; or

- During a period when the employee (if he/she works at night) is declared, on the basis of a medical expert's opinion issued by a facility of labor-medical care, to be temporarily unfit for night work.

There are special exemptions available from this "protection," e.g. in case of gross misconduct or cancellation by the employer.

### *Immediate Cancellation*

#### Immediate Cancellation by Employer

An employer may immediately cancel an employment relationship only exceptionally and only in the following cases:

- If the employee was sentenced for an intentional crime to an unconditional prison term of at least one year and such sentence is final, or if the employee was sentenced to an unconditional prison term of no less than six months for an intentional criminal act committed in the course of performing his/her work tasks or in direct connection therewith and the sentence is final; or
- If the employee breached obligations arising from legal regulations relating to work performed by him or her in an "especially gross manner."

Special rules apply to this type of termination.

As a practical matter, unless the employee clearly breaches obligations arising from legal regulations relating to work performed by him/her (e.g., regularly appears at work intoxicated, or steals or continuously fails to follow the instructions of his/her superiors), it is often difficult to meet the standard that an employee has breached obligations arising from legal regulations relating to work performed by him or her "in an especially gross manner." Moreover, the definitive answer to the

question whether the standard of “especially gross manner” was met can only be given by the relevant court deciding on a particular case.

### Immediate Cancellation by Employee

An employee may immediately cancel an employment relationship if:

- According to a doctor’s opinion issued by a facility of labour-medical care or decision of relevant State administrative authority that revises a doctor’s opinion, he/she cannot continue to perform work without serious threat to his/her health and the employer did not allow such employee, within 15 days of submission of this opinion, to transfer to other suitable work; or
- The employer did not pay the employee wages or compensation for wages or any part thereof within 15 days after the date when payment was due.

### *Termination of a Fixed-Term Employment Relationship*

A fixed-term employment relationship ends with expiry of the employment term. If, after expiry of the fixed term, the employee continues to carry out work and the employer is aware of it, such employment relationship shall change to an employment relationship agreed for an indefinite period, unless the employer agrees otherwise with the employee. A fixed term employment relationship may also be terminated in any of the four ways set out above in the paragraph regarding termination of employment.

### *Termination of an Employment Relationship during the Probationary Period*

During the probationary period, either an employer or employee may terminate an employment relationship in writing for any reason or without giving a reason. Written notice of termination of the

employment relationship should be delivered to the other party (as a rule at least three days before the date when the employment relationship is to end). The employer, however, cannot terminate the employment relationship during the first 14 days of the employee's illness and during the first 21 days of the employee's illness during the period of January 1, 2012 until December 31, 2013.

### 2.1. Trade Union Involvement

Trade Unions participate in termination of employment relationships under the following circumstances:

- An employer is required to discuss a notice of termination or immediate cancellation in advance with the competent Trade Union body;
- 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 prior consent of the competent Trade Union body before serving a notice of termination to such employee. The Trade Union is deemed to have consented to such termination if it did not refuse in writing to grant its consent to the employer within 15 days of receiving a request. The employer may make use of such consent within two months from the day it is granted;
- If the competent Trade Union body refuses to grant its consent under the conditions stated above, the notice of termination or immediate cancellation is generally deemed to be invalid. However, if other conditions of termination or immediate cancellation are met and if a court determines that it would be unjust to require the employer to continue to employ the employee, termination or immediate cancellation would be valid; and

- An employer is also required to notify the Trade Union in those circumstances as agreed between the employer and the Trade Union.

Special rules may be agreed upon in the collective bargaining agreement.

## 2.2. Mass Redundancy

Mass redundancy is defined as termination of employment relationships within a given 30 day period on the basis of termination notices served by the employer under Section 52 (a), (b) and (c) of the Labor Code of at least:

- 10 employees of an employer that employs from 20 to 100 employees;
- 10 percent of employees of an employer that employs from 101 to 300 employees; or
- 30 employees of an employer that employs more than 300 employees.

If termination of at least 5 employees occurs based on a termination notice served by the employer during the above 30 calendar day period (i.e., the last date of the employment is decisive) for redundancy reasons (Section 52 (a), (b) and (c) of the Labor Code), any termination based on a mutual agreement concluded between the employer and the employee with the termination date in the relevant 30 calendar day period is counted towards the threshold of collective dismissal.

Special rules and proceedings apply for any mass redundancy, including various information and consultation requirements towards employees and employee representatives and the Labor Office. This procedure is more time consuming and administratively demanding, and is also, in most cases, more expensive.

### 2.3. Severance Payments

Provided that the reason for termination (by agreement or notice) is one of those stated in Section 52 (a) to (c) of the Labor Code, an employee is entitled to severance payment in the following amounts:

- one multiple of his or her average monthly earnings, if the employment relationship lasted for a period of less than one year;
- two multiples of his or her average monthly earnings, if the employment relationship lasted for a period of at least one year, but was less than two years; or
- three multiples of his or her average monthly earnings, if the employment relationship lasted for a period of at least two years.

For these purposes the above stated time periods also include previous employment relationships of the employee with the employer, if the period between the termination of the previous employment relationship and the commencement of the following employment relationship did not exceed six months.

Provided that the reason for termination (by agreement or notice) is the one stated in Section 52 (d) of the Labor Code, the employee is entitled to twelve months' severance pay.

However, a higher severance payment amount may be agreed upon in the collective bargaining agreement or the employer's internal regulations or in the employment contract. Additional conditions for payment of the increased severance payment may also be agreed upon.

### 3. Other Comments

It is necessary to review, in detail, the entire employment documentation of each employee to be dismissed and the collective bargaining agreement (if any) and internal regulations of the employer (if any) in order to:

- Check whether any protection against dismissal applies;
- Identify the employee's position in the employment documentation as well as the organizational structure of the employer;
- Check the powers of attorney and authorizations granted to the employee in order to properly cancel them;
- Check the assets and values provided to the employee;
- Check whether there is any pending or threatening dispute with the employee (e.g., harassment, discrimination, etc.);
- Check outstanding entitlements and liabilities and vacation (outstanding unspent vacation must be paid out upon termination);
- Check whether there were any investment incentives provided by the employer and what were their conditions (e.g., continued employment of a certain number or type of employees);
- Check the bonus plan (stock option plan) or similar arrangements in which the employee participates and any related entitlements of the employee;
- Check whether or not a non-competition agreement was concluded with the employee; and

- Also check whether the employer implemented any Sickness Policy that grants employees continued full pay in case of sickness and consider its cancellation to reduce potential costs of dismissals.

## France

### 1. Introduction

Employment relationships in France are highly regulated, in particular with regard to termination of employment. The main sources of law that govern employment relationships are the Labor Code, collective bargaining agreements, and case law of the French Supreme Court (“*Cour de Cassation*”). In addition to the mandatory rules resulting from these various sources of law, employment relationships are also ruled by Internal Regulations (“*Règlement Intérieur*”) that may (or must for companies employing at least 20 people) be in effect within a company, custom and usage in a company, and individual employment contracts.

According to the principles of private international law set forth in the Rome Convention of June 19, 1980, absent a different, express choice of law by the parties to an employment contract, French Labor law generally applies where an employee usually carries out his/her duties in France, notwithstanding the nationality of either the employer or the employee. Even in cases where a different law has been chosen in the employment contract, the Rome Convention provides that such a choice cannot result in depriving employees of the protection afforded by the mandatory rules of French law that would otherwise be applicable (including French Labor law provisions related to termination of employment).

### 2. Terminations

#### 2.1. Restrictions On Employers

Unless a collective bargaining agreement or the employment contract provides otherwise, an employment contract can be terminated without any restrictions (i.e., without justification or indemnities) during the probationary period. However, a minimum statutory termination notice must be complied with during the probationary period when such probationary period is at least equivalent to one week (such termination notice will be respectively 24 hours, 48 hours,

two weeks or one month when the employee has worked less than eight days, between eight days and one month, more than one month, or more than three months). Collective bargaining agreements may provide for a longer minimum termination notice during the probationary period.

The maximum duration of the probationary period is two months for clerks and blue-collar workers, three months for technicians and intermediate supervisors, and four months for executive employees (“*cadres*”). The probationary period can be renewed once if the applicable collective bargaining agreement authorizes such renewal. The applicable collective bargaining agreement or the employment contract may also provide for a shorter probationary period.

After the probationary period, an employment contract can only be terminated in certain circumstances, depending upon whether the contract is entered into for a fixed term or an indefinite term.

In principle, fixed-term employment contracts (which can only be used in very limited circumstances provided for by law) cannot be terminated before their agreed duration, and automatically expire at the end of such duration.

Upon expiry of a fixed-term contract, the employee is generally entitled to a specific “end of contract” indemnity equal to 10 percent of the total gross salary received during the entire contract. The same indemnity is also due in case of early termination of the fixed-term contract that would not be justified by gross misconduct. However, this indemnity may be reduced to 6 percent of the total gross salary received during the entire contract by a branch-level collective bargaining agreement. Such provisions are only valid if the branch-level collective bargaining agreement entitles the employees concerned to benefit from counterparts such as, in particular, a privileged access to professional training.

However, French Labor law authorizes the termination of a fixed-term employment contract before the end of the agreed duration

(“anticipated termination”): (i) by mutual agreement of the parties to the contract, (ii) for gross misconduct (“*faute grave*”) of one party, (iii) in case of “force majeure”, or (iv) at the employee’s initiative, when he/she finds an indefinite-term employment. Apart from these four situations, termination of a fixed-term employment contract is considered as a breach of contract by the terminating party, resulting, in case of dispute, in the payment of damages to the other party (the minimum amount of which would correspond to the salary normally owed to the employee until the end of his/her contract).

Regarding indefinite-term employment contracts, an employer can terminate the contract at any time, but it must be able to justify a real and serious cause of termination (“*cause réelle et sérieuse*”), and it must comply with the applicable dismissal procedure, which varies depending on the type of dismissal.

There are two major categories of dismissals based on real and serious cause: dismissals based on the employee’s behavior (“dismissals for personal/professional reasons”, such as poor performance, employee’s negligence or employee’s inability to work), and dismissals based on economic grounds (“dismissals for economic reasons”). Dismissals for economic reasons can be either individual or collective, depending on whether one or more positions are to be eliminated or significantly modified. An employer may also be considered as having “constructively” dismissed an employee if the employee refuses to accept modifications to his/her employment contract that the employer implements unilaterally.

Certain categories of workers benefit from specific protection under French law. For example, a woman on maternity leave cannot be dismissed, as she benefits during that period from an absolute legal protection against dismissal. Furthermore, during the pregnancy period and during a four-week period after the end of the maternity leave, a woman is deemed protected (called relative protection), which means that a dismissal is valid only in case of impossibility to maintain the employment contract, due to economic reasons or a gross misconduct unrelated to the maternity; a dismissal for other reasons is

deemed null and void. The dismissal of an employee representative is also subject to specific requirements, such as a Labor Inspector's authorization.

## 2.2. Dismissals For Personal/Professional Reasons

By statute, any and all dismissals must be justified by a “real and serious cause” (“*cause réelle et sérieuse*”). The French Labor Code does not provide for either a definition of the real and serious cause, or a list of situations considered as such. Rather, the content and scope of this notion has been defined by French case law. Pursuant to French case law, “real” means that the cause must be exact, accurate, and objective, and “serious” means that it must be of some significance, making it impossible for the employer to continue the employment relationship.

For example, courts have considered that dismissals were justified by a “real and serious cause” in cases of professional inability, repeated errors, refusal to follow work instructions, violation of non-competition and loyalty clauses, physical inability, and/or extended or repeated illness, although the latter cause becomes very difficult to use to support a dismissal.

In case of a dismissal based on personal or professional grounds, an employer must comply with the following procedures:

- The employer must give the employee formal notice of a pre-dismissal meeting, at least five business days before the meeting, by a hand-delivered letter against a signed release, or a registered letter with return receipt requested, indicating the purpose, date, time, and place of the meeting. The letter must inform the employee of his/her right to be accompanied by a person of his/her choice who must be an employee of the company. If the company does not have any employee representatives, the letter must further indicate that the employee could also be assisted by a third party selected from

a list prepared by the local State authorities, and indicate where this list is available;

- During the pre-dismissal meeting, the employer must indicate the reasons justifying the contemplated dismissal and listen to the employee's explanations. During the meeting, the employer must not act as if the decision to dismiss the employee had already been taken. The meeting must take place during working time;
- If the employer decides to dismiss the employee, the employee must be notified of that decision by a registered letter with return receipt requested, which can be sent at the earliest after the expiry of a minimum of two full business-days following the pre-dismissal meeting, and must be sent no later than one month after the pre-dismissal meeting in the event the dismissal is based on the employee's misconduct. The employer must state in the dismissal letter the justification for the dismissal, which must characterize a real and serious cause for dismissal. Failure to give a valid justification of dismissal in the dismissal letter will result in a dismissal without cause. Assuming that the employer decides to release the employee from his/her work obligation during the notice period, this should be stated in the dismissal letter.

### 2.3. Dismissals For Economic Reasons

Pursuant to Article L. 1233-3 of the French Labor Code, a dismissal can only be considered as "economic" if it is based on a reason unrelated to the employee, resulting from a reduction or change in the workforce or a substantial modification of the employment agreement due, in particular, to economic difficulties or technical changes. The French Supreme Court has taken a very restrictive approach in its interpretation of acceptable economic reasons.

Furthermore, employers facing such circumstances must seek, on a worldwide basis, any alternative job opportunities for the employees

concerned within both the company and the group to which it belongs, and offer professional training to these employees.

Three types of economic dismissals must be distinguished:

- An individual dismissal;
- A collective dismissal concerning two to nine employees; and
- A collective dismissal concerning at least ten employees.

A specific procedure must be complied with for each of these types of dismissals. Such dismissal procedure, which will vary depending on the importance of the economic dismissal, could be preceded (individual dismissal) or will have to be preceded (collective dismissal), by a preliminary procedure on the planned restructuring leading to such dismissals.

#### 2.4. Consultation Procedure On A Planned Restructuring

This specific procedure is mainly related to the restructuring and the economic reasons behind the dismissals (e.g., discontinuation of an activity or product) and supposes that a Works Council has been set up in a company employing at least 50 persons. Usually, two Works Council meetings are called by the company: one is for information purposes, the other for consultation purposes.

This procedure is completed only after the Works Council has rendered an opinion (non-binding on the employer) on the contemplated restructuring.

Minimum procedure:

- Notice of call to the Works Council members, along with the agenda of the meeting and an economic note on the planned restructuring indicating the cause (economic justification), the

content and the global consequences on employment of the company's restructuring;

- First Works Council meeting: information, with a possibility to appoint a chartered accountant (CA); and
- Second Works Council meeting: consultation. The employer must necessarily reply to the Works Council's opinion and comments.

If a CA has been appointed by the Works Council during the first meeting, his/her report must be communicated to the Works Council at least eight days prior to this meeting.

Potential delay and disruption:

The Works Council must be given sufficient written information with regard to the cause of the contemplated restructuring (e.g., discontinuation of an activity) and enough time to review and study the company's economic justifications.

If the Works Council considers that the company has not fulfilled its obligations in this respect, it can either refuse to render an opinion and therefore *de facto* delay the process or initiate summary proceedings before the Civil Court, which may consider that the Works Council has not been properly informed/consulted and, on that basis, could decide:

- (i) to give more time to the Works Council by fixing another Works Council's meeting;
- (ii) to ask the employer to reinitiate the procedure from the beginning;
- (iii) to suspend the procedure until satisfactory information /consultation with the Works Council.

The Works Council could also launch a specific procedure known as the “*Alert Procedure*”.

Pursuant to Article L. 2323-78 of the French Labor Code, the Works Council is entitled to request information and explanation from the management when it has been made aware of events or facts that could presumably adversely affect the economic situation of the company.

Within the scope of the Alert Procedure, the Works Council is entitled to appoint a CA (whose fees will be borne by the company), who will have access to the relevant information and documentation on the contemplated restructuring and will prepare a report to the Works Council’s attention, which can then be presented by the Works Council to the management of the company.

French law does not provide for a maximum period of time for the CA to carry out his/her mission, and the Works Council could refuse to give an opinion on the contemplated transaction before having reviewed the CA’s report. From a practical standpoint, the Alert Procedure could substantially delay the economic dismissal procedure by approximately two months.

## 2.5. Dismissal Of One Employee For Economic Reasons

The steps for dismissing one employee for economic reasons are similar to that of the dismissal for personal/professional reasons, subject to some specific additional requirements. These steps may be summarized as follows:

- The employer must send or hand-deliver a notice of a pre-dismissal meeting under the same conditions as those outlined in the dismissal procedure for personal/professional reasons;
- During the meeting, the employer must explain the reasons for the dismissal and propose to the employee: .

- Within companies with fewer than 1,000 employees, a Professional Employability Agreement (“*Contrat de Sécurisation Professionnelle – CSP*”) providing psychological assistance, professional counseling and coaching, professional abilities evaluation, and training, in order to facilitate the redeployment of the employee after his/her dismissal. Such measures are put in place by the Unemployment authorities (“*Pôle Emploi*”). The employee has 21 days as of the receipt of the information note to accept or refuse the Professional Employability Agreement. If the employee accepts the Professional Employability Agreement, the employment contract will be considered as terminated by mutual agreement between the parties as from the expiry date of the 21-day period. However, the employee will still be entitled to challenge the validity of the economic justification having led to the termination of his/her employment contract and will be entitled to a dismissal indemnity calculated according to the collective bargaining agreement applicable to the company. For the purpose of determining the dismissal indemnity, the notice period the employee would have been entitled to in the event he/she would have refused the Professional Employability Agreement is taken into account. The employer must inform the *Pôle Emploi* of the employee’s acceptance of the Professional Employability Agreement. During the Professional Employability Agreement, the employee will receive an allowance from the *Pôle Emploi*. However, the employer must pay to the *Pôle Emploi* a contribution equal to three months of the employee’s salary. In a situation where the employee would have been entitled to a four-month notice period, three months would thus be paid directly to the *Pôle Emploi* and the remaining one-month notice period would be paid normally to the employee. In

the event the company fails to comply with its obligation concerning the Professional Employability Agreement, it would be required to pay to the *Pôle Emploi* damages equal to three months of the employee's average gross monthly salary over the last twelve months.

- Within companies with 1,000 employees or more, a Redeployment Leave (“*Congé de Reclassement*”), financed in part by the employer, which purpose is to allow the employee to benefit from training measures and job search programs. The duration of such Redeployment Leave is four months minimum and nine months maximum. The Redeployment Leave takes place during the notice period that the employee is not required to perform. In the event the duration of the Redeployment Leave exceeds the length of the notice period, the end of the employment contract is postponed until the end of the Redeployment Leave. During the Redeployment Leave exceeding the notice period, the employer must continue to pay a monthly remuneration to the employee equal to 65 percent of the average monthly gross remuneration received by the employee over the last 12 months;
- The employer must send a notification of the dismissal to the employee after a minimum waiting period of seven business days (15 business days for an executive employee). The dismissal letter must: (i) explain in detail the economic reasons for the dismissal and their impact on the employee's position or employment contract, (ii) refer to the Professional Employability Agreement or Redeployment Leave and remind the employee of the remaining period of time for him/her to opt for such retraining program, and (iii) state that the employee has a right of priority for re-employment for one year after the dismissal if the company envisages to hire

employees with the same qualifications and if the employee elects to use such right of priority within a year from the end of the employment relationship; and

- The employer must notify the “*Directeur Régional des Entreprises, de la Concurrence, de la Consommation, du Travail et de l’Emploi - DIRECCTE*” (Local Labor Administration) of the dismissal within eight days following the date of the sending of the dismissal letter.

## 2.6. Dismissal Of Two To Nine Employees For Economic Reasons

In cases where an employer intends to collectively dismiss two to nine employees within a 30-day period, the procedural steps required are as follows:

- The employer must set up a list outlining objective criteria to be used for determining the order in which the employees will be dismissed (e.g., seniority, family situation, age, job qualifications, etc.);
- The employer must provide written notification to the employee representatives (Works Council or, in the absence of a Works Council, employee delegates) with all supporting documents explaining the reasons for the collective dismissal and providing sufficient details on the latter;
- At the earliest three days later, the employer must meet with the employee representatives;
- In addition to the meeting with the employee representatives, the employer must send to each employee to be dismissed a convocation letter to attend a pre-dismissal meeting, under the same conditions as those outlined in the dismissal procedure for personal/professional reasons;

- The employer must hold individual pre-dismissal meetings with each employee to be dismissed and provide him/her with the Professional Employability Agreement/Redeployment Leave (as described in the dismissal procedure for one employee);
- A minimum waiting period of at least seven business days after the meeting must elapse before these dismissal letters (drafted as described in the dismissal procedure for one employee) can be sent to each employee, and such sending must be performed by registered letter with return receipt requested;
- The employer must then notify the “*Directeur Régional des Entreprises, de la Concurrence, de la Consommation, du Travail et de l’Emploi - DIRECCTE*” (Local Labor Administration) of the dismissals within eight days following the date of the sending of the dismissal letters; and
- An employee may request the employer to provide written information on the criteria used for selection of the employees dismissed. The request must be made by registered letter with return receipt requested or hand-delivered letter against a signed release within 10 days following the employee’s effective departure. The employer’s answer must also be sent by registered letter with return receipt requested or hand-delivered letter against a signed release within 10 days following the first delivery (by the postal services) of the employee’s letter of request.

## 2.7. Dismissal Of At Least 10 Employees For Economic Reasons

In cases where an employer intends to collectively dismiss at least 10 employees within a 30-day period, the procedural steps are more substantial. The procedures deal specifically with the social consequences of the restructuring discussed during the first part of the

procedure, i.e., the collective dismissal that should result from said restructuring.

Minimum procedure:

Article L. 1233-34 of the Labor Code allows the Works Council to appoint a CA for assistance during its consideration of the information presented by the management on the proposed economic dismissals.

Such appointment results in three Works Council meetings (instead of two, as with other dismissals).

The total duration of the procedure mainly depends on the length of the negotiations and the Works Council's attitude, and takes usually between approximately two to six months (however, the latter duration is not a maximum).

- Notice of call to the Works Council

The corporate representative of the company gives written notification to the employee representatives, providing them with all "useful information" on the dismissals. This information includes the economic, financial or technical reasons for the dismissals, the number of employees in the company, the number of dismissals planned, the professional categories concerned, the criteria proposed to establish the list of the employees to be dismissed (job qualification, family situation, seniority with the company, social particulars making it difficult to find a new job, e.g., age or incapacity), and the schedule planned for the dismissals. The selection criteria must be considered for each professional category.

This information on the planned dismissals must be accompanied by a draft Employment Safeguard Plan (previously known as a "Social Plan") containing information on the measures proposed to limit the number of dismissals or

to avoid them (which will include remedies in the form of part time jobs, professional training, outplacement, financial or organizational support to help the employees find new jobs, etc.).

All this information must be simultaneously sent to the Labor Authorities.

- First Works Council's meeting, where a CA may be appointed by the Works Council. Information on the planned collective dismissal if a CA has not been appointed.
- Formal notification of the dismissal project to the Labor Administration on the day immediately following the first meeting of the second part of the procedure (i.e., the part on the dismissal project as opposed to the part on the restructuring itself). Upon receipt of this formal notification, the Labor Administration will benefit from an eight-day period to issue a "*constat de carence*", i.e., a document considering that the Employment Safeguard Plan is not sufficient and appropriate.
- Second Works Council's meeting with information on the planned collective dismissal (and review of the CA's report if a CA has been appointed). Consultation with the Works Council on the planned collective dismissal if a CA has not been appointed (consultation means getting the Works Council's non-binding opinion through a vote of its members).
- Assuming that a CA has been appointed, holding of a third Works Council meeting with consultation on the planned collective dismissal, vote on the Employment Safeguard Plan and determination of the order of the dismissals. The employer must address in writing the comments and suggestions made by the employee representatives. During

this meeting the employer must also inform the employee representatives that the employees will be offered a Professional Employability Agreement or a Redeployment Leave as mentioned above. The minutes of this meeting and the list of the employees whose dismissal is contemplated must be sent to the Labor Administration.

- Convocation of each protected employee to a pre-dismissal meeting. The protected employees are in particular the employee representatives (Works Council's members, employee delegates, trade union delegates, members of the Hygiene and Safety Committee) and the employees having an office as Labor courts judges.
- Individual pre-dismissal meeting with each of the protected employees.
- Specific Works Council's meeting regarding the contemplated dismissal of protected employees.
- Notification of the dismissal to each employee by registered letter with return receipt requested not earlier than either 30 days after the notification of the dismissal project to the Labor Administration if no CA has been appointed, or 30 days after the expiry of a 14-day period following this notification if a CA has been appointed (for protected employees, the notification of their dismissal can only take place once the Labor Inspector's authorization has been obtained).

The procedure and time-frame for this type of collective dismissal are extended if the number of employees to be dismissed exceeds 100.

#### *Potential Delay And Disruption*

Before the first Works Council's meeting on the contemplated collective dismissal, the company's legal representative must give

written notification to the employee representatives, supplying all “useful information” on the dismissals.

- The above-mentioned information is extremely important since, if a court finds the information insufficient, it can order the company to resume the consultation procedure from the beginning.
- It is also important that the Employment Safeguard Plan, as drafted by the employer, be “sufficient” (i.e., substantial enough) when initially presented to the Works Council. It must contain proper redeployment measures, the absence of which may lead a court to suspend the procedure and order the company to resume the consultation procedure from the beginning, even if the Employment Safeguard Plan is improved or amended based on the Works Council’s comments between the two meetings.
- An insufficient Employment Safeguard Plan may lead the court to suspend the individual notification of dismissal to the employees. The Supreme Court, in a decision dated February 13, 1997, decided to cancel an Employment Safeguard Plan several years after the individual dismissals had been notified. The Court ordered the reinstatement of the dismissed employees (which obviously caused an important number of practical problems), and the payment of their salaries from the date of their dismissal to their effective reinstatement. The Court may order the reinstatement of the employees if they request so, except if such reinstatement has become impossible (e.g., closing of the company). When the employee does not wish to be reinstated or when such reinstatement is impossible, the employer will be required to pay an indemnity of at least 12 months of salary.
- If a court decides that the employer did not provide all the necessary information to the CA, it can order the

postponement of the second meeting, in order to allow the CA to review the documents.

- The Works Council can also obtain an order from the Court imposing upon the employer, under penalty (including daily penalties), to disclose any economic document necessary to the CA's mission, including documents concerning the company's parent company and other subsidiaries in France and abroad.

### *Information Provided To The Labor Administration*

The Labor Administration (“**DIRECCTE**”) must receive all the documents sent to the Works Council prior to its meetings and must receive the minutes of each meeting, including amendments to the Employment Safeguard Plan, schedule of dismissals, etc.

The planned collective dismissal must be formally notified in writing to the DIRECCTE at least one day after the first meeting with the Works Council on the planned economic dismissal. To this effect, the employer must send the DIRECCTE a copy of the documents given to the Works Council's members along with a copy of the minutes of the first meeting, including the comments and proposals of the Works Council, and the schedule of the planned dismissals.

If such documents are not sent to the DIRECCTE, the employer could be found guilty of a criminal offence and could be ordered to pay a fine of EUR 3,750 per offence.

The DIRECCTE verifies:

- (i) The content of the Employment Safeguard Plan and can propose additions or amendments to the plan. The DIRECCTE can also issue a “*constat de carence*” when the Employment Safeguard Plan does not contain appropriate measures. The Supreme Court once ruled that the “*constat de*

*carence*” is not binding on the employer who can decide to pursue the redundancy procedure. Courts have jurisdiction to decide whether an Employment Safeguard Plan is insufficient. However, when a court finds the employer’s Employment Safeguard Plan insufficient, the legal effect is to invalidate all subsequent actions based on the plan and therefore to nullify the employer’s entire dismissal procedure.

In addition, in the event of a collective dismissal, when an Employment Safeguard Plan is invalidated by the Labor Courts, the dismissed employees can either claim reinstatement within the company or a specific indemnity equal to at least 12 months’ salary.

From a practical standpoint, when the Labor Administration issues a “*constat de carence*”, the employer must resume the entire dismissal procedure and amend the plan in order to take into account the DIRECCTE’s observations.

- (ii) The compliance with the rules relating to proper information/consultation with the Works Council.

The employer is not compelled by law to observe the comments and follow the suggestions made by the DIRECCTE that may not be in the company’s best interest. However, ignoring the DIRECCTE’s comments and suggestions could be unwise in view of possible future disputes that may be raised by the dismissed employees.

The employer must respond to the DIRECCTE before sending the dismissal letters. Article L.1233-60 of the French Labor Code provides for a criminal fine of EUR 3,750 per employee dismissed if the employer dismisses the employees before responding to the DIRECCTE.

If the company employs fewer than 50 persons or if there is no employee representative within the company, the above procedure will be simplified and shortened.

## 2.8. Dismissal Of An Employee Representative

Any employee representative, either member (“*titulaire*”) or deputy (“*suppléant*”) (Works Council’s members, members of the Hygiene and Safety Committee, trade union delegates or employee delegates), benefits from a special status that provides additional protection against dismissal. The employer can dismiss such an employee only after having consulted with the Works Council (except for trade union delegates) and subject to the express prior written authorization of the Labor Inspector.

Any dismissal made by an employer without a real and serious cause, or without complying with the procedural steps mentioned above, triggers the payment of damages to the employee. However, in cases involving employee representatives, if the dismissal occurs without securing the Labor Inspector’s prior authorization, or despite the Labor Inspector’s refusal, the dismissal is null and void, and the employee representative could be reinstated to his/her previous position with payment of all the salaries lost since the date of dismissal. In addition, failure to obtain the Labor Inspector’s authorization for the dismissal of an employee representative, or failure to inform and consult with the Works Council when required, is a criminal offence that is punishable, for a first offence, by a maximum one-year imprisonment and/or a fine of up to EUR 3,750.

## 2.9. Residual Obligations

Irrespective of the reasons for the termination of the employment contract, and regardless of whether it is a dismissal (for personal/professional reasons or economic reasons) or a resignation, the employer must provide the employee, at the end of his/her employment, with a work certificate (“*certificat de travail*”), a pay slip corresponding to the final payments made (including severance payments, if any) and a specific document for the unemployment authorities, the *Pôle Emploi* form (“*attestation Pôle Emploi*”). It is also common, but not mandatory, that a final statement of accounts (“*reçu pour solde de tout compte*”) be delivered to the employee at the end of the employment relationship.

## 2.10. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

Under French Labor law, either party may serve notice of termination of the employment contract. During the notice period, the employment contract remains in force, and both parties continue, in principle, to perform without change their obligations under the contract. Therefore, unless the employee is released from the performance of his/her duties, he/she will have to work during that period and will continue to receive his/her normal remuneration. However, if the employer does not wish the employee to work during that period, it may release the employee from this obligation, but will have to pay the employee an indemnity in lieu of notice, in an amount equivalent to the amount of remuneration the employee would have received had he/she normally worked. This amount is subject to both employer's and employee's social charges.

During the notice period, if performed by the employee, the latter is usually entitled to two hours off per day to look for a new job, depending on the collective bargaining agreement applicable to the company.

The notice period begins to run on the day of first presentation of the dismissal letter or the resignation letter by the postal services. Unless the employee's employment contract or the company's applicable collective bargaining agreement provides otherwise, an employee is generally entitled to one to three months' notice period, depending upon the employee's professional category and seniority with the company.

Generally the following minimum notice periods apply:

- For employees with less than six months' service, notice provided by the applicable collective bargaining agreements, if any;

- For employees with six months to two years service, notice is at least one month (subject to a provision more favorable to the employee resulting from the law, a collective bargaining agreement or the employment contract);
- For employees with two years of service or more, notice is at least two months (subject to any longer notice period resulting from the law, a collective bargaining agreement or the employment contract); and
- For executive employees (“*cadres*”), notice is generally at least three months, irrespective of their length of service.

#### 2.11. Termination Indemnities

Even where a dismissal meets all of the substantive and procedural requirements, a dismissed employee is entitled to: (i) a paid vacation indemnity (“*indemnité de congés-payés*”), which is equal to the cash value of the number of accrued and unused vacation days at the end of the notice period, (ii) a notice period indemnity (“*indemnité de préavis*”) in cases where the employer decides to release the employee from work during the notice period, and (iii) a dismissal indemnity (“*indemnité de licenciement*”), which is a statutory minimum indemnity, based on years of service, applicable by default in the absence of provisions more favorable to the employee, such as those resulting from a collective bargaining agreement.

The statutory minimum dismissal indemnity is based on the employee’s seniority as follows:

- $1/5^{\text{th}}$  of the average monthly remuneration per year of service for employees with one year of service or more;
- Additional compensation of  $2/15^{\text{th}}$  remuneration per year of service after ten years’ service.

However, where the dismissal is justified by the employee's gross misconduct ("*faute grave*"), neither the notice period indemnity nor the dismissal indemnity is due. In case of willful misconduct ("*faute lourde*"), no severance payment is due.

In the event of an unlawful dismissal, the employee could also require the following additional payments:

- If the dismissal is found by a court not to be justified by a real and serious cause (unfair dismissal), the employee is entitled to additional damages to compensate for the loss he/she has suffered because of his/her abusive dismissal. If the employee has two years of service or more with the company and the company employs eleven employees or more, damages are set by law at a minimum of six months of gross salary. When the employee has less than two years of service or the company employs fewer than eleven employees, there is no minimum and the amount of damages is freely determined by the judges in light of the prejudice the employee can demonstrate.
- If the employer has not followed the applicable termination procedure, it may be ordered by a court to pay a maximum of one month's salary as damages to each employee concerned (this indemnity cannot, in principle, be claimed in addition to damages for unfair dismissal).

## 2.12. Laws On Separation Agreements, Waivers, And Releases

### *Settlement Agreement*

Under French Labor law, a settlement agreement will only be upheld if: (i) it is concluded after the dismissal is carried out (i.e., after the employee has received the dismissal letter); (ii) the dismissal has given rise to a dispute (and a potential claim of damages for the prejudice suffered); and (iii) the employee receives an additional payment, as a "settlement indemnity", to compensate for the prejudice suffered, over and above the mandatory minimum amounts of

severance and related benefits to which the employee would be legally entitled in the absence of a settlement.

The total package that an employer should be prepared to pay generally depends on the extent of the company's exposure to damages in the event the employee is not willing to settle. The settlement indemnity is paid in addition to the amounts that the employee would receive by law pursuant to his/her dismissal. Ultimately, the amount of the settlement payment is a question of negotiation between the employer and the employee.

*Mutual Termination Of The Employment Contract (“Rupture Conventiennelle Du Contrat De Travail”)*

An indefinite term employment contract can be terminated by mutual agreement (i.e., both the employee and the employer would agree on the termination). The parties must follow a specific and fairly stringent procedure.

The employer and the employee can agree to such termination following one or more meetings, during which both parties may be assisted by one person (in principle an employee of the company) under certain conditions.

The parties must execute an amicable termination agreement that must define the terms and conditions of the termination including:

- The amount of the specific termination indemnity, which cannot be less than the statutory dismissal indemnity provided by the law or the applicable collective bargaining agreement;
- The date of termination of the employment relationship, which cannot be earlier than the day following the ratification by the DIRECCTE (approximately 1.5 month after execution of the agreement).

As from the date of signature of the amicable termination agreement, each party has 15 calendar days to withdraw its consent. After this time limit, the amicable termination agreement must be sent to the DIRECCTE (generally by the employer) to be ratified by the latter.

The DIRECCTE benefits from 15 business days (as of receipt of the request) to ratify the agreement. In the absence of response within this 15-business day timeframe, ratification is deemed obtained. The DIRECCTE may however refuse to ratify the agreement. In such a case, the related employment contract is not terminated and remains in force.

Any dispute concerning the agreement, the ratification or the refusal to ratify may be brought before the Labor courts only, during a 12-month period after the ratification or refusal to ratify.

In addition, and contrary to the situation where the employee resigns, the employee is entitled to receive unemployment benefits following to the termination of the contract under a mutual termination agreement as if he/she were dismissed.

The specific termination indemnity is subject to favorable tax and social security treatment.

### 2.13. Litigation Considerations

Labor courts (“*Conseils de Prud’hommes*”) have jurisdiction for resolving individual labor disputes, whereas Civil courts (“*Tribunaux de Grande Instance*”) have general jurisdiction for resolving collective labor disputes. An employee may challenge the grounds used for his/her dismissal by any means.

Before hearing a case on the merits, French Labor courts must convene the parties to a preliminary mandatory conciliation procedure before the Conciliation Board (“*Bureau de Conciliation*”) of the court. If conciliation proves to be impossible, the case will then be postponed to a new hearing before a Judgment Board (“*Bureau de*

*Jugement*”), where the parties will be heard on the merits and a decision will, in principle, be made by the Labor court. It is possible for any party to lodge an appeal against this decision, and the appeal must be lodged before the Court of Appeal (“*Cour d’Appel*”). The Court of Appeal will re-examine the entire case. The Court of Appeal’s decision can also be challenged before the social chamber of the French Supreme Court (“*chambre sociale de la Cour de Cassation*”). However, the Supreme Court is not supposed to re-examine the facts, but will only examine whether the law provisions have been infringed by the first-degree courts.

As a matter of principle, the French Labor Code states that, in case of a dispute between an employer and an employee, the doubt must favor the employee. Moreover, from a practical standpoint, French Labor courts generally favor employees.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

France has very stringent regulations prohibiting certain types of employment discrimination.

The French Constitution provides that “... *all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions*”. The Constitution also expressly provides that women at work have the same rights as men and are entitled to equal pay for a same work. In addition, because France is a member State of the European Union, the provisions of the Rome Treaty concerning discrimination are applicable. France has also enforced a number of Conventions signed within the International Labor Organization.

Article L. 1132-1 of the French Labor Code provides that no candidate may be turned down from a recruitment process, nor may any employee be punished, dismissed or subject to a discriminatory measure (directly or indirectly), notably with regards to remuneration, training, relocation, appointment, classification, qualification or

promotion, because of his/her origin, sex, life manners, sexual orientation, age (unless the difference of treatment based on age can be justified by a legal purpose), marital status, being part of an ethnic group, a nation or a race, political or religious beliefs, union involvement, external appearance, surname, state of health, handicap, pregnancy or maternity.

Additionally, the EEC Equal Treatment Directive has been incorporated into the French Labor Code. It prohibits employers from:

- Mentioning any condition that is directly or indirectly indicative of sex discrimination in any employment offers;
- Refusing to employ a job applicant because of his/her sex or by reason of criteria that are directly or indirectly related to his/her sex;
- Assigning, transferring, or dismissing an individual because of his/her sex, or not renewing his/her employment on those grounds; or
- Providing remuneration, training, promotion, classification, or grading to an employee on grounds of sex.

French law also prohibits indirect discrimination, which is the adoption of criteria that are not necessary to perform certain functions, but may adversely affect workers of one sex. French law allows employers to discriminate in favor of one sex where the needs of the job require the jobholder to be of that sex. However, that exception is essentially limited to actors (playing male or female roles) and models.

Sexual harassment, as well as moral harassment, should also be regarded as discrimination. Indeed, discrimination shall be widely envisaged as any behavior in relation with a motive of direct

discrimination and/or any behavior with a sexual connotation, which purpose or effect is to damage the dignity of any person or to create a hostile, degrading, humiliating or offensive environment.

Apart from situations regarding sex discrimination, most cases of discrimination concern adverse treatment due to alleged union activity.

Female employees also have specific protection during maternity. An employee who is pregnant is statutorily entitled to suspend her employment contract from six weeks before the expected date of delivery until 10 weeks after the actual date of delivery and, thus, for a minimum period of 16 weeks. If the delivery is earlier than expected, the post-natal period of leave may be extended until the expiry of the 16 weeks. If the delivery is later than the expected date, the employee may extend her pre-natal maternity leave until the actual date of delivery; in such a case, the length of her post-natal maternity leave would not be reduced. The maternity leave may also be extended in cases of delivery of a third child, multiple births, or medical complications regardless of the number of dependent children. An employee (male or female) adopting a child is also entitled to the same leave as employees on maternity leave.

During maternity leave, the employment contract is merely suspended. The duration of the maternity leave is treated as a period at work for the purposes of deciding seniority rights, the right to participate in employee representative's elections within the company, and the right to annual paid vacation. The employee is strictly prohibited from working during a total eight-week period beginning prior to the delivery and expiring after the delivery and, in any case, during a six-week period following the delivery. During this period, the employment contract must be temporarily suspended, even if this is against the employee's will.

During maternity leave, maternity benefits are paid directly to the employees by the Social Security Fund, unless the applicable collective bargaining agreement provides that the employer maintain

the salary. In that case, the employer is required to pay the employee either the difference between the amount paid by the Social Security Fund as maternity benefits and her normal salary had she worked or her normal salary subject to obtaining direct reimbursement of the maternity allowance from the Social Security Fund.

### 3.2. Employee Remedies For Employment Discrimination

Under French law, all agreements or actions causing prejudice are considered null and void if they are based on discrimination. Violation of the “equal treatment” principle also entails criminal sanctions in France. It is a criminal offence for any person to discriminate on the grounds of sex, to make the performance of an activity more difficult for a person of the other sex, or to stop a person from following his/her chosen career by reason of sex.

Employees who believe that they have been discriminated against on the grounds of sex can sue their employer in the Labor court for damages or seek to obtain an order requiring reinstatement or promotion. The statute of limitations is five years from the discovery by the employee of the discrimination. The burden of proof of the discrimination is shared between the employee and the employer. First, the employee must produce evidence creating a presumption of discrimination. Once he/she does so, the employer must then demonstrate that the measures taken were justified and should not be regarded as discrimination.

### 3.3. Potential Employer Liability For Employment Discrimination

Where a French Labor court finds a sex discrimination claim well founded, it will declare the discriminatory decision null and void. Thus, in a case where a salary increase is denied, the Court may order a salary adjustment. In cases of dismissal, it may order the reinstatement of the employee along with damages for lost wages in the interim period. However, the employee has the option to refuse reinstatement and can elect to receive damages instead. These damages amount to a minimum of six months’ salary and benefits plus any severance terms available under any applicable collective

bargaining agreement. In addition, any unemployment benefits paid by the State to the employee must be reimbursed by the employer to the State.

In addition, the plaintiffs may file an action before the Criminal Courts to obtain criminal sanctions against the employer. If found guilty, the employer can be imprisoned for up to two years and/or ordered to pay a maximum fine of EUR 30,000.

#### 3.4. Practical Advice To Employers On Avoiding Employment Discrimination Problems

In cases of different treatment between two persons, it is in the employer's interest to be able to demonstrate that this difference is based on actual, objective and reasonable reasons. Therefore, in any situation where a differentiation will have to be made among several employees holding similar positions, the employer should prepare appropriate documentation and records as to the reasons for such a difference.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

In 1992, France adopted legislation on sexual harassment. The Law of 22 July 1992 makes sexual harassment a specific offence under the Criminal Code, as opposed to a mere kind of discrimination. The Law of 2 November 1992 amended the Labor Code and the Criminal Procedure Code to accomplish three major objectives: (i) to protect victims and witnesses of sexual harassment in the framework of the employment relationship; (ii) to encourage employers to discipline and punish harassers; and (iii) to implement measures to prevent sexual harassment at the workplace. The Law of 17 January 2002 has strengthened the preventive and repressive provisions regarding sexual harassment. In particular, it provides that any person (including a colleague or a subordinate) may now be considered as a sexual harasser and punished.

Article L. 1153-2 of the French Labor Code provides that no employee, nor any candidate for an employment position, for a traineeship or for a company training scheme, may be sanctioned, dismissed, or discriminated against, either directly or indirectly, in particular with regard to remuneration, training, redeployment, assignment, qualifications, classification, professional promotion, transfer or renewal of the employment contract, for having suffered or refused to suffer harassment from any person whose intention is to require sexual favors for themselves or for someone else.

Discrimination against a victim of sexual harassment or a witness to such harassment in matters relating to promotion, renewal of the employment contract, or training is prohibited. The hierarchy who engages in such pressure shall also be subject to disciplinary sanctions by his/her employer.

#### 4.2. Employee Remedies/Potential Employer Liability For Sexual Harassment

The employee who considers that he/she has suffered from sexual harassment must be able to evidence objective facts in order to demonstrate this harassment. The defender must then prove that those facts were justified and cannot be considered as sexual harassment.

Union organizations may bring court action in favor of any employee provided the employee has given written permission.

On the basis of Article 222-33 of the Criminal Code, any person may be punished by a fine of up to EUR 15,000 and/or an imprisonment of a maximum of one year, if he or she harasses an employee or a prospective employee in order to obtain sexual favors. Moreover, any sanctions by the employer based on these circumstances are deemed to be null and void.

In addition, Article L. 1155-2 of the Labor Code provides that the employer who takes disciplinary measures, dismisses or discriminates against an employee who was subject to, or who refused, sexual

harassment will be liable for a maximum of one year imprisonment and/or a maximum fine of €3,750. The Courts can also order that the decision be published in newspapers.

A behavior of sexual harassment could also be subject to criminal sanctions under Article 333 of the Criminal Code (indecent assault) or Article R. 38-1 (relating to assault and battery), as well as articles relating specifically to sex, race, or religious discrimination.

Article L. 1153-2 of the Labor Code states that the employees who are recognized as responsible for sexual harassment may be subject to disciplinary sanctions.

Moreover, French Labor courts have consistently held that sexual harassment, if proven, constitutes a gross misconduct, which justifies the immediate dismissal of the employee without prior notice and dismissal indemnity.

The offender may also be required to pay the victim damages in the event where the employee suffered a prejudice due to the termination of his/her employment contract resulting from sexual harassment.

#### 4.3. Practical Advice To Employers On Avoiding Sexual Harassment Problems

Employers are vested with a general power to prevent sexual harassment at the workplace. The company's corporate officer is responsible for taking all measures necessary to prevent harassment. In particular, the employer's internal regulations must reiterate the rules against sexual harassment.

The Hygiene and Safety Committee is also entitled to make proposals as regards sexual harassment. To further prevent harassment, employers should also take steps to inform employees of their rights and of the sanctions that will be taken against harassers.

Training managers and providing information to the personnel may help to avoid sexual harassment situations or to minimize the risk of liability for the employer in the event harassment occurs despite the measures taken.

#### 4.4. Moral Harassment

Pursuant to Article L. 1152-1 of the Labor Code, no employee should be the victim of any repeated acts of harassment on behalf of the employer, its representative or from any person who abuses the authority attributed by his/her functions, that may be harmful to the employee's basic dignity or would make his/her working conditions humiliating or degrading.

No employee should be punished, dismissed or discriminated against for bringing to light such harassment. Any disciplinary action taken against an employee in such circumstances would be declared void.

In the event a harassed employee is dismissed, the Courts will be able to void the dismissal and order the employee's reinstatement. Moreover, criminal sanctions could be imposed on the offender (maximum EUR 15,000 and/or 1 year imprisonment).

Employees must be able to evidence objective facts in order to support their claims.

## Germany

### 1. Introduction

The labor law of the Federal Republic of Germany covers all legal rules concerning the relationship between employers and employees and their respective organizations. Traditionally, the labor law in Germany is divided into two parts: individual and collective labor law. Individual labor law covers rights and obligations of employers and employees as provided for by law or by contract. Collective labor law deals with the representation and organization of employees through trade unions and works councils, and with co-determination of employees on company boards.

The rights and duties regarding the employment relationship including its termination are in particular determined by:

- The content of the employment agreement;
- Agreements between the works council and the employer;
- Collective bargaining agreements;
- Labor laws; and
- The constitution as well as European law.

For resolving conflicts in individual and collective labor disputes in Germany, labor courts play a dominant role. The German labor court system is comprised of three levels: (i) labor courts of the first instance; (ii) appellate labor courts; and (iii) the Federal Labor Court.

Labor courts in Germany become involved in disputes mainly on the initiative of employees or their representatives. Settlement of disputes in the labor courts is the normal course. The procedure in labor courts is divided into two steps. The first step is the conciliatory hearing during which the presiding judge hears the case alone. The purpose of

this step is to reach an amicable settlement, if possible at an early stage. If no agreement is reached at this stage, one or more further hearings involving also non-professional judges (one chosen by employer federations and another chosen by the unions) will be held, and the court will finally issue a judgment.

The German liability system focuses primarily on monetary damages. However, in cases of injury of body, health, freedom or sexual self-determination, Section 253 (2) of the German Civil Code provides for compensation for non-material losses, such as pain and suffering. Furthermore, according to the German Equal Treatment Act, in certain cases of discrimination and sexual harassment victims are entitled to demand compensation for material and non-material losses.

## 2. Termination

The employment relationship may be terminated by mutual consent such as by separation agreement or by expiry of an employment agreement limited in time. However, the most common way to terminate an employment is by notice of termination. An employer has to consider several restrictions in order to give notice validly.

### 2.1. Form And Content Of Notice Of Termination

The notice of termination, to be valid, must be in writing and signed by the competent person, usually the Managing Director or HR Director. If notice is given by other representatives of the employer whose authority to represent the employer is not commonly known to the employee, the original power of attorney must be attached to the notice of termination. The original signed notice of termination must be given directly to the employee, e.g., termination via fax or e-mail is null and void. Due to the serious consequences, the termination must be declared clearly and unambiguously. Thus, the notice of termination must clearly express the intention to terminate and whether termination is intended to be an ordinary (i.e., with a regular notice period), or an extraordinary (i.e., without notice period due to significant misconduct) termination.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

If a collective bargaining agreement is applicable, the notice periods follow the provisions contained in it. If no collective bargaining agreement is applicable, the notice periods follow the individual employment agreement or the applicable statute, where the statutory notice periods are more favorable to the employee.

The statutory notice periods are as follows:

- The basic notice period is 4 weeks effective on the earlier of the 15th day or the end of the calendar month; however, the following notice periods apply for a termination by the employer beyond two years of service:
- After 2 years of service: 1 month to the end of a calendar month;
- After 5 years of service: 2 months to the end of a calendar month;
- After 8 years of service: 3 months to the end of a calendar month;
- After 10 years of service: 4 months to the end of a calendar month;
- After 12 years of service: 5 months to the end of a calendar month;
- After 15 years of service: 6 months to the end of a calendar month;
- After 20 years of service: 7 months to the end of a calendar month.

During a probationary period, which may last for up to 6 months, the statutory notice period is only 2 weeks.

If the notice of termination does not refer to the correct termination date, the termination may be effective to the next permissible date, provided the content of the notice provides for such interpretation.

### 2.3. Involvement Of Works Council

If a Works Council exists, it must be given the opportunity to comment on the intended termination of an employee prior to serving the notice of termination. Therefore, the employer has to inform the Works Council properly, i.e., the employer must first communicate the relevant social criteria of the employee (age, years of service and number of dependants). The employer must also inform the Works Council about the reason for the termination. If the termination is based on compelling business requirements, the employer must in addition give its views on the necessity of the redundancy. It finally has to state why it picked the employee according to the criteria it applied. A termination without such information is void. The same applies if the Works Council is informed improperly. However, the Works Council cannot prevent the employer from dismissing the employee. The Works Council may take up to one week to give its statement in cases of terminations with notice and up to three days in case of a termination for cause with immediate effect.

### 2.4. General Termination Protection Under The Termination Protection Act

Employees are protected against unilateral termination of their employment by the Termination Protection Act, which, since January 1, 2004, applies to all business units with more than 10 employees. Before January 1, 2004, however, this termination protection applied to business units with more than five employees. Employees whose employment relationship started in a business unit with more than five but less than 10 employees prior to January 1, 2004, keep their protection even if the number of employees does not reach 10. However, in this case, employees hired after January 1, 2004 do not

obtain termination protection. Furthermore, the Termination Protection Act applies only to employees who have been employed for at least six months by the same employer.

If these prerequisites are met, an employee can be dismissed with ordinary notice only if the termination is “socially justified.” This means that the employment may be terminated for reasons based only on urgent business requirements, the employee’s conduct, or the employee’s person. There is no “at will” employment rule in Germany.

### *Urgent Business Requirements*

If the termination is based on urgent business requirements, the following preconditions must be met: (i) the employee’s specific job has been removed; (ii) it is not possible to employ the employee in another comparable or suitable position within the company; and (iii) the so-called “social selection” was properly made. In this context, “social selection” means selecting for redundancy the employee who would be the least severely affected by the termination. The employee’s years of service in the company, age, maintenance obligations and any disability must all be taken into consideration. In practice, this analysis often leads to the dismissal of the last person hired (i.e., the practice of “last in, first out”). The employer may be able to exclude some employees from “social selection” if this is justified due to legitimate operating reasons, such as knowledge, skills and performance of a certain employee, or the maintenance of a balanced staff structure.

### *Employee’s Conduct*

A termination for reasons based on the employee’s conduct is justified if the termination can be considered as an appropriate reaction to a breach of contractual duties by the employee. In this context, the interests of the employee and the employer must be balanced. A single breach of contractual duties will not normally be sufficient to allow a unilateral termination. The labor courts normally require that

the employee must have been warned not to repeat the breach of contract. Therefore, it is necessary for the employer to give a formal warning to the employee. However, there are cases where terminations without prior warning have been accepted by the courts, e.g., in case of theft of the employer's property. For reasons of evidence, the formal warning should be in writing.

### *Employee's Personal Circumstances*

The most common case for a termination based on the employee's personal circumstances is a termination due to lengthy or frequent illness.

A termination for lengthy illness is justified if the employee has been ill for a significant period of time and the recovery is not expected in a foreseeable period of time. Furthermore, the process of work must be disrupted considerably by the absence of the employee.

A termination for frequent illness is justified if the employee has been frequently ill in the past and similar illness periods are expected in the future. Again, the process of work must be disrupted considerably by the employee's absence. It is difficult to specify general rules as to how long and how frequent an illness has to be in order to justify a termination.

## 2.5. Special Termination Protection

Several protection laws provide for an additional termination protection for certain groups of employees.

Under the Maternity Protection Act, an employer may not terminate the employment of an employee during her pregnancy and until four months after giving birth. Only exceptionally, upon request of the employer, the competent authority may allow the termination of a protected woman if the employer can prove that the termination is essential and is not in any way related to the pregnancy. However, in

practice, the authorities are rather reluctant to permit such terminations.

Also, during their parental leave employees enjoy similar termination protection. Either parent is entitled to a parental leave that may extend up to 36 months until the child has reached the age of three. It may be taken in several periods by either parent or combined by both parents. Upon prior consent of the employer, a maximum amount of 12 months can be taken as parental leave until the child has reached the age of eight.

Furthermore, disabled employees enjoy termination protection, provided they have been employed for at least six months.

Last but not least, an employer must comply with termination protection rules for Works Council members and members of similar representative bodies. They may only be dismissed for important reasons.

## 2.6. Mass Dismissals

Terminations are considered to be a mass dismissal if a certain number of employees are dismissed within a period of 30 days and include:

- More than five employees in a business (*Betrieb*) with more than 20 and less than 60 employees; or
- 10 percent of all, or more than 25 employees, in a business (*Betrieb*) with at least 60 and less than 500 employees; or
- At least 30 employees in a business (*Betrieb*) with at least 500 employees. (Section 17 Termination Protection Act).

Any such dismissals must be notified to the local employment office in order to become valid. As a rule, the termination cannot become effective earlier than one month after the notification is filed with the

local employment office; the regional employment office may extend this period to two months.

If there is a Works Council in the business, it must be informed at least within 2 weeks before the employer informs the local employment office. If the Works Council gives a statement within this period, the employer has to send it to the employment office together with its notification of the planned mass dismissal. If either the Works Council or the employment office is informed improperly, the employer runs the risk that the terminations will be declared invalid by the labor courts.

If dismissals qualify as a “mass dismissal,” the employer would also have to consult with the Works Council beforehand and negotiate a so-called “equalization of interests-agreement” and a “social plan” that provides for severance payments to the dismissed employees. This applies only to companies with more than 20 employees. It is essential to carry out these consultations and negotiations with the Works Council prior to giving the notices of termination. Otherwise, the Works Council could obtain a temporary injunction against the employer. Additionally, the employer must inform and consult the economic committee timely, if it has business sites with more than 100 employees.

## 2.7. Termination For Cause

No notice period will need to be applied if there are sufficient grounds for a termination for cause. Such termination may take immediate effect (Section 626 of the German Civil Code). Facts must exist such that the terminating party cannot reasonably be expected to continue the employment until the regular termination date. All of the facts of the individual case and the interest of both parties have to be taken into consideration. Usually, it is not easy to establish the requirement for an extraordinary termination with immediate effect.

Some examples may illustrate the concept behind it:

- An employee who accepts bribes can normally be terminated for cause.
- Deliberate incorrect calculations of an employee's own expense claim generally justifies the termination of the employee for cause.
- Criminal acts on the part of the employee directed against or to the detriment of the employer (e.g., fraud, falsification of documents) will normally justify a termination with immediate effect.
- Competitive work during the period of employment may allow a termination without notice.
- Shutting down a business unit usually does not provide a reason for an extraordinary termination.

Often, however, it is difficult for the employer to prove a criminal act. Therefore, the labor courts usually allow an extraordinary termination if there is a strong suspicion that the employee committed the act.

A termination for cause with immediate effect can be based only on facts that have been discovered within a period of two weeks. In practice, this strict rule often leads to difficulties. Therefore, employers are well advised to initiate investigations at an early stage if there are grounds to suppose that criminal acts may have been committed.

## 2.8. Litigation Considerations

If the employer is able to prove the above preconditions for a termination in a legal dispute before the labor court (in which the employer has the full burden of proof), the termination would be considered valid and no severance would have to be paid. If, by

contrast, the employer cannot establish these conditions, the termination would be regarded as invalid. Consequently, the employment would continue and the employee could claim retroactive salary and reinstatement.

Terminations constitute the major type of claims litigated in German labor courts. The latest available statistics show that more than approximately 80 percent of all labor disputes are related to dismissals. In comparison to other countries, German labor law on terminations is quite strict. It is estimated that more than 75 percent of all employees who are served notice for termination end up going to court, and those who do generally receive a higher compensation payment than offered by employers at the time notice is served.

To avoid the ever-increasing number of lawsuits regarding terminations, German legislators have implemented Section 1a of the Termination Protection Act as of January 1, 2004. If the employer terminates the employment relationship for compelling business reasons, it may notify the employee and offer a severance payment of half a month's salary per year of service if the employee does not file a claim for termination protection with the labor court. If the employee refrains from legal proceedings against the employer, the severance payment falls due on the termination date. This precondition must be explained in the notice of termination. However, there is no obligation to combine the notice of termination with the offer of a severance payment.

## 2.9. Settlement Agreements

Even if the prospect of winning the termination lawsuit appears to be good, the employer might wish to come to an amicable separation. Such an agreement is not subject to the restrictions that must be considered in the case of a unilateral termination by the employer. By a settlement agreement, the parties agree upon an end to the employment relationship. Simultaneously, the employer commits itself to pay a certain amount as a redundancy compensation for the loss of the job.

As regards the financial aspects of such an arrangement, the following should be noted:

- First, the employee is entitled to continue work and to receive his/her salary until the end of his/her notice period. Also, if an amicable settlement is concluded, the employee normally claims to be paid until that date. For tax reasons, it is not possible to simply convert the salary to be paid during the notice period into a severance payment.
- In addition, it is customary to pay a severance. This is particularly true if the employer's prospects of winning a possible termination lawsuit are not good. There are no fixed rules for the calculation of such severance payment in German law. As a "rule of thumb," severance payments range between 0.5 and 1.5 of a monthly salary per year of service, whereby the salary includes all compensation components. These figures, however, are subject to negotiations. The actual severance amount can vary significantly from this range depending on the bargaining position of both parties, the age of the employee and the length of service.
- Severance payments as compensation for the loss of the job may be tax-preferenced only to a limited extent. In this case, the so-called "one-fifth-method" (*Fünftelungsmethode*) may be applied. Accordingly, the severance payment may be spread over the next five years in order to mitigate the effects of tax progression, under Secs. 24 and 34 of the Tax Income Act (*Einkommensteuergesetz*).
- According to case law, a settlement agreement may, in general, cause the employee not to receive unemployment benefits for a period of 12 weeks. Furthermore, the period in which the employee normally can claim unemployment benefits may be reduced to  $\frac{3}{4}$ . However, according to a recent directive by the Federal Employment Office, the employee

may not face such reductions if he/she is not responsible for his/her unemployment, which, for example, shall be presumed if the following conditions are met:

- The settlement agreement is concluded in order to prevent the employee's termination based on urgent business reasons;
- The notice period is complied with;
- The severance payment amounts to between 0.25 and 0.5 of the monthly gross salary per year of service; and
- The employee is not subject to special termination protection prohibiting an ordinary termination.

## 2.10. Laws On Employment Discrimination And Sexual Harassment

In the past, there was no specific anti-discrimination legislation in Germany. Because of the high degree of termination protection, it appears that the legislators did not see the need to pass anti-discrimination laws. Furthermore, employers have been obliged not to discriminate against employees without justification based on a general non-discrimination principle under case law. An employer's obligation to not discriminate has also been based on other specific laws, e.g., the employer must treat part-time employees and employees employed for a limited period of time equal to full-time employees and employees employed for an indefinite period of time, unless there is justification for a different treatment.

In compliance with the obligation to transpose the EC Directives N° 2000/43, N° 2000/78 and N° 2002/73 into German law, German legislators implemented the principle of equal treatment in form of the Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz/ AGG*), which took effect on August 18, 2006.

### *Discrimination Grounds*

According to Sec. 1 of the Equal Treatment Act, the employer may not discriminate on the following grounds:

- Racial or ethnic origin;
- Sex or sexual orientation;
- Religion or secular belief;
- Disability; or
- Age.

The non-discrimination obligation applies to employees, apprentices, and persons who may be considered as persons similar to employees due to their economic dependency (*arbeitnehmerähnliche Personen*), including persons working from a home office.

In particular, the Equal Treatment Act prohibits discrimination in relation to recruitment, promotion, salary and redundancy. It allows only for limited exceptions to the principle of equal treatment due to “justifying reasons.” The Act covers direct and indirect adverse treatment. Direct discrimination occurs when a person falling within the protected category is treated less favorably than another person in a comparable situation. Indirect discrimination occurs when an apparently neutral provision, criterion or practice would put one person having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons without these particular characteristics. For example, the criterion of “professional experience” may indicate indirect discrimination because of age. Discrimination may only be justified if the employer can point to one of the prescribed justifying reasons of the Equal Treatment Act, e.g.,

the respective characteristic is indispensable to the work to be performed.

According to the Equal Treatment Act, harassment, including sexual harassment, is regarded as discrimination. The law defines harassment as behavior injuring the dignity of employees at the place of work. Sexual harassment is defined as: (i) unwanted sexual behavior including unwanted sexual actions and invitations for this purpose; and (ii) sexual-related physical contact, comments of a sexual nature, or showing or visibly displaying pornographic material, which is clearly disapproved of by the person affected. Sexual harassment includes conduct caused at a work site by colleagues, superiors, subordinates, third parties or the employer. There is no justification for any such conduct.

### *Rights Of Employees*

In case of discrimination, the affected employee may file a complaint with management. The management then has to investigate the complaint and to inform the employee about the result.

Additionally, the employee may claim compensation for material or non-material losses from the employer or directly from the person who caused the damage. The employer must therefore take measures to avoid its employees from being subjected to discrimination in the working environment.

The amount of damages employees can claim has to be assessed by the labor courts. It is unlikely that the German labor courts will follow the concept of punitive damages. But the European Court of Justice has stated on several occasions that the amount of damages has to deter the employer from further discrimination. This will probably result in employers having to make substantial payments.

### *Employer's Obligations*

An employer is obliged to protect its employees from discrimination and take pre-emptive actions. According to the Act, an employer is required to give special training to its employees to raise awareness that discrimination must be avoided. To this end, the text of the Act and special regulations concerning the procedure of a discrimination claim before the labor courts, as well as the competent person in the operation to deal with discrimination complaints, must be made known within each business unit. This information may be provided through the intranet.

### *Burden Of Proof*

The burden of proof is shared between the employee and the employer. This means that in the labor court the employee must establish facts from which it can be presumed that there has been discrimination. It is then up to the employer to give proof that there has been no harassment or breach of the equal treatment principle, which might in practice be rather difficult.

### *Anti-Discrimination Authority*

A Federal Anti-Discrimination Authority has been established to safeguard the enforcement of the Anti-Discrimination Act. This authority promotes equal treatment and provides independent assistance to victims of discrimination. However, it cannot fine an employer for not observing the rights and obligations under the Equal Treatment Act.



## Hong Kong

### 1. Introduction

Labor law in Hong Kong is governed primarily by the Employment Ordinance. The Employees' Compensation Ordinance also addresses various aspects of the employment relationship.

The Employment Ordinance provides that every employee has the statutory right to become a member or an officer of a trade union or to take part in union activities outside working hours. However, the right to collective bargaining is not recognised in Hong Kong.

Unlike many other jurisdictions, Hong Kong does not have "at will" employment. All employment is contractual and must be terminated in accordance with the contractual terms or as otherwise provided by law.

### 2. Termination

#### 2.1. Termination Of Employment

The circumstances in which a contract of employment may be terminated are as follows:

- (a) *By Agreement By Both Parties*: a contract terminates automatically at the end of any agreed fixed term or on the mutual consent of both parties.
- (b) *By Notice Or By Payment Of Wages In Lieu Of Notice*: either party to a contract of employment may terminate a contract by giving to the other party, the requisite length of notice. Notice may be oral or in writing. The period of notice is commonly agreed upon as an express term of the contract. Except in the case of contracts that are stated to be probationary, the minimum length of notice that can be specified is seven days. A probationary contract can be terminated by either party without notice during the first month, and on seven days'

notice thereafter. In the absence of an agreed notice period after the probationary period, the employee will be entitled to one month's notice (unless the contract has a fixed term). In determining the length of notice to be given, statutory annual leave is not included nor is any period of statutory maternity leave.

Additionally, either party may terminate a contract of employment without notice, by payment by the terminating party of a sum equal to the average amount of "wages" as defined in the Employment Ordinance (EO) (see Calculating the Severance below), corresponding to the notice period.

The EO permits both the employer and the employee to waive their right to notice or to a payment in lieu of notice. This waiver will not contravene section 70 of the EO, which provides that any term of a contract of employment that purports to extinguish or reduce any right, benefit or protection upon the employee by the EO is void. Note that the EO only permits the parties to waive their rights to notice at the time notice is required to be given. Therefore, it is not possible to provide for such a waiver in the employment contract.

- (c) *Summary Dismissal*: an employer may terminate a contract of employment without notice or payment in lieu, if the employee in relation to his/her employment:
- Wilfully disobeys a lawful and reasonable order;
  - Commits misconduct, such conduct being inconsistent with the due and faithful discharge of his duties;
  - Is guilty of fraud or dishonesty;
  - Is habitually neglectful in his duties; or

- On any other ground on which he would be entitled to terminate the contract without notice in accordance with common law.
- (d) *Summary Termination By Employee*: an employee may terminate his/her contract of employment without notice or payment in lieu, if:
- The employee reasonably fears physical danger by violence or disease, such danger not being contemplated under his/her contract of employment;
  - The employee has been employed under his/her contract for not less than five years and is certified by a registered medical practitioner or registered Chinese medicine practitioner as being permanently unfit for a particular type of work for which the employee is engaged under his/her contract of employment;
  - The employee is subjected to ill treatment by the employer; or
  - The employee is entitled to terminate his/her contract on any other ground without notice at common law.

The EO also provides that the fact that an employee takes part in a strike does not entitle his/her employer to terminate the contract summarily.

The burden of proof is on the employer to show that summary dismissal was justified. Where an employer is seeking to summarily dismiss an employee for misconduct, an employer should ensure it has carried out proper investigations to justify the dismissal. If the grounds are regarded by the courts as inadequate to justify summary dismissal, the termination will be held to be wrongful, and the employer will be liable to pay

to the employee termination payments which would have been payable had the contract been lawfully terminated.

- (e) *Deemed Termination By Employer*: an employee may terminate the contract without notice or payment in lieu if any wages are not paid within one month from the day on which they become due to him/her under the EO. The contract shall be deemed to be terminated by the employer and the employer shall be deemed to have agreed to pay to the employee a sum equal to the amount of wages that would have accrued during the notice period, in addition to other statutory and contractual termination payments.
- (f) *By Operation Of Law*: should external events make it impossible for employment to continue, or should the employment be rendered illegal, or should the employer be insolvent or die, the contract may be terminated.

## 2.2. Restrictions On Termination

The EO and the Employees' Compensation Ordinance prohibit the termination of employment in certain circumstances:

- (a) An employer may not terminate the employment of a pregnant employee who has at least four weeks' service and who has served notice of her pregnancy (other than for reasons permitting summary dismissal). This protection applies from the date on which her pregnancy is confirmed by a medical certificate to the date on which she is due to return to work after giving birth or, if applicable, the date on which the pregnancy otherwise ends. These protections do not apply where the employee is working any agreed probationary period not exceeding 12 weeks (or the first 12 weeks of any probationary period exceeding 12 weeks). However any such dismissal during the probationary period should be for a reason other than pregnancy.

- (b) An employer may not terminate the employment of any employee who is on paid statutory sick leave.
- (c) An employee who gives evidence or information in connection with the enforcement of the EO or relating to any accident at work, co-operates in any investigation of his employer or who is involved in trade union activity, or who serves jury duty, may not be dismissed because of those circumstances.
- (d) An employer is not, unless specific approval of the Commissioner for Labour is obtained, entitled to give notice of termination of the employment of an employee who has suffered incapacity within the meaning of the Employees' Compensation Ordinance, before resolution of the appropriate claim in accordance with that ordinance.

Breach of these prohibitions is a criminal offence.

### 2.3. Employee's Entitlements Upon Termination

On termination, an employee will be entitled to accrued contractual entitlements (see Statutory and Contractual Entitlements below).

In certain circumstances, the employee may additionally be entitled to a severance payment or a long service payment under the EO (see both Severance Payments and Long Service Payments below). If the employee is covered by any employee benefit plans, their effect should be taken into account (see Calculating the Severance below for offset of payments under retirement schemes or contractual gratuity schemes against severance or long service payments).

If either party terminates the contract of employment other than in accordance with the EO, the sum equal to the amount that would have accrued under the EO will be payable by the party terminating the contract to the other party. If a party gives notice but does not fulfill

that notice period, that party will have to pay the sum that is owing for the remainder of the notice period.

A dismissed employee may also be able to claim the additional remedies detailed at Termination Without Valid Reason below where he/she is unreasonably dismissed or the employer unreasonably varies his/her terms of employment.

#### 2.4. Statutory And Contractual Entitlements

Unless the employment contract provides more than the statutory entitlement, an employee's entitlements upon termination will be determined by the EO. Entitlements upon termination will generally be the following:

- If termination is by way of dismissal by the employer, payment of "wages" (as defined in the EO) in lieu of notice if insufficient notice is given;
- Any accrued but unpaid wages;
- Payment in respect of any accrued but unused annual leave;
- Reimbursement of expenses incurred by the employee for the employer; and
- Where appropriate, long service payment or severance payment.

No account need be taken of a discretionary bonus. There is a presumption that any bonus will be contractual in the absence of a written term confirming that it is discretionary. If the bonus is contractual (such as a Chinese New Year bonus and performance bonuses commonly will be), a proportionate part of the bonus should be paid if the employee has worked more than three months in the period by which the bonus is calculated and is dismissed other than by way of summary dismissal. If the employee has worked less than

three months in the relevant period, no bonus need be paid (unless the contract says otherwise).

Even if a bonus is specified to be payable at the discretion of the employer, case law suggests that the employer's discretion to decide whether or not to pay such a bonus is not unfettered and that the employer must act in good faith when exercising its discretion. For example, if an employment contract stipulates that the discretionary bonus is payable based on the employee's performance, a bonus should be paid to the employee upon termination of his/her employment, if the performance of the employee has been good during the year.

The employee may also be entitled to other contractual payments (for example, stock awards) on termination in certain circumstances. The employer's policies and procedures should also be checked to assess what contractual entitlements an employee is entitled to on termination, such as an enhanced redundancy payment.

### *Calculating Payments*

Following amendments to the EO in 2007, the calculation changed for the following statutory payments:

- Payment in lieu of notice;
- Damages for wrongful termination of contract;
- End of year payments;
- Maternity leave pay;
- Damages for termination of contract during an employee's pregnancy or maternity leave;
- Sickness allowance (statutory sick pay);

- Damages for termination during sick leave;
- Holiday pay; and
- Annual leave (vacation) pay.

These payments must be calculated with reference to the average wages earned by an employee during the 12 calendar months immediately before the relevant date. For example, an employee's wages in lieu of notice would be calculated by reference to his or her average wages over the 12 calendar months preceding the employee's last day of employment.

## 2.5. Severance Payment

An employee who has been employed under a continuous contract for a period of not less than 24 months immediately prior to dismissal and is dismissed by reason of redundancy or lay-off is entitled to severance pay.

Dismissal by reason of redundancy is dismissal by the employer attributable wholly or mainly to one of the following facts:

- The business for the purposes of which the employee was employed is to cease;
- The business in the place where the employee was employed is to cease;
- The need for the employee's particular kind of work has ceased or diminished or is expected to cease or diminish; or
- The need for the employee's kind of work in the place where he or she was employed has ceased or diminished, or is expected to cease or diminish.

Under the EO, an employee who has been dismissed by his/her employer is presumed to have been dismissed by reason of redundancy.

An employee is deemed to have been “laid off” if the employer fails to provide the employee with work of the kind he/she is employed to do (unless the employee received payment in lieu):

- On more than half of the total number of normal working days in any period of four consecutive weeks; or
- On more than one-third of the total number of normal working days in any period of 26 consecutive weeks;

excluding any rest day, statutory holiday, annual leave or lockout by the employer, and whereby the employee is not entitled to any remuneration under the contract for such period.

If not mutually agreed and paid, the employee must make a written claim for severance payment, by notice in writing to the employer, before the end of the period of three months beginning at the relevant date. The relevant date is the date of termination of the employee’s contract of employment or, in the case of a contract terminated without full notice being served or by payment in lieu of notice, the date on which notice would expire if it had been served in full. If there is a question as to the right of the employee to the payment, or as to the amount of payment, a claim must be filed, within three months of the relevant date, with the Registrar of the Labour Tribunal or the Registrar of the Minor Employment Claims Adjudication Board.

The employer must make the severance payment to the employee not later than two months from the receipt of notice by the employee, unless a claim has been filed and is pending with the Labour Tribunal or the Minor Employment Claims Adjudication Board. If the Labour Tribunal or the Minor Employment Claims Adjudication Board finds in favour of the employee, the employer must pay the employee such

sum within 14 days from the date on which it is ordered to make payment. An employer that fails to comply with this requirement is liable on conviction to a fine.

## 2.6. Long Service Payment

An employee who has worked for a minimum of five years continuously for his/her employer is entitled to a long service payment if:

- He/she has been dismissed for reasons other than misconduct and is not entitled to severance payment;
- He/she terminates the employment contract without notice due to becoming permanently incapacitated; or
- He/she terminates the employment contract, and at the relevant date, is not less than 65 years of age.

If an employee who has worked continuously for his/her employer for a period of five years dies while in the service of that employer, the employer must make a long service payment to the employee's spouse, issue, parent or his/her personal representatives (note that set-off provisions will apply - as discussed in Calculating the Severance below). Where two or more persons are entitled to the long service payment, for example, where an employee leaves no spouse but has three children, the entitlement must be divided equally among such persons.

## 2.7. Calculating The Severance/Long Service Payment

Severance and long service payments are calculated using the same formula:

$\frac{2}{3} \times \text{monthly wage} \times \text{years of service}$  (pro rata for any incomplete year).

“Monthly wage” means the last full month’s “wages” (as defined below), unless the employee elects to have his/her wages averaged over the 12-month period immediately preceding termination. Monthly wage in excess of HKD 22,500 is however disregarded. For example, in the case of an employee whose monthly wage is HKD 23,000 (or any other figure in excess of HKD 22,500), the amount of HKD 15,000 (i.e.,  $2/3 \times \text{HKD } 22,500$ ) is used in the calculation for each year of service (pro rata for any incomplete year of service).

“Wages” means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his/her contract of employment, but does not include:

- (a) The value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
- (b) Any contribution paid by the employer on its own account to any retirement scheme;
- (c) Any commission which is of a gratuitous nature or that is payable only at the discretion of the employer;
- (d) Any attendance allowance or attendance bonus which is of a gratuitous nature or that is payable only at the discretion of the employer;
- (e) Any travelling allowance that is of a non-recurrent nature;
- (f) Any travelling allowance payable to the employee to defray actual expenses incurred by him/her by the nature of his/her employment;
- (g) The value of any travelling concession;

- (h) Any sum payable to the employee to defray special expenses incurred by him/her by the nature of his/her employment;
- (i) Any end of year payment or any proportion thereof that is payable under Part IIA;
- (j) Any gratuity payable on completion or termination of a contract of employment; or
- (k) Any annual bonus, or any proportion thereof which is of a gratuitous nature or that is payable only at the discretion of the employer.

There are special rules if the employee is not paid on a monthly basis, and special rules that apply to overtime.

#### *Overall Limit*

There is an overall limit on the amount of the award of HKD 390,000.

#### *Set-Off*

The employer is entitled to deduct from a severance or long service payment any gratuity based upon length of service, or any retirement scheme payment representing employer's contributions, paid to the employee. The reverse also applies, such that any gratuity or retirement scheme payment made to an employee by an employer will be reduced by the amount of any severance or long service payment made to such employee. These set-off provisions do not apply to an employee's own contributions, including any sum payable by way of interest thereon. The employer should contact the pension provider to determine the amount of the benefit derived from its contributions to the scheme. It is highly recommended that contact be made with the service provider as early as possible since this process can be lengthy and/or challenging.

### *No Entitlement*

There is no entitlement to severance/long service payment by reason of dismissal if:

- The contract of employment is summarily terminated by the employer without notice or payment in lieu in accordance with the EO (see paragraph (c) of Termination of Employment above); or
- The employer serves notice of termination of the contract of employment but the employee leaves service before the expiration of notice without the prior consent of the employer, or leaves service without having made a payment in lieu to the employer; or
- (Severance only) not less than seven days before the relevant date, the employer, the new owner or an associated company of the employer has offered to renew the contract of employment, or re-engage the employee under a new contract on the same terms and conditions or on terms that are no less favourable, and the employee unreasonably refuses the offer (nor is the employee deemed to have been dismissed).

### *Change In Ownership Of The Business*

On a change of ownership of a business:

- There is no entitlement to severance payment if at least seven days before the relevant date the new owner offers suitable employment on the same terms and conditions or on terms that are no less favourable, which the employee unreasonably refuses;
- An employee who satisfies the necessary conditions, (i.e., has been employed under a continuous contract of employment

for not less than five years) and who is not re-engaged by the new owner will be entitled to a long service payment (whether or not the employee unreasonably refused an offer of re-engagement from the new owner).

### *Re-Employment By Associated Company*

The provisions in the section immediately above also apply to the situation where an associated company of the employer offers the employee new employment. When the new associated company re-engages an employee, the employee's continuity of employment is not broken and his/her period of employment is counted as beginning when the employee was first employed by the original employer.

### 2.8. Termination Without A Valid Reason

In two situations, an employee may be entitled to additional remedies on termination:

#### (i) *Unreasonable Dismissal*

This is where an employee with two years of service or more is dismissed without a "valid reason" as defined in the EO.

#### (ii) *Unreasonable Variation Of The Terms Of Employment*

This occurs where an employer varies the employment contract without a valid reason and the employee's consent.

There is no minimum service requirement for this protection if the employee has been employed on a continuous contract (when the employee has worked for the same employer for the preceding four weeks for at least eighteen hours in each of those four weeks).

In (i) and (ii) above, the employer may be ordered to reinstate or re-engage the employee, or make a terminal payment, provided that he/she does not have a valid reason for the dismissal or variation.

If the employee resigns in these circumstances, it will be treated as a dismissal by the employer (giving rise to severance payments if the employee has been employed for more than two years).

In order to avoid liability, the employer must show a “valid reason” for the dismissal or variation. Valid reasons are:

- A reason related to the conduct of the employee;
- A reason related to the capability or qualification of the employee for performing work of the kind which he/she was employed by the employer to do;
- That the employee was redundant, or other genuine operational requirements of the business;
- That the employee could not continue to work in the position which he/she held without contravention of the law (either on his/her part or on that of his/her employer); or
- Some other reason of substance warranting the dismissal.

Reinstatement means that the employee is to be treated as if he/she had never been dismissed.

Re-engagement, on the other hand, need only be in employment comparable to that from which the employee was dismissed, or in other suitable employment. The employee may be re-engaged by the employer or by a successor of the employer or an associated company.

The consent of the employer and employee to any order for reinstatement or re-engagement is required. If either of them does not consent, or such an order is considered inappropriate, the employee may be entitled to a terminal payment. The terminal payment may include:

- Wages and any other payments due to the employee under his/her contract of employment; and
- Statutory entitlements under the EO to which the employee:
  - is entitled on dismissal and (which) have not been paid; and/or
  - might reasonably be expected to be entitled upon dismissal had he/she been allowed to continue in employment to attain the qualifying length of service required for the entitlement under the EO. This element will be calculated pro rata to the actual length of service of the employee. For example, where an employee with four years' service is dismissed without a valid reason, he/she will be entitled to four-fifths of the long service payment due for an employee with five years' service.

## 2.9. Termination Without A Valid Reason And In Contravention Of Statute

An employee may be entitled to an additional payment where he/she is dismissed other than for a valid reason and in contravention of any of the statutory restrictions on termination detailed at Restrictions on Termination above.

In these circumstances, if no award for reinstatement or re-engagement is made, the employer may be ordered to pay compensation of up to HK\$150,000. This liability is in addition to any separate liability of the employer under the EO to make payments to the employee and/or to pay any fine.

In determining and calculating an award for compensation, the circumstances of the case will be taken into account, which will include:

- The circumstances of the employer and the employee;
- The employee's length of service;
- The manner of dismissal;
- Any loss of the employee attributable to the dismissal;
- The chances of the employee obtaining new employment;
- Any contributory fault of the employee; and
- Any payment that the employee is entitled to receive under the EO, including any terminal payment.

#### 2.10. Notification Requirements

Where an employer ceases (or is about to cease) to employ any person in Hong Kong, the employer should notify the Inland Revenue on Form IR 56F at least one month before that person's employment terminates. The Inland Revenue may accept shorter notice where reasonable.

If the employer ceases or (is about to cease) to employ a person who is about to leave Hong Kong for a period exceeding one month, the employer must notify the Inland Revenue on Form IR 56G at least one month before the expected date of departure. The Inland Revenue may accept shorter notice where reasonable. If the employee will leave Hong Kong, the Inland Revenue Ordinance provides that the employer should not make any further payments of any kind (including salary) for a period of one month from the date on which this notice is given, except with the written consent of the Inland Revenue. The Inland Revenue Department will give consent to the employer to make payments once the employee has settled his outstanding tax liability and the ordinance provides a defence for the employer in any legal proceedings in respect of the employer's failure to pay the employee during this period.

Apart from notification to the Inland Revenue, the employer is required to notify the trustee of the mandatory provident fund scheme of the termination of employment prior to the next contribution date or according to the relevant scheme.

The employer should also notify the Immigration Department of termination of employment where it has sponsored the employee's work permit.

The employer has no obligation under the laws of Hong Kong to notify any other government agency or third party of the termination of employment of any employee.

#### 2.11. Discrimination

Hong Kong has the following anti-discrimination legislation:

- (i) Sex Discrimination Ordinance;
- (ii) Disability Discrimination Ordinance;
- (iii) Family Status Discrimination Ordinance; and
- (iv) Race Discrimination Ordinance.

#### *Protection*

The above laws provide that it is unlawful to discriminate on the grounds of sex, marital or family status, pregnancy, disability or race in Hong Kong.

Sexual, disability and racial harassment are also prohibited. The various ordinances protect against direct and indirect discrimination, victimization, hostile work environment, harassment and vilification. It should be noted that not all these protections apply to all the ordinances.

Currently there is no legislation on equal pay or prohibiting discrimination on the grounds of:

- religion;
- age; or
- sexual orientation.

There is a non-binding Code of Practice Against Discrimination in Employment on the Ground of Sexual Orientation (1996). In addition, claims are sometimes brought in relation to discrimination due to sexual orientation or on the basis of their transgender status, under narrow provisions within the Sex Discrimination Ordinance or the Disability Discrimination Ordinance.

#### *Equal Opportunities Commission And Codes Of Practice*

The Equal Opportunities Commission is a statutory body that has responsibility for implementing the anti-discrimination legislation in Hong Kong. The Equal Opportunities Commission's objective is to eliminate discrimination and promote equal opportunities.

#### *Codes Of Practice*

The Equal Opportunities Commission has issued Codes of Practice on each of the anti-discrimination ordinances. The Codes of Practice are not legally binding but failure to comply with them is admissible in evidence if a claim is brought.

The Equal Opportunities Commission recommends that staff should be trained to ensure that they understand the codes and their obligations under them.

In general, the Equal Opportunities Commission recommends that employers should apply objective criteria to all acts throughout the

employment process, from job advertisements and the interview process, through to treatment following termination. Employers should consider the actual requirements of the position, rather than make assumptions about who is qualified to fill the position and should ensure that fair and equal treatment is given to all individuals throughout their employment.

### *Complaints And Claims*

An aggrieved individual has a number of options under the anti-discrimination ordinances on how to pursue their rights. The options include the following:

- (i) Lodge a complaint with the Equal Opportunities Commission

The Equal Opportunities Commission is required to conduct an investigation and to attempt to settle the matter through conciliation.

- (ii) Obtain legal assistance from the Equal Opportunities Commission

If the conciliation fails, the complainant can apply for legal assistance from the Equal Opportunities Commission to bring a claim under the anti-discrimination ordinances in the District Court.

- (iii) Direct application to the District Court

Proceedings can be issued directly in the District Court without the need for any preliminary steps being taken with the Equal Opportunities Commission. However, if the process of making a complaint and engaging in conciliation has not been followed then an application for legal assistance cannot be considered.

### *Remedies*

An employer who is found guilty of discrimination will be liable for damages, including injury to feelings. It is worth noting that there is

no upper limit to the amount of damages that may be awarded in the District Court.

Typically damages will be assessed by reference to loss of earnings and injury to feelings.

The Court may also grant one or more of the following remedies:

- Make a declaration that the respondent has engaged in unlawful conduct and order that it does not repeat or continue such unlawful conduct.
- Order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant.
- Order that the respondent employs, re-employs or promotes the claimant.
- Order the respondent to pay the claimant punitive or exemplary damages.

## 2.12. Dispute Resolution

### (a) Court System

Certain types of employment disputes fall within the exclusive jurisdiction of the Labour Tribunal, while others may be heard or transferred to the District Court or Court of First Instance depending upon the amount in question.

#### (i) *Labour Tribunal*

The Labour Tribunal provides a relatively inexpensive and informal method of settling certain disputes between employers and employees. Neither side is permitted to be legally represented before the tribunal,

although the parties are free to seek and obtain legal advice at any time.

The Labour Tribunal Ordinance, which governs proceedings brought in the Labour Tribunal, provides that certain types of claims are within its exclusive jurisdiction, including the following:

- Claims by employees for wages due;
- Claims for payment in lieu of notice on termination of an employment contract;
- Claims for any other sums due from an employer under the Employment Ordinance or an employment contract; and
- Claims for severance and long service payments.

The Labour Tribunal will only hear claims which exceed HK\$8,000 in value. Claims which have a value below HK\$8,000 are dealt with by the Minor Employment Claims Adjudication Board.

Claims to the Labour Tribunal are lodged by making an appointment with the Labour Tribunal for a filing date. On the filing date, the claimant will need to verify the identity of the parties following which, a Tribunal Officer will interview the claimant to obtain statements and other relevant information.

An office bearer of a registered trade union may be authorized by the Labour Tribunal to represent a party before the Labour Tribunal even though parties are not permitted to be legally represented. The rules of evidence, which normally apply to courts, are applied less rigidly in the hearings of the Labour Tribunal and the Presiding Officer has a wide discretion to admit evidence.

It is essential that both parties attend the hearings of the Labour Tribunal, particularly the first hearing. If the claimant is absent, the

Labour Tribunal may strike out the claim or if the defendant is absent, judgment can be entered against him/her if the claimant is able to prove his/her case at that hearing.

Parties are encouraged to settle their dispute. During the first hearing before the Labour Tribunal, if the parties agree to explore the possibility of settlement, a Settlement Tribunal Officer may be directed by the Labour Tribunal to help negotiate a settlement.

Judgments awarded by the Labour Tribunal can be reviewed or an appeal can be lodged within seven days from the date of the award. Reviews by the Labour Tribunal can result in the claim being re-opened, or re-heard in whole or in part. The previous award or order can be confirmed, varied or reversed.

Appeals will require leave from the Court of First Instance. An appeal can be lodged only on the grounds that the award or order is erroneous on a point of law or outside the jurisdiction of the Tribunal. If leave is granted, the Court of First Instance will hear the appeal. Should the Court of First Instance refuse to grant leave, this refusal is final.

(ii) *Claims Falling Outside Of The Labour Tribunal's Jurisdiction*

The Labour Tribunal may not hear cases involving claims for higher wages, better working conditions, enforcement of post-termination restrictions, discrimination, and torts such as negligence or for personal injury. Depending on the amount claimed, these types of claims are heard in the Court of First Instance (for claims over HKD 1 million) or the District Court (for claims under HKD 1 million). The availability of alternative procedures for resolving disputes over higher wages, better working conditions and similar employment issues is less certain in that Hong Kong has never had legislation allowing collective bargaining.

Litigation in the courts of Hong Kong is based on an adversarial approach and the trial of matters is before a single judge. There is a

right of appeal to the Court of Appeal and in some cases to the Court of Final Appeal.

(iii) *Class Or Group Actions*

There is currently no provision under Hong Kong law to bring a “class action”, namely an action brought by one or more representative on behalf of a class of persons who may not all have been identified. However, in November 2009, the Law Reform Commission of Hong Kong issued a consultation paper seeking views on the merits of adopting class actions into Hong Kong law. The consultation period ended on February 4, 2010, but no conclusion has yet been reached.

Although provisions for bringing class actions do not currently exist, there is a procedure whereby identified individuals with the same interest in proceedings may bring or defend those proceedings through one or more representatives. These are known as “representative proceedings”. In recent years, there have been a number of representative proceedings in employment-related disputes commenced in the Labour Tribunal and the Court of First Instance.

(b) *Arbitration*

It is not uncommon for an employment contract to contain an agreement to resolve employment disputes through arbitration. Such a clause would be binding for employment-related matters that do not fall under the exclusive jurisdiction of the Labour Tribunal, such as enforcement of post-termination restrictions or claims brought in tort. However, where the Labour Tribunal has exclusive jurisdiction, for example in matters concerning claims for any sum due under a contract of employment, such claims must commence in the Labour Tribunal, irrespective of the existence of an arbitration provision.

Section 20(2) of the Arbitration Ordinance provides that, if a dispute is the subject of an arbitration agreement that is within the jurisdiction of the Labour Tribunal, the Labour Tribunal (which has been held to be a court under the meaning of the Arbitration Ordinance) may, at the

request of a party, refer the parties to arbitration. Before it does so, the Labour Tribunal must be satisfied that:

- (a) there is no sufficient reason why the parties should not be referred to arbitration in accordance with the arbitration agreement; and
- (b) the party requesting arbitration was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration and remains so.

Section 20(5) of the Arbitration Ordinance provides that if a referral to arbitration is made, an order must be made to stay the legal proceedings in that action.

Despite the provision of Section 20(2), case law suggests that if a request for stay in favour of arbitration is made in the Labour Tribunal, unless the parties agree to the transfer, the Labour Tribunal would be slow to grant a stay, as the intent of the Labour Tribunal Ordinance is that there should be a relatively simple and efficient mechanism for resolving employment disputes. Arbitration may be a long, drawn-out and costly process, when compared with the resolution mechanism in the Labour Tribunal.



## Hungary

### 1. Introduction

Hungarian labour law has gone through significant changes in the last decade, and has become one of the most developed areas of law in Hungary. Labour law plays an increasingly significant role in legal relationships in Hungary.

Employment relations in Hungary are governed by the Labour Code and other labour law legislation, collective bargaining agreements, and individual employment contracts. In the context of labour disputes, courts generally protect employees' rights by interpreting the provisions of the Labour Code, collective bargaining agreements and employment contracts in favor of employees.

The primary source of the currently effective Hungarian labor law legislation is the Act XXII of 1992 of the Labour Code (the "Labour Code"), which will be effective until June 31, 2012. As of July 1, 2012 a new Labour Code will be effective which is the Act I of 2012 ("New Labour Code").

The New Labour Code is fully harmonized with the Hungarian government's Labour Plan, as part of the so-called "*Széll Kálmán Plan*" which aims to restructure employment relationships to enhance competitiveness of Hungary and create jobs in Hungary.

The New Labour Code is also in line with applicable EU rules, such as 2008/104/EC on workforce lending, the Green Book following the Lisbon Strategy aiming flexibility at work and maintenance of security of employees, the 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, 1999/70/EC on definite term employment, 1997/81/EC on part-time employment, etc. The Hungarian government's purpose with the new Labour Code is to enhance competitiveness of the labor market of Hungary and to attract investors.

The New Labour Code retained the main principals of the current Labour Code, including the fundamental rights of the employer and employee. In addition to ensuring these rights, the New Labour Code strives to create friendlier business circumstances and provide greater flexibility in regulating employment relationships (e.g., atypical employment relationships, working time regulations, more space provided for agreement of the parties).

## 2. Terminations

### 2.1. Restrictions On Employers

The New Labour Code provides that all employment contracts and notices must be in writing. This means that the parties to an employment contract may terminate such contract only by giving notice in writing. Furthermore, the New Labour Code sets out the reasons for termination by notice (and immediate notice) and provides certain restrictions on terminations.

Pursuant to the New Labour Code, an employment relationship may be terminated: (i) by mutual consent of the employer and the employee; (ii) by notice; or (iii) by immediate notice.

The New Labour Code prohibits employers from terminating the employment relationship, by notice, as follows:

- During pregnancy, provided that the employee has given an appropriate notification regarding the pregnancy to the employee prior to the termination;
- During maternity leave;
- During the reserve army service;
- Female employees, during a treatment related to human reproduction procedures (for a maximum of six months), provided that the employee has given an appropriate

notification regarding the treatment to the employee prior to the termination; and

- On unpaid leave for the purpose of nursing or taking care of children, until the child reaches the age of three, irrespective of any leave of absence without pay.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

### *Termination By Notice*

#### (a) Employment Relationship For A Definite Period Of Time

With respect to fixed-term employment relationships, the reasons for the termination by the employer may only be in connection with: (i) the liquidation or bankruptcy procedures initiated against the employer; (ii) the abilities of the employee; or (iii) a force majeure affecting seriously the maintenance of the employment.

In case the employee terminates the fixed-term employment relationship, the employee must give valid reasons for the termination describing the circumstances that: (i) make the maintenance of the employment relationship impossible; or (ii) have disproportionate harmful affects regarding the employee's circumstances.

#### (b) Employment Relationship For An Indefinite Period Of Time

Both the employer and the employee may terminate an employment contract concluded for an indefinite term by notice. The terminating party, whether it is the employer or the employee, must give the appropriate notice to the other party. The employer's termination notice must contain the employer's valid and justified reasons for the termination, unless the employee is: (i) an executive as defined under the New Labour Code (e.g., managing director, member of the Board of Directors, etc.); or (ii) the employee qualifies as a pensioner. Termination notices that fail to include justified reasons are unlawful.

The employer's notice of termination must state that the employee is entitled to initiate legal proceedings within a specified period of time to challenge the termination and must provide information on how to initiate such proceedings. Failing to inform the employee of this will not make the termination invalid, nevertheless, the employee may initiate court proceedings within six months asserting that his/her employment was terminated unlawfully.

The labour law legal process itself may not serve as a valid reason for the employer's termination by notice.

In case the parties expressly agreed, the employment may not be terminated by notice, for a maximum one year from of the commencement of the employment relationship.

The reasons justifying termination of an employment relationship may be related only to: (i) the abilities of the employee; (ii) his or her behaviour in relation to the employment; or (iii) the operations of the employer. In the case of an employee terminating the employment relationship by notice, no reason is required to be included.

The statutory notice period in case of termination by notice is a minimum of 30 days, but may not be longer than six months; and commences on the day following the disclosure of the termination, except the following cases when the notice period commences after: (i) the employee's disability due to illness (but no longer than one year following the expiration of the sick leave period); (ii) the unpaid leave for the purpose of nursing a sick child; or (iv) the leave of absence without pay for caring for a relative.

Unless otherwise agreed by the parties, the statutory minimum notice period will apply in cases of termination by notice. According to the New Labour Code, the minimum 30-day notice period is extended depending on the duration of the employment as follows:

<b>Tenure (Number of Years)</b>	<b>Statutory Period Extended By Certain Days</b>	<b>Total Notice Days</b>
3 to 5	5	35
5 to 8	15	45
8 to 10	20	50
10 to 15	25	55
15 to 18	30	60
18 to 20	40	70
Over 20	60	90

There is no statutory notice period in case of terminating executive employees' employment relationships.

After giving an employee notice of termination, the employer must release the employee from his/her obligation to work for up to one half of the total notice period. The practical purpose of the exemption from work is to enable the employee to look for another job. The employee must receive his/her absence fee during the notice period.

(The absence fee is generally calculated on the basis of the employee's personal base salary and wage supplements including shift supplement etc. However, it is a narrower concept than average salary which generally includes other wage-like elements e.g. bonuses).

In the case of employees who are within five-years from the applicable retirement age, the employment may be terminated by the employer's immediate notice based on the employee's behaviour if the employee materially breached any important obligation stemming from the employment contract either intentionally or by gross negligence, or if he/she acts in a way that makes the continuation of the employment relationship impossible.

### 2.3. Severance Payment

If the employment relationship was terminated either: (i) by notice by the employer; (ii) by immediate notice given by the employee; (iii) by

the discontinuation of the employer's business activities without a legal successor; or (iv) by transfer of the former employer's business unit to the new employer that is not subject to the New Labour Code, the employee is entitled to a severance payment. The amount of the severance payment is calculated according to the duration of the employment, as follows:

<b>Continuous Employment With Employer (Years)</b>	<b>Multiple Of Absence Fee</b>
3 to 5	1
5 to 10	2
10 to 15	3
15 to 20	4
20 to 25	5
25 or above	6

If the termination of the employment relationship takes place within five years prior to the retirement age, the severance payment must be increased by an amount equal to three months' absence fee, provided that: (i) the employment relationship was terminated by the employer by notice; or (ii) following the cessation of the employer's business activities without a legal successor; or (iii) the former employer's business unit was transferred to the new employer which is not subject to the New Labour Code. No severance payment is due if: (i) the employee qualifies as a pensioner; (ii) the reason of the termination is related to the employee's employment-related behaviour, or his/her non health-related skills.

Pursuant to the New Labour Code, any unpaid leave exceeding 30 days (except maternity leave or leave for nursing or caring for a child until the child reaches the age of three, or leave for reserve army service for a maximum of three months) shall not be taken into account when calculating the duration of employment.

### *Termination By Immediate Notice*

Both the employer and the employee are entitled to terminate the employment relationship by immediate notice during the probationary period, and only the employer may terminate the employment by immediate notice if it was concluded for a definite term.

In the case of termination by immediate notice, the termination notice must contain the terminating party's clear and justified reasons for termination. The reasoning must be in connection with material breach of any important obligation stemming from the employment contract by the other party, either intentionally or by gross negligence. An employment relationship also can be terminated by immediate notice if the other party acts in a way that makes the continuation of the employment relationship impossible. The parties may neither extend nor limit the scope of the reasons that may serve as a basis for the immediate notice of termination. However, the parties may give concrete examples in the employment contract of behaviours that may give rise to an immediate notice of termination.

The party terminating the employment relationship by immediate notice must exercise its rights within 15 days as of becoming aware of the cause for immediate termination. Moreover, the terminating party must exercise its rights within a maximum period of one year from the date on which the facts justifying the termination actually arose. If the reason justifying the termination by immediate notice is a crime committed by the other party, the party terminating the employment relationship must exercise its rights within the statute of limitations applicable to such crime.

If the employer terminates the employment relationship by immediate notice, no severance payment is due to the employee. If the employee terminates the employment relationship by immediate notice, the employer must pay the employee an amount equal to the severance payment to which the employee would have been entitled, had the employer terminated the employment relationship by notice. The

rules pertaining to severance payments for termination by notice also apply.

If the employer terminates the employment relationship concluded for a fixed term by immediate notice, the employee will be entitled to an amount equal to a twelve-month absence fee. However, if the remaining period is less than twelve months, an employer will be required to pay only an amount equal to the absence fee for the remaining period.

#### 2.4. Collective Dismissals

##### *Criteria for qualifying as collective dismissal*

The New Labour Code provides that the termination of employees qualifies as a collective dismissal if the employer intends to terminate: (i) at least a pre-determined number of employees as set out by the New Labour Code; (ii) for a reason related to the operations of the employer; and (iii) within a 30-day period.

Concerning the above criteria, the New Labour Code does not differentiate between executive and non-executive employees, and, accordingly, in the case of collective dismissal, the Labour Code does not provide flexibility to exclude executive employees from the process, provided that such executives are working under an employment agreement, and not under, e.g., a civil law agreement.

#### 2.5. Number Of Employees Affected

The below chart shows the ratio of the average statistical number of employees employed by the employer within a six-month term preceding the date of the adopting decision of the employer on the collective dismissal and the number of employees to be terminated.

<b>Average statistical number of employees in employment</b>	<b>Number of employees to be terminated</b>
21-99	10

<b>Average statistical number of employees in employment</b>	<b>Number of employees to be terminated</b>
100-299	10%t
300 or above	30

The above numbers must be calculated on an entity-by-entity basis. Moreover, if an employer operates several different branches situated in different areas, the above numbers must be calculated on a branch-by-branch basis; with the exception that numbers relating to branches located in the territory of Budapest or in the territory of the same county, must be added together. If the numerical criteria are not met, the termination process does not qualify as collective dismissal.

## 2.6. Time Periods

The employer is required to determine the schedule of the collective dismissal in 30-day periods (“Periods”). The existence of the requirement to apply the specific rules on collective dismissal must be examined within each Period; i.e., whether the number of employees laid-off during a 30-day Period reaches the limits set out above. If the employer terminates another employment within 30 days from the last termination within a Period, the number of employees affected by such latter termination must be added to the number of employees terminated within the prior Period; and, if the number of employees terminated during the 30-day Period did not reach the limits, but together with those employees terminated within the subsequent 30 days it did, the rules on collective dismissal must also be applied to all terminations calculated together in the above way.

## 2.7. Method Of Termination

The collective dismissal related specific provisions of the New Labour Code must be applied if the employment of the affected employees is terminated by either: (i) notice of the employer; (ii) the mutual agreement of the employer and the employee; or (iii) in the case of an employment concluded for a definite term, in a way that the employer

pays to the employee his wages for the remaining period of the definite term of employment.

### *Collective Dismissal Process*

The process of implementing a collective dismissal plan may take several months. Under the New Labour Code, the employer is required to provide certain information: (i) to the Works Council; (ii) to the competent Labour Center; and (iii) to the affected employees.

#### 2.8. Pre-Consultation Obligations Of The Employer

Seven days prior to initiating the consultations referred to above, the employer must provide information in writing to the Works Council of: (i) the reasons for the proposed collective dismissal; (ii) the average statistical number of the employees employed by the employer within the six-month term preceding the date of adopting the decision of the employer on the collective dismissal; and (iii) the number of employees affected by the collective dismissal, broken down in job categories.

The employer must also notify the competent Labour Center on its intention to execute a collective dismissal at the same time as it informs the Works Council, and must provide the same information to the Labour Center that it must provide to the Works Council. A copy of such notice sent to the Labour Center must be delivered to the Works Council.

#### 2.9. Consultation Process

The employer must initiate the negotiations with the Works Council at least 15 days prior to the employer's formal written decision on the collective dismissal. The consultation must be continued until adopting by the employer its formal written decision on the collective dismissal or the conclusion of an agreement between negotiating parties.

During the consultation, the employer must provide further information in writing to the Works Council regarding: (i) the proposed schedule and aspects of executing the lay-off; (ii) the basis of selecting the employees to be laid off; and (iii) any benefits or support to be provided by the employer to the employees laid off in excess of those required by the applicable laws or the collective bargaining agreement (if any). The employer must also provide the same information to the Labour Center that it must provide to the Works Council. A copy of such notice sent to the Labour Center must be delivered to the Works Council.

The Labour Code does not provide specific provisions concerning the basis of selecting the employees to be terminated. The only general criteria are that the selection may not be discriminatory (e.g., may not be based on age, gender, or on the – definite or indefinite – nature of employment of the employees), but may be based on professional, or social criteria.

The Labour Code does not require, but allows the employer to provide benefits, compensation in addition to those mandatory payments that are due to the employees under the general rules of the Labour Code, or under the employment agreement of the affected employees.

During the consultation, the negotiating parties must discuss: (i) the possibilities for avoiding the collective dismissal; (ii) the basic principles of implementing the terminations; (iii) the methods to mitigate the negative consequences of the collective dismissal; and (iv) any potential means to decrease the number of employees affected by the proposed lay-off.

If an agreement is reached between the employer and the Works Council in any aspects of the collective dismissal process, the agreement must be put in writing and an original thereof must be delivered to the competent Labour Center. The terms and conditions of the agreement are binding on the employers, and must be taken into consideration when adopting its final written decision on the dismissal.

## 2.10. Decision Of The Employer

If, after the consultation, the employer decides to carry out the collective dismissal, it must adopt a formal, written decision thereon, setting out in its decision: (i) the number of employees to be laid off, separated according to job categories; and (ii) the first and the final day, and the time schedule of implementing the collective dismissal.

## 2.11. Implementation Of The Decision

### *Notification to the Labour Center*

The employer must notify the competent Labour Center in writing of its decision on implementing the collective dismissal and, simultaneously with the delivery of the preliminary notice to the employees discussed below, must provide the following data regarding the affected employees: (i) personal data (including social security number); (ii) current position at the employer; (iii) education; and (iv) average wages.

## 2.12. Preliminary Notification To The Affected Employees And Final Termination Of Employment

The employer must notify in writing each employee affected by the collective dismissal on its decision regarding the termination at least 30 days prior to: (i) serving the termination notice on the employee regarding the termination of the employment by notice; or (ii) notifying the employee on terminating his/her employment concluded for a definite term by paying the due wages for the remaining period. A copy of such notices must also be delivered to the Works Council and the competent Labour Center.

The termination notices may be served on the employees after the lapse of the 30-day period from the date of sending them the preliminary notice referred to above.

If at the time of providing the above-mentioned preliminary notice a restriction existed due to which, based on the prohibitions of the Labour Code, the employee's employment may not be terminated by

notice, the termination notice may only be served on such an employee after the prohibition ceased to exist.

The New Labour Code prohibits an employer from terminating employment by notice during the periods described above.

If, upon the expiry of the 30-day period related to the preliminary notice the above mentioned restriction ceases to exist, the employer may deliver to the employee the final termination notice.

The effective date of termination depends on the notice periods applicable to the respective employee according to the provisions of the New Labour Code and his employment contract. Each final termination of employment must be reported to the relevant tax authority.

### 2.13. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

If an employee initiates court proceedings asserting that his or her employment was terminated unlawfully, and the court rules in favour of the employee, the employer must pay for the damages of the employee that may not exceed an amount of 12 months' absence fee to which the employee would be entitled. Moreover, the employee shall also be reimbursed for the severance payment if: (i) his or her employment unlawfully was not terminated by notice; or (ii) severance payment was not due to him/her because he/she was unlawfully considered as already having acquired the right to receive a pension; or (iii) the reason of the termination was related to the employee's employment-related behaviour, or his/her non health-related skills.

If no damages occurred for the employee, the employee may request the absence fee that would be payable for the notice period.

If it is determined by a court that: (i) the termination of the employee's employment violated the rules of the equal treatment; (ii)

the employer violated the termination restrictions; (iii) the employee was an employee representative at time of the termination; or (iv) the employee has successfully initiated a claim against the mutual agreement or his/her other acts related to the termination, such employee, upon request, shall be restored in his or her original position.

If the employee terminates the employment relationship unlawfully, the employee must pay damages to the employer. These damages are limited to an amount equal to the employee's absence fee due for the notice period, or in the case of employees in key positions, to twelve times the employee's absence fee. If the employment was concluded for a definite term, the amount payable by the employee for the employer's damages shall not exceed an amount equal to three months' absence fee. The employer shall also be reimbursed for damages that may not exceed the employee's 12 months' absence fee.

#### 2.14. Litigation Considerations

Approximately 30 percent to 35 percent of labour disputes initiated in Hungary involve unlawful termination. In practice, the courts tend to rule in favour of employees in cases where an employer has failed to comply with the formalities pertaining to the termination notice provided in the New Labour Code. The New Labour Code provides more practical and reasonable rules related to terminations.

If an employee challenges the termination before a competent court, the court will first determine whether the employer complied with the applicable formality requirements set out in the New Labour Code. This means that prior to deciding on the merits of the termination, the court will investigate whether the employer provided appropriate reasons justifying the termination, complied with the statutory deadlines and restrictions applicable to the termination and whether the person authorized to exercise the employer's rights signed the termination letter (or if the person was not authorized to exercise the employer's rights, whether the termination was approved by the person authorized to exercise the employer's rights).

Thus, in practice, it is possible that even if it is established that an employee dismissed by immediate notice committed a crime against the employer, and the employer was one day late in delivering the termination notice to the employee, the termination may be deemed unlawful and the employee could be entitled to compensation for damages. Of course, the determination by the court that an employment relationship was unlawfully terminated does not affect the employer's right to initiate criminal proceedings against such an employee or to submit a counter-claim in the labour dispute requesting payment of damages caused by the employee.

### 3. Discrimination

#### 3.1. Laws On Employment Discrimination

The New Labour Code includes a section prohibiting discrimination against employees based on any condition not related to their employment. However, to date, only a few labour disputes have been initiated before the courts by employees claiming that their employer engaged in employment discrimination.

The New Labour Code and Act CXXXV of 2003 on equal treatment and promotion of equal prospects (the "Equal Treatment Act") prohibits discrimination against employees based on their gender, age, nationality, race, ethnic origin, religion, political convictions, participation in employee interest groups or any other condition not related to their employment.

In compliance with the EU Directives, direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been, or would be treated in a comparable situation, on any of the grounds referred to above. Furthermore, indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons, unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are

appropriate and necessary; or (ii) that provision, criteria or practice shall be considered as having reasonable ground with respect to the legal relationship in question.

According to the Equal Treatment Act, a violation of the principle of equal treatment in an employment occurs, in particular, if an employer discriminates against an employee directly or indirectly, particularly in relation to the determination and the use of the following provisions:

- The process of awarding jobs, especially through public job advertisements, the process of job applications and the terms of the employment;
- Provisions preceding the establishment of the employment or other work-related legal relationship, and provisions that were created for the furthering of such procedures;
- The establishment and termination of the employment or other work-related legal relationship;
- Training conducted before or during the work;
- The determination and providing of the terms and conditions of the work;
- The benefits relating to the employment or other work related legal relationship, particularly the determination and provision of the salary;
- Membership and participation in the employees' organizations;
- Promotions; and
- Enforcement of compensation and disciplinary liability.

In addition to the Labour Code, the Hungarian Constitution, the Hungarian Civil Code and the Equal Treatment Act, also Government Decree N° 218/1999 (XII.28.) on Minor Offences (the “Government Decree”), contain provisions prohibiting discrimination.

### 3.2. Employee Remedies For Employment Discrimination

According to the Hungarian Act III of 1952 on Civil Procedure (the “Civil Procedure Act”), labour courts may adjudicate disputes arising from the employment relationship, negotiations held prior to the conclusion of the employment contract and rights derived from the employment relationship after it is terminated. This means, for example, that an individual may initiate a lawsuit against a “potential” employer before the labour court, based on a claim that the employer violated the laws on discrimination by publishing a job advertisement that asked for men or women only, when there was no legal reason for such differentiation. The Civil Procedure Act provides for scheduling hearings very quickly (i.e., within 15 days) following the submission of a petition and, in certain cases, shifts the burden of proof to the employer.

Moreover, if the average earnings from an employment relationship to which the labour dispute pertains do not exceed a certain amount, it is also possible to exempt the employee from the costs and expenses of the legal actions relating to employment relationships. This exemption for employees is granted throughout the entire proceeding, from the submission of claim to the enforcement procedure.

### 3.3. Potential Employer Liability For Employment Discrimination

Despite the various legal regulations prohibiting it, there have been only a limited number of court cases involving employee claims of discrimination. An employee may challenge discriminatory terms contained in an employment contract and all discriminatory actions carried out by an employer before the competent labour court. All such discriminatory terms in the contract are considered null and void. Furthermore, if the employee is successful, the employer must pay the employee all damages incurred (including loss of salary, attorney’s

fees and procedural costs) as a result of the breach of the prohibition on discrimination.

If a dispute arises in connection with the violation of the prohibition on discrimination, the employer must prove that it did not breach this rule of the New Labour Code (the burden of proof is on the employer in labour disputes involving discrimination). In addition, pursuant to the Government Decree, a labour inspector is entitled to initiate a procedure for committing a minor offence if an employer discriminated against its employees. The Act LXXV of 1996 on Labour Supervision prescribes the labour matters that fall within the investigatory powers of the labour authorities, such as a violation of the prohibition on discrimination. The labour authorities carry out the labour inspections *ex officio*.

Without any special permission or prior notification, the inspector is entitled to conduct an inspection and request information from persons at the workplace, and using the Social Security Number. If the inspector discovers any violation of the prohibition on discrimination, he or she may take any necessary steps in order to remedy the violation, including: (i) prohibiting the employment in certain circumstances; (ii) requiring the employer to cease contravening the relevant labour laws by a certain deadline; (iii) requiring the employer, employing a foreign employee without work permit or EU Blue Card, to pay certain contribution into the Central Budget; (iv) informing the competent labour authority relating to illegal use of allowances granted for job-seekers; (v) making a written proposal to the manager of the labour authority regarding the imposition of a fine on the employer; (vi) initiating proceedings for minor offences; (vii) establishing the commencement date of the employment and requiring the employer to comply with the relevant statutory labour law; (viii) prohibiting the employer from its business activity if the employer does not have the required licenses, or registration; and (ix) issuing a notification to children's welfare services in case of non-compliance with age conditions relating to employees.

The fine can range between HUF 30,000 and HUF 8,000,000 for a first offence if only one labour law rule is breached. If more than one rule is breached or if a second offence is committed within three years following the date on which a previous resolution on the imposition of a fine becomes final and binding, the fine ranges between HUF 30,000 and HUF 20,000,000.

#### 3.4. Practical Advice To Employers On Avoiding Employment Discrimination Problems

Employers are obliged to prove that they did not violate the prohibition on discrimination. This means that in a labour dispute initiated by the employee based on the prohibition on discrimination, the employer must provide actual and reasonable reasons justifying why the affected employee did not receive the same treatment as other workers. Therefore, it is advisable for employers to prepare and maintain sufficient records and documentation regarding the reasons motivating an employer's decision to differentiate among employees (e.g., evaluations, payment of bonuses, terminations, etc.).



## Indonesia

### 1. Introduction

The Indonesian legal system is a civil law system. As such, the courts are not bound by decisions of the courts at the same level or higher. Instead, the statutes dictate the basis for deciding cases.

The sources of labor laws in Indonesia are widely dispersed among national laws and regulations, presidential decrees and ministerial decrees. Some of these sources are relatively recent, while others are quite old, some even issued in the colonial period. In general, these laws and regulations are applicable to all “workers”, regardless of their position (whether they are managerial or non-managerial workers), or their status (whether they are indefinite or definite period workers). However, there are some provisions that exempt certain groups of workers from receiving certain benefits; for example, managerial workers are exempted from the requirement to pay overtime.

In an effort to synthesize the diverse body of laws and regulations on the protection of workers, the government enacted Law No. 13 of 2003 on March 25, 2003 (“**Labor Law**”), effective on the same date. The Labor Law contains significant provisions and combines a major portion of the labor laws and legislation into a single legal instrument.

The Labor Law sets out general principles only and requirements regarding labor and employment matters in Indonesia. There are various implementing regulations issued by the Minister of Manpower. Furthermore, various old implementing regulations that have not been replaced by the new ones remain effective to the extent that they do not contravene and/or have not been replaced by new implementing regulations.

Termination of employment, employment discrimination and workplace harassment are generally regulated under the Labor Law. Termination of employment is also governed by Law No. 2 of 2004 regarding Industrial Relations Dispute Settlement (“**IR Disputes Law**”). There are various ministerial decrees issued by the Minister of Manpower that implement the general provisions on the termination of employment, employment discrimination and workplace harassment.

## 2. Termination Of Employment

### 2.1. General Principles Of Termination Of Employment In Indonesia

Generally speaking, the employer is required to use all efforts to prevent the termination of an employment relationship. Furthermore, an employer is prohibited from terminating the employment relationship for any of the following reasons:

- A worker is absent due to illness according to a physician’s statement for a period of not more than 12 months;
- A worker is unable to carry out his/her work due to the fulfillment of his/her state duties in accordance with the prevailing laws and regulations;
- A worker performs his/her religious rituals;
- A worker gets married;
- A female worker is pregnant, gives birth, experiences miscarriage or breastfeeds her baby;
- A worker has a blood relationship and or a marital relationship with another worker in the same company, except where this is regulated in the employment agreement, the company regulation or the collective labor agreement;

- A worker forms, becomes a member and/or the management of a union, carries out union activities outside working hours, or during working hours with the consent of the employer, or based on the provisions under the employment agreement, the company regulations or the collective labor agreement;
- A worker has reported the employer to the authorities concerning the question of whether the employer has committed criminal actions;
- Due to the difference of ideology, religion, political alliance, race, skin color, group, sex, physical condition or marital status;
- A worker has a permanent disability or is ill due to a work accident or due to the employment relationship, for which, according to a physician's statement, the recovery period cannot be determined. The Labor Law, however, allows the employer to terminate an employee who has a permanent disability or is ill after 12 consecutive months.

Subject to certain exceptions (set out below), in order to terminate unilaterally employment relationships, the general rule under Indonesian labor law is that employers must first obtain a favorable decision on the termination of employment from the Industrial Relations Court (“**IR Court**”). Such approval takes time and during the process both the employer and the employee are required to fulfill their respective obligations (i.e., the employee is still required to work and the employer is still required to pay the employee's salary and benefits).

Exceptions to the prior approval requirement for termination apply if the termination of employment occurs, for example, during the worker's probationary period (as long as the probationary period is specifically provided in writing), when the worker reaches retirement age under the employment agreement or if the employee voluntarily

resigns. This is an important exception and widely implemented under the so-called “negotiated resignation approach” when an employee agrees to a termination (however, the joint agreement on termination (“**Joint Agreement**”) must be registered with the IR Court).

These are the limited exceptions to the general rule that employers must first obtain a favorable decision from the IR Court on the termination of employment :

- (a) termination during probation period;
- (b) employee’s voluntary resignation (provided in writing, without duress/intimidation from the company);
- (c) expiry of a definite period (fixed term) Employment Agreement (provided that the definite period employment is not deemed as an indefinite period or permanent employment due to violation of the maximum allowed period of contract or types of work);
- (d) the employee reaches the retirement age as provided in the Employment Agreement, Company Regulations or Collective Labor Agreement;
- (e) employee’s death;
- (f) employee’s detention by the authorities causing his/her inability to work for six months; or
- (g) a court decision finding the employee guilty of a crime (within the six-month period that the employee is detained by the authorities).

## **Notice On Termination And Payment In Lieu Of Notice**

### **(a) Notice on Termination of Employment**

There are no labor laws and regulations that specifically regulate the notice period for terminating an employment relationship. The labor laws only provide that if termination of employment is unavoidable, the employer and the employee are obligated to conduct bipartite negotiations to reach consensus for the settlement of the termination of employment (see Process for Termination below for explanation on bipartite negotiation in the process for termination of employment). The negotiations may take place within a period of 30 days. During such 30 day period, the employer is obliged to inform the employee of the reason of termination (and other related issues) and to give the employee an opportunity to discuss the reason for termination and the termination payment.

In practice, many employment agreements stipulate the period of termination notice. This is acceptable under the existing labor laws and regulations, as long as the purpose of including this provision in the employment agreement is mainly:

- (i) To inform the employee regarding the employers intention to terminate the employment relationship;
- (ii) To give the employee the opportunity to find another job; and
- (iii) To discuss the termination package (when applicable).

If the employee challenges his/her termination of employment, the employer is still obliged to settle the employment dispute in the next level (i.e., mediation/conciliation and IR Court). If there is a termination dispute, the notice period will not be used in determining the effective date of termination, because the effective date of termination will be determined by the mediator or the IR Court.

(b) Payment in Lieu of Notice

Payment in lieu of notice in some jurisdictions is the equivalent of severance payment. In Indonesia, however, payment in lieu of notice is simply a part of the calculation of severance and, indeed, may be given in addition to the statutory termination package. On the other hand, it is also possible for an employment agreement to provide that the payment in lieu of notice can be set off against the statutory termination package. Nevertheless, if the IR Court decides that an employee is deemed entitled to the statutory termination package, the employer may have to pay the payment in lieu of notice on top of the statutory termination package (because this payment will be deemed as the employer's contractual obligation toward the employee).

### **Process For Termination Of Employment**

(a) Bipartite Negotiations

IR Disputes Law requires all industrial relation disputes, including disputes over termination of employment, to be first resolved through bipartite negotiations in a consultative manner in order to reach consensus. Bipartite negotiations are defined as meetings between the workers/laborers or workers/labor unions and employers to resolve industrial relation disputes.

Law No. 2/2004 further requires every bipartite negotiation to be properly recorded in the minutes of the meeting.

If the bipartite negotiation manages to resolve the dispute, then the parties will draw up and sign a settlement agreement. This settlement agreement is final and legally binding and must be implemented by the parties.

The existing laws and regulations do not regulate the content of a settlement agreement. In most cases, a settlement agreement also includes a "release clause", whereby the employee releases and holds harmless the employer/company, its affiliates, its management and its

employees from any and all obligations, liabilities, and claims in whatever forms, including claims through any courts, either in the present or in the future.

The settlement agreement should be registered by the signatories in the IR Court that has jurisdiction over the place where the parties executed the agreement.

Settlement of disputes through bipartite negotiations must be reached at the latest within 30 working days from the time the negotiation commenced. If within that time frame one of the party refuses to negotiate, or the negotiations did not result in an agreement, then the bipartite negotiation will be considered as failed.

If bipartite negotiations fail, one or both parties can report their dispute to the local agency responsible for manpower matters, attaching the proof that efforts to resolve the dispute through bipartite negotiations were conducted. The local agency is then obligated to offer the disputing parties conciliation to settle their disputes and, if the parties do not choose conciliation, the local agency will transfer the settlement of dispute to a mediator.

(b) Mediation or Conciliation

If the bipartite negotiation does not reach an agreement, one or both disputing parties can report their dispute to the Local Manpower Office, by attaching the minutes of the bipartite negotiation.

The Local Manpower Office is required to offer to both parties mediation or conciliation. The process for mediation or conciliation is more-or-less the same. The difference is between the mediator and the conciliator. The mediator is an official of the Manpower Office who is appointed by the Local Manpower Office to mediate the case. The conciliator is a private person (not a government official) whose name is listed as a conciliator at the Local Manpower Office. If within seven working days the parties do not choose the settlement method, the local manpower office will refer the dispute to a mediator.

No later than seven working days after receiving the delegation of responsibility for settlement of the termination dispute, the mediator/conciliator must conduct a review of the case and promptly convene a mediation/conciliation hearing.

The mediator/conciliator will try to persuade the parties to settle the dispute in the first 10 days. If there is no settlement, the mediator/conciliator must issue a recommendation no later than 10 days after the first mediation/conciliation session. The parties must submit a written reply to the mediator no later than 10 days from receiving the mediator's/conciliator's recommendation. If a party does not provide a reply, it will be deemed to have rejected the mediator's/conciliator's recommendation.

If the parties agree with the recommendation, the mediator must assist the parties in preparing a settlement agreement (no later than within three days). The settlement agreement needs to be registered at the IR Court.

If the dispute is not resolved through the mediation/conciliation, the mediator/conciliator will issue a written recommendation. If the mediator/conciliator's written recommendation is rejected by one or both parties, either party may continue the dispute by filing a lawsuit with the IR Court at the relevant District Court.

A mediator or a conciliator is required to accomplish his/her duties no later than 30 working days after he/she received the assignment to settle the dispute.

#### (c) Proceedings at the IR Court

If a party does not agree with the recommendation of the mediator/conciliator, the party may bring the case to the IR Court whose jurisdiction covers the workplace of the employees. The IR Court is a special court within the sphere of the general justice system. The Civil Procedure Law is applicable in the IR Court (unless otherwise stipulated by IR Disputes Law).

The proceedings at the IR Court theoretically should not exceed 50 working days from the first hearing.

(d) Supreme Court

For disputes over termination of employment, if a party does not agree with the decision of the IR Court, it may bring the case to the Supreme Court (through the Sub-registrar office of the IR Court) no later than seven working days after the date of the decision (for parties who are present at the court decision hearing), or seven working days after the date of decision notification (for parties who are absent).

The Sub registrar's office must submit the case dossiers to the Head of the Supreme Court within 14 working days after the date of the cessation appeal has been received.

As stipulated by Article 115 of IR Disputes Law, settlement of disputes over termination of employment at the Supreme Court shall be made in no more than 30 working days after the date the cassation appeal has been received.

### **Negotiated Resignation Approach**

One of the key exceptions to the general rule that the termination of an employee must first be approved by the industrial relation dispute settlement agency is where the employee voluntarily resigns. This is an important exception and widely implemented under the so-called "negotiated resignation approach".

In this preferred approach, the employer would approach the employee in question to invite them to sign a "negotiated resignation letter". A negotiated resignation assumes as a baseline a severance payment calculation, the statutory formula applicable to a termination and some additional incentive for prompt settlement. It is not a "termination", as such, because that would involve mediation at the local Manpower Office (or conciliation process) and then proceedings at the IR Court as described above.

The time spent in obtaining the decision justifying the termination of employment could take anywhere from four to six months (in a contested proceeding) after dealing with the bureaucracy, which requires large amounts of management time and incurs substantial legal fees. If the employee refuses to sign a negotiated resignation letter (because he/she does not really see himself/herself as having resigned voluntarily), but does agree on the amount of a redundancy package (which sometimes happens in practice), the company and the employee can enter into a “settlement agreement”. The net effect is essentially the same as a negotiated resignation.

### **Joint Agreement On Termination Of Employment**

If an employee refuses to sign a negotiated resignation letter (because they do not really see themselves as having resigned voluntarily), but do agree on the amount of a redundancy package (which sometimes happens in practice), the employer and the employee can enter into a Joint Agreement. The net effect is the same as a negotiated resignation but the Joint Agreement needs to be registered at the relevant IR Court. The registration of the Joint Agreement is an administrative process and does not involve court proceedings.

If the employees agree to the “negotiated resignation” approach the process will certainly be quicker and there will be no requirement to register any documents with the relevant IR Court. However, it should be noted that the risk with “negotiated resignation” is that the employees later try to claim they were forced to resign. Under the Labor Law, an employee has 12 months to make such a claim. With a Joint Agreement it is also possible for an employee to argue that he/she was forced to agree to the termination. However, in such a situation the employer could “back up” the arrangement by stating that it had the right to terminate the employee under the Labor Law and the employee agreed to the termination.

In one case an employee signed a resignation letter and later successfully argued that he was forced to resign. The employee had written the resignation letter himself at the employer’s office in the

room of the Human Resources Manager with the Manger looking over him. If an employer is concerned about the risk of an employee challenging a negotiated resignation, on balance the Joint Agreement approach would be more attractive.

### **Employee Rejection Of Package Offered**

If during the negotiation any of the employees reject the package offered by the employer in relation to the termination, either the employer or the relevant employee can lodge the case to the local office of the Ministry of Manpower (“**MOMT**”) to initiate the mediation/conciliation process (part of the normal process of termination of employment). In practice, the employer needs to be proactive in lodging the dispute to the local office of MOMT. In essence, the employer needs to go through the normal termination process.

If the mediation/conciliation sessions cannot lead to an amicable settlement, the mediator/conciliator will issue a recommendation on how the dispute should be settled. If termination of employment is recommended, the mediator/conciliator’s recommendation will usually include the recommended termination package. In practice, the mediator/conciliator’s recommendation will be within the boundaries of the Labor Law. This means that the relevant termination package will be in accordance with the Labor Law, unless there is a certain provision under the employment agreement, company regulations, collective labor agreement, or other agreements or policies applicable in the employer’s organization that provides a better termination package to the employee.

During the mediation/conciliation process (as well as proceedings at the IR Court), both the employer and the employee are required to fulfill their respective obligations. This means that the employee is still required to work, while the employer is still required to pay the employee’s salary and benefits as normally received by the employee. It is possible for the employer to suspend the employee during the termination process (until a settlement is reached or a final and

binding decision on the termination of employment is issued). However, during the suspension, the employer is still required to pay the full salary and benefits of the employee. It should be noted that technically under the Labor Law an employee cannot be suspended until the formal termination process has commenced, i.e., bipartite negotiation has commenced.

## **Approach**

In most cases the employer should approach the affected employee first to inform the employee of the termination and its impact on the employee. The applicable termination package should also be discussed with the employee along with the preferred mechanism (e.g., negotiated resignation letter, or if the employee does not really see himself/herself as having resigned, a Joint Agreement).

When discussing the termination package with the employee, the employer should emphasize that the package is already in line with the termination payment under the Labor Law. The employer should also explain to the employee if any additional incentive/payment will be paid on top of the statutory termination payment.

In Indonesia it is not uncommon for an employer to pay an additional amount to an employee (i.e., on top of the statutory payments) as an incentive for the employee to resign or agree to the termination. There is no minimum requirement in relation to the additional payment. In practice the additional payment ranges between three to six months' salary. The exact amount typically depends on the capability of the company. It is also possible for the employer to set a condition on the additional incentive, such as the incentive is only applicable if the employee agrees to sign the negotiated resignation letter or the Joint Agreement, but will cease to apply if the employee refuses to sign any such documents and refer the case to mediation/conciliation.

## Termination Payment Entitlement

The termination payment entitlement of an employee depends on whether the employee is employed under a definite period employment agreement or an indefinite period employment agreement.

### (a) Termination Payment for Indefinite Period Employees

The termination payment paid to terminated indefinite period employees consists of three elements: severance pay, long service pay and compensation of rights. **Attachment 1, below**, provides details of the three components of termination payment.

Whether an employee is entitled to severance pay, long service pay, compensation of rights and separation payment depends on the reason for termination of employment. Further details on the applicable termination payment formula for an indefinite period employee are described in **Attachment 2, below**.

In addition to the existing three elements of a termination package, the Labor Law introduced a new element, i.e., the concept of a “separation payment” (“*uang pisah*”). This payment is applicable where the employment termination involved the employee’s voluntary resignation or where the termination involved the employee’s absence without leave for five, or more, consecutive working days.

### (b) Termination Payment for Definite Period Employees

An employee employed under a definite period employment agreement who is terminated before the contract period expires is not entitled to a termination payment that consists of severance pay, long service pay and compensation of rights. Instead, any party that terminates a definite period

employment agreement before its expiry is obligated to pay to the other party compensation in the amount equal to the definite period employee's salary up until the definite period employment agreement should have expired.

(c) Salary During Process of Termination

Previously, an employer was obliged to pay an employee's salary during the termination process for up to six months or until the committee for the settlement of labor disputes issued its decision, whichever was earlier. The Labor Law does not set such a limitation. It only stipulates that as long as the industrial relations dispute settlement agency has not issued its decision, both the employer and the employee must carry out all of their respective obligations. It is contemplated that "respective obligations" means the obligation to continue working (for the employee) and to pay the salary (for the employer).

It is important to understand the reason for the absence of the previous reference to a six-month limitation on payments during the process of termination. IR Disputes Law stipulates the maximum period for the settlement of labor disputes, depending on the type of the dispute. There are four types of disputes subject to resolution by various settlement mechanisms. For example, the maximum period for the settlement of termination disputes (from the bipartite negotiation until the decision of the IR Court is issued) appears to be 152 working days or approximately seven months.

(d) Salary During Detention

The employer is not required to pay the salary if a worker is arrested for allegedly committing a criminal act. However, instead of salary, the employer is required to provide assistance to the employee's dependants. The amount of the

assistance depends on the number of dependant(s) and ranges from 25 percent to 50 percent of the employee's monthly salary.

(e) **Salary During Long-Term Illness**

The Labor Law provides that an employee who is ill is not obliged to work. The employee's salary during absence due to illness is calculated as follows:

- First four months of illness: 100 percent
- Second four months of illness: 75 percent
- Third four months of illness: 50 percent
- Each subsequent months illness: 25 percent (until termination of employment).

The employer is entitled to terminate an employee after the lapse of a 12-month period of long-term sick leave. The Labor Law entitles an employee to apply for the termination of employment due to his/her continuing illness and to receive a termination payment. However, the Labor Law does not provide a specific formula for termination by the employer because of long-term absence due to illness.

### **Expatriates - Managing Personnel**

Article 46(1) of the Labor Law states (using an unofficial English translation):

*“Expatriate workers shall be prohibited from holding positions managing personnel...”*

The Labor Law does not elaborate on the meaning of “managing personnel”. Unfortunately, officials at the MOMT currently tend to

interpret ‘managing personnel’ broadly, i.e., an expatriate is not allowed to handle or work on any personnel-related issues. Because the existing laws and regulations do not clearly interpret “managing personnel” the officials of the MOMT have discretion to determine whether an expatriate worker may be involved in HR supporting activities or not.

In this regard an employer needs to be mindful of the above in making a decision to bring expatriate regional HR personnel to Indonesia to be involved in matters that could be perceived as “managing personnel”. Expatriates have been detained and/or deported for allegedly being involved in “managing personnel”.

### 3. Employee Discrimination

#### 3.1. Laws On Employment Discrimination

The Labor Law provides that every worker has the same opportunity to obtain a job without discrimination. The Labor Law also provides that every worker has the right to receive equal treatment from the employer without discrimination. The employer must provide rights and obligations for workers without discriminating by sex, ethnic group, race, religion, skin color and political alliance.

##### (a) Protection for Female Workers

Non-discrimination between male and female workers is a concept that was introduced long before the Labor Law came into effect. Indonesia has ratified several ILO Conventions dealing with non-discrimination between male and female workers, including:

- ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (by virtue of Law No. 80 of 1957);

- ILO Convention on the Elimination of All Forms of Discrimination against Women (by virtue of Law No. 7 of 1984); and
- ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation (by virtue of Law No. 21 of 1999).

The right to employment and fair and appropriate remuneration and treatment in the employment relationship is also protected under Article 28D paragraph 2 of the 1945 Constitution (as amended).

Furthermore, the prohibition on discrimination in employment matters is also regulated under the Human Rights Act. The Human Rights Act provides that:

- All people are born free having the same and equivalent human dignity and are gifted with minds and conscience to live in a society, nation and state in the spirit of brotherhood.
- All people have the right to a just legal recognition, guarantee and protection and to obtain legal certainty and equal treatment before the law.
- All people have the right to human rights protection and basic human freedom without discrimination.
- Every citizen has the right to obtain proper work in accordance with his or her talent, qualification and ability.
- Every person is free to choose the work he/she enjoys and has the right to fair employment conditions.
- Every person, male and female, who performs the same, comparable, equivalent or similar work, has the

right to obtain the same wage and employment requirements.

- Every person, male and female, in performing the job that is suitable to his/her human dignity is entitled to a just wage in accordance with his/her performance in order to ensure the welfare of his/her family.

In addition to the Labor Law there are ministerial regulations and circular letters issued prior to the effectiveness of the Labor Law that have also prohibited discrimination against female employees, such as:

- Circular Letter of the Minister of Manpower No. SE-04/M/BW/1996 on the Prohibition of Discrimination against Female Workers in Company Regulations of Collective Labor Agreement; and
- Minister of Manpower Regulation No. Per-03/Men/1989 on the Prohibition of Termination of Female Workers due to Marriage, Pregnancy or Giving Birth.

Despite the ratified ILO Conventions, as well as Indonesian law and regulations prohibiting discrimination between male and female employees, in practice difference of treatment between male and female employees in a company still exists. For instance, medical benefits of a married male employee often cover his wife and children, whereas a married female employee is entitled to medical benefits as if she were single (not covering her husband and children). The rationale behind this is that a married male employee is considered as the bread-earner of the family, whereas a female employee is deemed a dependant of a male employee and, thus, is not the family bread-earner. Of course, this will be different if the female employee can prove that she is the bread-earner of the family (for instance, she is a single parent or her husband is

disabled or unemployed). She is then entitled to medical benefits covering her husband and children.

Female workers who are ill on the first and second day of the menstruation period (so that they cannot perform work) are entitled to menstruation leave. In practice, the employer will require the female workers to provide a doctor's certificate if they wish to take menstruation leave. A female worker is also entitled to maternity leave, i.e., 1.5 months before and after she delivers her baby and a 1.5-month miscarriage leave.

The Labor Law prohibits the employer from:

- Employing female workers who are less than 18 years of age from working from 11 pm to 7 am.
- Employing a pregnant female worker who according to a physician's statement will endanger the health and safety of her pregnancy and herself if she works between 11 pm to 7 am.

The Labor Law obliges an employer employing female workers between 11pm to 7am:

- To provide nutritious food and beverage;
- To protect morals and safety at the place of work; and
- To provide transportation from and to the work place.

(b) Protection for disabled workers

The Labor Law provides that an employer employing disabled workers must provide protection in accordance with the types and levels of their disability. The protection could be in the form of the provision of access, job tools and self-protective equipment that are suitable to the type and level of disability.

There is also a requirement for the employment of disabled persons regulated under Minister of Manpower Decree No. Kep-205/Men/1999. Under this Decree, an employer having 100 employees is obligated to employ at least one disabled person in accordance with the job conditions and qualifications. The Decree also requires an employer using high technology having at least 100 employees to employ one or more disabled persons.

(c) Protection for child workers

Basically an employer is prohibited from employing children. This provision may be exempted for children between 13 years and 15 years of age to carry out light work to the extent that it does not disturb their physical, mental and social development and health. The employer that wishes to employ children between 13 years and 15 years must fulfill the following requirements:

- Obtaining written permission from the parents or guardian;
- Creating an employment agreement between the employer and the parents or guardian;
- Establishing a workday of no more than three hours; and
- Carrying out the work during daytime and not interrupting school time.

Children who are at least 14 years old may carry out work at the place of work that is a part of an education curriculum or training ratified by an authorized official.

In the event a child is employed together with an adult worker, the place of work of the child must be separated from the place of work of the adult worker. A child is considered to be working if he/she is present in the place of work, unless proven to the contrary.

Indonesia has ratified ILO Convention No. 138 concerning Minimum Age for Admission to Employment, by issuing Law No. 20 Year 1999.

### 3.2. Employee Remedies For Employment Discrimination

Based on the general law of tort as provided under Article 1365 of the Indonesian Civil Code, an aggrieved party may claim damages caused by an unlawful action of the other party, as long as such unlawful action has caused actual losses to the aggrieved party. In practice, the employee will use this Article 1365 to claim damages caused by employment discrimination.

It is also possible for an employee to terminate the employment relationship and to claim a termination package, if the employer's action can be categorized as assaulting, rudely humiliating or threatening the worker.

### 3.3. Potential Employer Liability For Employment Discrimination

If it is proven that the employer committed a violation of the employment discrimination provisions by rudely humiliating, assaulting and threatening the worker, the employer may be held liable for the termination package for the employees who wishes to terminate the employment relationship. The employer may also be liable for damages to the employee based on Article 1365 of the Indonesian Civil Code, if the employee files a civil claim to the District Court.

If so, the employer will be subject to:

- Administrative sanction for violation of Articles 5 and 6 of Labor Law regarding equal opportunity and equal treatment

provisions under the Labor Law. The administrative sanctions consist of warning, written warning, limitation of business activities, freezing of business activities, cancellation of approvals, cancellation of registrations, temporary shut-down of a part or all of the production equipment and revocation of license.

- Criminal detention of a minimum 1 month and a maximum 12 months and/or a fine of a minimum IDR 10 million and a maximum of IDR 100 million for the violation of:
  - Article 67 regarding the protection of disabled workers;
  - Article 76 regarding the protection of female workers; and
  - Article 71(2) regarding the requirement to employ children to develop their talents and interests.
- Criminal imprisonment of a minimum 1 year and a maximum 4 years and/or a fine of a minimum IDR 100 million and a maximum IDR 400 million for violation of:
  - Article 68 regarding the employment of children; and
  - Article 69 (2) regarding the requirements to employ children for light work.

#### 3.4. Practical Advice To Employers On Avoiding Employment Discrimination Problems

In order to avoid employment discrimination problems, it is important for an employer to address this issue in the Company Regulations/Collective Labor Agreement and to provide a sanction for an employee who violates these provisions or policy. It is also important to conduct a special session for the employees (at least once – as part of the orientation program) to discuss the employment

discrimination issues. The employees must also understand that the employer requires them to immediately report to the employer any violation of employment discrimination policy that is committed by other employees.

## 4. Harassment

### 4.1. Definition Of Harassment

Harassment can take various forms. Typically, as long as the words, gestures or action of a person directed at another person tend to annoy, alarm or verbally abuse such other person (additionally, causing emotional distress on the other person), such word, gesture or action may be considered as harassment.

In practice, “harassment” is often specifically associated with “sexual harassment”. Sexual harassment is generally considered as exposure to unwanted verbal or physical conduct of a sexual nature.

### 4.2. Laws On Sexual Harassment

Sexual harassment is an issue that has not yet been much regulated in Indonesia. However, there is a general provision in the Indonesian Criminal Code on crimes against decency (*kesopanan*). Although there is no specific mention of the words “sexual harassment”, Article 281 of the Criminal Code can be used as the basis for filing a complaint against such an act by another party.

Article 281 reads:

“Imprisonment of a maximum period of two years and eight months or a maximum fine of IDR 4,500 will be imposed on:

- whoever intentionally breaks the norm of decency in a public place;

- “whoever intentionally breaks the norm of decency in the presence of any other individual who is present without his/her own desire.”

The Labor Law previously stipulated that an immoral act could be used as the basis for immediate termination of employment (“Article 158 Paragraph d”). Unfortunately, in October 2004, the Indonesian Constitutional Court (Mahkamah Konstitusi) issued a decision that, among other things, stipulates that Articles 158 (including Article 158 Paragraph d) and Article 159 of Law 13 contradict the 1945 Constitution of the Republic of Indonesia, and therefore are not legally binding. In its decision, the Indonesian Constitutional Court argued that immediate termination of employment for a major mistake, including committing an immoral act (which was possible under Article 158), gives excessive authority to the employer to unilaterally terminate an employee without due process of law, i.e., without having the prior decision of an independent and impartial court. Furthermore, the Indonesian Constitutional Court also ruled that Article 159 puts an unfair burden of proof on the employee since the terminated employee needs to prove that he/she is not guilty of a major mistake as alleged by the employer.

Based on the above decision, which states that Articles 158 and 159 are no longer legally binding, it seems that immediate termination of an employee because of his/her major mistake is no longer permitted, and an employer can only terminate an employee for a major mistake after the employee has been convicted by a criminal court or six months after the employee is arrested by the authorities and the employee is not able to carry out his/her work due to the criminal proceeding. However, the employer may be required to re-employ the worker if the worker is found not-guilty by the court.

#### 4.3. Employee Remedies For Sexual Harassment

As in the employment discrimination case, an employee may claim damages caused by unlawful action based on Article 1365 of the

Indonesian Civil Code, as long as such unlawful action has caused actual losses to the aggrieved party.

The employees will also have the right to terminate the employment relationship if the company gives work that endangers his/her life, safety, health and morale where such work is not mentioned under the employment agreement. According to the Manpower Department, work that exposed employees to sexual harassment can be deemed as “work that endanger the employees’ life, safety, health and morale”.

#### 4.4. Potential Employer Liability For Sexual Harassment

If the employer is found to have given an employee work that endangers his/her life, safety, health and morale, while such work is not mentioned under the employment agreement, the employer may be liable to pay the following to the employee who wishes to terminate the employment relationship: [2 x severance pay] + [1 x long service pay] and [1 x compensation of rights] (2x Formula).

In addition to the above, the employer may also be liable for damages claimed by the Employee under Article 1365 of the Indonesian Civil Code, if the work given by the employer exposed the employees to sexual harassment.

The criminal imprisonment of a maximum of two years and eight months or a maximum fine of IDR 4,500 may be imposed on an employer or person who is proven to have committed a crime against decency under Article 281 of the Indonesian Criminal Code.

#### 4.5. Practical Advice To Employers On Avoiding Sexual Harassment Problems

There are no specific training requirements on sexual harassment in applicable regulations. In practice, however, the provisions on sexual harassment and internal complaint procedures frequently are extensively regulated under the company regulations (a company that employs 10 employees or more is required to have this company regulations). The company is obliged to notify and explain the

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contents as well as provide the company regulations and its amendment to all workers. The standards set are applied by the company management as opposed to being required by statute.

## **Components of Termination Payment under the Labor Law**

### **1. Severance Pay (Article 156.2 of the Labor Law)**

- 1 month's salary for a service period of less than 1 year;
- 2 months' salary for a service period of one year but less than 2 years;
- 3 months' salary for a service period of two years but less than 3 years;
- 4 months' salary for a service period of three years but less than 4 years;
- 5 months' salary for a service period of four years but less than 5 years;
- 6 months' salary for a service period of five years but less than 6 years;
- 7 months' salary for a service period of six years but less than 7 years;
- 8 months' salary for a service period of seven years but less than 8 years;
- 9 months' salary for a service period of 8 years or more.

### **2. Long Service Pay (Article 156.3 of Labor Law)**

- 2 months' salary for a service period of 3 years or more but less than 6 years;

- 3 months' salary for a service period of 6 years but less than 9 years;
- 4 months' salary for a service period of 9 years but less than 12 years;
- 5 months' salary for a service period of 12 years but less than 15 years;
- 6 months' salary for a service period of 15 years but less than 18 years;
- 7 months' salary for a service period of 18 years but less than 21 years;
- 8 months' salary for a service period of 21 years but less than 24 years;
- 10 months' salary for a service period of 24 years or more.

### **3. Compensation of Rights (Article 156.4 of the Labor Law)**

- compensation for annual leave not taken by the employee who is already entitled to take the annual leave;
- compensation for travel expenses or costs for the employee and his family to return to the original location or hire;
- compensation for housing and medical, which is 15 percent of the total amount of severance and service payment;
- other compensation as stipulated under the employment agreement, company regulation or collective labor agreement.

### *Components of Salary*

The components of salary that are used to calculate the termination package under the Labor Law consist of:

- latest base salary; and
- fixed allowances (i.e., payments to the employee made regularly and not related to the employee's attendance or achievement of a certain job).

**Calculation for Termination Payment under the Labor Law**  
*(Applicable only to termination of indefinite period employees)*

<b>No.</b>	<b>Reason for Termination of Employment</b>	<b>Severance Payment</b>	<b>Long Service Payment</b>	<b>Compensation of Rights</b>	<b>Separation Payment (“Uang Pisah”)</b>
1.	Change of company’s status, merger or consolidation of the company, and the employer does not wish to continue the employment relationship (Article 163, Paragraph 2)	2x	1x	1x	None
2.	Company closure for efficiency measures, <u>not</u> for financial reasons or force majeure (Article 164, Paragraph 2)	2x	1x	1x	None
3.	Employee’s death (Article 166)	2x	1x	1x	None
4.	Employee reaching pension age, if the employer has not enrolled the employee in a pension plan (Article 167, Paragraph 5)	2x	1x	1x	None
5.	Employee’s self-termination – if the employee makes allegations against the employer which are proven (Article 169, Paragraphs 1 and 2)	2x	1x	1x	None

<b>No.</b>	<b>Reason for Termination of Employment</b>	<b>Severance Payment</b>	<b>Long Service Payment</b>	<b>Compensation of Rights</b>	<b>Separation Payment (“Uang Pisah”)</b>
6.	Employee’s violation of employment agreement, Company Regulations or Collective Labor Agreement (after three consecutive warning letters) (Article 161, Paragraphs 1 and 3)	1x	1x	1x	None
7.	Change of company’s status, ownership and merger or consolidation of the company, and the employee does not wish to continue the employment relationship (Article 163, Paragraph 1)	1x	1x	1x	None
8.	Company closure for financial reasons or force majeure (Article 164, Paragraph 1)	1x	1x	1x	None
9.	Bankruptcy of the company (Article 165)	1x	1x	1x	None
10.	Employee’s inability to work for six consecutive months due to detention by the authorities (Article 160 Paragraphs 3 and 6)	None	1x	1x	None
11.	Employee found guilty by a court within six months of detention by the authorities (Article 160 Paragraphs 5 and 6)	None	1x	1x	None
12.	Resignation (Article 162, Paragraph 2)	None	None	1x	Yes, if the employee’s duties and functions do not directly represent the company’s interests. The amount and implementation

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No.	Reason for Termination of Employment	Severance Payment	Long Service Payment	Compensation of Rights	Separation Payment (“Uang Pisah”)
					depends on the provisions under the employment agreement, Company Regulations or Collective Labor Agreement.
13.	Employee’s absence without leave (Article 168, Paragraph 3)	None	None	1x	Yes, if the employee’s duties and functions do not directly represent the company’s interests. The amount and implementation depends on the provisions under the employment agreement, company regulations or collective labor agreement.
14.	Employee reaching pension age - if the employer enrolls the employee in a pension plan (Article 167, Paragraph 1)	None	None	1x	None

<b>No.</b>	<b>Reason for Termination of Employment</b>	<b>Severance Payment</b>	<b>Long Service Payment</b>	<b>Compensation of Rights</b>	<b>Separation Payment (“Uang Pisah”)</b>
15.	Employee’s self-termination – if the employee makes allegations against the employer that are <u>not</u> proven (Article 169, Paragraphs 1 and 3)	None	None	1x	None
16.	The employee’s self termination due to his/her continuing illness after the lapse of 12 months (Article 172)	2x	2x	1x	None

The component of salary used as the basis for the calculation of the termination payment will consist of the basic salary and fixed allowance, including the value of rations, if provided by the employer.



## Italy

### 1. Introduction

In Italy, the main sources of law that govern employment relationships and that are relevant with regard to employment termination include:

- The Constitution;
- The Civil Code; and,
- Specific laws, particularly Law 604/1966 and Law 108/1990 on individual dismissals; Law 300/1970, popularly known as the “Workers’ Statute” establishing, among other things, workers’ basic privacy and union rights and Law 223/1991 on collective dismissals.

In addition, non-statutory, contractual rules may also be provided by national labor collective agreements (NLCAs), company or business unit internal shop agreements, and individual employment contracts.

According to the principles of private international law set forth in the EU Regulation N° 593/2008 (so-called Rome I), absent a different, express choice of law by the parties to an employment contract, Italian employment law generally applies where an employee habitually carries out his or her work performance in Italy, regardless of the nationality of either the employer or the employee.

Even where a different law has been chosen, the Rome I Regulation provides that such a choice cannot result in depriving the employee of the protection afforded by the mandatory rules of the law that would have applicable had the different choice not been made.

NLCAs apply insofar as the parties are affiliated respectively with the employers' associations and the unions that signed them, or if the NLCAs are incorporated by reference in the individual employment contracts. In some cases, courts have held NLCAs implicitly

applicable where the parties had performed their obligations as provided for by the NLCAs, although they had not formally agreed to make NLCAs applicable by reference to their relationship.

## 2. Termination

### 2.1. Terminations Restrictions On Employers

The main rules concerning dismissals for indefinite term contracts are set forth by Law N° 604/1966, by the Workers' Statute and by Law No. 108/1990, and, with specific reference to collective dismissal, Law No. 223/1991. The restrictions on dismissals found in these laws do not apply to employees who qualify for old-age pensions (i.e., currently 65 for men and 60 for women) or seniority pensions (except, in the latter case, if they have expressly chosen to continue working until the age of 65 or until reaching the maximum seniority for pension purposes). The restrictions also do not apply to employees during their probationary period.

The types of dismissals in Italy include:

- (i) Individual dismissals without the need to show "*giusta causa*" (just cause) or "*giustificato motivo*" (valid reason);
- (ii) Individual dismissals for "*giusta causa*";
- (iii) Individual dismissals without "*giusta causa*," but for some other "*giustificato motivo*"; and,
- (iv) Collective dismissals.

Individual dismissals without need of showing "*giusta causa*" and without "*giustificato motivo*" are applicable only to: (i) employees who qualify for old-age pensions or seniority pensions, but who did not inform the employer of their intention to keep on working as provided for by the law; (ii) employees during their probationary period; and (iii) employees classified as "*dirigenti*" (managers) under Italian law.

Individual dismissals with "*giusta causa*" occur when an employee is dismissed as a result of his or her misconduct, which "makes the continuation of the employment relationship impossible." Examples of "*giusta causa*" are theft or serious insubordination. Very often a dismissal for "*giusta causa*" has a disciplinary nature and, under Italian law, specific mandatory provisions govern the procedures that must be followed in order for an employer to first outline the disciplinary breaches committed by an employee and then impose disciplinary punishments, if any (including dismissal, as the case may be).

Employees can be dismissed without "*giusta causa*" but for a "*giustificato motivo*" which is, according to Law No. 604 of July 15, 1966, either a serious breach of the contract by the employee, or any objective reason relating to the company's organizational requirements (the provisions on "*giustificato motivo*" do not apply to employees classified as "*dirigenti*"; see relevant remarks below). A serious breach of the employee's duties has been found by the courts in cases where an employee: (i) failed to follow material management directions; (ii) caused material damage to machinery and equipment; (iii) executed work for the employee's benefit or for the benefit of third parties on factory premises; (iv) had unjustified and repeated absences; (v) was repeatedly absent on days subsequent to holidays or vacations; or (vi) was repeatedly sick so much so that the work performed and the salary paid are disproportionate.

"*Giustificato motivo*" has also been found by the courts in cases where the employer has installed new equipment that requires different skills or a fewer number of workers, or the employer closes branches or eliminates product lines, which makes it impossible to use redundant personnel for other duties.

In case of dismissal, the burden of proving the existence of a "*giusta causa*" or a "*giustificato motivo*" is upon the employer. An employer's failure to prove "*giusta causa*" or "*giustificato motivo*" will render a notice of dismissal null and void.

Employers also have limitations on the dismissal of particular categories of employees, including female employees upon marriage, pregnant women, female employees with a child under one year of age, employees disabled due to accidents at work or professional illness and works council representatives who, under the provisions of some NLCAs, can be dismissed only with the consent of the unions they belong to.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

A dismissal must always be in writing; a verbal dismissal is deemed null and void. Employees who are not classified as "*dirigenti*" are entitled to request the reasons for termination, provided they do so in writing, no later than 15 days from termination; an employer that receives such a request must reply in writing no later than seven days from the request, otherwise the termination is not effective. Most NLCAs, including those for "*dirigenti*," provide (although in different ways) that the reasons for termination must also be given in the letter of dismissal.

As a general rule, neither party needs to give notice of resignation or dismissal to the other upon the expiry of a fixed term contract. Termination of an employment relationship for an indefinite term is subject to notice by the employer in the case of dismissal, or by the employee in the case of resignation. The length of notice is governed by the applicable NLCAs, and may vary within a range of 15 days to 12 months, in accordance with the employee's seniority, category and level within the organization.

An employer or an employee may elect to terminate a contract without prior notice. However, in such cases, the party terminating the contract must pay to the other party an indemnity equivalent to the salary otherwise payable during the period of notice (including variable salary, based on the average of the last three years). Even if the notice is replaced by paying an indemnity, the contract is deemed to remain in existence during the notice period unless the parties agree

otherwise, including tacitly (i.e., where the employee accepts the indemnity without objections).

In cases where a "*giusta causa*" exists, the party terminating the employment need not give notice, but is entitled to terminate the employment immediately (subject to compliance with disciplinary procedures, when applicable). In cases of dismissal of employees who qualify for an old-age pension or a seniority pension, a notice is due, regardless of the fact that the employer need not support termination with a "*giusta causa*" or "*giustificato motivo*".

### 2.3. Collective Dismissals

The general provisions concerning collective dismissals are set forth by Law No. 223 of July 23, 1991, which implemented EEC Directive 75/129. The provisions on "collective dismissal" do not apply to employees classified as "*dirigenti*". A "collective dismissal" is defined in Article 24 of Law 223/1991 as occurring when an undertaking that consistently employs more than 15 individuals, dismisses at least five employees working in one or more production units within the same province, within a period of 120 days, as a result of "a reduction or a transformation of activity or type of work." Article 24 expressly states that the provisions regarding collective dismissals also apply to undertakings ceasing their activity.

Law No. 223 requires an employer willing to pursue a collective reduction of personnel to first notify labor unions and works councils, specifying the number, positions and professional profiles of the employees to be made redundant, as well as of the employees normally in force; the time schedule for implementation of the dismissals; the technical, organizational and production reasons justifying the dismissals and the reasons why it is not possible to adopt measures to avoid dismissals; and any actions planned in order to reduce the social impact of redundancies and the method of calculation of severance amounts in addition to any amounts provided for by the law and the collective agreements. At the same time, the employer must pay to the Social Security Institute an amount equal to

one month's so-called "*mobilità*" allowance ("*indennità di mobilità*"; a social security provision that, under some circumstances, may be paid by social security to employees dismissed in a collective dismissal) for each redundant employee.

Within seven days from receipt of the notification of dismissals, unions are entitled to request a joint review procedure with the employer in order to review the reasons justifying the dismissal and to try to find any possible alternative solutions to avoid dismissals (such as the possibility of using the personnel for different tasks and positions). This joint review may take up to 45 days from receipt of the employer's notice.

At the end of the joint review, the employer must inform the labor office of the outcome. If the parties did not reach an agreement during this joint review process, the labor office will call the parties together and carry out its own review. This official review must be concluded no later than 30 days after receipt of the employer's notice to the labor office.

When an agreement with the unions has been reached, or at the end of the procedure, the employer may give written notice of dismissal to the affected employees. The employer must also send a detailed list of the dismissed employees to the Head Provincial Labor Office and to the unions, specifying each employee's name, place of residence, qualifications, position in the company, age, and family status, as well as the criteria adopted in selecting redundant employees (selection criteria may be the ones agreed upon with unions or those set forth by the law: family dependants, seniority, and technical and production requirements).

The employer must also pay an additional contribution to the Social Security Institute of nine months' "*mobilità*" allowance for each redundant employee (if an agreement has been reached with unions this contribution is reduced to three months).

A special regulation is provided by the NLCA applicable to employees in the banking sector. Prior consultation with the Works Councils is required before starting the process provided for by the law No. 223/1991. If an agreement with the Works Council (even at the Group level) is reached before the dismissal procedure starts, it is possible to access a special fund aimed at financing projects to redeploy redundant employees and, if dismissals are unavoidable, grants to the dismissed employees a more generous payment than that granted by the “*mobilità*” allowance.

#### 2.4. Termination Indemnities

Upon dismissal for any reason, employees in Italy are entitled to the “*Trattamento di Fine Rapporto*” (*T.F.R.*). *T.F.R.* is deferred compensation that accrues year by year in favor of an employee and is paid upon termination, but is not in any way connected or subject to the circumstances regarding termination. As of January 01, 2007, *T.F.R.* must be contributed by employers to complementary pension funds (with the exception of employees who have opted out of such allocation) or to a governmental fund established specifically in order to manage *TFR* accruals (with regard to employees who exercised their opt-out right, and only if their employer has at least fifty employees). Under some circumstances, employees may obtain advance payments of a portion of *T.F.R.* Annual *T.F.R.* accruals are deemed an annual cost of employment and immediately accounted for as such (like ordinary compensation), and should therefore not be regarded as a cost of termination.

*T.F.R.* is calculated on the basis of an employee's salary, by taking into account the base salary and, absent contrary provisions in the collective agreements, any other compensation paid to employees (e.g., commissions, regular bonuses, thirteenth and fourteenth monthly salary, etc.), with the exception of amounts paid on an occasional basis and with the exception of reimbursements of expenses.

Each annual *T.F.R.* accrual is equal to the annual compensation, divided by 13.5. All previous years' accruals are annually revaluated

by an interest rate equal to 1.5 percent, plus 75 percent of the increase of the annual official cost of living index.

While it would be inappropriate to regard *T.F.R.* as a termination cost, employees might be entitled to the payment of other amounts. In fact, since Italian law protects employees against dismissals without “*giusta causa*” or “*giustificato motivo*”, employees may also be entitled to specific indemnifications or even reinstatement (in addition to and regardless of the *T.F.R.* amount), if a dismissal is successfully challenged in court.

Depending upon the size of the employer, the law provides either a so-called “real guarantee” or a so-called “obligatory guarantee” of employment.

According to Article 18 of the Workers' Statute, the so-called “real guarantee” of employment applies to employers with more than 15 employees within the territory of the same city (“comune”), or more than 60 employees in total (in case of multi-national groups, it is quite controversial whether this latter threshold includes only the Italian or even the worldwide headcount). Under such circumstances, the remedies for unfair dismissal amount to reinstatement, plus all remuneration lost during the period from dismissal until reinstatement, subject to a minimum of five months' pay. The employee has the option of waiving his or her right to reinstatement upon payment of additional compensation amounting to fifteen months' salary.

A so-called “obligatory guarantee” of employment is available when the employer has 15 or fewer employees and, in any other case, where the “real guarantee” of employment is not applicable. Under such circumstances, following a court's finding that dismissal was not based on a just cause or valid reason, the employee is entitled to reinstatement or to the payment of an indemnity equal to between two and a half and six months' salary. Unlike the “real guarantee” remedy, the dismissed employee cannot opt for reinstatement (i.e., the employer can choose to pay the indemnity instead of reinstating the employee). The court will determine the exact amount of the

termination indemnity taking into consideration all relevant circumstances (e.g., the size of the business, the employee's seniority, and any other facts relevant to the situation). If the employer has a total workforce of more than 15 employees, but not enough to trigger the “real guarantee” of employment, the indemnity may be increased up to a maximum of 14 months' salary, depending upon years of service.

A law-decree enacted in August 2011 and ratified by the Parliament in September provided that, at shop or local level, employers can negotiate collective agreements with unions that meet certain representativeness requirements, aimed at increasing occupation and competitiveness or responding to a crisis. Among other things, such agreements can derogate from the consequences of termination of an employment relationship, excluding some cases where the law totally prohibits dismissal (discrimination, marriage, pregnant women and mothers of children up to one year old). This provision alleviates the effects of the so-called real guarantee (e.g. by excluding reinstatement), but a valid reason for termination (as explained above) is still required. However, we need to wait for the first collective agreements and judicial cases to understand how this provision will be implemented in practice.

Neither “real guarantees” nor “obligatory guarantees” apply to:

- (i) Employees under a probationary period (who, under case law, are nonetheless entitled to judicial review of the fairness of their dismissal, to ensure they had an opportunity to perform during the trial period and are not being dismissed for unlawful reasons);
- (ii) “*Dirigenti*”; or
- (iii) Employees who qualify for old-age pensions or seniority pensions (and who, in the latter case, have not chosen to continue working).

As mentioned above, employees classified as “*dirigenti*” under Italian law (i.e., the highest category of employees under Italian law) may be dismissed at any time under the law upon giving them notice in line with their employment contract. *Dirigenti* cannot claim reinstatement, except if dismissal is based on discrimination or other prohibited reasons and is deemed void. *Dirigenti* are however frequently financially protected by the provisions of the most common national labor collective agreements. They are usually entitled to a notice of dismissal of up to 12 months' wages, and if dismissal is not deemed “justified”, they can be awarded an additional indemnification of up to 20-30 months wages, depending on the applicable collective agreements and on the age of the dismissed “*Dirigente*”. Usually, courts and arbitration panels have very broad discretion in assessing whether dismissal was “justified” and in determining the amount of the relevant award.

## 2.5. Voluntary Resignations

When an employee resigns, the employer is entitled to the notice period provided by the applicable collective agreement, which is usually shorter than the notice period provided in case of dismissal. If the employee resigns without notice, the employer can deduct from amounts still due to the employee, if any, an amount equivalent to the salary the employee would have earned during the notice that the employee failed to give. An employer may release resigning employees from working their notice of resignation but in this case employees are entitled to an indemnity in lieu of notice.

In the event of resignation for just cause (*giusta causa*), defined as a cause that “makes the continuation of the employment relationship impossible”, no notice is due and the employee is entitled to receive an indemnity in lieu of notice. Examples of “*giusta causa*” are failure of the employer to pay the wages and serious harassment cases.

As in the other cases of termination, employers have to pay the resigning employees all mandatory termination indemnities

("T.F.R." and pro-rata amount of the additional monthly wages, i.e., the 13th or even the 14th monthly salary).

## 2.6. Laws On Separation Agreements, Waivers, And Releases

In order to avoid the uncertainty, time and costs connected with judicial litigation, employers and employees frequently negotiate termination agreements by mutual consent. Termination by mutual consent does not imply the giving of a notice or the payment of an indemnity in lieu of notice by one party to the other. It is obviously prudent that a termination by mutual consent be entered into in writing, but a termination agreement does not otherwise require special formalities. In practice, however, termination agreements are seldom reached in an informal way, since employees normally ask for some compensation (severance) in order to accept termination agreements at the initiative of an employer, while employers usually desire that a termination agreement is final and does not leave room for further claims by employees. This latter goal usually is pursued by appropriate releases and/or waivers by employees. However, the law provides that waivers and releases by an employee are void if they concern the employee's mandatory rights under the law or collective agreements. A release or a waiver becomes enforceable if an employee fails to challenge it, in writing, no later than six months from the later of employment termination or the execution of the relevant release or waiver. Releases and waivers reached (i) in court, (ii) in front of unions or (iii) in front of Labor Councils (i.e., conciliation panels set up within the local offices of the Ministry of Labor) are immediately enforceable, which is why amicable agreements (including termination agreements and settlement of dispute agreements) may often be negotiated in advance, but are then reached in front of a court, union or Labor Council.

## 2.7. Litigation Considerations

An employee willing to challenge dismissal must do so, by means of any written document, no later than 60 days after the date he or she received notice thereof (the 60 days start from receipt of the reasons for termination, in case these reasons have been given at a later stage).

Objections moved against dismissal are ineffective if the employee, in the following 270 days, does not file a formal petition with the Labor Court or if s/he does not communicate to the employer a request for an arbitration or mediation procedure. If such request is refused by the employer, the employee has to file the claim with the Labor Court within 60 days, under penalty of forfeiture. Those terms do not apply to *dirigenti* and, under prevailing case law, to employees during a probationary period.

A preliminary, non judicial, mediation procedure is no longer mandatory in labor cases, although it may still be started. However, labor Courts have a specific statutory duty to try and settle the dispute at the first hearing including by setting forth a proposal of a settlement agreement to the parties. Judicial actions must be brought before specialized Labor Courts and are subject to peculiar procedural rules meant to accelerate the outcome of litigation and give more discretionary powers to the Court.

## 2.8. 2012 Reform Under Review by Parliament

At the time of writing chapter (May 2012), a major reform of several areas of Italian employment law is being reviewed by the Italian Parliament. It is therefore likely that many of the provisions described in this chapter will change after the Parliament has approved a new bill. For more information or for an update on the changes, please contact the authors of this chapter. At the time of writing, the areas most likely to be modified concern:

- (i) the provision of a pre-dismissal conciliation meeting with employees;
- (ii) employees' remedies against dismissal in the case of the above mentioned so-called "real guarantee" of employment (i.e. where employers have more than 15 employees within the territory of the same city, or more than 60 employees in total).

(i) Pre-dismissal conciliation meeting

This compulsory procedure would be initiated by the employer before notifying an individual dismissal for economic reasons. The Labor Office would then summon the parties within the next 7 days and by the same term, if no agreement had been reached for a separation by mutual consent, the employer would be free to give notice of dismissal (whilst most likely facing a dispute in court over the following months).

(ii) New Dismissal Remedies

Under the draft provisions there would be different rules for different types of dismissal, which, for simplicity, we break down into the following four categories:

1. *Dismissal for discriminatory reasons* - Protection in this case would not change: an employee dismissed for discriminatory reasons would still be entitled to claim his/her job back plus damages with a minimum of 5 months' full salary and no cap. This would remain the only case in which Article 18 applies also to employees with fewer than 15 employees (or 60 at national level) and to those classified as executives (*dirigenti*). Within 30 days from the order of reinstatement, the employee could unilaterally opt for payment of an indemnity equivalent to 15 months of his global salary and give up his right to reinstatement.
2. *Dismissal for subjective (disciplinary) reasons (specific cases)* - Employees who are dismissed on subjective (disciplinary) reasons (such as poor performance, insubordination and breach of duties up to and including offences such as fraud or serious conflict of interest), could only claim reinstatement (and damages) in 3 cases (which in practice cover most ordinary cases): (a) the alleged facts relevant to the disciplinary do not exist; (b) the employee did not commit the disciplinary breaches; or (c) the act is contemplated by the

disciplinary code in the collective regulation as punishable with a lesser sanction (typically a fine or suspension from duties).

In this scenario, and unlike the current rules, that do not provide for any cap, the maximum awardable damages are assessed by the court at a maximum of 12 months' salary plus social security contributions, less any earnings the employee may have received from another job up to the court proceeding.

3. *Dismissal for subjective (disciplinary) reasons (default case)* - In any case not listed in the previous category, the labor court would no longer be able to order forced reinstatement, but could only award an indemnity (in the event that the dismissal is deemed nonetheless unfair for other reasons), ranging between 12 and 24 months' salary, taking into account factors such as the size of the employer's workforce, the seniority of the employee, the behavior and conditions of the parties.
4. *Dismissal for objective (economic) reasons* - This new category would represent the most significant change to the current position. Contrary to current regulation, if the labor court ascertains that no "justified objective reason" supports the dismissal, the employee could no longer claim his job back and may only be awarded an indemnity of between 12 and 24 months' salary, taking into account those factors listed under category # 3 above as well as any attempt by the employee to search for another job and the behavior of the parties during the (new) pre-dismissal conciliation provisions. These new rules on economic dismissals are subject to one important exception: the employee could still claim his/her job back if the labor court ascertained that the alleged "economic reason" is "manifestly non-existent".

The same protection (without reinstatement) would apply where the employer violates the procedural requirements of

collective dismissals, with a notable exception; where the employer violated or misapplied the selection criteria agreed with the unions or (absent any such selection criteria agreed with the unions), set forth in the law, affected employees would be entitled to seek reinstatement.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

Employment discrimination is not as prevalent a source of labor disputes in Italy as it is in other jurisdictions. One reason may be that detailed labor regulations, especially those concerning termination, often provide alternative grounds for workers' complaints. However, Italy has very stringent regulations prohibiting certain types of employment discrimination.

The Italian Constitution provides that “all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal, and social conditions.” The Constitution also provides express provisions according to which women who work have the same rights and are entitled to equal pay in cases of equal work. Minors also have an express constitutional right to equal pay in cases of equal work.

In addition, Italy is a member state of the European Union and therefore the several pieces of EU treaties and legislation concerning discrimination are also applicable.

Italy has enforced a number of conventions signed within the International Labor Organization that include anti-discrimination provisions, such as Convention N° III of June 28, 1958, on discrimination in employment matters; Convention N° 100 of June 29, 1951, on equal pay for men and women; Convention N° 98 of July 1, 1949, on freedom of union activity; Convention N° 122 of July 9, 1964, on placement; and Convention N° 135, of June 23, 1971, on protection of workers' representatives. Italy also has several pieces of ordinary legislation that deal with discrimination-related issues.

Statutes prohibiting discrimination have been enacted at different times and therefore their respective scopes of application do not coincide and even the rules they set may be patterned according to different models.

The laws provide for the nullity of all agreements or actions purporting to make the employment of a worker conditional, or to dismiss an employee, or to discriminate in the assignment of titles or duties, in transfers, in disciplinary sanctions, or otherwise cause prejudice to an employee, on the basis of union involvement, political or religious beliefs, race, ethnic origin, language, sex, sexual orientation, disability or age. More specific legislation has also been enacted concerning the equal treatment of men and women and positive actions to implement it and concerning persons affected by AIDS. Some statutory prohibitions on discrimination expressly concern “collective discrimination” that may occur if economic benefits are granted collectively on a discriminatory basis.

The law on the equal treatment of men and women prohibits all discrimination based on sex, marital status, family composition or pregnancy, and forbids discrimination in hiring (regardless of the selection and placement procedures, the activity, and the category of the offered position), orientation, training, salary (female workers are entitled to the same remuneration as male workers, in cases where the performance is the same or of an equal value) or in classifications, assignment of duties or promotions.

Recently, in an effort to grant gender equality also in boards of listed companies, legislation has been approved which introduces the obligation to balance genders when appointing members of the Board of Directors and of the Board of Statutory Auditors. Where there is no such balance, the under-represented gender should be granted with a quota of 1/3 (1/5 initially) of the appointed Directors/Auditors. The Italian Authority controlling listed companies may formally warn companies in case of non-compliance and subsequently levy fines.

Italian law also provides that indirect discrimination constitutes discrimination as well. Indirect discrimination based on sex is the adoption of criteria that are not necessary to perform a certain function, but that may adversely affect workers of one sex. Indirect discrimination based on racial or ethnic origin, sexual orientation, disability or age, consists of the adoption of apparently neutral criteria, but that would put at a particular disadvantage employees of a certain racial or ethnic origin, sexual orientation, age or with disability (except if adopted criteria are objectively justified by a legitimate aim pursued with necessary means).

Apart from situations involving sex discrimination, most cases of discrimination concern discrimination due to alleged union activity. In this situation, the law provides specific protection to unions concerning their activity, and there is specific protection (both under the law and the NCLAs) for union representatives.

One of the most debated issues regarding discrimination is whether a general prohibition of discrimination exists in Italy, even beyond the statutory definitions, or whether discrimination is confined to the cases provided for by law. Quite often, the issue arises in cases where employees with the same function are paid different amounts, and this difference is not the result of sex, political, race or similar types of prohibited discrimination. Not surprisingly, various courts have reached different conclusions on different occasions, but with the prevailing opinion that:

- (i) Discrimination is expressly governed by statutory provisions and prohibited in the cases specifically provided for by law;
- (ii) As a consequence of the fact that discrimination refers to specific cases, one cannot say that there is a mandatory provision requiring equal pay for the same positions;
- (iii) A court will accept discrimination that falls outside the statutory prohibitions and that is justified by a business ground.

It is controversial whether discrimination may be reviewed by a court in light of the statutory duties imposing good faith in the performance of an employment contract (i.e., whether discrimination without a proven business ground can constitute bad faith performance and therefore a breach of the employment contract). Recent case law by the Italian Supreme Court (Corte di Cassazione) states that a judicial review of discrimination issues based on a contractual duty of good faith is not possible.

### 3.2. Employee Remedies For Employment Discrimination

Discrimination upon hiring (i.e., not in other situations, such as promotions, transfers, etc.) is punishable with a fine and/or arrest up to one year. Breach of certain provisions prohibiting sex discrimination are also punishable with a fine, which is a criminal punishment. Collective discrimination is also punishable with a monetary sanction, consisting of payment to the governmental national pension scheme of an amount equal to the benefits unlawfully paid to a group of employees during a period of up to one year.

Since personnel-related decisions based on discrimination are void, employees alleging discrimination may seek injunctive relief and damages according to ordinary rules; specific procedures are set forth in case of sex discrimination and also in case of discrimination based on religion or belief, disability, age or sexual orientation, race and ethnic origin. A worker may seek a court's injunction against the perpetrator of the discrimination, so that the latter is ordered to desist from the discrimination and to eliminate the consequences of the discrimination. Failure to comply with the judge's order may constitute a criminal offence.

In cases of sex discrimination, the law provides that in order to prove it, a claimant may offer prima facie evidence, including statistical evidence, that consistently lead to the conclusion that discrimination occurred. Statistical data may constitute circumstantial evidence also in cases regarding discrimination based on religion or belief, disability, age or sexual orientation, race and ethnic origin. If such

evidence is offered, the burden of proof is shifted on the defendant to prove that discrimination did not take place.

Administrative authorities responsible for enforcing equal treatment laws also may take action in cases of collective sex discrimination, even if no individual employees are clearly or directly affected by the discriminating policies. In this case, the judge may order that a plan to remove discrimination be drafted after consulting with the unions.

Every two years, employers with more than 100 employees must draft a report regarding equal opportunities between men and women and deliver it to works councils, to the equal opportunities authority and to labor inspectors.

Specific provisions of law also address the case of dismissal due to discrimination, providing that it is void under any circumstances and that employees terminated as a result of discrimination are entitled to reinstatement and lost wages, regardless of their grade, position or the size of the employer.

When a court upholds a claim that there has been discrimination based on racial or ethnic origin, sexual orientation, disability or age, the court will issue a cease and desist order and will also order that the consequences of discrimination be removed.

In cases of discrimination due to union activity, unions may seek injunctive relief against “anti-union behavior” or to implement preventive measures to try and avoid discrimination against union representatives (e.g., by requiring the union's consent before a works council leader may be transferred).

### 3.3. Potential Employer Liability For Employment Discrimination

If discrimination has led to a loss of income (wages, fringe benefits or other valuable benefits), such damages may be recovered. In cases where the discrimination is punishable as a crime, employees are entitled to recover “moral damages” that may be equitably assessed by

the judge to compensate for the “moral” suffering caused by the discrimination.

In cases where an employee's health has been damaged so that the employee's ability to earn a professional income is compromised, damages are calculated with reference to the loss of income (although this is infrequent in discrimination cases).

In cases regarding discrimination based on religion or belief, disability, age, sexual orientation, race or ethnic origin, the law expressly provides that “non-patrimonial” damages (i.e., damages not compensating an economic loss) may be awarded.

Damages affecting the employees' health also may consist of “biological” damages. Case law developed the concept of “biological damages”, consisting of the actual physical or (often in cases of discrimination) mental suffering, regardless of the reduction of the ability to work, and the professional status of the relevant person. According to case law, biological damages are due in cases of permanent damages as well as temporary damages. Biological damages are usually calculated with difficulty (although case law customarily resorts to charts that differentiate monetary damages based on a system of “percentage points”) and must be assessed in each case through a medical certification.

In recent years, case law has also developed the concept of “existential damages”, i.e., damages to the quality of life of an individual, usually consisting in a lasting change of the habitual activities of a person and to the relationships maintained by an individual, in any aspect of his or her life. The legal issues regarding the judicial evidence that must be given when such damages are claimed, and regarding quantification of an appropriate monetary award by courts, are still controversial.

If discrimination results in discriminatory decisions about management of personnel (e.g., damages for unjustified termination, damages for demotion, etc.) an employer's liability is also determined

by the relevant specific statutory or case law provisions. Finally, the concept of punitive damages does not exist in the Italian legal system.

When a court upholds a claim that there has been discrimination based on racial or ethnic origin, sexual orientation, disability or age, the court may order the adoption of a plan to remove the relevant discrimination, in order to avoid the repetition of similar discriminatory situations. Moreover, the court may order the publication of the decision in a national newspaper. The breach of the court's orders may lead to criminal punishments, including imprisonment.

More recently, according to a specific ruling of the Labor Office, the assessment of sexual discrimination or harassment can also entail the loss of certain benefits (tax, contributions or credit facilitations) and public contracts, as well as the exclusion from future bids up to two years in case of relapse, unless the case is settled by conciliation.

#### 3.4. Practical Advice To Employers On Avoiding Employment Discrimination Problems

Managers should be made aware of the legal issues surrounding discrimination and should be given clear guidelines prohibiting all types of discrimination. Since the types of discrimination that are expressly prohibited by law have increased in recent years, it frequently happens that employers are not fully aware of the potential discriminatory implications of decisions that used to be acceptable until recently. Training and internal information programs are highly recommended, both to increase awareness by decision-taking managers about the discrimination issues and to help defend possible cases where actual discrimination is alleged. In adopting decisions that might be challenged on the ground of discrimination, evidence of the business reasons for such decisions should be prepared and collected, so as to be able to cope with burden of proof issues in case of allegations of discrimination.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Traditionally, there have been no specific statutory provisions addressing sexual harassment in Italy. However, sexual harassment used to be punished and can still be punished by resorting to a number of provisions under criminal law. In the past, sexual harassment has been criminally prosecuted based on the provisions on “harassment” in general (Article 660 of the Italian Criminal Code), or the provision that concerns “acts of violent lust” (Article 521 of the Italian Criminal Code). In 1996, this latter provision was replaced by a new criminal provision on sexual violence, which also replaced the old provisions on rape and other sexually oriented crimes. The new provision is broadly worded and makes punishable “everybody who, with violence or threat or through abuse of authority, obliges anybody to make or to undergo sexual acts”.

The wording “sexual acts” has, in turn, been broadly interpreted so as to include all actions that may affect self-determination of sexual conduct. In one precedent, the Italian Supreme Court (*Corte di Cassazione*) expressly stated that such provision can apply to employment relationships, provided that the employer abused its position.

Furthermore, according to Legislative Decree No. 198/2006 (also known as “Code of equal opportunities for men and women”), harassment is defined as “any unwanted conduct triggered by reasons of sex with the purpose or effect of violating the dignity of a worker and creating an intimidating, hostile, degrading, humiliating or offensive environment”, while sexual harassment in particular is defined as “any unwanted conduct, physical, verbal or not-verbal, having sexual character and the purpose or effect of violating the dignity of a worker and creating an intimidating, hostile, degrading, humiliating or offensive environment”. Both harassment and sexual harassment are statutorily deemed to be discriminations, as well as any unfavorable conduct of the employer that reacts against a

complaint and/or petition claiming the compliance with the principle of equal treatment of men and women.

The statutory provisions on sex discrimination have also been utilized in cases where negative decisions (dismissals, transfers, etc.) had been adopted following claims of sexual harassment.

Actions, agreements and measures concerning the employment relationship with workers who have suffered harassment or sexual harassment are void and unenforceable whenever they involve the refusal or the acceptance of such harassment.

#### 4.2. Employee Remedies For Sexual Harassment

The combination of different provisions has raised a number of other issues and has given courts the task of defining legal guidelines. For example, there has been some debate on whether labor courts have jurisdiction over sexual harassment actions, or whether ordinary courts should hear such cases. The conclusion is generally that labor courts do have such jurisdiction.

Employees have different remedies in cases of sexual harassment and may undertake:

- (i) An action for damages against the harasser under tort law;
- (ii) A claim that the employer be held jointly and severally liable for damages caused by the harasser; and,
- (iii) An action against the employer under Article 2087 of the Italian Civil Code for breach of contractual obligations (consisting of a failure to comply with the obligation to protect an employee).

Where sexual harassment involves discriminatory decisions about personnel, the ordinary remedies provided for those specific decisions also apply (e.g., reinstatement in case of discriminatory dismissal).

Harassment regarding sexual orientation is deemed discriminatory by operation of law and therefore the relevant remedies apply (see above in relevant chapter).

#### 4.3. Potential Employer Liability For Sexual Harassment

Damages in tort cases (including the possible joint liability of the employer) may be equitably assessed by the judge to compensate for the “moral” suffering caused by the harassment.

In cases where damages have affected an employee’s health, and therefore an employee’s ability to earn a professional income, damages should be calculated with reference to the loss of income (this is infrequent in sexual harassment cases).

Damages also may consist of “biological” damages and “existential” damages, as defined above.

An employer’s liability is determined by the relevant statutory provisions where sexual harassment involves discriminatory personnel decisions (e.g., damages for unjustified termination).

Harassment regarding sexual orientation is deemed discriminatory by operation of law and therefore the relevant employer liability is the same (see above).

#### 4.4. Practical Advice To Employers On Avoiding Sexual Harassment Problems

Article 2087 of the Civil Code has been construed by courts as obliging employers to take all adequate measures to protect their employees, above and beyond those taken in compliance with mandatory safety rules and those concerning merely physical health. Therefore, under Article 2087, an employer may be liable for the actions of its employees in breach of the employment contract if the employer did not take all measures necessary to avoid or stop sexual harassment from occurring. Courts have expressly indicated that preventive measures include prompt action and investigation upon

learning of the harassment (whether learning of the harassment from the victim or otherwise). A number of cases have also dealt with the issue of dismissals of employees responsible for sexual harassment against other employees. In a majority of those cases, the dismissals were justified as a disciplinary sanction, even where the disciplinary code did not expressly provide for disciplinary measures against sexual harassment. Thus, courts suggest that employers should not ignore the possibility that sexual harassment has happened, but should investigate and, if sexual harassment is found, protective measures should be adopted in favor of the victim, including, if appropriate, disciplinary action against the harasser.



## Malaysia

### 1. Introduction

To promote investments and economic growth, the Malaysian government encourages a cordial relationship between employers and employees. Generally, Malaysia has had no occurrence of crippling worker strikes, lock-outs or demonstrations over the past ten to fifteen years. Problems are usually resolved in an atmosphere of goodwill and negotiation between parties, including trade unions.

The major employment laws in Malaysia that directly impact the employment relationship are the Employment Act 1955 (“**EA**”), and the Industrial Relations Act 1967 (“**IRA**”).

The EA governs matters relating to employment in Malaysia and applies to most employees whose wages do not exceed RM1,500 per month (USD 1= approximately RM3), or who are engaged in specified work (i.e., manual labor or supervising manual labor, or operation or maintenance of a motor vehicle), irrespective of salary amount (“**EA employee**”). Employees above this wage level are governed by common law and by their employment contracts. The main areas covered by the EA are terms relating to employment contracts, including the termination of contracts, maternity protection, days and hours of work, annual leave, public holidays, termination and lay-off benefits, and methods of dealing with complaints and enquiries.

The Employment (Amendment) Bill 2011 (“**Bill**”) was passed by the House of Representatives in October 2011. The Bill seeks to amend and to supplement existing employer obligations prescribed by the EA as well as to introduce new obligations. The highlights include enhanced maternity protection and the introduction of the criminalisation of workplace sexual harassment in respect of all employees, as well as personal liability for EA non-compliance.

The IRA deals with relations between employers and trade unions, and the prevention and settlement of differences or trade disputes through conciliation or by the Industrial Court. In practice it protects the rights of workers and employers to form or join a trade union and to participate in its lawful activities, and prohibits employers from discriminating against workers on the ground of union membership. The IRA further provides for procedures for collective bargaining.

## 2. Termination

### 2.1. Restrictions On Employers

In Malaysia, termination of employment falls under the purview of the EA, the Employment (Termination and Lay-Off Benefits) Regulations 1980 (“**1980 Regulations**”), and the IRA. Although the provisions of the EA only cover EA employees, these principles of law are generally considered as guidelines for most employer-employee relationships, particularly in the absence of a written contract of service.

#### *Wrongful Termination*

The IRA addresses the issue of unions, trade disputes and dismissals. It also mandates that an employment relationship cannot be terminated without “just cause or excuse.”

While “just cause or excuse” would be an issue to be determined by the Industrial Court in general, independently of the employer’s compliance with the EA and/or the terms and conditions of the employment contract relating to benefits, terminations should be motivated by a bona fide business decision, such as the cessation and sale of a business, continuing losses, or disciplinary or performance reasons. In a disciplinary situation, an employer should ensure that the process of investigation and hearing be adhered to and that the employee be given due warning (if applicable), and the chance to state his or her case.

In the event of wrongful termination, employees may seek redress before the Industrial Court. In the first step, the claimant will make representations to the Director-General for Industrial Relations for reinstatement. If there is no settlement, the matter may be referred to the Industrial Court for adjudication.

### *Retrenchment Termination*

An employment relationship in Malaysia may be terminated for redundancy. Special provisions under the 1980 Regulations govern termination by retrenchment or the take-over or cessation of a business, and mandate that retrenched EA employees are entitled to specific termination indemnities. In a retrenchment situation, employers should select the employees to be retrenched based on objective criteria. The Malaysian Code of Conduct for Industrial Harmony, which is not legally prescribed by legislation (but is taken note of by the Industrial Court), provides guidelines for the selection of affected employees. The guidelines specify the following criteria:

- (i) the need for the efficient operation of the organization;
- (ii) the ability, experience, skill and occupational qualifications of workers;
- (iii) the consideration for length of service and whether employees are casual, temporary or permanent;
- (iv) the age of the employee;
- (v) the employee's family situation; and
- (vi) the "last in, first out" principle (i.e., the last person employed should be the first person retrenched).

## 2.2. Notice Provisions/Consequence For The Parties' Failure To Provide The Required Notice

The EA also outlines how and when a contract of service may be terminated. Under the EA, a contract of service for a specified period of time, or the performance of a specified piece of work, lapses when the period expires or when the work is completed. Where the contract of service is for an unspecified period of time, either party may terminate the contract by giving notice of termination as specified in the contract. In the absence of a written provision as to the length of notice required, Malaysian law provides that the period of notice shall not be less than:

- (i) four weeks for employment of less than two years;
- (ii) (six weeks for employment of two years or more but less than five years; and
- (iii) eight weeks for employment of more than five years.

In lieu of notice, an employer may pay wages to an employee in the amount equivalent to the period of notice. However, regardless of compliance with the notice period or the payment of benefits, the IRA provides that an employer cannot terminate the service of an employee without “just cause or excuse.” In cases of retrenchment, employers are also required to report to the Malaysian Director-General of Manpower at least one month before carrying out the lay-off.

## 2.3. Termination Indemnities

Under the provisions of the 1980 Regulations, an employee who has been retrenched or whose service has been terminated as the result of redundancy is entitled to certain benefits. These benefits include:

- (i) 10 days' wages for every year of employment of less than two years;

- (ii) 15 days' wages for every year of employment of two years or more but less than five years; and
- (iii) 20 days' wages for every year of employment of five years or more.

Where an employee has only worked for a portion of a year, payment is to be prorated and calculated to the nearest month of employment. These benefits are in addition to wages paid in lieu of notice.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

The Federal Constitution states that there shall be no discrimination against citizens on the ground of religion, race, descent or place of birth. Article 8(2) of the Federal Constitution was amended to prohibit gender discrimination. This, however, has yet to be encapsulated in any specific legislation.

The Labor Department of the Malaysian Ministry of Human Resources has issued the Code of Practice for the Employment of the Disabled in the Private Sector ("Disability Code"). The objectives of the Disability Code are to:

- (i) establish guidelines for the registration and job placement of the disabled with the private sector;
- (ii) increase the awareness of private sector employers on the importance of offering employment opportunities to the disabled; and
- (iii) encourage the disabled to prepare themselves in terms of ability, qualifications and skill sets to participate in the development of Malaysia as employees.

Though the Disability Code sets out the responsibilities of both the employer and the disabled employee, like other similar Codes relating to employment, there are no legal sanctions for non-compliance.

The Persons With Disabilities Act 2008 (“**PDA**”) that came into force on July 7, 2008 is the first specific anti-discrimination law in Malaysia that applies in the workplace. Under the PDA, employers are legally required to ensure that employees with disabilities are accorded just and favourable work conditions, and equal remuneration to those without disabilities. However, it is not expressly clear whether the PDA 2008 will cover both employees as well as job applicants. It appears that the protections under the PDA only extend to current employees. Currently, there are no detailed guidelines on the PDA. Pending such guidelines and standards, the exact impact on the employment landscape remains to be seen. The PDA does not, however, specify any legal sanction for failure to comply.

The Department of Occupational Safety and Health of the Malaysian Ministry of Human Resources has also issued a “Code of Practice on Prevention and Management of HIV/AIDS at the Workplace” (“**HIV/AIDS Code**”), to reduce the spread of the disease and to guide employers and employees in managing HIV/AIDS issues at the workplace.

The objectives of the HIV/AIDS Code are to:

- (i) provide guidelines to employers and employees on appropriate and effective ways of preventing and managing HIV/AIDS at the workplace;
- (ii) promote education and awareness on HIV/AIDS; and
- (iii) promote a non-judgmental, non-discriminatory work environment.

### 3.2. Practical Advice To Employers On Avoiding Employment Discrimination Problems

Generally, employers in Malaysia may be liable for unfair dismissal pursuant to the employer's discriminatory acts or omissions where they can be construed as evidencing an intent on the part of the employer to no longer be bound by the terms of the employment contract.

As a first step to minimize discrimination problems at the workplace, employers should set up and implement in-house mechanisms as outlined in the Disability Code, the PDA and the HIV/AIDS Code. Such measures should be implemented despite the codes not having the force of law, so as to promote positive employee relations. More importantly, pursuant to the PDA, employers should now recognize and endeavour to fulfill their new legal obligations towards employees with disabilities to ensure equal and non-discriminatory workplace practices and attitude.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Malaysia does not have any legislation governing workplace harassment. If the Bill comes into force, there will be various obligations and rights specific to workplace sexual harassment, regardless of whether the employee comes within the ambit of the EA or not. The Bill makes it compulsory for all employers to inquire into any sexual harassment complaint unless: (a) the complaint has previously been examined and no sexual harassment has been proven; or (b) the employer is of the opinion that the complaint of sexual harassment is frivolous, vexatious or is not made in good faith. If the employer decides not to proceed, the employer must inform the complainant of the reason.

A person who is dissatisfied with the refusal may refer the matter to the Director General of Labour (“**DGL**”), who has the power to direct the employer to conduct an inquiry or direct that no further action

shall be taken. In addition, the DGL is also required to inquire into the complaint, unless the above exceptions apply.

If the employer is satisfied that sexual harassment is proven, the employer is to take disciplinary action such as dismissing or downgrading the wrongdoer, or imposing any other lesser punishment deemed fitting. Where the DGL determines that sexual harassment is proven, the complainant may terminate the employment contract without notice and the complainant would be entitled to full notice payment.

That said, in 1999, the “Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace” was promulgated (“**Sexual Harassment Code**”). The Sexual Harassment Code is not legally binding, but companies are expected to adopt its recommendations including rolling out an internal policy on harassment. The Bill does not, unlike the earlier version, require employers to implement such a policy and in the absence of relevant guidelines pursuant to the Bill, the Sexual Harassment Code would be the first reference point in seeking to ensure compliance.

The Sexual Harassment Code contains guidelines for the establishment and implementation of internal preventive and redress mechanisms for dealing with sexual harassment. “Sexual harassment” is defined under the Sexual Harassment Code as “any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological, or physical harassment that might, on reasonable grounds, be perceived by the recipient as: (i) placing a condition of a sexual nature on her or his employment; or (ii) an offence or humiliation, or a threat to her or his well-being, but that has no direct link to her or his employment.” This definition is wide-ranging and covers almost every possible form of sexual harassment, including verbal statements, gestures and physical conduct. It also includes employment-related sexual harassment that occurs outside the workplace as a result of employment responsibilities or employment relationships (e.g., at work-related social functions, during work-related travel, or over the telephone).

#### 4.2. Practical Advice To Employers On Avoiding Sexual Harassment Problems

To successfully combat sexual harassment in the workplace, employers are encouraged to set up comprehensive in-house mechanisms. The minimum elements of such a mechanism, as outlined by the Sexual Harassment Code, include:

- (i) a policy statement from management prohibiting sexual harassment in the organization;
- (ii) a clear definition as to what constitutes sexual harassment;
- (iii) setting-up a special complaint/grievance procedure;
- (iv) clear stipulation of the disciplinary rules and penalties that will be imposed against a harasser as well as against those who make false accusations;
- (v) formulation of a set of protective and remedial measures for the victim; and
- (vi) promotional and educational programs to explain the company's policy on sexual harassment and to raise awareness of sexual harassment among all employees.

Although it is not legally binding, implementation of the Sexual Harassment Code and the setting-up of in-house inquiry boards will provide employees under harassment with an avenue for redress within their organization.



## Mexico

### 1. Introduction

Article 123 of the Mexican Constitution sets out the fundamental principles guiding employment relationships within Mexico. Specific regulation of the employment relationship, however, is largely statutory. The Mexican Federal Labor Law (**FLL**) contains detailed provisions concerning the minimum employment conditions and rights that employers must grant to their employees. Under the FLL, all labor rules are construed to achieve social justice between workers and their employers. The FLL applies to all employees who provide personal, subordinated services within Mexico, regardless of nationality.

In addition to the FLL, precedents from the Supreme Court and federal courts play an important role in regulating employment relationships. Mexican courts are responsible for the interpretation of the FLL's provisions. However, such courts are not empowered to alter or deviate from the FLL's unambiguous provisions.

Most Mexican practitioners agree that Mexican labor law has not kept up with the needs of a dynamic global marketplace. The FLL has not been substantively modified since 1970, or procedurally modified since 1980. The process for change is slow, partly because decision makers cannot agree on the direction modern Mexican employment law must take.

### 2. Terminations

#### 2.1. Restrictions On Employers

As a general rule, Mexican law implies or presumes the existence of a contractual relationship between employers and their employees. The agreement may be written or oral, and express or implied. Whether and under what circumstances an employer may dismiss an employee depends on the specific nature of the employment agreement.

The FLL recognizes two general types of employment relationships: collective and individual. Collective employment relationships are established when employees are organized by a certified labor union and the union represents the employees in dealing with an employer. An individual employment relationship is created automatically when an employee performs tasks under the employer's control, whether on a temporary basis or for an indefinite term. In individual employment relationships, the law presumes the existence of an agreement between the employer and the employee. However, it is advisable for employers to execute a written individual employment agreement with each employee, to clearly establish the terms of the relationship.

There is a presumption under Mexican law that an employment relationship is for an indefinite period of time. An employer may remove this presumption by the execution of employment agreements that prescribe that the nature of the services to be performed are for a specific job or term. The FLL recognizes the following types of individual labor contracts: contracts for a specific job, for a specified period of time (fixed term), and for an indefinite period of time (indefinite term). The circumstances of the particular job determine whether the employer may validly execute employment agreements for a specific job or for a specific period.

An individual labor contract for a specific job typically arises when an employee is hired for a specific assignment, such as for the construction or remodeling of a specific worksite. This contract ends upon the completion of the specific job without liability to the employer.

Similarly, an individual labor contract for a fixed term exists only when the nature of the employee's assignment so requires. The FLL recognizes this type of contract for the temporary replacement of an employee due to disability, vacation or temporary absence. This contract also may be used to hire employees as seasonal workers or for performing certain temporary activities that cannot be carried out by an employer's regular staff.

Employees may challenge their employer's categorization of their contracts for a specific job or period of time by claiming that the services rendered are actually a part of the employer's permanent, ongoing business. If the employer fails to prove that the services performed under these contracts are not a part of the employer's regular and permanent activities, labor authorities may likely categorize the relationship as one for an indefinite term. Such a determination entitles an employee to severance pay or reinstatement following termination of the contract.

In light of this presumption and the heavy burden on employers seeking to diminish or overturn the presumption, most individual employment contracts are entered into for an indefinite term. An employer cannot terminate, suspend or rescind an individual labor contract for an indefinite term without penalty unless it can demonstrate "just cause" under the FLL. Article 47 of FLL acknowledges that an employer has "just cause" for dismissing an employee when or if:

- (i) Such employee commits dishonest or violent acts, makes threats, offends or mistreats the employer, his or her family, co-employees, or the officers or administrative personnel, during working hours or outside the worksite, unless the employee is provoked to act in self-defense;
- (ii) During the performance of his or her work or by reason of it, the employee intentionally or by negligence, causes material damage to the work building, machinery, instruments, raw materials or any other goods of the company;
- (iii) Through negligence or inexcusable carelessness, the employee jeopardizes the safety of the establishment or the persons inside of it;
- (iv) The employee commits immoral acts in the establishment or place of employment;

- (v) The employee reveals manufacturing secrets or confidential matters to the detriment of the employer;
- (vi) The employee disobeys the employer or its representatives without reasonable cause in matters related to the work under contract;
- (vii) The employee refuses to adopt preventive measures or to follow the procedures to avoid accidents or illness;
- (viii) The employee works in a state of drunkenness or under the influence of a narcotic or depressant drug, unless there is a medical prescription in the latter case;
- (ix) The employee has a final judgment imposing a prison sentence, preventing him or her from fulfilling the employment contract; or
- (x) The employee gives reasonable cause for loss of confidence.

In addition to just cause, the FLL recognizes that the labor relationship may be terminated under other circumstances. The labor relationship may be terminated without penalty:

- (i) By mutual agreement;
- (ii) As a result of the death of the employee;
- (iii) By termination of the specific job or the term of the capital investment;
- (iv) By the physical or mental incapacity or disability of the employee;
- (v) By “force majeure” or acts of God;

- (vi) By the self-evident non-profitability of the operation; or
- (vii) By legally declared insolvency or bankruptcy.

Conversely, according to the FLL, an employee also has just cause to rescind an individual labor relationship. Under these circumstances, the employee is automatically entitled to severance benefits:

- (i) If the employer misleads the employee with respect to the conditions of the job at the time it was offered (this cause will cease after the first 30 days of services rendered);
- (ii) If the employer or the employer's family, officers or administrative personnel commit dishonest or violent acts, make threats, offend or mistreat the worker, his or her spouse, parents, children or brothers and sisters during or outside of working hours;
- (iii) If the employer reduces the employee's salary;
- (iv) If payment of salary is not made at the usual, or on the agreed date or place;
- (v) If the employer maliciously damages the employee's working tools;
- (vi) If there is serious risk to the safety or health of the employee or his or her family; or
- (vii) If through negligence or inexcusable carelessness the employer endangers the safety of the workplace.

An employee also may resign voluntarily without just cause. If an employee resigns voluntarily, he or she is entitled to receive any accrued benefits, such as the Christmas bonus and vacation premium.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

To dismiss an employee with cause and without liability for the severance payment, an employer must prove that it acted fairly by providing appropriate notice. Specifically, an employer must prove that it dismissed the employee for just cause, that it gave the employee prompt written notice of the dismissal and that it stated the reason or reasons why the dismissal was “just.”

Employers must provide this notice to the dismissed employee within 30 days of the date on which the employer became aware of the acts that allegedly justify the dismissal. The notice must be made available to the employee for his or her review and signature. If the employee refuses to receive the notice, the employer must advise the respective Labor Board within five days following the date of the termination. If the employer fails to abide by these notification obligations, the dismissal is considered to be unjustified.

## 2.3. Termination Indemnities

An employee who is unjustly dismissed or who rescinds the relationship for cause is entitled to receive severance payments consisting of the following:

- (i) Three month’s total compensation, based on the wages and benefits earned at the time of the termination;
- (ii) 20 days’ total compensation per year of service (this amount does not apply under certain circumstances);
- (iii) A seniority premium equal to 12 days’ wages per year of service (subject to a salary limitation of up to twice the minimum wage);
- (iv) Back wages from the date of the dismissal through the date of payment (in the event of litigation).

The seniority premium must be paid to all employees who: (i) voluntarily leave their employment after completing 15 years of service; (ii) leave their employment for just cause; (iii) are dismissed by the employer with or without just cause; or (iv) die while still employed, in which case their beneficiaries receive the seniority premium. In addition, an employee dismissed without cause has the option to be reinstated to his or her former job instead of receiving the severance payment, provided the employee does not work in a white-collar position (“employee of trust”).

#### 2.4. Laws On Separation Agreements, Waivers And Releases

The FLL’s employee-protection provisions apply to virtually every labor relationship in Mexico and are not subject to waiver by employees. In the case of an employee’s resignation, however, the law recognizes as valid a resignation letter from the employee stating that he or she resigned voluntarily and that the employer does not owe him or her any additional compensation.

However, and pursuant to Article 33 of the FLL, any waiver made by employees to earned wages and severance benefits is null and void by law. And any termination agreement, in order to be valid, must be in writing and ratified before the Labor Board. The Board shall approve the agreement provided it does not contain any provisions that could contain any waiver of such rights and benefits.

#### 2.5. Litigation Considerations

Employment law in Mexico has been slow to adapt to the changing needs of the global marketplace. The increasing number of claims has created a seemingly insurmountable backlog for labor officials.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

The Mexican Constitution provides that every person is entitled to basic constitutional rights regardless of sex, race, religion, age, political views or nationality. Among such rights are the labor

principles contained in Article 123 of the Constitution. However, Mexico's legal provisions governing discrimination are not as developed as those in other countries. Generally speaking, employers are not liable to employees who experience discrimination in the workplace for a specific type of damages. However, employees may terminate with cause their employment relationship and claim the payment of severance and back pay.

Employees do have recourse for discrimination under certain limited circumstances. For example, the FLL provides that employees performing equal work must be afforded equal pay, provided the employees work in the same position, work shift and efficiency conditions. An employee has the right to bring a claim for pay equalization before the Labor Board.

The FLL also provides specific maternity rights. A woman cannot be employed to work in unhealthy or hazardous conditions, undertake industrial night work, work in commercial or service establishments after 10 p.m., or perform overtime work if the health of the mother or her child is put into danger, either during pregnancy or lactation. Women are also entitled to maternity leave of six weeks before and six weeks after childbirth, during which period the employee is entitled to her full wages. The law further provides that the full maternity period must be counted as time worked for purposes of seniority and length of service. Additionally, if it is impossible for the employee to return to work because of her pregnancy, the maternity leave is extended by the time necessary, and the employee is entitled to half pay for a period not exceeding 60 days.

The Mexican Federal Labor Law, in Article 173, states that the employment of children aged 14 through 16 years old shall be subject to special protection and inspection of the labor department. The Law forbids minor employees from working in places where alcoholic beverages are sold, in places where their morality may be damaged, in submarine or subterranean jobs, in dangerous or unhealthy activities,

in activities in which their physical development might be impeded, or in non-industrial establishments after 10 p.m.

Children who are over 14 but under 16 years old are permitted by the Law to work a maximum of six hours per day, distributed in two periods of three hours each, with a period of at least one hour between them. If these children are called to work on Sundays and mandatory days off, the employer shall pay an additional 200 percent of the base salary. Minors are not eligible to work overtime.

The violation of the Law regarding provisions for the employment of minor workers may result in a fine that rises from three to 155 times the minimum daily salary, pursuant to Article 995 of the Law.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

It is rare for an employee in Mexico to seek legal remedies for sexual harassment. This area of Mexican law is largely undeveloped. Nevertheless, there are several pieces of legislation dealing with sexual harassment, including the FLL, the Criminal Code for the Federal District (“Criminal Code”) and the Civil Code for the Federal District (“Civil Code”).

The FLL does not specifically address “sexual harassment.” Nevertheless, such conduct could constitute cause for the harassed employee to rescind his or her employment relationship based on Section II of Article 51 of the FLL, which provides that, “Causes for rescinding the labor relationship without the employee’s responsibility are. The employer, his relatives, officers or managerial personnel, committing, within the service, lack of integrity or honesty, violent acts, threats, defamation, mistreatment, or other acts of an analogous nature, against the employee, spouse, parents, children or siblings.”

In addition, a sexually harassed employee might argue that the employer breached its obligations under the FLL and is therefore subject to a fine. Article 132 of the FLL sets out the employer’s

general obligations. Specifically, Section VI requires employers “to show due consideration for the employees, abstaining from mistreatment by word or action.” The penalty for breaching Article 132 is contained in Article 1002, which provides for a fine equivalent of up to 315 times the general minimum daily salary. In setting this multiplier, the Labor Boards and courts consider both the seriousness of the offense and the circumstances of the particular case.

Unlike the FLL, Article 259-Bis of the Criminal Code specifically addresses sexual harassment. Such Article states in part that “a penalty consisting of a fine equaling up to 40 days, may be imposed against a person who, on an on-going basis, sexually harasses another person of either sex, taking advantage of his/her hierarchical position derived from their labor, educational, domestic or any other kind of relationship which implies subordination. Sexual harassment will only be sanctioned when it causes damage to the victim.” In order for sexual harassment to be found, the victim must establish: (i) that the harasser acted with a sexual intention; (ii) the harassment occurred on more than one occasion; (iii) the harasser is the victim’s supervisor or holds a superior position with the employer; and (iv) the individual harassing must be taking advantage of that superior position while committing the harassment.

An employee who has been sexually harassed may also make a claim pursuant to Article 1916 of the Civil Code, which provides a remedy for “moral damages.” Moral damages are defined as the injury to a victim’s feelings, affections, beliefs, decorum, honor, reputation or private life. In assessing the victim’s damages, the law also recognizes the consideration that others have for the individual.

On June 11, 2003, the Federal Official Gazette published a decree whereby Mexico’s Federal Law to Prevent and Eradicate Discrimination (the “Discrimination Law”) was enacted.

The Discrimination Law defines and somewhat expands the legal range granted to discrimination matters by the Mexican Political

Constitution, which previously established in Articles 1 and 123, the prohibition of discriminatory treatment in general and in labor matters specifically. Furthermore, the Discrimination Law complements the rules established for that purpose in Article 3 of the Federal Labor Law and in Agreement 111 of the International Labor Organization on discrimination matters (ratified by Mexico in 1961). Although the Discrimination Law includes provisions of a general nature, it establishes some concepts that may have implications specifically for the area of labor and employment.

Article 4 of the Discrimination Law provides that, for the purposes of the Law, discrimination shall mean any distinction, exclusion or restriction that has the effect of impeding or annulling the acknowledgment or exercise of rights and an effective equal opportunity for persons based on ethnic or national origin, gender, age, disability, social or financial conditions, health condition, pregnancy, language, religion, opinion, sexual preference, marital status or any other reason.

Article 9 of the Discrimination Law prohibits any discriminatory practice that interferes with or prevents the exercise of rights and an effective equal employment opportunity. On this basis, the following conduct should be deemed as discriminatory: prohibiting the free choice of employment, or restricting the opportunities to access, stay or be promoted. It may be inferred that such prohibition defines employer-administered pregnancy tests as discriminatory conduct.

While the Discrimination Law does not create civil or criminal liabilities against parties practicing discriminatory conduct, such as those existing in other countries, it does provide for the creation of an administrative Council (the “Council”) that may eventually take action against parties who fail to comply with the Discrimination Law.

#### 4.2. Employee Remedies For Sexual Harassment

The type of remedy available, or penalty imposed, depends upon the legal authority under which the victim pursues the sexual harassment

claim. An employee charging sexual harassment under Article 132 of the FLL is entitled to an award for damages. The penalty for breaching Article 132 of the FLL is a fine of three to 315 times the general minimum daily salary, taking into consideration the seriousness of the offense and the circumstances of the particular case.

Criminal charges may be brought against the alleged harasser only if the victim agrees to bring the claim. Under Article 29 of the Criminal Code, the harasser is liable for a fine not to exceed 40 times the daily minimum wage. The criminal penalty is assessed only against the harasser; no criminal penalty is imposed against the company where the individual works.

Pursuant to Article 1916 of the Civil Code, when an illicit act or omission produces moral damages, the person responsible for such damages is required to repair them through monetary indemnification, regardless of whether material damages have been caused. The amount of the indemnity is determined by considering the rights violated, the degree of liability, the economic situation of the responsible party and that of the victim, and any other relevant circumstances of the case.

#### 4.3. Equal Opportunity Rights For Males And Females

Enacted in 2006 and based on equality and non-discrimination principles, the Law for Equal Opportunities for Males and Females (“Law”) regulates gender equality and is intended to protect any individual who is placed in a situation of disadvantage due to gender.

The Law describes a total of three programs to make it enforceable, including a nation-wide program under which equality rights must be observed by individuals and authorities to avoid gender discrimination in connection with social and civil stereotypes.

The enforceability of the Law is reserved for the Human Rights Commission and the applicable sanctions are described in the Public Official Responsibilities Law.

#### 4.4. Practical Advice To Employers On Avoiding Sexual Harassment Problems

If an employee complains of sexual harassment, the employer should immediately investigate the employee's charges. A prompt, thorough and fair investigation and good faith remedial action will likely be useful in defending the employer against a claim in Mexico. However, case law is sparse in this area.

Following the investigation, the employer must make a determination as to the validity of the claim. The strength of the claim and the evidence that supports it will dictate the appropriate response. If the occurrence of the offensive behavior is ambiguous, a warning may be appropriate. However, if it is clear that problems exist, the employer should consider requesting the harasser's resignation or terminating his or her employment.

An employer should be cautious when dismissing any employee, as the harasser may raise an unjust dismissal claim against the employer. If the evidence of sexual harassment is clear, it appears that based on the provisions of the FLL, a company may successfully defend the harasser's wrongful dismissal claim. Under the FLL however, the burden still lies with the employer to prove that it had just cause in dismissing the harasser. If the employer cannot satisfy this burden, the Labor Board may order the employer to pay the statutory severance to the employee under Article 50 of the FLL. Therefore, if the investigation is ambiguous or inconclusive, a severance arrangement may be the safest manner of dealing with the situation.



## Netherlands

### 1. Introduction

Employment relationships in the Netherlands are mostly governed by collective labor agreements (CLAs), individual employment agreements and, if any, the internal regulations of the employer. Much of Dutch employment law, however, is mandatory. In principle, Dutch employment law applies to all employment relationships performed in the Netherlands, whatever the nationality of the employee or the employer. There is a general principle, however, allowing parties to choose a different applicable law (other than Dutch law) to govern the employment relationship, although certain mandatory provisions of Dutch employment law can never be excluded.

The primary sources of law that govern employment relationships in the Netherlands include:

- The pertinent sections in the Dutch Civil Code;
- The Extraordinary Decree on Labor Relations 1945 (“BBA”);
- The Works Council Act;
- The European Works Council Act;
- The Act on Collective Labor Agreements;
- The Labor Conditions Act;
- The Act on the Reporting of Collective Dismissals;
- The Act Adjustment Working Hours;
- The Act on Working Hours;

- The Act Labor and Care;
- The Act on Equal Treatment of Men and Women of 1980 (“Wgb m/v”);
- The General Equal Treatment Act of 1994 (“Wgb”);
- The Act on Equal Treatment in Employment (Age Discrimination) (“Wgbl”); and
- The Act on Equal Treatment Disability or Chronic Illness (“Wgbh/cz”).

Employment relationships in the Netherlands may also be governed by European decrees and rules, as for instance, the European Social Charter (ESH), or Dutch Decrees as the Decree on the Rules relating to Mergers of the Social and Economic Council 2000. In addition, legislation from other legal fields such as corporate and pension law, and social security or tax law, might influence the employment relationship.

An employment agreement may be oral or written. Whether oral or written, the employer is under a statutory obligation to provide the employee with a written statement containing specified data relating to the employment agreement. If written, an agreement may take the form of a contract signed by both parties, an exchange of letters or a single confirmation (a single document). The language may be any language as long as both parties are able to understand what the agreement says. A non-competition clause and a clause regarding a trial period must however always be in writing and undersigned by both parties; if they are not, they will be deemed null and void.

## 2. Terminations

### 2.1. Restrictions On Employers

An employment agreement in the Netherlands will terminate by operation of law upon expiry of the initial fixed period of time (if it is not renewed) and can be terminated: (i) by mutual consent; (ii) during the trial period; (iii) immediately for “urgent reasons” (for “cause”); (iv) by giving notice; or (v) by court decision pursuant to Article 7:865 of the Dutch Civil Code.

If an employment agreement is terminated by mutual consent, no notice has to be given, and the employer and the employee can agree on a reasonable severance package. In the past, an employee would not have accepted such a termination unless he or she had found another job, because such employees generally were not entitled to unemployment benefits. Since the adjustment of the Act on Unemployment in June 2006, however, the rules for unemployment benefits are less severe, and the unemployment benefits will be more easily granted as long as the employment agreement is not terminated based on urgent reasons or upon request of the employee.

Neither is notice required to be given when terminating an employment agreement during the trial period. The maximum trial period under Dutch law for employment agreements with an indefinite term is two months. If the period is longer, the trial period as a whole is invalid. For employment agreements with a fixed term, the trial period is a maximum of one month for agreements of less than two years and a maximum of two months for agreements of two years or more. Trial periods can also be adjusted by collective labor agreements.

Under Dutch law, a fixed-term employment agreement terminates by operation of law on the expiry of the agreed upon period. During this fixed term, however, the agreement can be terminated only by giving notice after having obtained a court decision or a dismissal permit from the Employee Insurance Agency (*Uitvoeringsinstituut*

*Werknemersverzekeringen* - “UWV”) and only if a premature notice period has been explicitly provided for in the employment agreement. During a fixed-term employment, the above applies to employers and employees equally, except for the fact that an employee does not need to obtain a dismissal permit from the UWV in order to give notice. Fixed-term employment agreements (even if continued twice) terminate by operation of law if the chain of fixed-term employment agreements does not cover 36 months or more. A chain is a series of fixed-term employment agreements that succeed each other with less than three months in between.

Under Dutch Law, consecutive fixed term employment agreements will be converted, by operation of law, into an employment agreement for an indefinite period if either:

- (i) the total duration of the consecutive fixed term employment contracts exceeds 36 months; or
- (ii) more than three fixed term employment agreements are concluded consecutively with intervals of three months or less (the “chain rule” or “*ketenregeling*”).

However, if a fixed term employment agreement follows immediately after an employment agreement for 36 months, but is entered into for less than three months, the employment agreement is not deemed to be an indefinite-term employment agreement.

The Minister of Social Affairs and Employment temporarily widened the chain rule from 9 July 2010 as a crisis measure with the aim of keeping young employees at work. For employees under the age of 27, to whom (i) or (ii) applies, the total duration of fixed term employment agreements was increased to 48 months and the number of fixed term agreements allowed was four. This temporary measure was repealed from 1 January 2012.

In cases of both indefinite-term and fixed-term employment agreements, employers can terminate the employment with immediate

effect for cause in situations where they cannot reasonably be expected to continue the employment. The law provides examples of “urgent reasons,” such as gross negligence in the performance of duties, theft, fraud, crimes involving a breach of trust, or the divulging of trade or professional secrets.

To terminate with immediate effect for cause, the reason for dismissal must be extremely urgent and sufficiently serious to justify immediate and irrevocable termination. The risk with such dismissal is that a court may decide afterwards that the cause was not serious and urgent enough, and thus declare the termination null and void. In such a case, the employee may be entitled to receive his or her salary from the date of improper termination until the employment agreement is terminated in a proper way (e.g., by obtaining approval from the UWV to give notice or a court decision). The court, however, in its discretion, may increase or reduce the amount of compensation to be paid.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

An employment agreement can be terminated by giving notice after having received a dismissal approval from the UWV. The UWV will grant a dismissal approval only if there is a valid reason for dismissal, such as improper performance, reorganization or business economic reasons.

If the employer asks for a dismissal approval because of improper performance, the employer must show that it did the utmost to help the employee improve his or her performance. The employer also must prove improper performance by the employee.

In case of a redundancy or reorganization, the employer must prove to the UWV that a reduction in the workforce is necessary in relation to the decrease of business. To do so, the employer is usually required to provide specific documentation supporting the claim, such as consecutive balance sheets showing a clear decrease, a comparison

with similar businesses incurring losses, efforts taken to avoid dismissals and a forecast that the situation will not change.

The selection of employees to be dismissed also must be made, in principle, based on the “proportionality or reflection principle,” which means that, in the category of interchangeable positions, per age category, the employee hired first is to be dismissed last. The proportionality principle can be deviated from under a collective labor agreement to address specific circumstances in a company or industry. The termination conditions in such a collective labor agreement have to be objectively verifiable and can include other related issues such as employability and outplacement.

Until a dismissal approval is obtained, a notice of termination is null and void. After the dismissal approval has been obtained, the appropriate notice period must be given. Notices of termination should be given at the end of the month, unless a different day has been appointed by written agreement, internal regulations or past practice. Employees are required to observe a notice period of one month, unless otherwise specified in writing. Employers are required to provide one month’s notice for an employment contract that has lasted for a period of less than five years; two months’ notice for contracts that have lasted 5 to 10 years; three months’ notice for contracts of 10 to 15 years; and four months’ notice for contracts that have lasted 15 years or longer. These notice periods can be shortened by collective labor agreements or extended by written agreement.

However, the notice period for the employer cannot be less than double the notice period for the employee in case of extension by written agreement. The notice period for the employee cannot be extended beyond six months. This general rule applies unless a termination is prohibited because of a statutory ban against terminating an employment agreement by giving notice (for instance, during illness or pregnancy). Notice of termination is prohibited during an employee’s illness (for a maximum of two years), unless the illness arose after the UWV received the request for approval.

If an employee does not agree with his or her dismissal, the employee can start proceedings in the Cantonal Court based on Section 7 of Article 681 of the Dutch Civil Code (“obviously unreasonable dismissal”) and claim damages. Based on Section 7 of Article 682 of the Dutch Civil Code, the employee can even claim reinstatement.

An employment agreement can also be terminated by court decision, if a petition based on Section 7 of Article 685 of the Dutch Civil Code is filed on the grounds that there is an urgent reason for it or that circumstances have substantially changed. The circumstance of improper performance or recession can be considered as a substantial change of circumstances. The drawback of a termination by court decision based on “changed circumstances” is that the court may award substantial compensation to an employee as a condition for termination. The amount of compensation will depend on the specific circumstances. The advantage of a court decision is that it may allow terminations in situations where notice cannot be given (for instance, during illness).

As a consequence of changes to the Act on Unemployment in June 2006, it is no longer necessary to instigate (pro forma) court proceedings to safeguard an employee’s rights to unemployment benefits in the case of termination by court decision, after an amicable settlement has been reached.

### 2.3. Termination Indemnities

One of the reasons for awarding redundancy payments to employees to be dismissed is to prevent legal proceedings based on an “obviously unreasonable dismissal.” This may be the case if no sound reason is given for the termination or if the financial effects of the termination are too harsh on the employee balanced against the interests of the employer. Whether the effects are too harsh will depend on the specific circumstances of the case (e.g., tenure, age, etc.). In many cases, the parties may agree to an out-of-court settlement, or the employer may provide for a reasonable redundancy payment (or

Social Plan), in which case the employee would not have any grounds to commence proceedings based on the Dutch Civil Code.

In proceedings based on dismissal due to substantially changed circumstances, Cantonal Courts tend to award compensation. On January 1, 1997, the Cantonal Courts introduced a uniform formula on a nationwide basis, which was last amended on January 1, 2009. This formula is particularly used in dismissal cases based on Section 7 of Article 685 of the Dutch Civil Code filed on the grounds that there is an urgent reason for dismissal or that circumstances have substantially changed. According to the Cantonal Court formula, severance pay is calculated by multiplying the number of weighed years of service by the monthly salary and an “adjustment factor.” Years of service of the employee count for 0.5 if the employee is younger than 35, for 1 if the employee is between the ages of 35-45, for 1.5 if the employee is between the ages of 45-55, and for 2 if the employee is age 55 and older.

The basis of the formula is the fixed gross monthly salary, plus all fixed and agreed salary components. Other benefits, such as pension premiums, are in principle not taken into account. Case law, however, shows that under some circumstances, the courts do consider stock benefits to be part of the employee’s salary and for that reason take the rights under a Stock Option Plan into account when calculating severance pay and may even rule to continue a Stock Option Plan after the termination of an employment contract. In the event the anticipated loss of income until the employee’s reasonably anticipated retirement age is less than the sum resulting from application of the formula, the compensation shall in principle be calculated on the basis of that loss of income.

The adjustment “C-factor” is an element for the purpose of weighing any special circumstances of the case. If a job becomes redundant due to a business reorganization and no special circumstances apply (e.g., illness) and the employer’s reasons are absolutely sound, this is generally known as a “neutral” dissolution, in which case the adjustment factor is set at 1. Special circumstances may be involved

if the termination of the employment relationship can be blamed on the employer. The factor will then be a higher figure. It is also possible that the termination can be blamed on the employee, in which case the factor will be lower than 1.

Because of the adjustment factor, the amount of severance payment that will be granted by the court is difficult to predict. Despite the fixed formula, the adjustment factor leaves the courts sufficient room for their own interpretation and discretionary weighing of the facts and circumstances. Special circumstances (such as failing to offer an alternative suitable position or substantial and persistent financial losses) may be taken into account and may lead to an adjustment factor higher or lower than 1. Furthermore, if the employer cannot provide a sufficiently sound business reason for the intended restructuring, the adjustment factor is likely to be higher. Moreover, a short employment (one to two years) can also merit an adjustment factor (well) in excess of 1, for example where the employer encouraged the employee to leave his former employer. The adjustment factor also can be utilized to assess the employee's ability to find another job.

After an employee has been absent for two (or more) years of illness, for which the employer is not to blame, the C-factor will in principle be 0. However, in circumstances where the illness might be (partly) blamed on the employer, or the working conditions, or the employer has not fulfilled its obligations with regard to the reintegration of the employee, the C-factor might be higher.

Where, in a reorganization, the company has agreed a social plan with the unions, the Cantonal Court will in principle grant compensation based on the social plan instead of on the Cantonal Court formula, unless granting such compensation would lead to an evidently unreasonable outcome for the employee. It should be noted that this basic principle will only apply if it concerns a social plan with the trade unions (and not the Works Council).

Redundant employees are, in principle (as of October 1, 2006), entitled to unemployment benefits equivalent to 75 percent of the last earned (maximized) daily salaries for the first two months and thereafter to 70 percent of the last earned (maximized) daily salaries. The duration of such benefits will depend on the tenure and age of the employee.

Recent case law shows that in case of proceedings based on obviously unreasonable dismissal, the amount of damages cannot be based on a fixed formula (such as the Cantonal Court formula), but on the actual material and immaterial damages incurred by the employee. The Court must relate the amount of damages to the nature and gravity of the failure of the employer to act as a diligent employer and to the damages incurred by the employee as a consequence hereof. In case the extent of damages cannot be determined, the Court is allowed to estimate the damages.

#### 2.4. Collective Redundancies

The Act concerning the Reporting of Collective Dismissals offers additional protection to employees in the case of a collective dismissal. The Act prescribes that an employer that intends to terminate the employment agreements of at least 20 of its employees within a period of three months and within one working area must report its intention in writing to the UWV and give the grounds for the decision (notification). When calculating the number of dismissals, it is not only dismissals that require a dismissal permit (permission from the UWV) and those that involve at least five requests for dissolution by the court for business reasons pursuant to Section 7:685 of the Dutch Civil Code [BW] that are counted. Employment agreements that are being terminated through mutual consent must also be included in the total number of dismissals.

The employer must also inform the relevant trade unions and – unless the trade unions do not respond within a reasonable time or declare to have no interest – consult them. Consultation does not entail an obligation to come to an agreement. However, there should have been

actual deliberation. Besides consulting the trade unions, the employer must also consult with its Works Council. The obligation to report, supply additional information and consult provides trade unions with the opportunity to start negotiations with the employer regarding the necessity of the collective dismissal and possible stipulations or redundancy schemes. The results of the negotiations (a social plan containing a “termination package” for the employees involved) can be of use to the UWV when the director considers the individual dismissal applications.

The UWV will only attend to the request for individual dismissal permits if there was a prior notification to the UWV and if the employer provides a written statement that the trade unions and Works Council were consulted. However, if the employer can demonstrate that complying with the obligation to consult the trade unions and Works Council jeopardizes re-employment of the redundant employees or the employment of other employees, the UWV can attend to the request anyway.

Once the employer has received the dismissal permits from the UWV, it can proceed with the dismissals by giving due notice of termination. There is a minimum waiting period for giving notice of one month starting as of the notification to the UWV. This waiting period also applies to agreeing upon a settlement agreement or for the court to dissolving an employment agreement. The one month waiting period does not, however, apply if the trade unions involved have stated they have been consulted and agree with the intended dismissals. Please note that by following the UWV procedure, this one month waiting period will (often) have elapsed. If the employer did not follow the procedures for dismissal, the dismissals of redundant employees can be declared void.

A court may only grant requests for dissolution of employment agreements for economic reasons if it ascertained that the employer notified the UWV and provided a written statement that the trade unions and Works Council were consulted. Such obligation only applies to the court if the employee argued that the employer did not

comply with the obligations pursuant to the Act concerning the Reporting of Collective Dismissals. If the employer can demonstrate that complying with the obligation to consult the trade unions and Works Council jeopardizes re-employment of the redundant employees of the employment of other employees, the court can grant the request anyway. If necessary, the court can also deviate from the one month waiting period.

Under specific circumstances – deceit by employer, the dissolution was based on false documents, new documents emerged in spite of the employer trying to withhold these – the employee can request revocation of dissolution.

There is no difference between the UWV's review of an individual dismissal request and its review of a collective request. In all cases, the dismissal must meet the standards of justice and of Article 6 of the BBA. The employer must demonstrate that it could not have reasonably decided otherwise. The directives for applying Article 6 of the BBA do not provide the UWV with many indications as to how to apply the standards of reasonableness. In any event, the UWV must balance the interests of the employer and those of the employees. In addition, the UWV must examine whether the personnel reduction (or, for instance, the closing of a plant) is necessary in view of the reduced business and whether it is possible to temporarily bridge the difficulties a company is facing.

In principle, the UWV may not assess the reasonableness of the redundancy scheme and may not impose such a scheme, since this is a matter between the employer and the employee (or, possibly, the trade unions on behalf of the employees). In practice, however, any favorable redundancy scheme offered by the employer to the employees may play a role in the UWV's decision – it may even be the decisive factor.

If the company involved has a Works Council (required in companies with 50 or more employees) or a Personnel Representative Committee, the Works Council Act also applies, which requires the

company to ask the Works Council or Personnel Representative Committee for advice on certain intended decisions. Collective redundancies fall into this category.

The advice must be requested within a reasonable time frame so as to allow the Works Council to have a say in the decision that is to be made. The request for advice must include a summary of the reasons for the decision, its expected consequences and the measures proposed in response. If, after advice has been given, the company decides to go through with its planned decision, it must inform the Works Council in writing of the decision and the reasons behind it. In the case of negative advice, the execution of the decision must be postponed for one month. During that month, the Works Council may lodge an appeal with the Companies Chamber of the Court of Appeal in Amsterdam. An appeal also may be lodged if the company fails to request advice. The Personnel Representative Committee does not have the right of appeal to the Companies Chamber of the Court of Appeal after it has given negative advice. The Companies Chamber can reject the decision on substantial grounds only if the decision is “apparently unreasonable.”

## 2.5. The European Works Councils Act

By the European Works Councils Act, which came into force on February 5, 1997, Directive 94/45/EC (on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees) was implemented in Dutch law. Since implementation, the European Works Councils Act has been amended twice.

Based on Article 19 of the European Works Councils Act, the central management of the (community or group) company and the European Works Council will meet at least once a year. In this meeting, the central management will inform and consult the European Works Council based on a written report, among others, on essential changes in the organization, implementation of new labor or production

procedures, reduction in the workforce or shutting down of companies, establishments or important parts of these establishments, and on the status and developments of the employment and collective dismissal.

In addition to the above, the central management will inform the European Works Council as soon as possible on all special circumstances and proposed decisions with a significant impact on the interests of the employees of at least two establishments or companies of the community company or group, especially with regard to relocation, shutting down or collective dismissal. When requested by the European Works Council, the central management will meet and consult with the European Works Council based on the written report of the central management and at a time when the information and consultation is still relevant. The European Works Council can give advice directly on the subject after or within a reasonable period of time after the meeting. Without prejudice to the pledge of secrecy, the European Works Council is allowed to inform the national Works Councils within the community company or group, or when no such Works Councils exist, all employees, on the content and the results of the information and consultation procedure.

On July 2, 2008, after having consulted the interested parties (unions and employers organizations) and external consultants, the EC launched its proposal for amendments to Directive 94/45/EC, among others, clarifying the information and consultation procedure and linking the national and transnational levels of the information and consultation procedures.

On June 13, 2008, the Dutch government announced its willingness to support the EC with regard to changes in the scope and timing of information and consultation procedures. The Dutch government also started its own investigation into the performance of the European Works Council in the Netherlands.

Recently changes in the European Works Councils Act came into force. The obligation to alter is pursuant to the new Directive on the

European Works Council that was accepted by the European Parliament on December 16, 2008. The most important adjustments are:

- The further determination on what has to be consulted with the European Works Council, as well as mandatory provisions in the European Works Council agreement about the functions and the procedure for information and consultation. Where the agreement is missing, subsidiary requirements can be used as fall-back rules;
- The introduction of the definitions ‘information’ and ‘transnational matters’ and a supplementation of the definition of ‘consultation’;
- The obligation to inform the competent European trade union and employers’ organizations on the start of negotiations, to enable them to monitor the establishment of a new European Works Council;
- A provision that employees’ representatives be provided with training without loss of wages; and
- An adaption clause to the European Works Council where the structure of the (group of) undertaking(s) changes significantly. Except for the adaption clause, there is no general obligation to renegotiate existing European Works Council agreements in the Directive.

## 2.6. The Act Adjustment Working Hours

On July 1, 2000, the Act Adjustment Working Hours came into force. Under Article 3 of the Act, employers are not allowed to dismiss an employee based on the fact that the employee requested an adjustment of his or her working hours. If the employer dismisses an employee based on such a request, the employee can claim for annulment of the

dismissal. “Dismissal” in this context includes not continuing an employment agreement for a fixed term.

Under the Act, an employee with at least one year of service with the employer can request an adjustment of his or her working hours. The employer is only allowed to refuse such a request based on substantial business or service interests. With regard to the adjustment related to more working hours and not with regard to the request for less working hours, this can be deviated by CLA or by written agreement with the Works Council or, when no Works Council exists, with the employees’ representatives. The basic obligation for the employer to agree with any adjustment does not exist for employers with fewer than 10 employees. Such a small employer, however, based on the Act, is obliged to make an arrangement with regard to the right of the employees for an adjustment of the working hours.

## 2.7. Law On Separation Agreements, Waivers, And Releases

In principle, it is possible for an employee to release an employer of termination liabilities (for example, in an employment agreement). Such a waiver, however, will not be binding on a court. In a procedure, a court will weigh all the facts and circumstances, judge the case on its own merits and use the Cantonal Court formula as a guideline. However, a court might consider the release as a reason to mitigate the compensation, but that would depend on the specific circumstances of the case. These principles are also applicable in cases where parties explicitly agreed on a fixed termination package (a so-called “golden parachute”). The Dutch Civil Code requires the court to set a fair amount of compensation in the event of a termination, and the parties are not allowed to infringe the court’s authority in this respect.

## 3. Employment Discrimination

### 3.1. Laws On Employment Discrimination

Under Article 1 of the Dutch Constitution, all individuals within the Netherlands are entitled to be treated equally in comparable cases.

Discrimination on the grounds of religion, belief, life principles, race, sex or any other specified grounds is prohibited by the General Equal Treatment Act of 1994. The Dutch Civil Code also provides for equal treatment of men and women who are employed by a private employer. This law is based on the norm set out in Article 119 of the European Community Treaty and the Directives relating thereto, which prohibit discrimination against men and women.

### *Discrimination On The Grounds Of Sex*

The Dutch Civil Code forbids direct and indirect sex discrimination. Indirect discrimination is the application of a requirement or condition that has a negative impact on the members of one sex, which the employer cannot justify on objective, gender-neutral grounds. In order to make a distinction based on an objective ground, it must be demonstrated that the distinction is made to serve a legitimate purpose not related to sex discrimination. The applicable criteria must comply with the demands of proportionality, legitimacy and efficiency. Arguments based exclusively on a financial nature are generally insufficient to result in an acknowledged, objective ground for justification.

Direct and indirect discrimination is prohibited in hiring, promotions, terminations and in all the terms and conditions of employment (excluding social security and pensions). The Act on Equal Treatment of Men and Women of 1980 also prohibits direct or indirect sex discrimination in all acts connected with the recruitment of employees (e.g., advertising and dealing with job applications) and in vocational training and guidance given to employees (although an exception is made if being a member of a particular sex is a decisive factor for the profession to which the training relates). Discrimination against a woman on the ground of pregnancy, or discriminatory retirement ages for men and women, also contravenes the equal treatment legislation.

Both the Act on Equal Treatment of Men and Women and the Dutch Civil Code exclude cases in which being a member of a particular sex is a decisive requirement of the job (e.g., models for men or women's

clothing, actors playing male or female roles, etc.). In addition, provisions to protect women in relation to pregnancy or motherhood do not infringe this legislation.

The Netherlands has also implemented Article 119 of the Treaty of Rome and the Equal Pay Directive. The Act on Equal Treatment of Men and Women aims to eradicate any differentiation in the payment of wages to those commonly paid to an employee of the opposite sex performing work of “equivalent value.” This applies to both individual and collective labor agreements. Any provisions that seek to depart from the principle of equal pay are void.

#### *Discrimination On The Grounds Of Age*

On May 1, 2004, the Act on the Equal Treatment on the basis of Age in Employment came into effect. The Act on the Equal Treatment on the basis of Age in Employment prohibits direct and indirect age discrimination in, among other things, the recruitment and selection of employees, the terms and conditions applicable to the employment relationship, and the entering into and termination of the employment relationship. Both direct and indirect age discrimination are prohibited unless such discrimination is justifiable on “objective grounds.” An objective ground that is not expressly stipulated in the Act on the Equal Treatment on the basis of Age in Employment will have to fulfil the requirements of legitimacy, proportionality and efficiency.

#### *Discrimination Against Disabled And Chronically Ill People*

On December 1, 2003, the Act on the Equal Treatment on grounds of Disability or Chronic Illness came into effect. This Act prohibits direct and indirect discrimination on the grounds of a disability or chronic illness in, among other things, the recruitment and selection of employees, the terms and conditions applicable to the employment relationship, and the entering into and termination of the employment relationship. Direct and indirect discrimination on the grounds of disability or chronic illness are not prohibited in the case of positive

discrimination or if the discrimination fulfils the requirements expressly laid down in Article 3 of the Act on the Equal Treatment on grounds of Disability or Chronic Illness. Moreover, indirect discrimination can be justified by an objective justification if this objective justification fulfils the requirements of legitimacy, proportionality and efficiency.

Under the Act on the Equal Treatment on grounds of Disability or Chronic Illness, the prohibition on discrimination includes the obligation on the part of the employer to make all necessary adjustments according to the existing needs of the employees, unless these adjustments can be considered to form a disproportionate burden on the employer.

#### *Discrimination Against Part-time Employees*

Article 7:648 of the Dutch Civil Code prohibits discrimination by an employer of part-time employees in the terms and conditions of employment unless such discrimination is justifiable on “objective grounds.” Again, these objective grounds must fulfil the requirements of legitimacy, proportionality and efficiency. Any stipulation or act in contravention of this prohibition is void.

#### *Discrimination Against Employees Under A Fixed-Term Employment Contract*

In the Netherlands, Directive 1999/70/EC has been implemented by Articles 7:649 and 657 of the Dutch Civil Code. It prohibits direct and indirect discrimination on the grounds that the employment contract concerned is for a fixed term, unless the discrimination can be objectively justified. Again, this objective justification will have to fulfil the requirements of legitimacy, proportionality and efficiency.

#### *Discrimination Against Foreigners*

The Act on the Implementation of the European Treaty regarding the legal position of migrating employees also provides a certain degree of protection for foreigners. The terms and conditions of employment

agreements entered into with foreign employees residing in the Netherlands, as well as the renewal or termination of those agreements, may not be less favorable than those governing employees of Dutch nationality. Any provision that violates this prohibition is void.

On April 28 2005, the Minister of Administrative Renewal and Kingdom relationships announced a broad integration of the four main equal treatment Acts (Awgb, Wgbh/cs, Wgbl, and Wgb m/v). Since then, however, no such integration has taken place.

### 3.2. Employee Remedies For Employment Discrimination

Any stipulation, provision or personnel decision that is inconsistent with equal treatment legislation is void. It therefore follows that the dismissal of an employee for invoking his or her rights under that legislation is also void. In such a case, the employee can claim damages from the employer.

An employee who has been discriminated against has various other options to pursue. Among others, the employee may seek dissolution of his or her employment contract on urgent or serious grounds, and request a substantial amount of compensation due to the discriminatory acts of the employer. If it is the employer that petitions for dissolution and this petition is motivated by discriminatory reasons, the employee may invoke the absence of a serious reason for dissolution of the employment agreement.

An employee dismissed for discriminatory reasons also may claim damages or restoration of his or her employment contract on the ground that the dismissal was manifestly unreasonable. Another possibility for the employee dismissed for discriminatory reasons is to invoke the nullity of the dismissal under Article 8 of the General Equal Treatment Act and Article 7:647 of the Dutch Civil Code. In these circumstances, the employer will be obliged to continue paying the employee's salary, as the employment relationship is deemed to have remained in existence.

An employee dismissed for discriminatory reasons also has the option to file an action against the employer on the basis of a wrongful act. Where gender discrimination is involved, the employer is liable for the consequences of its wrongful act, regardless of whether blame or justifying grounds are present. Furthermore, the employee may hold the employer liable for improper performance under the employment contract.

In court proceedings based on discrimination, an employee stating that he or she has been discriminated against only needs to put forward facts from which it could be inferred that discrimination took place. It is then for the employer to show that it did not violate the provisions of the legislation.

The employee (and others) may ask the Equal Treatment Commission to investigate allegations of discrimination. The opinion of the Equal Treatment Commission has no legally binding effect. If the relevant employee does not object, however, the Commission may seek a judgment that any acts that are in breach of the ban on discrimination under the general Equal Treatment Act, the Dutch Civil Code, or the Act on Equal Treatment of Men and Women be declared wrongful, or that an order be given to cancel any such personnel decisions.

Finally, the employee may file a complaint for breach of Article 137g or Article 429 of the Dutch Criminal Code. In criminal proceedings, the employer may be ordered to pay damages in addition to a prison sentence and a fine if found liable under the Dutch Civil Code.

### 3.3. Potential Employer Liability For Employment Discrimination

An employee can sue a company for discrimination, for which a court can award compensation for losses and even emotional damages. In recent cases, emotional damages of approximately EUR 5000 have been awarded. In the event of pay discrimination on the basis of gender, the employee can reclaim the deficit in pay under the Act on Equal Treatment of Men and Women, plus statutory interest under the

Dutch Civil Code. In addition, a penalty may be imposed of up to 50 percent of the amount owed.

In cases of race discrimination, the Dutch Criminal Code states that any person who, in conducting his or her business or profession, discriminates on the basis of race is subject to a fine of up to EUR 4,500 or imprisonment of up to six months. Furthermore, the Dutch Criminal Code also states that any person who, in conducting his or her business or profession, discriminates on the basis of race, religion, belief, gender or sexuality is subject to a fine of up to EUR 4,500 or imprisonment of up to two months.

#### 3.4. Practical Advice To Employers On Avoiding Employment Discrimination Problems

Every employer has a duty to act as a “diligent” employer. According to that principle, an employer must adhere to all applicable legal provisions. In this context, it is important for an employer to take appropriate measures to prevent discrimination against employees and to create a non-discriminatory work environment.

#### 3.5. New Legislation In Respect Of Accrual And Lapse Of Days’ Holiday

As of January 1, 2012, new legislation in respect of the accrual of days’ holiday during illness and the expiry period of days’ holiday came into force. The content of the new legislation is twofold. The legislation refers to the lapse of (statutory) days’ holiday after six months, and accrued days’ holiday during illness.

- (i) Currently a limitation period of five years applies with respect to days’ holiday. Based on the new legislation an expiry period of six months will apply with respect to statutory days’ holiday (i.e., 20 days’ holiday in case of a fulltime employment (40 hours per week)). This entails that in the event employees have not taken their statutory days’ holiday within six months after the year in which they were accrued,

those days will lapse. With respect to the days' holiday exceeding the statutory minimum the limitation period of five years remains applicable.

- (ii) Currently the accrual of statutory days' holiday of employees who are disabled for work is limited. An employee who does not perform the agreed work due to illness shall, irrespective of whether he is entitled to remuneration, acquire entitlement to holiday over the period of the last six months in which the work was not performed. An employee who performs the agreed work for only part of the agreed working period due to illness, i.e., is partially incapacitated, only acquires entitlement to holiday equal to a proportionate part of that to which he would have been entitled had he worked the full working period. The European Court of Justice has ruled that this legislation is in breach with Directive 2003/88/EC (which prohibits discrimination between healthy and ill employees). Pursuant to the new legislation the accrual of statutory holiday rights will no longer be limited. In other words, the accrual of days' holiday for employees who are disabled for work will become equal to the accrual of employees who are not disabled for work.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

In view of the growing number of complaints about sexual harassment, the Labor Conditions Act was amended in 1994 to require employers to protect employees against sexual harassment, aggression and violence. Sexual harassment in the Netherlands is considered to be a form of sexual violence taking place at or relating to the workplace. Sexual harassment may manifest itself in physical, verbal and non-verbal forms of communication, varying from sexually oriented remarks to rape. Article 1 of the Labor Conditions Act specifically defines sexual harassment as undesirable sexual approaches, requests for sexual favors or other verbal, non-verbal or

physical behavior of a sexual nature, which also includes any of the following:

- (i) Submission to such behavior is either explicitly or implicitly used as a condition for a person's employment or promotion;
- (ii) Submission to or rejection of such behavior by a person is used or partly used as a basis for decisions relating to the person's work; or
- (iii) Such behavior is aimed at affecting a person's work performance or creating an intimidating, hostile or unpleasant working environment, or results in affecting a person's work performance to an unreasonable extent or creating an intimidating, hostile or unpleasant working environment.

Under the Dutch Civil Code, a "diligent employer" is primarily responsible for the prevention of sexual harassment and may not turn a blind eye to unwanted sexual advances within the company. To prevent sexual harassment, the employer must evaluate the risk of sexual harassment and subsequently formulate a prevention program in order to limit the risks as much as possible. The employer must ensure, among other things, that the workplace is safe. If harassment occurs in spite of this, the employer must take more drastic measures. The employer can meet this obligation by appointing a confidant and by implementing a complaint procedure including sanctions.

Like the employer, the employee is also legally required to behave and act as a diligent employee and to observe the company's disciplinary code. If an employee fails to meet these requirements, he or she commits a breach of contract. A direct order to refrain from sexual harassment is not necessary but may be included in the employment contract, the company rules or the collective bargaining agreement. Depending on the seriousness of the sexual harassment, the employer can impose sanctions in view of the breach of contract, varying from a reprimand to summary dismissal. The sanction must be in proportion to the seriousness of the misbehavior.

#### 4.2. Employee Remedies For Sexual Harassment

A harassed employee may choose to initiate court proceedings pursuant to the Dutch Civil Code. If the employer is guilty of sexual harassment, the employee may base the claim on breach of contract, wrongful act or both. The employer has a contractual relationship with the employee, but if the “perpetrator” is a colleague, there is no contractual relationship. In that case, the employee may claim that the harassing colleague did not meet his or her duty as a diligent employee; thus, the colleague is considered to have committed a wrongful act. The harassed employee can also claim that the employer has not acted as a diligent employer by failing to provide for a safe working environment and preventing sexual harassment from taking place.

If the undesirable sexual approach or physical behavior of a sexual nature is such that an assault or rape is concerned, criminal law proceedings may be commenced. Under the law, an assault or rape is an event in which violence is used or a threat of violence is made. If pressure of any other nature has been exerted and proof can be furnished that the harassed person could not offer resistance, Article 242 of Dutch Criminal Law applies as well.

An employee may turn to the employer in the event of harassment at work by another employee. As a result, the employee guilty of harassment can be dismissed. Collective bargaining agreements sometimes include a provision in which the harassed person is required to inform the employer of such a situation.

#### 4.3. Potential Employer Liability For Sexual Harassment

In certain circumstances, the employee may request that a court dissolve the employment contract under the Dutch Civil Code. In addition, the employee may request a court to award damages. It can be inferred from recent case law that the circumstances of each case play a role in the employer’s potential liability. The courts have ruled that for the employer to be liable, the employer must have been informed in a timely manner of the incident and that the employee

properly investigated the alternatives offered by the employer. In addition, in some cases, the courts have determined that the victim's behavior and reputation are important in establishing the amount of damages.

When an employee is accused of sexual harassment, the employer also has some recourse. The employer may request the competent Cantonal Court to dissolve the employment contract with the harassing employee. According to case law, the Cantonal Court will consider the following factors in deciding on the dissolution request:

- (i) The employer must have been aware of the unwanted sexual advances;
- (ii) The employer must have thoroughly investigated the course of affairs and should have actually sought alternatives within the company or a subsidiary or affiliated company;
- (iii) The employer must have investigated the possibilities to normalize the relationship between the harassed employee and the harassing employee (e.g., by insisting on conversations between the parties);
- (iv) In case of suspicion of sexual harassment, the employer may rely on the statement of the harassed employee, as well as other complaints in the past;
- (v) The consequences attached to the incident by the employer must be in proportion to the seriousness of the misbehavior;
- (vi) To establish the seriousness of the harassing behavior, all parties involved must be heard;
- (vii) In case of a master-servant relation, the harassed person is in a dependent and vulnerable position;
- (viii) A difference in age is taken into account;

- (ix) There must be a disturbed employment relationship as a consequence of the sexual harassment;
- (x) The duration of the employment relationship and the reputation of both the harassing party and the harassed party are taken into consideration in establishing whether there has been a change in circumstances; and
- (xi) The employer must have a sexual harassment policy in place in which explicit sanctions are mentioned in case of breach of the policy.

#### 4.4. Practical Advice To Employers On Avoiding Sexual Harassment Problems

Employers in the Netherlands are well served to conduct a thorough investigation into a complaint of sexual harassment. Thus, sexual harassment should be an area of special attention in every working environment. It is the employer's responsibility to try to prevent any form of sexual harassment. Employers should, therefore establish clear codes of conduct prohibiting any such behavior in the workplace. In consultation with the Works Council, personnel should be informed of the existence of a complaint process and the steps to be taken to pursue a complaint.



# Philippines

## 1. Introduction

The Constitution of the Republic of the Philippines recognizes and affirms labor as a primary social economic force. As such, the rights of workers are protected and their welfare promoted. The Constitution guarantees the right of labor to security of tenure, humane conditions of work and equality of employment opportunities.

The Civil Code of the Philippines describes the relations between capital and labor as not merely contractual, but one infused with public interest. Labor contracts should yield to the common good. Where in doubt, all labor legislation and all labor contracts should be construed in favor of the employee's safety and decent living.

## 2. Terminations

### 2.1. Restrictions On Employers

In the Philippines, an employer has a right to hire, dismiss and discipline employees, while the employee has a right to security of tenure. The employee's right to security of tenure means that he or she may only be dismissed for one of the causes defined in the Labor Code of the Philippines ("**Labor Code**") and only after the employer has followed the appropriate procedure.

An employee may only be dismissed for just and authorized causes provided by law. In this respect, employees are entitled to "substantive due process" under the Labor Code. The terms "just" and "authorized" causes have specific, separate definitions in the Labor Code. The distinction between just and authorized causes is important because the applicable procedural due process requirement, as well as the requirement of giving separation pay, varies depending on the cause of termination. Just causes are those arising from some fault or inadequacy on the part of the employee. On the other hand, authorized causes are based either on economic or health considerations.

The just causes for termination of employment are as follows:

- (i) Serious misconduct or willful disobedience by the employee of the lawful orders of the employer or representative in connection with his or her work;
- (ii) Gross and habitual neglect by the employee of his or her duties;
- (iii) Fraud or willful breach by the employee of the trust placed in him or her by the employer or duly authorized representative;
- (iv) Commission of a crime or offense by the employee against the person of his or her employer or any immediate member of the employer's family or duly authorized representative; and
- (v) Other causes analogous to the above reasons.

The authorized causes for termination of employment are as follows:

- (i) Installation of labor saving devices;
- (ii) Redundancy;
- (iii) Cutbacks to prevent losses;
- (iv) Closing or cessation of operation of the establishment or undertaking; and
- (v) Disease, where the continued employment of the afflicted employee is prohibited by law or is prejudicial to his or her health as well as to the health of his or her co-employees.

The absence of just and authorized causes means that there is a violation of the employee's right to substantive due process and that the termination is not in accordance with the law. An employee who is dismissed without a just or authorized cause is entitled to

reinstatement without loss of seniority rights and other privileges, full back wages (inclusive of allowances), and other benefits or their monetary equivalent, computed from the time compensation was withheld until the time of the actual reinstatement.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

The Labor Code requires not only that an employee be dismissed for a just or authorized cause, but also that he or she be dismissed only after the observance of the appropriate procedural due process by the employer.

In dismissing an employee due to a just cause, the Labor Code requires the employer to serve a written notice to the employee informing the employee of the charges against him or her, and giving the employee reasonable opportunity within which to explain his or her side (i.e., at least five calendar days to submit an explanation). After serving the notice, the employer should give the employee a further opportunity to be heard through a hearing or conference so that the employee can answer the charges with the assistance of counsel, if he or she so desires. If the employer decides to dismiss the employee, it should serve another written notice to the employee to inform the employee of its decision to dismiss him or her.

In case of employment termination due to an authorized cause, the employer should serve a written notice of termination to each affected employee and to the appropriate regional or field office of the Philippine Department of Labor and Employment (“**DOLE**”) at least 30 days before the intended effective date of termination. The notice should specify the authorized cause and the effective date of termination. The 30-day notice period is mandatory. It cannot be waived or substituted by its monetary equivalent.

For employment termination due to disease, in addition to the notice requirements in the immediately preceding paragraph, there should be a certification by a competent public health authority that the disease

cannot be cured within a period of six months even with proper medical treatment.

If the termination is due to the completion of a contract, project or any phase thereof, or failure of an employee to meet applicable work standards in cases of probationary employment, the employer is simply required to serve a written notice to the employee within a reasonable time before the effective date of termination.

Under Philippine law, an employer is liable for a monetary penalty if it terminates an employee in violation of the requirements of procedural due process, even if the employer had a just or authorized cause for the termination. The monetary penalty is subject to the discretion of the court.

### 2.3. Termination Indemnities

The separation from work of an employee for a just cause does not entitle him or her to separation pay. However, this is without prejudice to whatever rights, benefits and privileges the employee may have under applicable employee agreement, company policy or practice.

In case of employment termination due to installation of labor saving devices or redundancy, the Labor Code provides that the employee should be given separation pay equivalent to at least one month's pay for every year of service or one month's pay, whichever is higher. A fraction of at least six months is considered as one year for separation pay purposes.

On the other hand, the Labor Code provides that in case of employment termination by reason of cutbacks to prevent losses, closure not due to serious business losses or disease, the employer is required to give the employee separation pay equivalent to one-half month's pay for every year of service or one month's pay, whichever is higher. A fraction of at least six months is considered as one year in this instance as well.

With respect to employment termination because of closure due to serious business losses, current jurisprudence provides that such employers are not required to give any separation pay.

The separation pay described above is the minimum amount set by the Labor Code. The employer is not prohibited from providing enhanced separation pay. However, it may be required to pay more than the minimum depending on the employee agreement, company policy or company practice.

#### 2.4. Law On Separation Agreements, Waivers, And Releases

A separation agreement, waiver or release from the employee will not bar the employee from subsequently filing a complaint concerning his or her employment, including his or her employment termination. This is because the courts normally frown upon separation agreements, waivers or releases of employees as contrary to public policy. The reason commonly given is that the employers and employees do not stand on the same footing. Notwithstanding that rule, it is still prudent to get an employee to sign his or her separation agreement, waiver or release. The separation agreement, waiver or release may strengthen the employer's position in the event that an action is filed on matters covered by the document. If it can be shown that the separation agreement, waiver or release was voluntarily entered into and represented a reasonable settlement, the document is binding on the parties and may not later be disowned.

#### 2.5. Litigation Considerations

An employee has the right to question the validity of his or her dismissal. Once questioned before the proper labor authorities, the employer has the burden of proof to establish the validity of the dismissal by showing that the dismissal was due to a just or authorized cause and that it was accomplished in compliance with the appropriate procedural due process.

In addition, a labor complaint usually takes three to four years to litigate because it may involve four levels of the judiciary.

When an employee files a labor complaint with the National Labor Relations Commission (“**NLRC**”), the complaint will be forwarded to a Single Entry Assistance Desk at the NLRC and the parties will be subject to a 30-day mandatory conciliation-mediation. If the complaint remains unresolved, it will be assigned to a labor arbiter (i.e., trial judge) who will hear and decide the case. The labor arbiter’s decision may be appealed to a division of commissioners of the NLRC within 10 days from receipt of such decision. If the labor arbiter’s decision involves a monetary award (e.g., back wages), an appeal by the employer may only be perfected upon posting a cash or surety bond equivalent to the monetary award, exclusive of damages and attorney’s fees. It should be noted that an order of the labor arbiter to reinstate the employee is immediately executory even pending appeal to the NLRC, and the employer has the option to choose between actual or payroll reinstatement.

The NLRC’s decision may still be elevated to the Court of Appeals and subsequently to the Supreme Court. In this regard, a petition for certiorari with the Court of Appeals or the Supreme Court does not stay the execution of the NLRC’s decision unless the Court of Appeals or the Supreme Court issues a temporary restraining order.

All levels of the judiciary are essentially pro-labor. Any doubt between the evidence of the employer and the employee is resolved in the employee’s favor in line with the constitutional mandate to afford full protection to employees.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

##### *Labor Code On Women And Other Forms Of Discrimination*

The Labor Code provides that the government shall ensure equal work opportunities, regardless of sex, race, age or creed. Republic Act N° 7192, otherwise known as the “Women In Developing and Nation Building Act”, affords women equal work opportunities with men. Also, Republic Act N° 9710, otherwise known as the “Magna Carta of

Women”, affirms the role of women in nation building and ensures the substantive equality of women and men, promotes empowerment of women and pursues equal opportunities for women and men.

Under the Labor Code, it is unlawful for an employer to discriminate against any female employee with respect to terms and conditions of employment solely on account of sex. The following are considered acts of discrimination:

- (i) Payment of lesser compensation, including wage, salary or other form of remuneration and fringe benefits, to a female employee as against a male employee for work of equal value; and
- (ii) Favoring a male employee over a female employee with respect to promotions, training opportunities, and study and scholarship grants solely on account of their sexes.

It is also unlawful for an employer to do any of the following:

- (iii) To require as a condition of employment or continuation of employment that a female employee shall not get married;
- (iv) To stipulate expressly or tacitly that upon getting married, a female employee shall be deemed resigned or separated;
- (v) To dismiss, discharge, discriminate or otherwise prejudice a female employee merely by reason of her marriage;
- (vi) To deny any female employee the benefits provided in the Labor Code or to discharge any female employee to prevent her from enjoying the benefits provided in the Labor Code;
- (vii) To discharge any female employee on account of her pregnancy or while on leave or in confinement due to her pregnancy;

- (viii) To discharge or refuse the admission of any female employee upon her returning to work for fear that she may again be pregnant.

The Labor Code also makes it unlawful for an employer to do any of the following:

- (ix) To discriminate against any employee who has filed any complaint concerning wages or has testified or is about to testify in such complaint;
- (x) To discriminate against employees in the exercise of their right to self-organization;
- (xi) To discriminate in regard to wages, hours of work, and other terms and conditions of employment to encourage or discourage membership in any labor organization;
- (xii) To discriminate against an employee for having given or being about to give testimony under the Labor Code.

*Republic Act N° 7277 (“RA 7277”), as amended by Republic Act N° 9442, otherwise known as the “Magna Carta for Persons with Disability”*

RA 7277 provides that no person with a disability shall be denied access to opportunities for suitable employment. A qualified employee with a disability is subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as a qualified non-disabled person. Furthermore, no employer shall discriminate against a qualified person with a disability by reason of the disability in regard to job application procedures; the hiring, promotion or discharge of employees; employee compensation; job training; and other terms, conditions and privileges of employment. The following constitute acts of discrimination:

- (i) Limiting, segregating or classifying a job applicant with a disability in such a manner that adversely affects his or her work opportunities;
- (ii) Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out a person with a disability unless such standards, tests or other selection criteria are shown to be job-related for the position in question and are consistent with business necessity;
- (iii) Utilizing standards, criteria or methods of administration that have the effect of discrimination on the basis of disability or perpetuate the discrimination of others who are subject to common administrative control;
- (iv) Providing less compensation, such as salary, wage or other forms of remuneration and fringe benefits, to a qualified employee with a disability, by reason of his or her disability, than the amount to which a person without a disability performing the same work is entitled;
- (v) Favoring an employee without a disability over a qualified employee with a disability with respect to promotions, training opportunities, and study and scholarship grants, solely on account of the latter's disability;
- (vi) Re-assigning or transferring an employee with a disability to a job or position he or she cannot perform by reason of his or her disability;
- (vii) Dismissing or terminating the services of an employee with a disability by reason of his or her disability, unless the employer can prove that the disability impairs the satisfactory performance of the work involved to the prejudice of the business entity, provided, however, that the employer first sought to make reasonable accommodations for the disabled employee;

- (viii) Failing to select or administer in the most effective manner employment tests which accurately reflect the skills, aptitude or other factor of the applicant or employee with a disability that such tests purports to measure, rather than the impaired sensory, manual or speaking skills of such applicant or employee, if any; and
- (ix) Excluding persons with disabilities from membership in labor unions or similar organizations.

*Republic Act N° 8371 (“RA 8371”), otherwise known as the “Indigenous Peoples’ Rights Act of 1997”*

RA 8371 provides that it shall be the right of the indigenous cultural communities/indigenous peoples (“**ICCs/IPs**”) to be free from any form of discrimination, with respect to recruitment and conditions of employment so that they may enjoy equal opportunities for admission to employment, medical and social assistance, and safety, as well as other occupationally-related benefits.

RA 8371 makes it unlawful for any person:

- (i) To discriminate against any ICC/IP with respect to the terms and conditions of employment on account of their descent. In this regard, ICCs/IPs and non-ICCs/IPs should be paid equal remuneration for work of equal value; and
- (ii) To deny any ICC/IP employee any right or benefit herein provided for or to discharge them for the purpose of preventing them from enjoying any of the rights or benefits provided under RA 8371.

*Republic Act N° 8504 (“RA 8504”), otherwise known as the “Philippine AIDS Prevention and Control Act of 1998”*

Under RA 8504, discrimination in any form from pre-employment to post-employment, including hiring, promotion or assignment, based on the actual, perceived or suspected human immunodeficiency virus

(**HIV**) status of a person is prohibited. Termination from work on the sole basis of actual, perceived or suspected HIV status is deemed unlawful.

*Republic Act N° 8972 (“**RA 8972**”), otherwise known as the “Solo Parents Welfare Act of 2000”*

RA 8972 provides that no employer shall discriminate against any solo parent (sometimes referred to as single parent) employee with respect to terms and conditions of employment on account of the employee’s status.

*Department Order N° 73-05 (“**DO 73-05**”), otherwise known as the “Guidelines for the Implementation of Policy and Program on Tuberculosis/TB Prevention and Control in the Workplace” issued by the DOLE*

DO 73-05 provides that workers who have or had tuberculosis shall not be discriminated against. Instead, they shall be supported with adequate diagnosis and treatment, and shall be entitled to work for as long as they are certified by the company’s accredited health provider as medically fit and shall be restored to work as soon as their illness is controlled.

*Advisory N° 5-10 (“**Advisory 5-10**”), otherwise known as the “Guidelines for the Implementation of a Workplace Policy and Program on Hepatitis B” issued by the DOLE*

Advisory 5-10 enumerates non-discriminatory policy and practices:

- (i) There shall be no discrimination of any form against workers on the basis of their Hepatitis B status consistent with international agreements on non-discrimination ratified by the Philippines. Workers shall not be discriminated against, from pre- to post-employment, including hiring, promotion or assignment, because of their Hepatitis B status.

- (ii) Individuals found to be Hepatitis B positive shall not be declared unfit to work without appropriate medical evaluation and counseling.
- (iii) Workers shall not be terminated on the basis of the actual, perceived or suspected Hepatitis B status.
- (iv) Workplace management of sick employees shall not differ from that of any other illness. Persons with Hepatitis B-related illnesses should be able to work for as long as medically fit.

### *Jurisprudence On Discrimination On Wages*

Discrimination in terms of wages is also prohibited. In one case involving Filipino teachers of a school who were receiving lower salaries compared to their foreign colleagues in the same school, the Supreme Court said that all the teachers, regardless of nationality, should receive equal pay for work of equal value.

#### 3.2. Potential Employer Liability For Employment Discrimination

Employers who willfully commit any unlawful acts of discrimination, or who violate applicable implementing rules and regulations, can be held criminally liable and punished with a fine, imprisonment or both, at the discretion of the court and depending on the circumstances of the discrimination. For offenses committed by a corporation and other juridical persons, the penalty may be imposed upon the guilty officer or officers. If the guilty officer or officers are foreigners, he/she or they will be deported after satisfaction of the penalty imposed by the court.

The filing of the criminal action does not normally bar a discriminated employee from instituting an entirely separate and independent civil action for monetary claims against his or her erring employer. These claims include, but are not limited to, damages and other affirmative relief.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Philippine law protects workers from all forms of sexual harassment in the work environment. Republic Act N° 7877 (“**RA 7877**”), otherwise known as the “Anti-Sexual Harassment Act of 1995”, declares sexual harassment in the employment environment unlawful.

Under RA 7877, work-related sexual harassment is committed by an employer, employee, manager, supervisor or agent of the employer or any other person who, having authority, influence or moral ascendancy over another in a work environment, demands, requests or otherwise requires any sexual favor from the other, regardless of whether the demand, request, or requirement for submission is accepted by the object of the act. In particular, sexual harassment is committed in a work-related or employment environment when:

- (i) The sexual favor is made as a condition of hiring , employment, re-employment or continued employment of the individual, or in granting the individual favorable compensation, terms, conditions, promotions or privileges; or the refusal to grant the sexual favor results in limiting, segregating or classifying the employee which in any way would discriminate, deprive or diminish employment opportunities, or otherwise adversely affect the employee;
- (ii) The above acts would impair the employee’s right or privileges under existing labor laws; or
- (iii) The above acts would result in an intimidating, hostile or offensive environment for the employee.

RA 7877 also imposes on the employer the duty to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of such acts. Towards this end, the employer is required to do the following:

- (i) Promulgate appropriate rules and regulations in consultation with and jointly approved by the employees, through their duly designated representatives, prescribing the procedure for the investigation of sexual harassment cases and the administrative sanctions therefore. The said rules and regulations issued should include, among others, guidelines on proper decorum in the workplace and educational or training institutions;
- (ii) Create a committee on decorum and investigation of cases on sexual harassment. The committee shall be composed of at least one representative each from the management, the union, if any, the employees from the supervisory rank, and from the rank and file employees. It shall conduct meetings, as the case may be, with officers and employees to increase understanding and prevent incidents of sexual harassment. It shall also conduct the investigation of alleged cases constituting sexual harassment; and
- (iii) Disseminate or post a copy of RA 7877 for the information of all concerned.

The Supreme Court has had occasions to rule on the validity of the disciplinary action imposed by an employer on its employee who was guilty of sexual harassment.

#### 4.2. Potential Employer Liability For Sexual Harassment

Persons found guilty of acts of sexual harassment are subject to imprisonment of one to six months, a fine of PHP10,000 to PHP20,000, or both fine and imprisonment, at the discretion of the court. The aggrieved party also may institute an independent civil action for damages and other affirmative relief.

An employer that is informed of such acts and fails to take immediate action will be jointly and severally liable with the erring employee for damages arising from the acts of sexual harassment.

#### 4.3. Practical Advice to Employers on Avoiding Sexual Harassment Problems

In addition to complying with its duties and obligations as set forth above, employers should act immediately on sexual harassment complaints.

If an employer receives a complaint concerning an act of sexual harassment, it should take action immediately by investigating the veracity of the complaint in accordance with its rules and regulations for the investigation of sexual harassment cases, which it has previously put in place. If there is merit in the complaint, the employer should impose the appropriate penalty on the erring employee.

As stated above, the employer will be jointly and severally liable with the erring employee for damages arising from the sexual harassment act, if it is informed of such act and it fails to take immediate action. Thus, it is very important that the employer investigates a sexual harassment complaint as soon as it receives such complaint and imposes the appropriate penalty on the erring employee, in accordance with the rules and regulations it has put in place.



## Poland

### 1. Introduction

Labour relations in Poland are primarily governed by the Labour Code. Labour law also includes collective labour agreements and other collective arrangements, as well as the employer's internal regulations that specify the rights and duties of the parties in employment relationships. The provisions of collective labour agreements and the employer's internal regulations may not be less favourable to employees than the provisions of the Labour Code or other legislation.

The basic principles of Polish labour law, as defined in the Labour Code, consist of:

- The right of free choice of employment;
- The employer's duty to respect the dignity and personal rights of the employee;
- Equal rights in the performance of identical tasks;
- Equal rights of men and women in labour relations;
- A prohibition on any forms of discrimination and bullying;
- The right to obtain fair remuneration for work;
- The protection of employees' rights;
- Employees' and employers' rights to establish or join employees and employers' associations and organizations;  
and

- The right of employees to limited participation in the management of the employer's business.

State Labour Inspectorate and labour courts have authority, among others, to verify the employer's proper execution of duties towards the employees. Fines imposed by the labour court on employers committing specific breaches of labour law can amount between PLN 1.000 and PLN 30.000 (approx. between EUR 230 and EUR 7,000).

## 2. Terminations

Each agreement signed between the parties will be deemed an employment agreement if one party is obliged to perform specified duties under the supervision of the employer at the time and place specified by the employer in return for remuneration. Employment agreements can have a fixed term or an indefinite term. It is possible to enter into a separate contract for a trial period of up to three months.

### *Termination With A Notice Period*

Either party may terminate the employment contract with notice if the contract is for an indefinite period or a trial period. A definite term contract for longer than six months may be terminated upon two weeks' notice, only if the parties reserve such right in the contract.

The length of notice is dependent on the period of employment with the employer and, in exceptional cases, on the employment period with the previous employer if the employee was taken over by the new employer. Any decision by the employer to terminate an employment agreement concluded for an indefinite period, with or without notice, should be accompanied by a statement giving reasons justifying the termination and information about the employee's right to appeal to the Labour Court. The trade union representing the employee should receive the reasons for the termination of the agreement in writing.

The length of notice for an employee on a contract for an indefinite time period depends on the actual length of employment at the time the termination notice is given. The notice periods required by the Labour Code are as follows:

- (i) Two weeks - if the employee has been employed for less than six months;
- (ii) One month - if the employee has been employed for at least six months, but less than three years; and
- (iii) Three months - if the employee has been employed for at least three years.

If an employee appeals against his/her dismissal and, during the court proceedings it is determined that the notice of termination of the contract for an indefinite period was unjustified, or contrary to the provisions on termination of employment contracts, the court may, on the employee's request, rule that the notice of termination is invalid.

If the contract has already been terminated, upon request, the court may order that the employee be reinstated to his/her job on its original terms or order damages to be paid to the employee. The court may disregard an employee's request to be reinstated if it determines that it is impossible to do so or that to consider such a request is pointless and as an alternative may order that compensation be paid. The compensation will amount to the remuneration owed for a period of between two weeks and three months, and not less than the remuneration owed for the period of notice.

## 2.1. Restrictions On Employers

An employer may not dismiss certain categories of employees including: those who will reach retirement age in no more than four years if the entire employment period enables those employees to acquire the right to retirement benefit after having reached that age; those who are on authorised holiday leave or any period of justified

absence up to a limit defined by law; those who are pregnant or have recently given birth, those on childcare leave, employees in unionised companies who are members of the management of a trade union, and social labour inspectors. No general protection against termination on the grounds of pregnancy exists for individuals undertaking a trial period up to one month, if the employment agreement for such trial period terminates before the lapse of the third month of pregnancy.

### *Termination Without Notice*

An employer is entitled to terminate a contract of employment without notice due to the fault of the employee if:

- (i) The employee commits a serious breach of his/her basic duties as an employee;
- (ii) The employee commits an offence that renders further employment at his/her post impossible, if the offence is obvious or has been confirmed by a court judgment; or
- (iii) The employee loses, through his/her own fault, a license necessary for the performance of work at his/her post.

An employer is entitled to terminate a contract of employment without notice, without the employee's fault if:

- (i) The employee is incapable of working due to illness and such incapacity lasts longer than three months in cases where the employee has been employed in the same business establishment for less than six months, or longer than the illness-allowance period, and the period of first three months of rehabilitation allowance in cases where the employee has been employed in the same establishment for at least six months, or where the incapacity was caused by an accident at work or is the direct result of performing his/her work tasks; or

- (ii) The employee is absent from his/her work for more than one month for a justified reason other than those mentioned above.

In the case of unlawful termination of the employment contract without notice, the employee is entitled to appeal to the labour court and request reinstatement to the former terms and conditions of employment, or to receive compensation.

An employee is entitled to terminate a contract of employment without notice if:

- (i) A medical certificate has been issued that states that the employee's work is harmful to his/her health, and the employer failed to transfer the employee, within the time specified in the medical certificate, to another job that is appropriate for his/her state of health and vocational skills; or
- (ii) The employer committed serious violation of its basic duties towards the employee. It should be noted that bullying is treated as this type of violation and gives the employee a right to bring a claim for compensation for termination of employment if that employee has terminated his/her employment relationship as a result of being subject to bullying (the employee can also raise a claim for compensation for harm suffered if bullying has a detrimental effect on such employee's health).

The employer, in the event of a wrongful termination of the employment contract by the employee without notice in the case defined in item (ii), is entitled to appeal to the labour court and request compensation.

## 2.2. Restrictions On Employers

A contract of employment may not be terminated without notice, due to the employee's fault, if one month has elapsed since the employer became aware of the circumstances allowing such termination. Prior

to such termination the employer must seek the opinion of the trade union representing the employee.

### 2.3. Collective Dismissals

Mass lay-offs are regulated by the Law on Mass Lay-offs dated March 13, 2003 (as amended) (“**The Law on mass lay-offs**”). The Law on mass lay-offs, however, does not apply to establishments with fewer than 20 employees.

Mass redundancies are deemed to take place where an employer who employs at least 20 people terminates, within a period of 30 days maximum, the employment relationships, by notice or by mutual agreement of the parties, with:

- (i) At least 10 employees, if the employer employs less than 100 people; or
- (ii) 10 percent of employees, if the employer employs at least 100 but less than 300 people; or
- (iii) 30 employees, if the employer employs 300 or more people.

#### *Procedure*

Pursuant to the Law on mass lay-offs, the procedure for mass lay-offs is as follows:

- (i) Employers must consult trade unions operating in the employer’s company about the intent to conduct mass lay-offs. These consultations shall regard, in particular, the possibility of avoiding or reducing the extent of mass lay-offs and labour issues connected with the lay-offs, including in particular the possibility of prequalifying or professional training, as well as finding other employment for employees to be laid off;

- (ii) The employer must notify the company trade unions in writing of the causes of the intended mass lay-offs, the number of employees and professional groups to which they belong, professional groups of employees covered by the lay-off, the period during which such lay-offs will occur, the proposed criteria for selecting employees for the lay-offs, the order of employee lay-offs, and proposals as to how to resolve labour issues connected with the intended lay-offs. Where the lay-offs are covered by cash benefits, employers must additionally present methods by which the level of these benefits shall be established. The notice should be delivered to company trade unions within a period enabling the unions to make proposals regarding the above-mentioned matters in the scope of consultations;
- (iii) Written notice should also be delivered to the local labour office;
- (iv) An agreement should be executed between the employer and the company trade unions within 20 days of the date of notifying the company trade unions. The agreement must define the procedure with respect to the employees to be laid off;
- (v) If consent as to the content of the agreement cannot be reached, the employer must prepare regulations defining the procedure for mass lay-offs with special regard to proposals made by the company trade unions in the course of negotiating the agreement;
- (vi) If no agreement has been reached, the employer must inform the company trade unions representing the employees about the termination of each employment agreement and give the reasons that justify it. Within five days from receiving this information the company trade union may raise reservations that the employer must consider, but does not have to follow.

- (vii) Where the company trade unions do not operate at the given employer, their rights connected with the mass lay-off procedure shall be available to employee representatives selected in procedures adopted at the given employer. The employer prepares regulations on the procedure of mass lay-offs after consulting the representatives;
- (viii) After concluding the agreement with the company trade union or with the representatives (or once the period of time for reaching an agreement has elapsed), the employer must notify the proper labour office in writing of the agreements reached on the lay-offs, including the total number of employees and of the employees to be laid off, the reasons for the lay-offs, and the period during which the lay-offs are to be made.
- (ix) Termination notices may not be given to employees before notifying the labour office, or, in the event such notification is not required, after reaching the agreement or issuing the regulations;
- (x) Termination of employment relationships with employees in the scope of mass lay-offs may occur no sooner than after 30 days from the date of the notification delivered to the local labour office, or if this is not required, no sooner than 30 days from conclusion of the agreement or issue of the regulations; and
- (xi) Termination notices are delivered in accordance with the regulations regarding the periods of termination notice, special protection of employees, etc.

In respect of protected employees (for example, employees close to retirement, pregnant women, and those on maternity leave, etc.) it is only possible to change their current terms and conditions of work and remuneration. If the procedure described above results in a reduction in remuneration, such employees will be entitled to an equalization payment until the end of their period of protection.

Employment contracts concluded for definite periods of time or for the period of performance of a specific task may be terminated upon two weeks' notice.

In the case of employment contracts concluded for an indefinite term, where the notice period amounts to three months, the employer may shorten the notice period to a minimum of one month. The employee shall be entitled to indemnity for the remaining two-month period of notice.

#### 2.4. Severance Payment

The amount of the severance payment depends upon the length of employment of the employee with the given employer as follows:

- (i) The equivalent of one month's salary, if the employee has worked for less than two years;
- (ii) The equivalent of two months' salary, if the employee has worked for two to eight years; or
- (iii) The equivalent of three months' salary, if the employee has worked for more than eight years.

Generally the level of severance pay may not exceed 15 times the minimum monthly salary as published by the government as of the date of the termination of employment (i.e., a total amount of approximately EUR 6,450 for 2012), unless the employer decides not to follow this limitation.

#### 2.5. Law On Separation Agreements, Waivers, And Releases

It is quite common that parties to an employment relationship decide to have the employment contract terminated by mutual consent, even if a termination notice has good grounds, because an agreement is not subject to the restrictions that must be considered in the case of a unilateral termination by the employer. Under the separation agreement the parties should agree to a specified end date to the

employment relationship. Generally an employer would commit to pay a certain amount as severance payment for the loss of the employee's job (not less than the amount that the employee would have earned during his/her notice period).

## 2.6. Litigation Considerations

Employees may challenge the employer's decision on dismissal (including termination of the employment agreement upon a notice period and termination of the employment agreement without notice) before a court of justice. When filing a suit against an employer, an employee may request:

- (i) Reinstatement; and/or
- (ii) Indemnity for the period of unemployment.

From a practical standpoint, as such claims are free of charge and as the courts tend to rule in favour of the employees, it is quite common for dismissed employees to file such actions. However, court decisions on reinstatement are made rarely and the indemnity is usually limited to an equivalent of the employee's recent remuneration received prior to the dismissal (between two weeks and three months of salary).

## 3. Discrimination

### 3.1. Laws On Employment Discrimination

Under the Labour Code, employees are entitled to equal treatment in the areas of: initiating and terminating an employment relationship, conditions of employment, and promotion and access to training aimed at raising professional qualifications, in particular without reference to sex, age, disability, race, religion, nationality, political convictions, trade union affiliation, ethnic origin, faith, sexual orientation, and also without reference to employment for a specified or unspecified period of time, or on a full-time or part-time basis.

Equal treatment in employment means there that can be no discrimination of any sort towards employees, directly or indirectly.

Signs of discrimination include:

- (i) Activities aimed at encouraging another person to violate the principle of equal treatment in employment;
- (ii) Behaviour aimed at, or which has the effect of, violating someone's dignity or of demeaning or humiliating an employee (harassment); and
- (iii) Sexual harassment, that is any unacceptable behaviour of a sexual nature or making reference to the sex of an employee, which is aimed at or has the effect of violating the employee's dignity, or of demeaning or humiliating an employee; this kind of behaviour may consist of physical, verbal or non-verbal elements (sexual harassment).

The principles of equal treatment in employment are not breached by activities consisting of:

- (i) Refusal to employ if justified by the nature of the work, conditions in which the work is performed or professional requirements of employees;
- (ii) Modifying employment conditions with regard to the number of working hours, if justified for reasons not related to employees;
- (iii) Use of means which differentiate the legal status of an employee due to parental care, age or disability of an employee; and
- (iv) Establishing the conditions of employment and dismissal of employees, principles of remuneration and promotion, and access to training for the purpose of raising professional

qualifications - taking into account the level of seniority in the company.

Actions taken for a limited period aimed at balancing the chances of all or a significant number of employees discriminated against for one or more of the reasons described above, by reducing real inequality to the benefit of those employees, shall not be deemed violations of principles of equal treatment, within the area outlined in this regulation.

Employees also have the right to the same remuneration for the same kind of work performed or work having the same value.

Provisions in employment agreements, and other acts on the basis of which an employment relationship comes into being, that violate the principle of equal treatment in employment, are invalid. The respective labour law regulations apply and supersede such provisions and, if there are no such regulations in the labour law, those provisions must be replaced by appropriate provisions of a non-discriminatory nature.

### 3.2. Employee Remedies For Employment Discrimination / Potential Employer Liability For Employment Discrimination

An employee who has been discriminated against by the employer has the right to a compensation payment that cannot be lower than the minimum monthly salary. It should be noted that there is no maximum level of compensation payment that can be claimed by the employee. The burden of proving that there has been no breach of the principle of equal treatment rests with the employer.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Polish law defines sexual harassment as follows: “any unacceptable conduct of a sexual nature or reference to the sex of an employee, aimed at violating the dignity of or belittling or humiliating an

employee may also constitute discrimination with regard to sex; this conduct may comprise physical, verbal, or non-verbal elements”. The definition mentions “an employee” but a former employee or a candidate applying for work who was subject to the above presented actions are also entitled to present such claim.

#### 4.2. Employee Remedies For Sexual Harassment / Potential Employer Liability For Sexual Harassment

Because sexual harassment is regarded as a type of discrimination, the rules presented in the above section related to discrimination apply to sexual harassment.



## Russia

### 1. Introduction

Russia has a comprehensive set of laws regulating labor relations between employers and employees. The principal Russian legislation governing labor relations in the Russian Federation is the 2002 Labor Code of the Russian Federation (“Labor Code”), as amended through 2008. In addition to this core legislation, labor relations are regulated by the 1996 Law of the Russian Federation, “On Trade Unions and their Rights, and Guarantees of their Activities”, as amended through 2005, and the Russian legislation on labor safety, as well as other laws and numerous regulations.

The Labor Code sets minimum employment standards that cannot be overridden by the agreement of the parties. Accordingly, any provision in an employment contract that negatively affects an employee’s entitlement to these minimum employment standards is not enforceable.

### 2. Terminations

#### 2.1. Restrictions On Employers

Termination of employment in Russia is strictly regulated by the Labor Code and can only be carried out on specific grounds as provided therein. The dismissal of an employee on the initiative of management is heavily regulated by law. A number of specific procedural requirements and formalities when dismissing an employee for cause must be completed carefully by the employer for the termination to be valid. “At-will” employment relationships are generally not permitted, except in the case of the employment of a company’s CEO.

Article 77 of the Labor Code establishes the general grounds upon which an employment relationship may be terminated. These general grounds are further described in Articles 71, 78 – 84, 278 – 280, 288, 292, 296, 307, 336, 341 and 347 of the Labor Code. The procedure on

formalization of employment termination is set out in Article 84 of the Labor Code.

The Labor Code provides that an employment relationship can be terminated on the following grounds:

- (i) Mutual agreement of the parties (Article 78 of the Labor Code);
- (ii) Expiry of the term of the employment agreement (Article 58 of the Labor Code), unless employment relations effectively continue and neither of the parties require the relations to be terminated;
- (iii) Termination of an employment agreement on the employee's initiative (Article 80 of the Labor Code);
- (iv) Termination of an employment agreement on the employer's initiative (Articles 71 and 81 of the Labor Code);
- (v) Transfer of the employee, at his or her own request or with his or her consent, to a job with another employer, or transfer to an elective office (job position);
- (vi) Refusal of the employee to continue employment in connection with a change of the owner of the organisation's assets, a change of its affiliation (subordination) or its restructuring (Article 75 of the Labor Code);
- (vii) Refusal of the employee to continue employment in connection with changes to the fundamental terms of the employment agreement (Article 74 of the Labor Code);
- (viii) Refusal of the employee to be transferred to another job for a health reason in accordance with the corresponding medical certificate or due to the lack of appropriate job at the employer (Article 73 of the Labor Code);

- (ix) Refusal of the employee to transfer to another locality due to relocation of the employer (Article 72 of the Labor Code);
- (x) Circumstances beyond the control of the parties (Article 83 of the Labor Code); and
- (xi) Breach of the rules for conclusion of an employment agreement that are prescribed by this Code or other Federal law if the breach excludes the possibility of continuing employment (Article 84 of the Labor Code).

Article 81 of the Labor Code sets out the circumstances that would entitle an employer to terminate unilaterally its employment relationship with an employee. Article 81 of the Labor Code applies regardless of whether the employment relationship is for a definite or indefinite period. Article 81 of the Labor Code provides that an employment relationship may be unilaterally terminated by an employer under the following circumstances:

- (i) Liquidation of the organisation or termination of activity by the individual entrepreneur acting as the employer;
- (ii) Reduction in the number of employees or staff positions at the organisation or at the individual entrepreneur acting as the employer (also referred to as “staff redundancy”);
- (iii) Unsuitability of the employee for the job position held or job performed, as a result of insufficient qualifications as confirmed by the results of the employee’s formal evaluation;
- (iv) Change of the owner of the organisation’s assets (applies to the company’s CEO, his/her deputies, and chief accountant);
- (v) Repeated failure by the employee to perform, without justifiable reasons, his or her employment duties if the employee has a valid disciplinary sanction imposed on him/her;

- (vi) Single gross breach by the employee of his or her employment duties as follows:
- (a) Absenteeism, i.e., absence from the workplace without justifiable reasons for a whole day (shift), regardless of its length, and also in the case of the absence from the workplace without justifiable reasons for more than four consecutive hours in the course of working day (shift);
  - (b) Reporting to work (at his/her workplace or on the territory of the employer's organization or at a location where the employee is to perform his/her employment function under instruction from the employer) under alcoholic, narcotic or other intoxication;
  - (c) Disclosure of a legally-protected secret (including State, commercial, service, and other secrets), which became known to the employee in connection with his/her performance of employment duties, including the disclosure of the personal information of another employee;
  - (d) Committing at the place of work a theft (including petty theft) of the property of others, embezzlement or willful destruction or damaging of property, if this has been established by a court conviction or by a resolution of a judge, body or official duly authorised to consider cases on administrative breaches, and if this conviction or resolution has come into legal force; or
  - (e) Breach of work safety requirements by the employee established by a work safety commission or work safety official if the breach resulted in grave consequences (job-related accident, emergency or

disaster) or knowingly created an actual threat of such consequences;

- (vii) Culpable actions by an employee directly involved in handling monetary or other valuables, if such actions constitute grounds for the employer's loss of trust in the employee;
- (viii) Commitment by an employee with tutorial responsibilities of an immoral act if such act is incompatible with the employee's work continuation;
- (ix) Taking of an unfounded decision by an employee who is the company's CEO (the head of the branch or representative office of the organisation), his/her deputies or the chief accountant of the organisation, if the decision resulted in the breach of safekeeping of the organisation's property, or illegitimate use of that property, or other damage to the property of the organisation;
- (x) Single gross breach of employment duties by the employee who is the company's CEO (the head of the branch or representative office of the organisation) or his/her deputies;
- (xi) Provision by the employee to the employer of forged documents upon the conclusion of the employment agreement;
- (xii) On grounds that are provided for in an employment agreement with an employee who is the company's CEO or a member of its collective executive body; and
- (xiii) In other cases that are provided for by the Labor Code and other Federal laws.

Pursuant to Article 83 of the Labor Code an employment agreement is subject to termination in the following circumstances that are beyond the control of the parties:

- (i) Conscription of the employee for military service, or his assignment to alternative civilian service;
- (ii) Reinstatement of an employee who filled the same job position previously if he/she has been reinstated by a decision of the State Labour Inspectorate or a court;
- (iii) Failure of the employee to be re-elected to his/her office;
- (iv) Sentencing of the employee to a punishment that makes his/her continued employment in the same job position impossible as a result of a court conviction that has come into legal force;
- (v) Finding that the employee is completely disabled for employment activity in accordance with a medical certificate issued using the procedure established by Federal laws and other regulatory legal acts of the Russian Federation;
- (vi) Death of the employee or the natural person acting as the employer, or court recognition of the employee or the natural person acting as the employer as no longer being alive or as missing;
- (vii) Extraordinary circumstances that prevent employment relations from being continued (military activities, disaster, natural disaster, major emergency, epidemics and other extraordinary circumstances) if these circumstances are confirmed by a relevant State authority;
- (viii) Disqualification or another administrative punishment that excludes the possibility of the employee performing his/her duties under the employment agreement;

- (ix) Expiry of the validity, suspension of validity for a period of more than two months or removal of an employee's special right (license, right to drive road vehicles, right to bear arms or other special right), if this leads to the impossibility of the employee performing his/her duties under the employment agreement;
- (x) Termination of access to state secrets, if the work performed requires such access;
- (xi) Repeal of a court decision or repeal (recognition as illegal) of the decision of the State Labour Inspectorate regarding the reinstatement of an employee to a job;
- (xii) Bringing into compliance of total number of foreign employees (including stateless persons) with the proportion of such employees established by the Russian government; and
- (xiii) Arising of the limitations on performing of certain types of labor activity if such limitations are prescribed by the Labor Code or another Federal Law and exclude the possibility of the employee of performing his/her duties under the employment agreement.

With respect to the company's CEO, Article 278 of the Labor Code sets out additional grounds for termination on the unilateral initiative of the employer:

- (i) In connection with the removal from office of the head of a debtor organisation in accordance with the legislation on insolvency (bankruptcy);
- (ii) In connection with a decision to terminate the employment agreement, taken by an authorised body of the legal entity, the owner of the organisation's assets or a person (body) authorised by the owner; and

- (iii) On other grounds provided for by the employment agreement.

This last point in Article 278 is a very important provision of the Labor Code as it permits an employer and the head of the company to determine the grounds for the termination of the employment relationship without being limited to those grounds specifically enumerated elsewhere in the Labor Code.

For certain specific categories of employees, the Labor Code provides the following additional grounds that constitute cause and would permit an employer to terminate an employment relationship unilaterally:

- (i) An employee hired by a natural person acting as the employer (Article 307 of the Labor Code) or an employee of a religious organization (Article 347 of the Labor Code) may be terminated on the grounds that are specified in the employment agreement;
- (ii) An employee holding a secondary job may be terminated where another employee is hired to do the job and if the job is his/her principal one (Article 288 of the Labor Code);
- (iii) A teaching professional working with an educational institution can be terminated on the following grounds (Article 336 of the Labor Code):
  - (a) A gross breach of the charter of the educational institution, repeated within a period of one year;
  - (b) Any use of teaching methods involving physical and (or) psychological violence or force on a student;
  - (c) Where the rector, pro-rector, faculty dean and head of a branch (institute) of a State or municipal educational institution of higher occupational level reaches the age of sixty-five; and

- (d) Failure to be selected in a competition for the position of a scientific-educational employee or the expiry of the period of selection by competition;
- (iv) An employee of a representative office of the Russian Federation abroad may be terminated before the expiry of the term of employment in the following cases (Article 341 of the Labor Code):
- (a) In case of emergency in the host country;
  - (b) Where the employee is declared *persona non grata* or where notice is received from the competent authorities of the host country to the effect that the employee's continued stay there is unacceptable;
  - (c) Where the established quota of diplomatic staff or support personnel of the corresponding representative office is reduced;
  - (d) Where the employee fails to observe the customs and laws of the host country and the generally accepted code of conduct and morality;
  - (e) Where the employee fails to perform the obligations he/she assumed on behalf of his/her family members at the time of concluding the employment agreement concerning their observance of the laws of the host country, generally acceptable codes of conduct and morality, and of internal rules in effect on the territory of the corresponding representative office;
  - (f) Where the employee is in single gross breach of his/her employment duties and of the secrecy requirements with which the employee was familiarised at the time of concluding the employment agreement; and

- (g) Where the employee is temporarily disabled for a period of more than two months or where he/she develops a medical condition that prevents him/her from working abroad, in accordance with a list of illnesses approved by the Federal body of executive power authorized by the Government of the Russian Federation.

The Labor Code also gives protection to a number of specific categories of employees, most particularly female employees. Pregnant women are among those protected from dismissal unless the employer is liquidated. Women with dependent children under three years of age, and single mothers (defined as cases where the paternity of the child has not been legally established) with children under 14 years of age (18 years of age if the child is disabled), other persons bringing up children of these ages and categories without the assistance of their mother cannot be terminated on the initiative of the employer except for the cases set out in Article 81 (i), (v) – (viii), (x) and (xi) or Article 336 (ii) of the Labor Code (cf. the first two paragraphs of this section).

In addition, an employer must consult the trade union to dismiss employees who are trade union members in cases where the position has become redundant, the employee is unable to perform his or her job adequately due to insufficient qualifications, as confirmed by the employee evaluation process, or repeated failure by the employee to perform, without justifiable reasons, his/her employment duties if the employee has a valid disciplinary sanction imposed on him/her. The trade union must decide whether to permit the dismissal within seven workdays of being notified by the employer of its intention to dismiss the employee. Where no mutual consent regarding an employee's dismissal is agreed between the employer and the trade union within ten working days from the date of informing the trade union of the possible dismissal, the employer has the right to make the final decision itself. However this decision may be appealed to the State Labor Inspectorate. The employee must be dismissed within one month of receiving the trade union's reasoned opinion.

Article 269 of the Labor Code provides that employees under 18 years of age in cases other than the liquidation of the organization may only be dismissed with the consent of the corresponding State Labour Inspectorate and the Commission on Minors and Protection of Their Rights.

As a general rule, an employment contract is concluded for an indefinite period. A definite term employment contract may only be concluded in the circumstances specifically described in Article 59 of the Labor Code (generally, where the nature or conditions of the work to be performed are of fixed duration) and the term of the contract cannot be longer than five years in duration.

Pursuant to Article 77(2) of the Labor Code, an employment contract, which has been concluded for a definite period of time, is terminated when the term of the contract expires unless employment relations effectively continue and neither of the parties requires the relations to be terminated. A fixed-term contract may also be terminated at the employer's initiative for the reasons set out in Article 81 of the Labor Code and at the employee's initiative in accordance with Article 80 of the Labor Code.

For temporary workers with an employment contract of up to two months, an employer may terminate the employment agreement due to liquidation of the organization or staff redundancy with three days' prior written notice. An employee having concluded such a contract has the right to terminate it early, with three days' prior written notice.

For seasonal workers (those employees who have concluded an employment contract for a certain period [season] generally not exceeding six months), an employer may terminate the employment relationship with seven days' prior written notice by reason of liquidation or staff redundancy. Such employees are entitled to severance pay equal to two weeks' average earnings. A seasonal worker has the right to terminate his/her employment early, with three days' prior written notice.

Note that seasonal and temporary employees may be terminated for cause on the grounds and in compliance with the procedure set out in the Labor Code.

## 2.2. Notice Provisions/Consequences Of A Failure To Give The Required Notice

The Labor Code provides that an employee has the right to terminate the employment relationship by providing the employer with two weeks' prior written notice (Article 80 of the Labor Code). The parties are free to agree that the employment relationship will terminate prior to the expiry of this two-week period. Any provision in the employment agreement that imposes additional notice requirements on the employee will not be enforceable due to its non-compliance with labor law requirements. However, such notice requirement is extended to at least one month in respect of the company's CEO wishing to terminate his or her employment (Article 280 of the Labor Code).

An employee with a temporary employment contract of up to two months' duration, or who was hired as a seasonal worker, is free to terminate the contract on three days' prior written notice to the employer.

In cases of liquidation of the organization and/or staff redundancy, the employer is required to give at least two months' prior written notice to relevant employees (Article 180 of the Labor Code). Failure to comply with this requirement may invalidate the termination and result in the employee's reinstatement in the job.

## 2.3. Termination Indemnities

In certain circumstances, an employee who is unilaterally dismissed by an employer has the right to receive a termination indemnity (compensation for early termination of employment). Pursuant to Article 178 of the Labor Code, an employee is entitled to receive a severance payment of not less than his/her two weeks' average earnings when dismissed because he or she:

- (i) Refuses to transfer to another job, which is necessary due to health reasons confirmed by a relevant medical certificate, or due to the lack of suitable work at the employer;
- (ii) Is drafted or enlisted into the army or alternative civilian service;
- (iii) Is replaced by the employee who previously held the position;
- (iv) Refuses to be transferred to a new location with the employer;
- (v) Is recognized as completely disabled for employment activity in accordance with a medical certificate; or
- (vi) Refuses to continue work due to the change of the terms of the employment agreement agreed upon by the parties.

In the event of a staff redundancy or the liquidation of the employer, an employee is entitled to receive at least two months' prior notice of the impending dismissal and, on the date of dismissal, a mandatory severance payment equal to one month's average salary. In the event that he/she has not been able to secure alternative employment following the date of termination, he/she may be entitled to receive up to two additional months' average earnings as severance.

#### 2.4. Laws On Separation Agreements, Waivers And Releases

There are no restrictions on an employer and employee entering into a separation agreement on the termination of the employment relationship. Therefore, to avoid any uncertainties and misunderstandings relating to the termination of employment, an employer and employee may conclude a mutual consent termination agreement which sets out specific terms of employment termination, including the amount of compensation for early termination. However, pursuant to Article 9 of the Russian Civil Code, an individual is not legally entitled to waive his/her rights. It is, therefore, questionable whether a waiver and release of claims by an

employee will be upheld by a Russian court; such claims will be considered by the court on a case-by-case basis. Nevertheless, where a mutual consent termination agreement exists, the employer's position will be enhanced if an employee subsequently files a claim.

## 2.5. Litigation Considerations

In general, a Russian court will only consider the merits of a case if the employee has been dismissed according to the required procedures. Therefore, if an employer has dismissed an employee in breach of the proscribed procedural form, the dismissal will be held by a court to be wrongful, even if the substantive merits of the case are valid.

An employee is entitled to commence a court action against an employer if he/she believes that he/she has been unjustly dismissed or if the employer has committed any other violations of his/her rights. In connection with this action, an employee has the right to demand that the employer stop such violations (including reinstatement at work) and is also entitled to seek moral damages (compensation for damages suffered by the employee as a result of the employer's actions which may include loss of reputation, mental or physical suffering, etc.). The remedy for wrongful dismissal is reinstatement of the employee into his or her former position and repayment of all back earnings for the period of forced absence from work (e.g., for the period from the date of dismissal until the date of reinstatement at work).

## 3. Employment Discrimination

### 3.1. Laws On Employment Discrimination

Although there is no specific Russian legislation on discrimination in the work place, both the Labor Code and the Russian Constitution contain provisions specifically prohibiting discrimination. Article 3 of the Labor Code prohibits discrimination on the grounds of gender, race, nationality, language, social origin, property status, place of residence, religious beliefs, affiliations with social associations and

other circumstances not connected with the professional qualities of the workers. Article 19 of the Russian Constitution contains a similar provision. Article 3 of the Labor Code does permit preferential treatment for certain classes of individuals who are viewed by the state as requiring additional protections or to whom an affirmative action program applies.

The Labor Code makes specific exceptions for female employees in a number of areas. These distinctions are, for the most part, set out in Chapter 41 (Articles 253 to 263 of the Labor Code). Article 64 of the Labor Code provides that an employer is prohibited from refusing work to an employee on the basis that she is pregnant or has a child under the age of three. If such an individual is not hired, she has a right to request that the company provide her with written reasons as to why she was not hired.

Pursuant to Article 255 of the Labor Code a female employee is entitled to 140 days of maternity leave (or more days in specific cases) and is subject to a maternity state allowance during the period of this leave. Following the maternity leave period, the employee is entitled to take a further period of childcare leave until the child reaches the age of three (Article 256 of the Labor Code), without salary. During this leave she is entitled to a childcare state benefit until the child is 1.5 years old. During this leave, a female employee may choose to work part-time while preserving her entitlement to the childcare leave state benefit. This additional leave can also be taken by the father, grandmother or grandfather, or other relatives and/or guardians caring for the child provided that the mother of the child has returned to work.

Article 253 of the Labor Code prohibits women from being hired to perform arduous work, to work under harmful conditions or to work underground. Additional legislation lists the various positions that fall into these categories. Pursuant to Article 259 pregnant women cannot be asked to work overtime, at night (from 10pm until 6am), on days off or be sent on business trips. Women who have children under the age of three can be asked to work overtime, on days off or sent on

business trips only if they consent (in writing), and such work is not against medical advice for health reasons.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

There is no specific legislation that prohibits sexual harassment in the workplace. Article 133 of the Criminal Code of the Russian Federation provides that compelling an individual to engage in sexual relations through the use of blackmail, the threat of destruction, damage or withdrawal of property, or the withdrawal of any other material right upon which the victim depends is a crime. Although this provision of the Criminal Code is broad enough to include claims of sexual harassment in the work place, no court cases on this issue exist.

# Singapore

## 1. Introduction

The Employment Act and the Retirement Age Act are the two key statutes in Singapore relating to the termination of employment contracts and discrimination against employees. In the absence of a relevant statute, common law applies (because English cases are highly persuasive in Singapore, it is largely English common law principles that are applied by local courts). Other statutes dealing with various aspects of employment are the Industrial Relations Act (which has provisions for a collective agreement process involving trade unions), the Central Provident Fund Act, the Factories Act, Workplace Safety and Health Act, Work Injury Compensation Act, Trade Union Act and Employment of Foreign Manpower Act.

## 2. Terminations

### 2.1. Restrictions On Employers

Singapore's Employment Act applies generally to persons who have entered into or who work under a contract of service. It does not apply to persons employed in managerial or executive positions. In cases where the Act does not apply, the terms and conditions of employment are left to be agreed upon by the employer and the employee and are usually written into a contract of service signed by both parties.

The Employment Act contains general provisions on terms of employment, including payment of salary, terminations, periods of notice for termination and liability for breach of contract. It also includes provisions on maximum hours of work, sick leave, retirement and retrenchment benefits, which apply only to employees earning less than S\$1,600 per month.

An employer and employee are free to negotiate the terms of employment. However, the Act provides that any terms in a contract of service to which the Act applies that are less favorable to an

employee than any of the conditions or service prescribed by the Act are illegal, null and void.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

### *Managerial Employees*

Notice periods and other procedures required to dismiss a managerial employee are typically outlined in the employment contract and are enforceable under the general principle of freedom of contract. A provision in an employment contract expressly providing for payment of a sum in lieu of notice is also generally enforceable. In the absence of such provisions in an employee's contract, the employee is entitled to "reasonable" notice, depending on factors, such as age, seniority, length of service, functions and position of the employee in the company, and the salary period. For example, a fairly junior management employee who receives a monthly salary may be entitled to notice of only one month. On the other hand, a senior executive who is 50 years old or more, and who has been with the company for 20 years, may be entitled to at least six months' notice. The provision of one to three months' notice of termination of employment or payment in lieu thereof (where no contractual notice period is specified) is a "rule of thumb" in Singapore, but is not absolute. It is not uncommon for the termination benefits payable to an executive or management employee (whose employment has not been terminated for cause) to be set at up to six months' salary, which may or may not include a payment equivalent to a specific amount per year of service.

If a managerial employee is not given notice of termination in accordance with the provisions of his or her contract or, in the absence of an express contractual provision concerning notice, is not given "reasonable" notice of termination, he or she is entitled to damages. In practice, instead of giving full notice of termination and requiring an employee to serve out a period of notice, an employer will frequently terminate the employee's contract with immediate effect and pay the employee an amount equal to the salary that would have

been due during the period of such notice (whether contractual notice or “reasonable” notice). The employee also may receive other benefits where the relevant employment contract is silent as to whether it may be terminated upon the payment of salary only. When an employer follows this course of action, the termination is technically a breach of contract. However, the breach is substantially satisfied by the payment of liquidated damages equivalent to such salary and benefits (as applicable).

If a contract of employment is for a fixed period, generally it may not be terminated prior to the end of such period unless there are provisions to the contrary in the contract. The termination of a fixed term contract by the company before the expiry of the term would also constitute a breach of that contract, and the employee would be entitled to compensation by way of damages. The damages due would normally be equal to the salary (and value of benefits) that the employee would have earned during the unexpired portion of the fixed term, less any salary earned from other employment during the unexpired portion. The employee has an obligation to mitigate his or her loss by trying to find alternative employment.

### *Non-Managerial Employees*

The Employment Act applies to all those employees who are not in “managerial or executive” positions. The contracts of non-managerial employees can be oral or in writing, although written contracts are preferred to avoid uncertainty in the terms of the agreement. If the contract is for a specified piece of work or for a specified period of time, it automatically terminates upon expiration or when the specified work is completed.

In fixed term and indefinite term contracts, if the contract provides for a specified period of notice of termination, then the company should comply with those requirements when it terminates an employment agreement. However, in the absence of a provision in a contract of employment for an indefinite term dealing with notice for termination, then the company must give notice in accordance with Section 10(3)

of the Act, which requires certain minimum notice periods, ranging from one day to one month, depending on the length of employment.

In lieu of providing the employee with the notice, the company may pay the amount of salary that would have accrued to the employee during the period of notice.

### 2.3. Termination Indemnities

#### *Retrenchment/Redundancy Payments*

Currently, no law exists specifically compelling employers to provide, or even merely governing, redundancy payments in Singapore. However, Section 45 of the Employment Act provides that an employee with less than three years of continuous service is *not* entitled to any retrenchment benefit, if retrenchment has arisen on grounds of redundancy or reorganization of the employer's profession, business, trade or work.

For employees employed in continuous service with an employer for more than three years, the statutory provision had previously been used to support the view that a claim for retrenchment benefits for termination on the ground of redundancy is available. However, this view has been rejected by the courts.

Because the Employment Act does not apply to persons employed in managerial or executive positions, entitlement to redundancy payments for these types of employees is generally a matter of contract law. In practice, even where there is no legal obligation to make redundancy payments, employers in Singapore generally are willing to pay retrenchment benefits to their employees. This helps to pre-empt any complaints made by disgruntled employees to the Ministry of Manpower. In the absence of contractual commitments, the precise quantum of retrenchment benefits remains entirely a matter of negotiation. However, it is common practice to pay retrenchment benefits of about one month for each year of service.

## 2.4. Laws On Separation Agreements, Waivers, And Releases

It is not illegal for employers to seek a release of liability from workers at the time of their dismissal in return for receiving something of value from the employer that the latter has no legal obligation to give to the worker. Consideration, in most circumstances, involves the payment of money. However, consideration is not limited to money; for example, it can include waiving a loan for the employee.

The enforceability of separation agreements, waivers and releases is a function of the common law generally, and there are no prescribed formats or statements to be included before such documents will be upheld.

## 3. Employment Discrimination

### 3.1. Laws On Employment Discrimination

The only type of employment discrimination currently legislated in Singapore is in regard to age. Notwithstanding any contrary agreement, the Retirement Age Act prohibits dismissal of any employee who is below the retirement age of 62 (or other retirement age prescribed by the Minister for Manpower) on the grounds of age. An employer who dismisses an employee on the grounds of age will be guilty of an offence and is liable upon conviction for a fine of up to S\$5,000 and/or imprisonment of up to six months. If the employee feels that he or she has been unlawfully dismissed on the grounds of age, he or she may make representations to the Minister for Manpower to seek reinstatement.

Unlike the Employment Act, the provisions of the Retirement Age Act apply to all employees including executives, managers and professionals.

Singapore does not have any equal opportunities legislation and, therefore, there are no explicit laws preventing sexual and racial discrimination. Article 12 of the Constitution does however provide that all persons are entitled to the equal protection of the law and that

there shall be no discrimination based on religion, race, descent or place of birth. Challenges on constitutional grounds are however rare in Singapore. The government has stated that it believes legislation in the area of equal opportunities will not be effective. Instead, it has chosen to address the issue using moral persuasion. For example, guidelines on job advertisements were recently issued by the Singapore National Employers Federation, the National Trades Union Congress and the Ministry of Manpower. The guidelines stipulate that race, religion, marital status, age and gender should not be used as job criteria in advertisements. Although these guidelines do not have the force of law, they are likely to have some influence on general employment practices.

The Employment Act does, however, provide statutory entitlement to maternity leave and protection from dismissal for employees while on maternity leave. If an employer dismisses a pregnant female employee or fails to pay her what she is entitled to under the Employment Act, the employer is guilty of an offence and will be liable upon conviction to a fine of up to S\$1,000 and/or imprisonment of up to six months. The Employment Act also makes null and void any contractual provisions that purport to remove or reduce the employee's statutory right to paid maternity leave and the employer's statutory duty to pay for such leave. Because managers and executives are not covered by the Employment Act, they do not enjoy this protection.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

There is currently no local legislation dealing directly with sexual harassment and, therefore, sexual harassment is not illegal in itself. However, certain types of sexual harassment may give rise to claims under other areas of law, such as defamation or assault and battery at common law. In addition, the Singapore Penal Code has provisions that may apply. For example, if anyone utters any word "intending, to insult the modesty of any woman," he or she may be liable under this Code.

## Spain

### 1. Introduction

Labor law in Spain consists of the group of rules that protect an employee in his or her employment relationship and those that determine the conditions applicable to life in the workplace.

The primary sources of Spanish labor law include:

- Spanish Constitution: The Constitution of 1978, which recognizes the main labor, social and union rights, as commonly understood in Western European countries;
- Treaties: Certain treaties and conventions, including the many EU regulations. Spain is a signatory country to ILO Agreements N° 87 (Agreement on Trade Union Freedom and Protection of the Right to Form Trade Unions of 1948) and N° 98 (Agreement on the Right to Form Trade Unions and Right to Collective Bargaining of 1949);
- Parliament Acts, Royal Decrees and the government regulations that implement them: The 1995 Labor Act is the main piece of labor legislation applicable nationwide, the 1994 General Law on Social Security is the main social security legislation, and the 2000 Law on Foreigners is the main piece of immigration legislation;
- Case law: Formally, case law in Spain is only created when two consistent Supreme Court cases decide the same issue in the same way. Single Supreme Court cases and appellate level court decisions are of course extremely persuasive to lower courts, but they are not technically binding.
- Collective bargaining agreements: Collective bargaining agreements or “CBAs” are detailed, binding agreements negotiated between unions (and/or other employee

representatives) and employers organizations (and/or employers). Many collective bargaining agreements have been negotiated for a specific industry in the entire country, such that all companies in Spain that belong to that specific industry will automatically be bound by the rules established in the nationwide collective bargaining agreement. Other collective bargaining agreements apply only to a specific province or limited geographical area, or, if the collective bargaining agreement is negotiated at a company level, to a specific company or part thereof. Almost all companies in Spain are subject to a collective bargaining agreement and should be aware of and comply with the applicable collective bargaining agreement's rules.

- Employment contracts: The law regulates whether contracts (either oral or written) can be entered into for a fixed term or must be for an indefinite term, as is the general rule. Also, the law regulates a number of special types of employment relationships (e.g., senior executives, commercial agents, home-workers and others), which are not subject to the rules established under the Labor Act for the so-called “ordinary” employment relationship.

### *The Labor Courts*

The Labor Courts are responsible for passing and enforcing judgments on labor issues. They constitute a special branch of the judicial system. There are three levels of labor courts: the Social Courts at a provincial level, the Social Chamber of The High Courts at a regional level, and the Social Chamber of the Supreme Court located in Madrid. The Supreme Court of Justice is the highest jurisdictional body of the State, except in matters relating to constitutional guarantees, where the Constitutional Court has the final decision making power.

## *Labor Disputes*

- Individual Disputes and Collective Disputes

In general, individual disputes are those that arise between an employee and an employer relating to the individual's personal rights. Collective disputes arise only when collective interests are at stake, but not where the interest is exclusively an individual interest that happens to affect more than one employee.

- Mediation, Arbitration and Conciliation

Conciliation is a procedure that aims at encouraging a transaction between the parties with the ultimate goal of avoiding judicial proceedings. In both individual and collective disputes, Spanish law obliges parties to attempt conciliation with the Labor authorities before filing a claim in Labor Courts. Mediation proceedings may be initiated at the request of the parties in dispute for the appointment of an impartial mediator. If the settlement proposed by the mediator is accepted, it has the same binding effect as a collective agreement. Arbitration is a procedure for settlement of labor disputes characterized by the intervention of a third party, the arbitrator, whose decision is binding. Mediation and arbitration procedures are typically initiated for collective disputes and rarely used in individual disputes.

## 2. Terminations

The Labor Act lists various reasons that justify the termination of an employment relationship. Such reasons include, but are not limited to: mutual agreement of the parties; reasons validly established in the contract to the extent permitted by the law; resignation, retirement, death or disability of the employee or employer; "force majeure;" and actual and constructive dismissal. The various types of terminations have different applicable rules and consequences. The comments

below are limited to (i) a brief reference to the termination of fixed-term contracts due to the expiry of their term, and (ii) a more thorough introduction to the rules on dismissals of employees under ordinary, indefinite term contracts.

### *Termination Of Definite Term Or Fixed Term Contracts*

Unless otherwise terminated earlier, definite or fixed term employment contracts automatically come to an end on the expiry of the fixed term. If the employment relationship continues de facto for any reason on expiry of such term, the agreement may be deemed to have been tacitly extended for an indefinite period of time.

When the duration of a fixed-term contract exceeds one year, the party who wishes to terminate the contract must give a minimum 15 days' notice. In some cases, depending on the type of contract, an employee may be entitled to severance compensation of up to 12 days' salary per year of service.

Fixed-term contracts can only be concluded in certain prescribed circumstances and are subject to various regulations, including provisions limiting the maximum duration of such contracts.

### *Termination Of Ordinary, Indefinite Term Contracts*

Under the Labor Act, ordinary employees may only be dismissed with cause after any trial period has expired (during the trial period, the contract may generally be terminated by either party freely). The basic causes for termination can be grouped into disciplinary causes and what are known as "objective" causes, which most commonly are economic, technical, productive or organizational causes. Each of the two basic types of dismissals has its own required procedure.

#### (i) Disciplinary Dismissals

Disciplinary dismissals may be based on the following grounds:

- Repeated and unjustified lack of punctuality or attendance at work;
- Lack of discipline or disobedience at work;
- Verbal or physical aggression to the employer, other staff or their families;
- Breach of good faith and abuse of confidence in performing the job;
- Intentional and continuous reduction of regular or agreed work performance;
- Drunkenness or drug addiction, if it adversely affects the employee's work; and
- Harassment of the employer or of any person who works at the company by reason of racial or ethnic origin, religion or convictions, disability, age, or sexual orientation and sexual harassment or harassment by reason of sex of the employer or people who work in the company.

These grounds are often further regulated by the applicable collective bargaining agreement, which can specify proscribed conduct and the degree of the applicable sanction.

Disciplinary dismissal decisions must be given to the employee in writing stating the facts giving rise to the dismissal and specifying the effective date of termination. The employee then has 20 days as from the effective date of termination to contest the dismissal. Before the employee can file a complaint for dismissal with the Labor Courts, however, the parties are required to attempt to settle the matter at the Mediation, Arbitration and Conciliation Office, an Agency of the Labor Department. If no settlement is reached, the employee may

then file a court claim. After trial, the Labor Court may declare the dismissal justified, unjustified, or null and void.

If a Labor Court finds that legal causes for the dismissal exist and the correct procedure has been followed, the dismissal is declared justified and no severance compensation needs to be paid to the employee.

If the alleged cause for dismissal is not satisfactorily proven or, if it is proven, but is insufficient to justify a dismissal, the dismissal may be declared unjustified. In this event, the employer has five days from being notified of the Court decision to choose between reinstating the employee or paying severance compensation. If the dismissed employee is an employee representative, however, the employee representative chooses, rather than the employer.

The severance compensation for unfair dismissals was reduced by legal amendments that became effective as of February 12, 2012. Under the new rules, for employees hired on or after February 13, 2012, severance compensation for unjustified dismissals is computed on the basis of 33 days' gross salary per year of employment subject to a maximum of 24 months' salary. For employees hired prior to February 13, 2012, severance compensation is computed as the sum of (i) 45 days' gross salary per year of employment through February 12, 2012, plus (ii) 33 days' gross salary per year worked as from February 13, 2012. In cases where employees were hired before the amendments, the total severance compensation is subject to a maximum of the greater of the following:

- 720 days of total salary, or
- 45 days' gross salary per year of employment through February 12, 2012, capped at 42 months of salary.

Thus, if an employee on February 12, 2012, had already "accrued" over 24 months (or 720 days) of salary as severance compensation under the previously existing 45 day/year formula, the employee will

be entitled to this greater amount, but in this case that greater “accrued” amount will be the maximum severance compensation, and the employee will no longer continue to become entitled to any additional severance compensation for employment after February 12, 2012. The employee’s salary for these purposes includes fixed and variable salary, as well as benefits in kind and equity benefits, but it does not include certain benefits that are considered “social” in nature such as complementary health care schemes, pension schemes and insurance coverage.

Note that if the employee is an employee representative and the dismissal is considered unjustified, the employee representative has the right to decide whether he or she is reinstated with back pay, or whether the employment is terminated. If the employee representative opts for their employment to be terminated, then aside from the standard severance compensation, the employee representative will be entitled to so-called interim salary, which is the representative’s salary from the date of termination through the date on which the court’s judgment is notified. The amount of such interim salary depends on how long the court takes to hear the case and reach a decision, but it can amount to three to six months of salary.

As an alternative to a possible finding of justified or unjustified dismissal, the Labor Court can find that the dismissal is null and void. The Labor Court will declare the dismissal null and void in a number of specific cases, which primarily include the following:

- Where the dismissal is based on discrimination prohibited by the Constitution or by law, or violates the employee’s fundamental rights or public freedoms. This can include cases of retaliation against the employee for legitimately exercising his or her rights.
- In cases where the employee is pregnant, has requested or is enjoying maternity or paternity related rights, the dismissal

will be automatically null and void, unless the court finds that it was justified.

- Where the dismissal is in retaliation for having exercised rights that exist to protect employees who are victims of gender related violence.
- When the dismissal occurs within nine months of the employee having returned to work after maternity- or paternity-related leave of absence.
- Where collective dismissal procedures should have been used but were not.

Should the Labor Court declare the dismissal null and void, the company is required to immediately reinstate the employee with back pay. Given the costs of having to reinstate and the increased difficulties of dismissing the employee afterwards, prior to any dismissal, the company should carefully consider any surrounding circumstances to ensure that no cause for a finding of a null and void dismissal exists.

(ii) Objective Dismissals

“Objective” dismissals are dismissals that do not have to do with the employee’s (“subjective”) misconduct and that are instead based on one or more of the following objective reasons:

- An employee’s incompetence that has come to light or arisen after the trial period has elapsed;
- An employee’s failure to adapt to reasonable technological developments affecting his or her position, so long as the company has provided adequate training for the employee to adapt to those developments;

- An employee's absence from work, even if justified, which exceeds 20 percent of work days in two consecutive months, or which exceeds 25 percent of work days in any four months in a twelve month period (absences due to strikes, maternity, paternity, vacation, sick leave due to work related accident, and any other sick leave unrelated to work related accidents that lasts over 20 days, do not count for purposes of the 20 percent or 25 percent, but absences due to short term sick leaves that last 20 days or less, even if they are fully justified, do count);
- When the company needs to phase out job positions based on organizational, productive, economic or technical grounds. Under amendments passed in February 2012, economic causes will exist when the company has a negative economic situation, in cases such as current or foreseen losses or a persistent decrease in income or sales. The new law specifies that, in any case, there will be a persistent decrease when income or sales have decreased in three consecutive quarters (even if the company is in profit). Organization causes include where there are changes to the system and methods of employees' work or to the way production is organized; technical changes exist where, amongst other things, there are changes in the means or instruments of production; and productive reasons exist when, amongst other things, there are changes in the demands for the products or services that the company has in the market.

This last type of objective dismissal may only be used when the number of employees to be dismissed does not exceed a particular number established by the Labor Act; if the employees to be dismissed for these reasons exceed the maximum number, the procedure for collective dismissals will need to be followed (see the section below on collective dismissals).

With regard to the objective (individual) dismissal procedure, the employee must be given a letter of dismissal and provided with 15 days' prior notice or salary in lieu thereof. The company, at the time the letter is provided, must also pay severance compensation of 20 days' salary per year of service, with any period of less than one year's service to be prorated, up to a maximum of twelve months' salary.

If the procedural requirements for objective dismissals are not strictly followed, the dismissal will be considered unjustified. In addition, if the dismissal is based on discrimination, or if it interferes with maternity- or paternity-related rights or family care rights, or infringes the rules on collective dismissals, it will also be null and void as in cases of disciplinary dismissal.

If an objective dismissal is declared by a court to be unjustified, the employee will be entitled to the same severance compensation established for unfair disciplinary dismissals as explained above (specifically, the 45 days' salary per year worked through February 12, 2012, plus 33 days' salary per year worked after that date, subject to a cap of the greater of 720 days of salary or the amount of severance compensation computed through February 12, 2012).

Note, however, that the 20 days' salary per year of service paid for such objective dismissals at the time of termination will be deducted from the severance due if the dismissal is considered unjustified. Also note that if the employment contract at issue was a special indefinite term contract pursuant to Royal Decree 8/1997, Additional Disposition One, the amount of indemnity for an unjustified objective dismissal will exclusively be calculated as 33 days' salary per year of employment, up to a maximum of 24 months' salary, such that under these special types of contracts, no part of the severance will need to be based on the 45 days' salary per year of service formula, regardless of when the employee was originally hired.

Finally, as in disciplinary dismissals, if the person dismissed is an employee representative and the dismissal is considered unjustified,

the employee exercises the option instead of the employer, and if the employee representative opts to terminate employment, he or she will be entitled not only to the severance compensation, but also to the interim salary, which is the salary from the date of termination through the date on which the court's judgment is notified.

If the court finds the dismissal to have been justified, the contract will be declared to have been terminated, and no compensation will need to be paid other than the 20 days' salary per year of service (up to 12 months' salary) that was originally provided to the employee along with the notification letter of dismissal.

### (iii) Collective Dismissals

The collective dismissal procedure must be used when, in any ninety-day period, the number of employees to be dismissed for economic, technical, productive or organizational reasons equals or exceeds the following:

- Ten employees in companies with fewer than one hundred employees;
- Ten percent of the workforce in companies with one hundred to three hundred employees;
- Thirty employees in companies with three hundred employees or more; or
- All employees in companies with over five employees.

If the number of dismissals does not meet these thresholds, the dismissals are subject to the objective (individual) dismissal procedure described above.

Note that spreading out the dismissals over consecutive ninety-day periods to avoid the collective procedure and instead qualify for the

above simpler objective procedure could lead a court to declare the dismissals fraudulent and consequently null and void. Significant case law exists on (i) which types of dismissals count for purposes of the threshold and (ii) how the 90 day period and/or consecutive 90 day periods should be calculated. These rules are extremely important and should be considered carefully prior to any dismissal to avoid having the dismissal(s) declared null and void and having to reinstate employee(s) with back pay. In addition, special rules may apply as to which employees should be dismissed first (e.g., employee representatives have “last to go” rights and collective bargaining agreements may also establish other “last to go” rights).

The collective dismissal procedure can be divided into the following stages:

- Notice of the Commencement of the Procedure

The collective dismissal procedure requires that the employer notify the employee representatives of the company and then file a copy of that notice with the labor authorities. The notice must be accompanied by a number of supporting documents explaining the grounds for the dismissals and justifying the measures to be adopted. The documents should include economic and legal documentation of the causes of the dismissals, information on the company’s employees and the employees affected, the timing of the intended redundancies, and the criteria applied to select the employees affected.

If the dismissal affects more than fifty percent of the workforce, the employer must also notify the employees and the labor authorities of any sale of company assets.

- Consultation Period

Under the Labor Act the consultation period can last up to a maximum of fifteen days in companies with fewer than fifty

employees and up to a maximum of thirty days in companies with fifty employees or more.

During the consultation period, the company and employees discuss the reasons for the dismissals and the possibility of avoiding or reducing their negative effects on the employees through measures such as relocation or training to attempt to increase employees' employability.

- Individual Dismissal Notification

Once the consultation period ends, the employer must notify the labor authorities whether or not an agreement has been reached with the employee representatives.

If an agreement has been reached during the consultation, the company will need to provide the labour authorities with a copy of that agreement. If no agreement has been reached, the company must notify the labor authorities and the employee representatives of its decision regarding the collective redundancies and the conditions that will apply to the redundancies.

Thereafter, the company can proceed with the individual dismissals by providing the employees with a minimum of 15 days' notice plus the statutory severance compensation of 20 days' salary per year worked, capped at 12 months' salary (or whatever amount may have been agreed with the employee representatives). Also note that 30 days must elapse between the start of the consultation and the effective date of the dismissals. A failure to reach an agreement with the works council no longer impedes the company from proceeding at the reduced severance compensation rate as used to be the case prior to the February 2012 amendments.

After the dismissals are implemented, both the employees and the employee representatives are entitled to contest the sufficiency of the causes for the dismissal, the incorrect use of the collective redundancy procedure, or the validity of any agreement that may have been reached with the works council. However, under the February 2012 amendments, if the court finds that insufficient causes for the redundancies exist, in most cases, the employees will only be entitled to the statutory severance for unfair dismissal, that is, to the reduced severance compensation of the 33 days per year capped at 24 months (plus any “accrued” severance through February 12, 2012). Only if the incorrect redundancy procedure was used or if the agreement reached with the works council during consultation involved fraud, lack of consent, or other serious issue, will the dismissals be considered null and void. In short, then, despite the risk of possible litigation after the redundancies are implemented and the increased need to ensure that the proper procedure is followed, companies can proceed with collective dismissals within a reduced time frame of a little over a month and with costs limited to the statutory severance compensation for unfair dismissal, even if the company lacks good cause.

Note also that the law establishes a number of other rules on redundancies that can affect some companies and entail additional costs. Specifically, for example, companies with over 50 employees affected by redundancies are required to provide outplacement for those employees for a minimum of six months. Companies with over 500 employees that have had benefits in the previous two years are also required to make additional payment to the Spanish treasury for each employee that it makes redundant who is 50 years of age or older; the amount varies depending on a number of factors, but basically aims to compensate the government for the cost of such employee’s unemployment benefits and early retirement plans. For companies with less than 25 employees that make employees redundant with good cause, the wage guarantee fund can recover limited costs of the required severance payment (i.e. 8 days’ salary per year of service, with any period of less than a year to be prorated).

### 3. Discrimination

#### 3.1. Laws On Employment Discrimination

The primary source of discrimination law in Spain is the Spanish Constitution of 1978. In this respect, Articles 13 and 14 of the Spanish Constitution read as follows:

- “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.” (Article 14);
- “Aliens shall enjoy in Spain the public freedoms guaranteed by this Title, under the terms established by treaties in the law.” (Article 13.1).

Moreover, Article 9.2 of the Constitution imposes a duty on authorities to promote the appropriate conditions, which will ensure equal treatment to men and women, and to remove any barriers that inhibit equal treatment.

In implementation of the Spanish Constitution, Spanish labor law has established specific rules that implement the Spanish Constitution in the field of employment and, in some cases, extends the protection against discrimination to additional groups. In general terms, the relevant provisions are somewhat varied but may be grouped as follows:

- General Prohibition Against Discrimination

Article 4.2 (c) of the Labor Act states that employees have the right not to be discriminated against, directly or indirectly, in seeking work or once employed, for reasons of sex, civil status, age (within the legal provisions), racial or ethnic origin, social condition, religious or political beliefs or convictions, sexual orientation, affiliation with a union (or

lack thereof) or language. Discrimination due to disability is also prohibited, so long as the individual is apt to perform the relevant work.

Discriminatory employment measures are considered null and void. Indeed, Article 17 of the Labor Act provides as follows:

“The statutory orders, clauses established by collective bargaining agreements, individual agreements and employer’s unilateral decisions which contain direct or indirect unfavorable discrimination on grounds of age or disability or when they show favorable or unfavorable discrimination in the employment, as well as with respect to pay, working hours and other work conditions on grounds of sex, origin, including racial or ethnic, marital or social status, religion or convictions, political beliefs, sexual orientation, trade union membership and adhesion to union agreements (or lack thereof), family links with other employees within the company and language “within Spain,” shall be considered null and void.”

“Any decisions of the employer that constitute an unfavorable treatment of employees in reaction to a claim made within the company or in reaction to a court claim that aims to require compliance with the principle of equal treatment and no discrimination shall likewise be null and void.”

The provision reiterates the general consequence of a violation of the prohibition against discrimination or employer retaliation; specifically, the law cannot acknowledge the discriminatory or retaliatory act as valid and consequently the act is considered null and void and thus legally ineffective.

- Principle Of No Offenses Or Harassment

Article 4.2 (e) of the Labor Act states that employees have a right to privacy and to protection of their dignity, including protection against harassment based on racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, and against sexual harassment and harassment by reason of sex.

- Equal Pay

Article 28 of the Labor Act reinforces the principle of equal pay by requiring employers to provide “equal pay for equal work” with no possible grounds for sex discrimination. Pay is widely defined as including not only base salary, but also all bonuses, commissions and other benefits.

### 3.2. Employee Remedy For Employment Discrimination

With respect to the remedies available for employment discrimination, procedurally, the Constitution provides for the protection of fundamental rights by the ordinary courts of justice. Appeals may be lodged before the Constitutional Court once ordinary proceedings have been exhausted. Courts are constitutionally bound to interpret these fundamental rights in accordance with international law and principles.

In addition, where the equal treatment principle is infringed, the employee concerned can file a claim with the Labor Courts following the appropriate procedures first. The court has power to award compensation, and there is no statutory maximum on the amount of damages that can be awarded.

In connection with dismissals, if an employer dismisses an employee for discriminatory reasons, the dismissal will be considered null and void. Particularly protected in dismissal cases are employees enjoying or who have requested the enjoyment of maternity- or paternity-related rights; if their dismissal is not considered fair, it will

automatically be considered null and void. In the field of maternity/paternity-related rights, closely related to sex discrimination issues, the law establishes rights in an attempt to reconcile professional and personal aspects of the employee (e.g., leaves of absence). These rights were significantly developed and extended with a new law in early 2007, the Organic Law 3/2007 of March 22, 2007 on Equality between Men and Women.

### 3.3. Potential Employer Liability For Employment Discrimination

The potential employer's liability for employment discrimination can be summarized as follows:

#### (i) Labor Consequences

Should the company allow or not take the necessary measures to stop harassment at the work place, the employer could be considered to be failing to comply with its labor obligations; the employee can in such cases claim a type of constructive dismissal and request that his or her labor relationship be terminated with a severance compensation for a dismissal declared unjustified by a court (i.e. 45 days' salary per year of service until February 12, 2012, and 33 days' salary per year of service after that date. The total severance compensation shall be subject to a limit of 720 days' salary unless that number of days' salary is surpassed solely by the compensation due for the period of employment prior to February 12, 2012). Additionally, the employee could claim an additional compensation for damages caused by the harassment (although no statutory maximum exists on the amount of damages that can be awarded, compensation amounts that courts have awarded to date do not tend to be significant by U.S. standards).

(ii) Administrative Sanctions

The Labour Offenses and Fines Act classifies the following acts or omissions as very serious employment offenses and authorizes the imposition of fines ranging from EUR 6,251 to EUR 187,515. The offenses which may be sanctioned include the following:

- Unilateral decisions of employers involving direct or indirect discrimination based on age or disability or involving any sort of discrimination in the matter of compensation, hours, training, promotion and other labor conditions with respect to sex, ethnic or racial origin, civil status, social status, religion or beliefs, political ideas, sexual orientation, trade union membership and support, kinship with other employees within the same company and language;
- Any decision of the employer that constitutes unfavorable treatment of employees in response to a claim made within the company or in reaction to a court claim that aims to require compliance with the principle of equal treatment and no discrimination;
- Sexual harassment when it takes place in the framework of the employment relationship, regardless of who the agent may be.
- Harassment based on racial or ethnic origin, religion or beliefs, disability, age and sexual orientation and by reason of sex, when it takes place in the framework of the employment relationship, regardless of who the agent may be, if and when the employer knows of the harassment and fails to take the necessary measures to prevent it;

- Failure to establish an equality plan when the equality plan is required, failure to apply the equality plan or clear breach of the equality plan.
- Establishing conditions through advertised job offers or through any other means that constitute discrimination of any sort, with respect to access to employment for reasons of sex, ethnic or racial origin, civil status, social status, religion or beliefs, political ideas, sexual orientation, trade union membership and support, kinship with other employees within the same company, social condition and language.

Moreover, where the equal treatment principle is infringed, the law provides for the loss of subsidies and discounts the employer may have been enjoying under public employment programs and disqualification from receiving any such subsidies and discounts for a period of six months. Courts may also award the employee compensation for damages caused.

(iii) Criminal Sanctions

Articles 22.4, 314 and 510 of the Spanish Criminal Code prohibit discrimination as follows:

- Article 314 punishes whoever causes “serious discrimination” in public or private employment against a person, based on grounds of ideology, religion or belief, or due to the person’s race or ethnicity. The corresponding sanction may be imprisonment in the most serious cases, although a punishment of imprisonment is highly unusual in practice;
- The Spanish Criminal Code includes racist motives as an aggravating circumstance (Article 22.4) in any

offense, and punishes, among other acts, incitement to discriminate, dissemination of abusive material, discrimination in public services and professional corporate discrimination, and the promotion of discrimination by associations;

- Section 510 punishes incitement to “discrimination,” “hatred” and “violence,” and the use of offensive expressions against groups or associations based on certain prohibited grounds (i.e., racism, anti-Semitism, religion, ideology, race, sex, illness, etc.) as follows:

“Anyone who incites others to discrimination, hatred or violence against groups or associations for reasons of racism, anti-Semitism or other reasons relating to ideology, religion or belief, or on the grounds of the fact that its members belong to a particular ethnic group or race or on the grounds of their national origin, gender, sexual orientation, illness or disability shall be liable to one to three years’ imprisonment and to a six to twelve month fine.”

“The same penalty shall apply to anyone who knowingly or with reckless disregard disseminates false information that is offensive to groups or associations for reasons relating to their ideology, religion or beliefs, or to the fact that their members belong to a particular ethnic group or race or to their national origin, gender, sexual orientation, illness or disability.”

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Section 14 of the Spanish Constitution sets forth the prohibition of sexual discrimination, and section 18.1 guarantees the rights to personal and family privacy and honor. Moreover, the Spanish Labor Act provides certain guarantees against sexual harassment, considering that privacy and dignity are basic employee rights. Those

rights include the protection against physical or verbal conduct that may constitute sexual harassment (Section 4.2.e.).

In addition, under recent legislative amendments, section 54.2.g of the Labor Act considers sexual harassment at the workplace as a breach of the employment contract and, hence, as a valid cause to dismiss the harasser. In this respect, certain collective bargaining agreements now include sexual harassment expressly as a valid cause for dismissal.

#### 4.2. Employee Remedies And Potential Employer Liability For Sexual Harassment

The employee remedies and the employer's potential liability for sexual harassment can be summarized as follows:

##### (i) Labor Consequences

As mentioned above for discrimination grounds, should the company allow or not take the necessary measures to stop harassment at the workplace, the employer could be considered to have breached its labor obligations, and the employee could claim a form of constructive dismissal and request that his or her labor relationship be terminated with a severance compensation for a dismissal declared unjustified by a court (i.e. 45 days' salary per year of service until February 12, 2012, and 33 days' salary per year of service after that date. The total severance compensation shall be subject to a limit of 720 days' salary unless that number of days' salary is surpassed solely by the compensation due for the period of employment prior to February 12, 2012). Additionally, the employee could claim an additional compensation for damages caused by the harassment.

##### (ii) Administrative Sanctions

Sexual harassment when it takes place in the framework of the employment relationship, regardless of who the agent of the

harassment may be, can be deemed as a very serious employment offense and therefore may be sanctioned with a fine ranging from 6,251 Euros to 187,515 Euros.

(iii) Criminal Sanctions

Section 184 of the Criminal Code states that sexual harassment is a criminal offense. Depending on certain circumstances, the corresponding sanction may consist either of a fine or, in particularly serious cases, an imprisonment ranging from six (6) months to one (1) year. Imprisonment is highly unusual in practice.



## Sweden

### 1. Introduction

The relationship between employers and their employees is highly regulated in Sweden. In addition to a substantive body of legislation, many aspects of the employment relationship are subject to collective bargaining agreements. With respect to employment discrimination and sexual harassment laws, The Discrimination Act came into force on January 1, 2009, replacing several of the former discrimination laws.

The primary legislation governing employment relations in Sweden is as follows:

- The Labor Disputes Act (1974:371);
- The Co-Determination in the Workplace Act (1976:580);
- The Employment Protection Act (1982:80);
- The Parental Leave Act (1995:584);
- The Act against Discrimination of Part-time Employees and Employees on Fixed-term Employment (2002:293); and
- The Discrimination Act (2008:567).

### 2. Terminations

#### 2.1. Restrictions On Employers

The term and conditions of employment, with respect to employees who are not considered to occupy a managerial position, are governed by the Swedish Employment Protection Act (1982:80). The Act favors employees. Contracts of employment may only deviate from the Employment Protection Act in certain aspects. According to this Act, the employer needs *just cause* to terminate an employment.

Just cause may be attributable to either the employee personally, such as mismanagement, or to the employer, such as redundancy. Summary dismissals may only be undertaken as a result of the employee's gross negligence.

If an employer considers terminating an employment based on circumstances relating to the employee personally, the case must be examined carefully. In practice, three elements are relevant in determining whether the employer has a just cause, including: (i) a failure to carry out duties; (ii) awareness by the employee of this failure; and (iii) the failure results in damages to the employer. If these elements exist, it is likely that just cause exists for termination or, in extreme cases, summary dismissal.

The case law on termination due to personal circumstances is extensive. The Swedish Labor Court, which is the final arbiter in labor law disputes, has tried several hundred cases in the last two decades. Employers, therefore, should seek guidance in case law before terminating an employment due to circumstances related to the employee personally.

Before an employer may terminate an employment, the employer must make efforts to provide the employee with another position within the company if the employee can reasonably be offered a vacant position and has the qualifications required.

As for terminations due to reasons attributable to the employer, such as in a redundancy situation, other elements must be considered. For example, an employer must follow a certain order of priority with respect to the employees when giving notice of termination due to redundancy. This usually entails that the employee who has been with the company the shortest time has to leave first.

## 2.2. Notice Provisions/Consequences of A Failure To Provide The Required Notice Period

Under the Employment Protection Act, employers are required to provide employees with a minimum notice period ranging from one to six months. The notice period depends on the age of the employee, if employed prior to January 1, 1997, or the length of service, if employed as of January 1, 1997.

Collective bargaining agreements often provide for extended notice periods based on seniority in age and term of employment.

Furthermore, in case of termination due to the employee personally, the employer must inform the employee of the pending termination 14 days before the formal notice of termination. In case of summary dismissal such information must be given to the employee one week in advance. The information must also be given to the employee's union, if the employee is a union member.

The formal notice of termination as well as summary dismissal must be given in writing, usually on a certain form, and delivered to the employee personally, or in special cases, in a registered letter.

If an employer fails to provide the required notice period, the employer may become liable to pay damages to the employee.

### *Consultation Requirements*

In a redundancy situation when the employer is bound by a collective bargaining agreement, or if any of the employees are union members, the employer shall, according to the Swedish Co-Determination at Work Act, consult with the union(s) concerned before any final decision is made by the employer. The obligation to consult comprises both the question of whether there is a redundancy situation and the question of which employees should be given notice of termination in accordance with the above-mentioned priority rules.

As for termination due to personal reasons of an employee who is a union member, the union may request consultation after being informed about the pending termination. In such a case the employer has to wait before giving the employee the formal notice of termination until the consultations are completed.

If the employer does not fulfill its obligation to consult, the employer may become liable to pay damages to the union.

### 2.3. Termination Indemnities

In cases of wrongful termination, the indemnities for which the employer may become liable are considerable.

If an employee contests that there is just cause for termination of the employment, he or she normally has a right to stay employed and work until the question of the termination has been settled in court, which could take as much as one to two years with the possibility to appeal. The employer normally must pay the employee salary and benefits during this period. If the employee is successful, he or she will have the right to remain employed and may also be entitled to general damages. If the employer refuses to comply with a court order to retain the employee, the employee may also be entitled to damages for economic loss.

According to case law, general damages do normally not exceed SEK 125,000 (currently approximately USD 18,000). Damages for economic loss are calculated as a loss of salary during a certain period. This period is established in relation to the total length of employment and is 16 months' salary for an employee with less than five years of employment, 24 months' salary for an employee with five to 10 years of employment, and 32 months' salary for employees with at least ten years of employment. However, the number of monthly salaries in compensation for economic loss may not exceed the number of months that the employee has been employed. The employee can choose to either claim entitlement to remain employed or solely claim damages to cover the economic loss. If the employee's

claims to remain employed, he/she ordinarily has a right to stay employed throughout the court procedure, which may take one to two years.

#### 2.4. Laws On Separation Agreements, Waivers, And Releases

In Sweden, there are no specific provisions regarding separation agreements. However, such agreements are recognized instruments when dismissing employees. Such agreements often regulate the terms and conditions relating to the termination of the employment relationship and the benefits to which the employee is entitled. A separation agreement may be entered into only when the separation is pending, and no waiver of statutory rights may be included in a contract of employment.

#### 2.5. Litigation Considerations

The Labor Disputes Act covers the judicial procedures in disputes concerning collective bargaining agreements and other disputes concerning relations between employers and employees. The Labor Court settles disputes in connection with the Co-Determination in the Workplace Act, collective bargaining agreements and other disputes where the plaintiff is an employers' organization, a union or an employer that is a party to a collective bargaining agreement.

Disputes concerning non-union employees or employers that are not bound by any collective bargaining agreement are usually settled with the District Court as the court of first instance. Appeals are referred to the Labor Court as the second and final instance. This also applies to individual employers or employees who, despite being subject to a collective bargaining agreement, wish to pursue their case independently.

Contrary to the ordinary rule that the losing party pays the legal fees of both parties, each party in a labor dispute may be responsible for his or her own legal fees if the losing party had reasonable grounds to have the case tried in a court.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

On January 1, 2009, a new Discrimination Act (2008:567) entered into force in Sweden, replacing a number of other acts with respect to discrimination in different areas. The new act prohibits discrimination in employment on the basis of equal opportunity between men and women, transgender identity or expression, ethnic origin, religion or other belief, disability, age and sexual orientation. The law does not only apply to employees but also to, among others, job applicants, interns, contracted labor force, and persons making inquiries about work.

Different types of discrimination under the law are direct and indirect discrimination, harassment, and sexual harassment and orders or instructions to discriminate. The remedies for breaching the Discrimination Act are damages to the discriminated person in question.

By way of example, indirect discrimination means when an employer disfavors a job applicant or an employee by applying a provision, a criterion or a method of procedure that appears to be neutral but which in practice is particularly disadvantageous to persons of one sex. However, it is not considered indirect discrimination if the provision, criterion or method of procedure is appropriate and necessary and can be justified with objective grounds that are not connected to the sex of the persons.

The Act against Discrimination of Part-time Employees and Employees on Fixed-term Employment prevents an employer from disfavoring part-time employees or employees on fixed term employment contracts by giving them less favorable employment conditions than the employer gives or would have given employees that work full-time or have an employment for an indefinite period. The prohibition covers both direct and indirect discrimination.

However, it does not apply if less favorable employment conditions are justified by objective grounds.

According to the Parental Leave Act, it is not permissible for an employer to disfavor job applicants or employees for reasons that are attributable to parental leave in respect of salary, benefits, promotion or training/education. For example, this means that an employee on parental leave ordinarily may not be treated less favourably than other employees with respect to salary increases by reason of the parental leave. However, the prohibition does not apply if the disfavouring is a necessary consequence of the parental leave.

### 3.2. Employee Remedies/Potential Employer Liability For Employment Discrimination

Violation of the Discrimination Act by an employer may result in a liability to pay damages. The Ombudsman for Equal Opportunity, together with his Commission, initiates, directs and supervises efforts to promote equality. The Ombudsman may also bring charges against an employer on behalf of, e.g., the job applicant or employee.

If an employee is discriminated against by his or her employer in breach of the prohibition in the Act against Discrimination of Part-time Employees and Employees on Fixed-term Employment, the employer may be liable to pay general damages to the employee for the violation and damages for the employee's economic loss.

### 3.3. Practical Advice To Employers On Avoiding Employment Discrimination Problems

Employers in Sweden must pay careful attention to the various discrimination acts. The inclusion of "indirect" discrimination in these statutes places a burden on employers to ensure that their policies and procedures do not discriminate in purpose or effect.

An employee claiming to have been discriminated against must present basic facts showing that it is likely that the employer has committed a breach of the Act. The burden of proof will then be

transferred on to the employer to establish that no unlawful discrimination has taken place. Employees may be assisted by the Ombudsman for Equal Opportunity.

An employer should be aware that allegations of discrimination often have a high news value and such issues are often covered by media.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Sexual harassment is generally defined as any kind of unwanted sexual behaviour by words or action in the workplace, in a working situation outside the actual workplace or in connection with an application for work, which leads a person to feel degraded, stressed or discouraged. In many cases, it is clear that certain behaviour qualifies as sexual harassment. In other cases, the harassment is not that obvious (e.g., undesirable comments about looks, outward appearance or private life, or pornographic pictures in the workplace), and the individual committing the harassment may not realize the seriousness of the conduct. An employer is obliged to investigate the circumstances surrounding any alleged sexual harassment.

### 4.2. Employee Remedies For Sexual Harassment

An employee who considers that he or she has been subject to sexual harassment should lodge a complaint with the employer or with the local union representative. After having received the complaint, the employer has an obligation to start an investigation. If the employee considers that the complaint has not been dealt with properly, he or she may forward the complaint to the Ombudsman for Equal Opportunity, who may start an investigation and act as a representative for the harassed employee.

Employees who have been sexually harassed by their employers may be entitled to damages. The employees may also be entitled to damages if the employer has not taken the appropriate measures to prevent sexual harassment in the workplace. Generally, damages to

employees in Sweden are considered to be moderate, but have lately increased. However, it is unusual that damages exceeding SEK 100,000 (currently approximately USD 15,000) are awarded.

#### 4.3. Potential Employer Liability For Sexual Harassment

According to the Discrimination Act, all employers are obliged to ensure that no employee is sexually harassed in the workplace. An employer who becomes aware that an employee considers herself or himself to have been exposed to sexual harassment by another employee shall investigate the circumstances surrounding the alleged harassment and, if it has occurred, implement the measures that may reasonably be required to prevent continuance of the sexual harassment. If the employer does not fulfill its obligations, it may be liable to pay damages to the employee for the violation caused by the omission.

#### 4.4. Practical Advice To Employers On Avoiding Sexual Harassment Problems

Every employer should prepare a policy relating to making a complaint of sexual harassment. If an employer receives a complaint by an employee indicating that someone is sexually harassed in the workplace, an investigation must be initiated. The normal procedure is informal. The first step is to notify the suspected perpetrator that a complaint has been reported and that such claimed behavior cannot be tolerated.

If an informal investigation is insufficient, a formal investigation must be initiated, which means that those involved have to be identified. A careful investigation of facts and evidence must take place. If the harassment is verified, different kinds of sanctions may be taken against the perpetrator of the harassment. The type of sanctions depends on the seriousness of the acts committed and includes transfer, termination or summary dismissal.

The Global Employer: Focus on Termination, Employment Discrimination,  
and Workplace Harassment Laws

Furthermore, it is important to keep in mind that allegations of sexual harassment often are covered by media and there is a risk of bad publicity.

## Switzerland

### 1. Introduction

Compared to the laws of most European countries, Swiss employment law is quite liberal, particularly in relation to the termination of employment contracts. Apart from gender discrimination and sexual harassment, Swiss law does not require an employer to treat all of its employees in the same way under similar conditions. Discrimination against employees may however be prohibited if it amounts to a violation of the employee's personality.

- Currently, the main statutes of employment law in Switzerland are the following:
- The Swiss Code of Obligations;
- The Federal Labour Statute;
- The Federal Act on Equal Treatment of Women and Men; and
- The Federal Statute on Information and Consultation of Employees in enterprises.

The Swiss Code of Obligations contains Switzerland's labour relationship rules. It consists of discretionary provisions, mandatory provisions and semi-mandatory provisions. Discretionary provisions do not apply if the parties have adopted other terms in the individual employment contract. Semi-mandatory provisions may only be waived by more favourable contractual terms. Mandatory provisions are compulsory and cannot be waived by mutual agreement.

The Federal Labour Statute consists mainly of provisions specifying the measures to be taken to guarantee the health and safety of employees working in industrial and commercial enterprises, including rules on working hours, rest periods, the protection of women and young people and internal regulations.

The Federal Act on Equal Treatment of Women and Men prohibits gender discrimination in all public and private employment relationships.

The court system differs from Canton to Canton but since January 1, 2011, the procedure itself has been governed by federal law. The uniform application of Swiss labour law throughout Switzerland is secured by the Swiss Federal Supreme Court to which all labour law issues with an amount in dispute in excess of CHF 15,000, as well as questions of fundamental interest, can be referred.

## 2. Terminations

### 2.1. Restrictions On Employers

Swiss law is based on the principle of freedom to terminate. Therefore, an employer does not need to prove, in general, that it has good reasons to terminate an employee. An exception applies in the case of elected employee representatives or where an employee can establish prima facie evidence that the termination amounts to gender discrimination.

Swiss law prohibits employers, once the probationary period ends, from terminating employment relationships during the following protected periods:

- During the employee's performance of compulsory Swiss military service, civil defence service, military women's service or Red Cross service and, in case such service lasts for more than 11 days, during the four weeks prior to and after the service;
- During periods in which the employee is prevented from performing work fully or partially by no fault of his or her own due to illness or accident for as long as the incapacity to work lasts but in any event for a maximum period of up to 30 days in the first year of service, up to 90 days as of the second

year of service until and including the fifth year of service, and up to 180 days as of the sixth year of service;

- During pregnancy and during the 16 weeks following childbirth; and,
- During the employee's participation, with the agreement of the employer, at a foreign aid service assignment abroad ordered by the competent federal authority.

A notice given during a protected period will be void. However, if the notice is given prior to the beginning of such period and if the notice period has not expired prior to the start of such protected period, the running of the notice period is only suspended and continues once the protected period has expired.

The terminating party does not have to indicate any reason for terminating the employment relationship. Upon request of the other party, however, the party giving notice has to provide in writing the reason for the termination. A refusal to provide such a reason does not affect the validity of the termination, but can trigger adverse procedural consequences and could suggest an abusive termination, which is contrary to Swiss law.

The law considers a termination of employment to be abusive in the following, non-exhaustive cases:

- If the notice of termination results from a personality trait of the other party, unless that trait relates to the employment relationship or significantly impairs cooperation within the enterprise;
- If the notice of termination is given because the other party exercises a constitutional right, unless the exercise of such right violates a duty arising out of the employment

relationship or significantly impairs cooperation within the enterprise;

- If the notice of termination is given solely to frustrate claims of the other party arising out of the employment relationship (e.g., an entitlement to a bonus under the existing employment contract);
- If the notice of termination is given because the other party asserts, in good faith, claims arising out of the employment relationship (even if such claims have no ground); or
- If the notice of termination is given because the other party performs compulsory military service, civil defence service, military woman's service or Red Cross service, or is subject to a legal duty not voluntarily assumed.

The notice of termination given by the employer is also abusive if it is given:

- Because the employee belongs or does not belong to a union or because the employee lawfully exercises a union activity;
- During a period in which the employee is an elected employee representative in a company institution or in an enterprise affiliated thereto unless the employer can prove that the termination was based on justified reasons;
- In connection with a collective dismissal without prior consultation with the employees' representative body or, if there is none, the employees; or
- If such termination contradicts the employer's own behaviour (e.g., if the employer set the employee on a performance improvement plan until the end of September but in June prematurely terminates the employee for poor performance).

An abusive termination is valid; however the party that gave notice abusively must pay an indemnity to the other party. The amount of the indemnity is determined by the judge based on the circumstances of the case, but cannot exceed six months' wages. In relation to breach of consultation obligations for collective dismissals, the indemnity may not exceed two months' wages of the dismissed employee. In order to assert a claim for indemnity, the terminated party has to file a written objection against the termination with the party who gave notice of termination no later than by the end of the ordinary notice period and file the claim with the competent court within 180 days of the termination date.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

Swiss law distinguishes between employment contracts entered into for a fixed term and employment contracts entered into for an indefinite term. A fixed term employment ends without notice of termination at the end of the fixed term. No notice can, in principle, be given during such term unless the parties agreed differently. The only exception is a termination without notice for cause or if the parties had explicitly agreed on notice periods despite the fixed term.

Both the employer and the employee may terminate an employment relationship at any time without notice for cause. This applies to employment for a fixed term as well as employment for an indefinite term.

Cause is considered by law to be any circumstance under which the terminating party cannot in good faith be expected to continue the employment relationship until the end of its term or by respecting the ordinary notice period. The employee's poor performance almost never constitutes cause, and prevention from performing work through no fault of his or her own, in particular due to illness, never constitutes cause. The Swiss courts are very reluctant to accept a cause justifying a termination without notice. Depending on the seriousness of the reason, a prior formal admonition by which the employer explicitly

threatens to terminate the employment without notice is required before termination without notice can be given.

In any event, the party who wants to terminate the employment relationship without notice has to do so as soon as it becomes aware of the reasons justifying the immediate termination. As a general rule, no more than two to three days may elapse between the knowledge of the valid reason and the termination of the employment relationship.

In case of an unjustified dismissal without notice, the dismissal with immediate effect remains valid. The employee, however, has grounds for a claim for compensation representing what he or she would have earned until the expiration of the fixed employment term or, in the case of an employment relationship for an indefinite term, what the employee would have earned if the relationship had been terminated with due observation of the notice period. From this amount, the salary that the employee earned from other work or that he or she intentionally failed to earn, as well as the costs saved because of the termination of the employment relationship, have to be deducted. Furthermore, the employer has to pay an indemnity to the employee. If the parties do not agree on the amount of such indemnity, it will be fixed by the judge, taking into account all circumstances of the particular case, but it may not exceed the employee's wage for six months.

Employment contracts concluded for an indefinite term may be terminated by either party by giving notice. The parties are, in principle, free to fix the notice period in writing. However, once the probationary period has ended, the notice period may not be shorter than one month. During the probationary period, which by statutory law is one month but can be extended by written agreement to three months but also waived, the parties are free to agree upon any notice period. Notice periods cannot differ for the employer and the employee. If an employment agreement provides otherwise, the longer notice period applies to both parties. Unless the parties agreed differently, the notice only becomes effective at the last day of a calendar month.

If the parties have not agreed on notice periods in writing, the agreement can be terminated during the probationary period at any time on seven days' notice. Once the probationary period has ended, the employment can be terminated in the first year on one month's notice; in the second year and up to and including the ninth year of service, on two months notice; and thereafter on three months' notice, always to the end of a calendar month. The notice period begins on the date on which the terminated party receives the notice rather than the date on which the notice letter was dispatched.

### 2.3. Termination Indemnities

The employer is free to refuse to allow the employee to work out their notice period. However, if the employer does so refuse, it must pay full salary due during the notice period. Any commission or other variable salary components must be calculated and paid as if the employee had continued to work during the entire notice period. If the employee starts a new job during the notice period, the salary earned at such a new job can be deducted provided that the employer reserved the right to do so when releasing the employee from work. Note that even if the employer refuses to allow the employee to work during the notice period, the employment relationship continues until the end of the notice period and the employer pays the employee's full salary during such period. Payment in lieu of notice is, therefore, excluded.

According to statutory law, severance pay is only due if, upon termination of the employment relationship, the employee is at least 50 years old and if, furthermore, he or she has been employed with the same employer for at least 20 years. The amount of severance pay may be fixed by written agreement or collective bargaining agreement, but has to equal at least the employee's wages for two months. If the amount of the severance pay is not fixed by agreement, the court may fix the amount in its discretion taking into account all the relevant circumstances. The severance pay fixed by the court may not, however, exceed an amount equal to the employee's wages for eight months.

The court may reduce or deny a severance payment if the employment relationship was terminated by the employee without a valid reason or by the employer without notice for cause, or if payment of the severance would cause hardship to the employer. The severance pay will be reduced by the amount of benefits that the employee receives from a personnel welfare institution to the extent these benefits have been funded by the employer, or based on the employer's allowances. Because employers have been required, since 1985, to pay contributions to a personnel welfare institution, the statutory obligation on severance pay is, in most cases, not relevant. Quite often collective bargaining agreements provide for severance pay under lower conditions. Severance pay is also commonly provided for in employment contracts with top executives or in individual separation agreements.

#### 2.4. Law on Separation Agreements, Waivers, And Releases

The Swiss Code of Obligations explicitly lists the rights that the employee cannot waive during the term of the employment contract and one month after its termination. In particular, the employee cannot, in principle, waive in advance the protection Swiss law grants in case of pregnancy and illness. Therefore, separation agreements are valid under Swiss law only if the employee receives at least what he or she would have received had the employment been terminated by observing the ordinary notice period or if they constitute an actual settlement agreement by which the parties mutually waive some of their rights. These requirements are less strict where the separation agreement was concluded on the initiative of the employee.

#### 2.5. Litigation Considerations

Under Swiss law the party that asserts a claim based on a certain factual situation must prove such situation. This means that an employer that terminated the employment without notice has to prove that a cause exists. If, for example, the employer only assumes that an employee engaged in an illicit behaviour but is not able to prove such fact, a termination given without notice for cause due to such suspicion will not be considered justified.

As a termination is only valid at the time when the other party receives the notice, the terminating party must prove when the other party received the notice. Unless the employment contract requires a specific form, it is advisable to hand deliver the notice of termination to the employee and for the employee to countersign a duplicate thereof or to send the notice to the employee well before the end of the month by registered mail with return receipt requested.

### 3. Discrimination

#### 3.1. Laws On Employment Discrimination, Including Maternity Leave Rights, Equal Pay Issues, Child Labour

Swiss law does not have a comprehensive non-discrimination rule. In particular, an employer is free to decide whom to employ and whom to dismiss. There are only two exceptions to this rule. The first and most important exception is the principle that the employer may not discriminate against either sex. This includes a prohibition to discriminate against a person based on his or her marital status or family situation, or based on pregnancy. In particular, the employer cannot base its decision whom to employ or whom to terminate on such criteria. The law also prohibits indirect gender discrimination, i.e., measures that are not directly linked to the gender but which affect the employees of one gender more than those of the other gender. In practice, the unequal treatment of full-time and part-time workers often amounts to gender discrimination because women are still more likely to work part-time than men. The non-discrimination principle also requires that men and women receive equal pay for equal work and that their employment conditions are equal. This includes, in particular, equal professional development and career opportunities.

The second exception to the principle of freedom to terminate relates to elected employee representatives, who cannot be terminated without valid reason. In case of a restructuring the employer is, however, free to decide which employee to terminate, and the elected employee representative does not benefit from an enhanced protection from being terminated in such a case. Swiss law only prohibits the

discrimination of a single or a small group of employees if such discrimination amounts to the employer's neglecting the employee's personality, and the latter discrimination is, thus, only exceptionally accepted.

Pregnant employees can, upon simple notification, refrain from work at any time. Absences due to pregnancy are treated the very same way as absences due to sickness or military service. During the first eight weeks after the birth of her child, the employee must not work. She has the right to extend her maternity leave for another eight weeks and for as long as she is breastfeeding her child. The employee is entitled to a maternity pay equal to 80 percent, paid by the state-run insurance of her last average monthly salary but presently capped at CHF 196 per calendar day. This maternity pay starts at the date of birth of the child and terminates at the time the employee resumes work or 14 weeks after the birth of the child, whichever is earlier.

Children below the age of 15 must, in principle, not be employed. There are certain exceptions for children who are 13 and 14 years old. Employees who are younger than 16 years old may not work after 8 p.m., and employees who are younger than 18 years old may not work after 10 p.m. Employees who are younger than 18 years old must not work more than nine hours per day, including any overtime work.

### 3.2. Employee Remedies For Employment Discrimination

The law presumes gender discrimination where the person alleging a discriminatory act brings *prima facie* evidence of the existence of such gender discrimination. Persons whose job application was rejected and who feel discriminated against can request that the potential employer state in writing the reasons for this rejection. The explanation helps the applicant to assess whether gender discrimination exists.

### 3.3. Potential Employer Liability For Employment Discrimination

The sanctions in case of a violation of the obligation to treat both genders equally depend on the particular situation in which such gender discrimination takes place.

If an employer denies a job to an applicant due to gender discrimination, the employer has to compensate the applicant. However, the total compensation to be paid to all applicants who applied for one job may not exceed three months' salary for the job.

The sanctions are more severe if an existing employee is discriminated against based on his or her gender. If such person is dismissed because of gender discrimination, the dismissed employee may not only ask for a compensation of up to a maximum of six months' salary but also seek reinstatement if the employee was, without valid reason, terminated during an internal complaint or a court proceeding relating to gender discrimination or within six months after the end of such proceeding. This constitutes an exception to the principle under Swiss law that even an unjustified summary dismissal or an unfair dismissal is valid and simply entails compensation payments. Furthermore, an employee who does not receive equal pay for equal work can claim the difference and is only barred from doing so by the five-year statute of limitations, which applies to all claims arising out of the employment relationship.

### 3.4. Practical Advice To Employees On Avoiding Employment Discrimination Problems

If an employer pays different salaries to men and women it has to justify such difference. If the difference is due to labour market conditions, the salaries must be adjusted over a relatively short period of time. The Swiss Federal Supreme Court may also require an employer, in a case where it is using market conditions to justify hiring a man at a higher salary than a female employee in a similar position, to submit evidence of the market conditions that allegedly required the employer to pay a higher salary to get the employee to sign the employment contract.

Employers should be particularly attentive to indirect gender discrimination and should, in particular, thoroughly assess whether different treatment of part-time workers could amount to indirect gender discrimination.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Under the Federal Act on Equal Treatment of Women and Men, sexual harassment is considered to be a form of gender discrimination. The Act explicitly states that threatening an employee, promising advantages to an employee or coercing an employee to submit to a sexual conduct is sexual harassment. The employer is required to take all necessary and adequate measures to prevent gender discrimination.

### 4.2. Employee Remedies For Sexual Harassment/Potential Employer Liability For Sexual Harassment

A victim of a sexual harassment may sue the employer if the employer cannot prove that it took all the measures that are necessary and adequate to avoid any sexual harassment. In addition, an indemnity of up to six times the average monthly salary paid throughout Switzerland for this kind of jobs is due. So far, only a few court decisions exist with respect to sexual harassment, and they have almost exclusively been made in connection with a termination of the harassed employee. Such terminations are considered to be abusive by the courts, which then fix a maximum compensation in favour of the harassed employees. The indemnity, which is due for sexual harassment, and the indemnity for abusive termination can be cumulatively awarded. The labour court of Zurich awarded the maximum amounts in a case where two waitresses who complained about sexual harassment by their superior were terminated because of such (well founded) complaint.

#### 4.3. Practical Advice To Employers On Avoiding Sexual Harassment Problems

Employers in Switzerland should make their employees aware that they do not tolerate any form of sexual harassment and that any form of sexual harassment will be punished. The adoption of a policy to avoid sexual harassment and of compliance procedures is, therefore, highly recommended. Such policy should also set out the procedures that employees can initiate if they consider themselves to be victims of a sexual harassment.



## Taiwan

### 1. Introduction

The Republic of China (**Taiwan**) has certain mandatory laws for employee protection. The major law concerning termination of employment is the Labor Standards Law (**LSL**). Since January 1, 1999, the LSL is applicable to almost all of the industries in Taiwan, with the exception of a very few lines of business. The LSL provides the mandatory terms and conditions of employment and is applicable to all expatriates and employees, including those at the managerial level. Under the LSL, Taiwan employees have rather strong rights in regard to terminations, and other working conditions such as minimum working hours and overtime rates.

The concept of “termination at will” (dismissing an employee for any reason, without notice, and at any time) is not permissible under the LSL, even if the employee agrees to it in his or her employment contract. The only exception in the LSL is a managerial person who is appointed by the board of directors (e.g., general manager), is registered in the company’s corporate card filed with the Taiwan government, and signs an appointment agreement (rather than an employment agreement) with the company. Such a person is deemed to be the representative of the company, and thus exempted from the LSL.

Courts in different cities of Taiwan interpret the LSL in a rather unified way because they rely on the rulings issued by the labor authorities (the Council of Labor Affairs in the central government and the Labor Bureau in the local governments). However, where the rulings by the labor authorities are contradictory, the courts will make their decisions independently based on their interpretations of the relevant law provisions.

Taiwan’s laws concerning employment discrimination and harassment against employees are rather limited. These rules mostly are set forth in laws or regulations with respect to criminal law or social order

maintenance regulations. The only independent rule regarding anti-sexual harassment is established in the biggest metropolitan area, i.e., Taipei City.

Litigation involving employment disputes has become more prevalent than ever in Taiwan since the LSL was expanded to cover most industries in Taiwan. However, most labor law disputes are related to terminations rather than to sexual harassment or discrimination.

## 2. Terminations

### 2.1. Restrictions On Employers

Articles 11 and 12 of the LSL provide the statutory causes for which an employer may terminate an employment relationship. If a termination is not based on any cause under these two Articles, the employee is entitled to claim that the termination is illegal.

Article 11 of the LSL outlines the circumstances under which an employer can terminate a labor contract *with* advance notice, including when:

- (i) The employer's business is suspended or assigned;
- (ii) There is an operating loss or business contraction;
- (iii) Forced majeure necessitates business suspension for more than one month;
- (iv) A change in business nature requires a reduction in the number of employees, and the particular employee cannot be assigned to other proper positions; or
- (v) A particular employee is confirmed to be incompetent for the work required of him or her.

Article 12 of the LSL outlines circumstances under which an employer may terminate a labor contract *without* advance notice, including when:

- (i) An employee misrepresents any fact at the time of signing his or her labor contract in a manner that might mislead the employer and cause the employer to sustain damage;
- (ii) An employee commits violence or utters gross insults at the employer, the employer's family members or agents, or fellow employees;
- (iii) An employee has been sentenced to temporary imprisonment in a confirmed judgment, but is not granted a suspended sentence or permitted to commute the sentence on payment of a fine;
- (iv) There is a gross breach of the labor contract or a gross violation of work rules;
- (v) An employee deliberately ruins machinery, tools, raw materials, products or other property of the employer, or deliberately discloses any technological or confidential business information of the employer, thereby causing the employer to sustain damage; or
- (vi) An employee is absent from work without proper cause for three consecutive days or six days in a month.

In all of these situations (with the exception of cases of temporary imprisonment), the employer must terminate the labor contract within 30 days of becoming aware of the qualifying event.

## 2.2. Notice Provisions/Consequences Of A Termination In Violation of the LSL

If an employer terminates an employee for one or more of the reasons under Article 11 of the LSL, the employee is entitled to severance pay based on his or her years of service and prior notice (or payment in lieu of notice). For example, if a company is to be merged with another company, it may invoke Article 11(1) of the LSL to dismiss its employees and pay them money in lieu of prior notice in addition to the severance pay.

Article 16 of the LSL outlines notice requirements for contracts terminated under Article 11. It requires 10 days of advance notice where an employee has worked continuously for the same employer for more than three months but less than one year; 20 days' advance notice when an employee has worked continuously for the same employer for between one and three years; and 30 days' advance notice when an employee has worked continuously for the same employer for more than three years.

An employment agreement is not terminable at the employer's wish unless any of the statutory causes for termination exists under the above relevant articles. If an employer terminates an employee for reasons other than these statutory causes, the employee may file a lawsuit with the court, requesting to be reinstated to the previous position and compensated with salary for the period of illegal termination. Alternatively, the employee may choose to be compensated with salary for the period of the illegal termination period as well as the money in lieu of required prior notice before severance.

## 2.3. Mass Severance

The Mass Severance Protection Law (**MSL**) applies when an employer intends to lay off its employees under Article 11 of the LSL and one of the thresholds under the MSL is met. The MSL is triggered when an employer with a certain number of employees on a site is intending to lay-off a certain percentage of the employees

within a certain number of days. The MSL specifies three instances where the law may be triggered.

When the MSL is triggered, the employer is required to follow specific procedures, including reporting to the local competent authority and the affected staff of the Mass Severance Plan (MSP) 60 days prior to the termination date of the employment, forming a negotiation committee within 10 days after submission of the MSP, etc. The negotiations with the employees representatives need to take place biweekly, and there is no payment in lieu of the 60-day negotiation time and advance notice. An employer will be subject to administrative fines ranging from TWD 100,000 to TWD 500,000 for violation of the above requirement.

#### 2.4. Termination Indemnities

In addition to advance notice (or payment in lieu thereof), Article 17 of the LSL requires an employer to pay separation fees to employees terminated for reasons outlined under Article 11 based on the years of service accrued under the LSL (the so-called old pension system, or “Old Scheme,” a defined benefit program). It requires a severance fee equivalent to one-month’s average salary for each full year in which the employee has worked continuously for the company. In cases where the employment is less than one year and for partial years, the severance pay must be computed proportionately. Service periods of less than one month must be computed as one month.

The new pension system under the Labor Pension Act took effect July 1, 2005 (the “New Scheme,” a defined contribution program). Employees who opted for the New Scheme or who were hired after July 1, 2005, will be entitled to one-half month of average salary for every year of service accrued under the New Scheme with a maximum payout of six months’ salary.

In addition to advance notice and the severance fee, the employer is required to submit a list of terminated employee(s) to the local competent authority as well as the Public Employment Services

Agency at least ten days prior to the employees' termination date under Article 33 of the Employment Service Act.

In cases of mergers, Article 20 of the LSL provides an alternative that allows the merged company and the surviving company to have consenting employees continue to work for the surviving company. In such cases, the employees will not receive a severance fee from the merged company, but the surviving company must acknowledge their prior seniority. Employees may consent to such an arrangement in order to maintain their entitlement to the pension for their prior seniority.

An employer is not obligated to pay severance to an employee for termination if the employee is found to have engaged in misconduct under Article 12 of the LSL. Some of the misconduct described in Article 12 of LSL is rather vague (e.g., where there is a gross breach of the labor contract or a gross violation of work rules, the employee may be terminated without entitlement to severance pay). Disputes often arise as to whether an employee's behavior constitutes misconduct for purposes of this Article. Therefore, an employer's work rules should describe any legitimate causes for termination with specificity.

## 2.5. Law On Separation Agreements, Waivers, And Releases

There are no laws in Taiwan with respect to separation agreements, waivers and releases. Nevertheless, it is becoming more common for employers to seek a release of liability from employees at the time of their termination in order to avoid future arguments as to whether or not the termination was legitimate. Taiwanese law does not require consideration for such separation agreements, waivers and releases. However, if an employer seeks a release of potential claims without paying any severance fee, Taiwanese courts usually will examine whether a statutory termination cause exists. If an employee signs a release of potential claims for termination after receipt of severance pay, the Taiwanese courts are less likely to examine the termination causes.

## 2.6. Litigation Considerations

The majority of employment disputes that entail litigation in Taiwan involve wrongful termination. Since the LSL was expanded to cover most of the Taiwan industries, more and more cases will be brought in courts over employment-related disputes. Some employees do not retain a lawyer to argue a case on their behalf, as Taiwanese law does not require a litigant to be represented by an attorney. This is also because Taiwanese law does not require the party who loses a lawsuit to pay for the adverse party's attorney fees.

## 3. Employment Discrimination

### 3.1. Laws On Employment Discrimination

Taiwan's general rule against discrimination is set forth in Article 7 of the Constitution, which states that "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law."

This provision of the Constitution, however, is not directly applicable to an employee's remedy for discrimination during court proceedings. An employee who is discriminated against by his or her employer will typically base a claim on Article 184 of the Civil Code, which provides that "A person who, intentionally or by his own fault, wrongfully injures the rights of another is bound to compensate him for any damage arising therefrom. The same rule applies when the injury is done intentionally in a manner contrary to the rules of good morals. A person who infringes a statutory provision enacted for the protection of others is presumed to have committed a fault."

In addition, because discrimination against an employee involves personal rights, Article 18 of the Civil Code also may be applicable. This article provides that "If any personal rights are unlawfully infringed, application may be made to the court for the suppression of the infringement. Under the above circumstances, action for damages or for emotional compensation may be brought forth only in those cases which are specifically provided by law." According to Articles

17, 19 and 195 of the Civil Code, as well as court decisions, the personal rights in Article 18 include a person's liberty, name, body, health and reputation. By analogy, discrimination against an employee may be considered to have damaged the employee's reputation and thus fall under these Articles.

Another law relating to employment discrimination is the Protection Act for Rights and Interests of (Physically and Mentally) Disabled Citizens. Article 38 of this law requires a private organization that has 100 or more employees to hire physically or mentally disabled employees, totaling at least 1 percent of the whole staff. Violation of this article will subject the employer to a contribution to the welfare fund for persons with disabilities established by the Taiwanese government. The amount of the contribution is equal to the basic salary of the disabled employee that the employer failed to hire in compliance with the regulations.

### 3.2. Employee Remedies For Employment Discrimination

An employee who wins an employment discrimination case can recover damages caused by the discrimination. However, Taiwanese law does not provide a specific rule to determine actual damages. The employee has to prove that the employer intentionally or negligently behaved in a discriminatory fashion in order to prove injury to his or her rights pursuant to Article 184 of the Civil Code. In cases where the alleged discrimination cannot be proved to have caused any harm to the employee, a Taiwanese court may not find in favor of the claim.

### 3.3. Potential Employer Liability For Employment Discrimination

An employee can sue both the employer and the person responsible for the discrimination. The employee's legal ground for filing the lawsuit against the company is Article 188 of the Civil Code, which provides that "The Employer is jointly liable to make compensation for any damage which the employee wrongfully causes to the rights of another person in the performance of his duties." However, the employer is not liable for damages if it exercised reasonable care in the selection of the employee and in supervising his or her duties or if

the damage would have been occasioned regardless of such reasonable care. An employer also may defend itself by demonstrating that the acts of discrimination were not committed during the performance of the alleged violator's duties or with the instructions and authorization of the company's top management.

### 3.4. Practical Advice To Employers On Avoiding Employment Discrimination Problems

In Taiwan, there are very few cases brought alleging employment discrimination. However, it is advisable for employers to establish a solid system for maintaining appropriate employee records, documentation of personnel decisions and appropriate decision-making with respect to discipline, evaluation and terminations. The rules regarding discipline, evaluation and terminations are required to be set forth in a company's work rules if the company has 30 or more employees.

### 3.5. Law Concerning Gender Work Equality

The Gender Equality in Employment Law (**GEEL**) aims to protect the equality of work between the genders. Among other things, it prohibits the employer from discriminating against an employee based on his or her gender in any aspect of the employment. Article 13 of the GEEL also requires the employer to prevent and correct sexual harassment from occurring in the workplace. Under the same article, an employer hiring over 30 employees is required to adopt measures for preventing and correcting sexual harassment and must display these measures in the workplace. The GEEL also provides some female-oriented rights, including menstruation leave and extended maternity leave. Both female and male employees are entitled to maternal/paternal leave under Article 16, provided that they have been in service with the employer for one year and the employer hires more than 30 employees.

In addition to the above, under the GEEL, employees are entitled to various child-care related benefits and rights, and the law provides

remedies and appeal procedures when an employee is injured as a result of the employer's violation of this law.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

If an employee encounters sexual harassment in the workplace or in situations relating to work, the employee may allege criminal offenses under Article 224 of the Criminal Code, which provides that "A person who renders resistance impossible by threats or violence, by administering drugs, by inducing hypnosis, or by other means, and who commits an indecent act against a male or female person shall be punished with imprisonment for not more than seven years." Article 304 of the Criminal Code may also be implicated by workplace sexual harassment. It provides that threats against another person to do a thing that he or she has no obligation to do, is punishable with imprisonment for not more than three years, detention or a fine of not more than TWD 300.

Article 83(3) of the Social Order Maintenance Act provides that anyone who teases persons of the other sex by using obscene language, gestures or any other means can be punished with a fine of not more than TWD 6,000. The Taipei City Government has also enacted a rule prohibiting sexual harassment. However, the measure is more in the manner of an administrative policy and no punishment is provided in cases of violation.

More specifically, Article 25 of the Prevention of Sexual Harassment Act imposes criminal penalty on "intentional sexual harassment." The Article defines intentional harassment as "kissing, hugging or touching the buttocks, breast, or any other private parts" of another. A person who is found to have violated the above article is required to offer compensation to the injured party for his or her damages and will be required to take proper measures to restore the injured party's reputation, if such reputation is damaged. In addition, the person who violated the article will be fined between TWD 10,000 and TWD 100,000 by the competent authorities and may be imprisoned for a

definite term of less than two years, be required to provide forced labor service under detention, or pay a fine of less than TWD 100,000.

#### 4.2. Employee Remedies For Sexual Harassment

The possible offenses described above may be initiated only upon a complaint (i.e., a prosecutor cannot initiate a criminal action unless a complaint has been filed with the prosecutor's office) filed by either the actual victim or the victim's spouse. For the offenses under the Criminal Code, the complaint must be filed within six months from the date the person entitled to complain was informed of the occurrence of the incident and the identity of the offender. For an offense under the Social Order Maintenance Act, the complaint must be filed within two months.

#### 4.3. Potential Employer Liability For Sexual Harassment

If a company's staff members or managers are found to have engaged in sexual harassment, the company may be found liable under Taiwanese law. Similar to an employer's liability in cases of discrimination, Article 184 (which requires those who injure the rights of others to compensate them for damages) and Article 188 of the Civil Code (which requires employers to exercise reasonable care in the selection and supervision of its employees) can also be applied in cases of sexual harassment.

In its defense, the employer must prove that the acts of sexual harassment were not committed by the violator during the performance of his or her duties and not with the instruction or authorization by the company's top management. In addition, if the acts of sexual harassment are committed after working hours and during social contact between employees at their own initiative, the employer may not be found liable.

However, the employer will be subject to joint civil liability for the sexual harassment, unless the employer can show that it has complied with the Gender Equality in Employment Act and other relevant regulations and has exercised necessary care to prevent such incident

from occurring even though its efforts have failed (Article 27 of Gender Equality in Employment Act).

#### 4.4. Practical Advice To Employers On Avoiding Sexual Harassment Problems

The Taiwan government now encourages an employer to have an anti-sexual harassment policy and complaint procedure. With such a policy, it is easier for an employer to defend against sexual harassment charges. Accordingly, employers in Taiwan are encouraged to include such a policy and complaint procedure in their personnel policies. The policy should define sexual harassment, prohibit it as a matter of company policy, provide an avenue for aggrieved employees to make complaints regarding what they believe to be sexual harassment, and authorize disciplinary action against any harassers.

## Thailand

### 1. Introduction

The major laws that determine the relationship between employers and employees in Thailand are the Civil and Commercial Code, the Labor Relations Law, the Labor Protection Act, the Labor Court and Labor Procedure Law, the Workmen's Compensation Law and the Social Security Law. The Thai labor force is largely non-unionized, so collective agreements do not play a large part in regulating working conditions. The Ministry of Labor and Social Welfare is the authority responsible for setting and enforcing minimum employment standards.

The Labor Protection Act governs termination, discrimination and sexual harassment. Among other things, the Labor Protection Act prescribes minimum working standards for the purpose of protecting employees against exploitation by employers. The Labor Protection Act includes provisions for general labor protection, protection for children and women, minimum remuneration, wage bonds, severance pay, welfare and safety at work, employee welfare funds and labor inspectors. The Constitution of Thailand also provides equality for men and women and bars discrimination based on certain criteria.

### 2. Terminations

#### 2.1. Restrictions On Employers

Under Thai law, an employer has no legal restrictions on its ability to dismiss an employee, unless the employee is a member of an employee committee, which is required for a workplace with 50 or more employees. To terminate a member of an employee committee, an employer must first receive prior permission from a Thai court. In addition, the Labor Relations Law imposes criminal liabilities upon the employer, among others, for termination of employees who exercise their rights thereunder, including submission of a labor demand, termination on the grounds of labor union membership or for termination of employees involved in a labor demand while a collective bargaining agreement remains in force. An employee

whose employment is terminated may, depending on the cause of termination, have certain entitlements, each of which are independent from the other and may not be waived by payment of the others.

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

When an employee is hired for an indefinite period of employment (rather than a fixed period), the employer is required to give advance written notice of termination to the employee of at least a normal wages period, on or before any pay day, so that termination of the employment contract will take effect on the next pay day. In any case, the notice of termination need not be longer than three months. For example, in cases where the employment is for an indefinite term and the employee is paid on the 30th day of the month, the employee may be dismissed by advance written notice, under which the termination will be effective on the next payment date following the notice (“effective date”). Therefore, if the notice was issued on June 7th, the employee must be paid up until July 30th. The employee would be paid his or her usual monthly salary on June 30th as well as the salary for July. Any other entitlement payments (e.g., severance pay) also would be paid out on July 30th.

Alternatively, the employer may choose to terminate the employee by written notice with immediate effect by making an immediate payment in lieu of the notice period. The payment must be equivalent to the salary due if the employee was terminated with ordinary notice. For example, if the employer terminates the employee on June 7th with immediate effect, then the salary up to June 7th, the payment in lieu of notice for the period of June 8th to July 30th, and any other entitlement payments (e.g., severance pay) must be paid on June 7th.

Advance notice of termination or payment in lieu of notice is not required in cases where an employee is terminated for willfully disobeying or habitually neglecting the lawful orders of the employer, deserting his or her work, misconduct, or acting in a manner

incompatible with the expected and faithful discharge of his or her duty.

In cases where a company dismisses employees due to improvement of the organizational structure, manufacturing process, sales or service, which resulted from the use of new machinery, or a change of machinery or technology, the employer is required to give at least 60 days' advance notice and the reason for termination to the employees as well as to the relevant labor official.

If a company relocates and that relocation affects the normal living of an employee or his or her family, the employer must inform employees of the move at least 30 days prior to the date of relocation otherwise pay them special compensation in lieu of the advance notice equaling 30 days' wages. An employee who does not wish to relocate to the new workplace can terminate the employment contract within 30 days from the date of notification or relocation (whichever is applicable) and is entitled to special compensation at the rate of statutory severance pay.

### 2.3. Termination Indemnities

An employer is required to provide severance pay to an employee who is dismissed without a statutory cause, provided that the employee has worked for at least 120 days. The amount of severance pay varies according to the period of service with the employer as follows:

<b>Period Of Service</b>	<b>Rate Of Severance Pay</b>
120 days but less than 1 year	30 days' wages
1 year but less than 3 years	90 days' wages
3 years but less than 6 years	180 days' wages
6 years but less than 8 years	240 days' wages
10 years or more	300 days' wages

In cases of a reduction in the number of employees due to improvement of the organizational structure, manufacturing process, sales or service, which resulted from the use of new machinery, or a change of machinery or technology, employees who have six years or more continuous service are entitled to an additional special compensation (in addition to the severance pay) at a rate of not less than the last wage for 15 days for each full year of service, subject to a maximum of 360 days.

Additionally, the law entitles employees to at least six working days a year as annual holiday. However, employees who have worked less than one full year cannot use their first year's entitlement. The first year's entitlement of six working days can be used once they begin the second working year. The employer may pro-rate the annual holiday otherwise the employee will be entitled to use the entire annual holiday up front at the beginning of the given year. In the event that the employee has accrued but has unused annual leave, he or she is entitled to payment in lieu of such unused leave upon termination.

There are some exceptions to the obligation to pay severance compensation. Employees with a fixed term contract of no longer than two years who are terminated within their contract period, in particular those who perform:

- (i) work on a particular project that is not the normal business or trade of the employer upon which there must be the definite commencement and termination date of work;
- (ii) work that is temporary and has a stipulation of termination or completion of work; or
- (iii) seasonal work do not qualify for severance pay.

Severance pay is also not required in cases where the termination of employment occurs where the employee:

- (i) is dishonest in the exercise of duty or intentionally commits a criminal offence against the employer;
- (ii) intentionally causes damage to the employer;
- (iii) violates any work regulations, or lawful and fair orders of the employer, for which a warning in writing has previously been given by the employer and the employee repeats the violation within one year, except in a serious case where the employer is not required to give such a warning;
- (iv) neglects duties for three consecutive regular working days without a reasonable excuse;
- (v) is negligent whereby serious damage is caused to the employer; or
- (vi) has been sentenced to imprisonment by final court judgment. If the offence committed is through negligence or is a minor offence, it must be a case where damage has been caused to the employer.

In cases where the employee has been relocated at the expense of the employer to perform a specific job, the employer is bound, unless otherwise provided in the employment contract, to pay the cost of the return journey when the employment agreement ends. This is required where:

- (i) the contract has not been terminated or extinguished by reason of the act or fault of the employee; and
- (ii) the employee returns within a reasonable time to the place from which he or she was relocated.

#### 2.4. Laws On Separation Agreements, Waivers, And Releases

To avoid exposure to a claim of damages for unfair termination by an employee, particularly in the case where there is no statutory or justifiable reason for termination, it is not uncommon for an employer to offer the employee a lump-sum payment that may represent the severance pay, payment in lieu of notice of termination and payment in lieu of unused annual vacation. In return for such payment, the employee should be required to sign a letter of resignation and a release whereby the employee waives his or her rights to claim any further damages against the employer as a result of his or her resignation.

Under Thai labor law, an employee's resignation does not entitle the employee to any severance pay or other mandatory termination payments. Based on the Supreme Court precedents, the release agreement may be unenforceable if the employee's signature was not freely given. Some of the Supreme Court precedents provide that the release agreement would be acceptable if it is signed after the termination date. This is because the court would consider that at that time, the employee and the employer are at the same hierarchical level so the release agreement would be deemed to be signed of the employee's own free will and not under the employer's orders.

#### 2.5. Litigation Considerations

An employee may contest the termination of employment before a Labor Court. If the Labor Court deems the termination to be unfair or unjustified, it may order the employer to reinstate the employee at the wages prevailing at the time of termination. In the event that the employee cannot work with the employer (e.g., the relationship between the employer and employee has deteriorated to such an extent that the resumption of the employment would not be feasible), the Labor Court may alternatively order the employer to pay damages for unfair termination, taking into consideration the age of the employee, length of service, hardship suffered by the employee as a result of the termination, the cause of the termination and the amount of severance pay the employee is entitled to receive.

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

The Constitution of Thailand prohibits discrimination based upon place of birth, nationality, language, gender, age, physical or health condition, economic or social status, religious belief, education or training, or political ideology. In addition, the Labor Protection Act prohibits discrimination based upon gender in the matter of employment, unless equal treatment is not possible due to the nature of the particular work.

The Labor Protection Act imposes restrictions on the types of work that an employer can allow women and children employees to handle. It is reasoned that these restrictions exist to protect the individual rather than to exclude the individual from certain forms of labor.

For example, an employer is prohibited from allowing a female employee to engage in various types of unsafe underground or submerged construction, scaffolding work above a certain height, production and transportation of explosives, or other forms of labor as prescribed in Ministerial Regulations. Nor can an employer, among other things, instruct a pregnant female employee to work between 10 p.m. and 6 a.m., overtime, on a holiday, or to work with machinery or engines that vibrate, involve driving or conveyance, carry objects weighing more than 15 kilograms, or to do vessel work or other work as stipulated by the Labor Ministry.

An employer is also restricted from terminating a female employee on account of her pregnancy. Pregnant employees are entitled to take maternity leave of not more than 90 days per pregnancy, inclusive of holidays. Remuneration is given for up to 45 days of the maternity leave. A pregnant employee may request the employer to change her current job responsibilities on a temporary basis either before or after the pregnancy.

Ministerial Regulations N°7 provides certain relaxations for the restricted work of a pregnant female employee. The employer may instruct a female employee to work in a professional or academic capacity concerning exploration, drilling, refining and manufacturing products from petroleum or petrochemicals if the work is not a danger to the health or the body of such employee. In addition, it also allows the employer to instruct a pregnant female employee who works in an executive position, academic capacity, administrative capacity or a capacity concerning finance or accounting to work overtime on a working day insofar as it does not affect the health of the employee, provided that the consent of the employee has been obtained each time.

The Labor Protection Act prohibits children under 15 years old from undertaking employment. It also imposes some procedures and restrictions when employing children under 18 years old to protect their well-being, such as prohibiting a minor from working with smelting, hazardous material, micro-organisms, bacteria, radiation, explosives, forklifts, cranes, electric or motorized saws, cleaning of machinery, or engines in operation. Children are also afforded various rights under the law in the interest of developing and promoting their quality of life and work performance. Such rights include remunerable participation in seminars and meetings, receiving training or taking leave for participation in activities organized by governmental, educational or private organizations.

### 3.2. Potential Employee Remedies/Employer Liability For Employment Discrimination

The Constitution does not expressly provide remedies or penalties for violation of the anti-discrimination provisions. However, since such violation constitutes a wrongful act under the Civil and Commercial Code (CCC), the injured party may claim damages from the employer. The CCC provides that a person who commits a wrongful act is bound to pay compensation for willfully or negligently injuring the life, body, health, liberty, property or any right of another person.

Violation of the anti-discrimination provisions under the Labor Protection Act may subject the employer to a maximum fine of THB 20,000 (approximately USD 700). Moreover, the injured employee may claim damages from the employer on the ground of a wrongful act under the CCC.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

The Labor Protection Act prohibits an employer, work chief, supervisor or inspector from sexually harassing any employee (not only a woman or child employee as previously regulated).

However, such prohibition does not extend to cover harassment among employees of the same rank. Also, the law is silent as to what activity would constitute sexual harassment or whether the employer, where it is a company or other form of corporate entity, will also be liable for the sexual harassment committed by its directors, officers or the relevant employees. No court decisions have addressed such issues.

Violation of the harassment provision may result in a maximum fine of THB 20,000 (approximately USD 700). The harassed employee is also able to claim for damages on the grounds of the wrongful act under the CCC.



## United Arab Emirates

### 1. Introduction

The United Arab Emirates (the “UAE”) is a federation of the seven Emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Umm Al Quwain and Ras Al Khaimah. There are within the UAE a number of designated free zones, certain of which have been exempted from the federal laws of the UAE relating to civil and commercial matters.

Labour matters in the UAE are governed by Federal Law No. (8) of 1980 Regarding the Organization of Labour Relations, as amended (the “Labour law”). Within free zones, certain specific employment rules can apply, which the relevant free zone authority is responsible for enforcing (those rules are beyond the scope of this discussion). For most free zones, the employment rules in place have been based on the Labour Law. The Dubai International Financial Centre, a financial free zone in Dubai, introduced its own employment law in 2005 (Employment Law No. 4 of 2005), with the aim of ensuring that employees working in that particular free zone received minimum international standards and conditions of employment.

Labour disputes in the UAE are subject to the exclusive jurisdiction of UAE courts following an initial mediation referral to the competent department at the UAE Ministry of Labour. The UAE courts are not bound by precedent and as such, matters are reviewed on a case-by-case basis.

As a general matter, it should be noted that the Labour Law recognises “fixed term” (terminates at a specified time) and “open-ended” (does not stipulate an end date) contracts. The Labour Law details the conditions for terminating an employment contract and the financial implications of doing so.

### 2. Termination

An employment contract can be terminated at any time during the probationary period or, alternatively, for the following reasons:

- if a contract is for a fixed term, on expiry of the fixed term, or if the employee engages in the type of behaviour outlined in Article 120 of the Labour Law (see below); and
- if a contract is “open ended”, for a “legitimate reason.” A legitimate reason is usually connected with the employee’s performance or conduct.

## 2.1. Termination Under Article 120 Of The Labour Law

An employer may in certain instances dismiss an employee without notice or payment of end of service gratuity. There are ten specified reasons under the Labour Law (set out in its Article 120) in which such summary termination can take place, as follows:

- (i) If the employee adopts a false identity or nationality or submits forged certificates or documents;
- (ii) If the employee is engaged on probation and is dismissed during the probationary period or on its expiry;
- (iii) If the employee makes a mistake resulting in substantial material loss to the employer, on condition that the employer notifies the Labour Department of the incident within 48 hours of becoming aware of its occurrence;
- (iv) If the employee disobeys instructions respecting industrial safety or the safety of the workplace, on condition that such instructions are in writing and have been posted at a conspicuous place and, in the case of an illiterate employee, that he/she has been acquainted with them orally;
- (v) If the employee does not perform his/her basic duties under the employment contract and persists in violating them despite the fact that he/she has been the subject of a written investigation for this reason and has been warned that he/she will be dismissed if such behaviour continues;

- (vi) If the employee reveals any secret of the establishment in which he/she is employed;
- (vii) If the employee is finally sentenced by a competent court for an offence involving honour, honesty or public morals;
- (viii) If the employee is found in a state of drunkenness or under the influence of a drug during working hours;
- (ix) If, while working, the employee assaults the employer, the responsible manager or any of his/her work mates; or
- (x) If the employee is absent from work without a valid reason for more than 20 non-consecutive days, or more than seven consecutive days in a given year.

## 2.2. Termination By An Employer For A “Legitimate Reason”

Under an “open-ended” contract, the employer can exercise the contractual right to terminate the employment on notice. However, the employer’s freedom is somewhat restricted under the Labour Law, which requires a “legitimate reason” for termination, and also requires for such termination not to be “arbitrary”.

It is generally admitted that “legitimate reasons” for termination are reasons that are based on grounds of performance or conduct (without such grounds reaching the seriousness threshold of Article 120 of the Labour Law).

Arbitrary termination is defined under Article 122 of the Labour Law whereby: “termination by the employer of an employee’s service is considered arbitrary if the cause for such termination has nothing to do with the work”.

Where an employee is terminated for a “legitimate reason”, notice must be served on the employee and end of service gratuity must be paid in accordance with the Labour Law.

Where an employee's termination is deemed "arbitrary", the employee can seek compensation under the Labour Law up to a maximum of three months' wages.

### 2.3. Redundancies

Laws in the UAE do not recognise the concept of redundancy. Instead, a redundancy process must fall within the existing termination provisions of the Labour Law. In at least some prior instances, the UAE courts have decided that redundancies due to mergers and/or downsizing are not cases of "arbitrary" termination. However, while there have not been recent notorious cases on the matter, the Ministry of Labour has informally indicated that it expects some compensation to be paid to an employee made redundant.

### 2.4. Notice

In accordance with the Labour Law, a person employed under an "open-ended" contract must receive a minimum of 30 days' notice, or longer as may be agreed between the parties.

Notice periods cannot be waived or reduced. Where the employer does not require or wish that the employee work through their notice period, they must pay the employee in lieu of notice. In turn, an employee who does not provide adequate notice would be liable to pay compensation to the employer for the outstanding notice period. The only exception to this rule (i.e., where the notice requirement would not need to be observed) is when the employee is terminated for one of the reasons specified under Article 120 of the Labour Law.

### 2.5. End Of Service Gratuity

The end of service gratuity awarded to the employee is dependant on the length of time the employee has worked. The end of service gratuity is calculated in accordance with the Labour Law provisions, unless a higher rate has been agreed between the parties. An employee who has completed a minimum of one year's service and whose contract expires or is terminated is normally entitled to receive end of service gratuity.

Under the Labour Law, end of service gratuity is calculated at 21 days' basic wage for the employee's first five years of service (and pro-rata in respect of each incomplete year of service after the first year), and 30 days' basic wage for each year of service thereafter.

Where the employee resigns from his/her position and the employment contract is "open-ended", the employee's end of service gratuity entitlement would be reduced and the employee would be entitled to receive the following:

- (a) one-third of the gratuity amount where he/she has between one to three years of service;
- (b) two-thirds of the gratuity amount where he/she has between three and five years of service; or
- (c) the full gratuity amount where the employee has over five years of service.

No gratuity entitlement is awarded where an employee on a fixed term contract resigns from his/her position and has less than five years of service.

End of service gratuity is capped at two years' basic wage. Basic wage is the wage stipulated in the employment contract that includes salary and commissions but does not include allowances such as housing, transport, etc. The Ministry of Labour typically uses the average commission paid to the employee during his/her last six months of employment where the basic wage includes a commission component. An employee will not be entitled to any end of service gratuity if they have been dismissed for one of the reasons listed under Article 120 of the Labour Law.

Payments made by an employer into a pension fund or into a retirement, insurance or similar scheme may discharge the employer's legal obligation in respect of the end of service gratuity for the relevant employee(s). At the end of the employment, the employee

would be paid the savings balance in his/her pension account or the end of service gratuity due under the Labour Law, whichever is greater. This would however need to be clearly stated in the rules of the pension fund or scheme and, eventually, in the employment agreement as well. The employee may otherwise benefit from both payments.

## 2.6. Consultation Requirements

There are no unions, work councils or employee collectives of this nature within the UAE labour market.

## 3. Employment Discrimination

There are no anti-discrimination provisions in the Labour Law. There is, however, a positive discrimination requirement which states that, in the event of unavailability of UAE national workers, preference will be given to workers of other Arab countries, and then workers of other nationalities.

In 2010, a Resolution that represents an effort to increase the participation of UAE nationals in private sector professional roles was issued by the UAE Ministry of Labour. In addition to setting forth penalties and black points for violations of labour regulations, the Resolution provides an incentive for private sector Emiratisation by reducing the bank guarantees companies are required to provide for sponsoring foreign employees.

## 4. Sexual Harassment

There are no provisions in the Labour Law dealing with sexual harassment, although harassment may be a criminal offence under the UAE Penal Code.

## United Kingdom

### 1. Introduction

Employment protection in the UK is primarily statutory in origin. In addition to the statutory provisions (as interpreted by the courts and Employment Tribunals over the years), there are Codes of Practice in some areas (such as discrimination and dismissal procedure) that are issued by government-sponsored bodies. The Codes are not legally binding but they must be taken into account by Employment Tribunals when deciding cases - and should therefore be taken into account by employers. Contract law (which derives from common law rather than legislation) also plays a significant part in employment protection.

Much employment protection derives from the European Union. As part of the European Union (EU), the UK is subject to EU employment legislation, some of which applies directly to UK employees, but the majority of which lays down minimum standards that need to be implemented locally by each Member State. Consequently the laws in different Member States are often very different, even though they originate from the same EU legislation.

It is worth stressing that the United Kingdom is divided into three separate legal jurisdictions: England & Wales, Scotland, and Northern Ireland. Each jurisdiction is subject to its own laws in certain areas, but the law is usually very similar, and often identical.

There has been a significant increase in awareness amongst employees of their employment rights over recent years. National newspapers regularly publish articles concerning employment disputes with well-known companies or individuals, particularly discrimination claims, and that has increased awareness further. Claims are very common: the Employment Tribunals received over 218,000 cases over the period April 2010 to March 2011.

Most claims in England and Wales are heard by specialist Employment Tribunals. A much smaller number of claims, including larger contractual claims, are heard before the UK's traditional courts (the High Court or County Court).

## 2. Terminations

### 2.1. Restrictions On Employers

There are two main legal restrictions on an employer when dismissing an employee under UK law: (i) unfair dismissal legislation; and (ii) the rights that the employee has under his or her contract of employment.

UK unfair dismissal legislation provides that an employer can only lawfully dismiss an employee if: (i) it has a “fair” reason to dismiss; and (ii) it follows a fair and reasonable procedure. It is worth noting that for these purposes the expiry of a fixed-term contract is treated as a dismissal.

There are five reasons that are treated as “fair” reasons under the legislation: (i) redundancy (where an employer reduces the number of employees in a particular role and/or at a particular site); (ii) misconduct; (iii) capability (i.e., performance issues or inability to do a job); (iv) where continued employment would breach a legal duty (such as allowing a disqualified driver to continue to drive); and (v) some other substantial reason, which acts as a catch-all category.

Once an employer has established a fair reason, it must follow a fair and reasonable dismissal procedure. The procedure which must be followed differs depending on the specific reason for the dismissal but should generally follow the basic principles of fairness set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures (**ACAS Code**), including giving advance written notice of the proposed dismissal and providing relevant information; holding a hearing at which the employee can make representations (at which the employee has the right to be accompanied by a trade union representative or work colleague); and offering the employee a right to

appeal. The terms of the ACAS Code technically only apply to dismissals for misconduct or poor performance, not to redundancies or ill health dismissals, but its broad themes of fairness are equally applicable to all dismissals.

If there is no “fair” reason for the dismissal, or the procedure followed is not reasonable in the circumstances, the dismissal will be unfair for the purposes of the legislation. The employee can claim compensation up to a maximum sum of GBP 85,200 (this is the maximum figure as of February 2012, but the maximum amount increases annually). A small part of the compensation is an automatic award linked to length of service, age and salary; the remainder is linked to the employee’s actual financial losses and will usually depend on the likelihood of the employee finding alternative employment.

A failure to follow the ACAS Code will not render a dismissal automatically unfair. However, if (in a misconduct or poor performance situation) either party unreasonably fails to follow the ACAS Code, an Employment Tribunal can increase / decrease any compensation awarded by up to 25 percent.

For employees starting work from April 6, 2012 onwards, the law has changed so that only those with at least two years of continuous employment with the same or an associated employer are covered by the unfair dismissal legislation. However, this change only affects new joiners - those who commenced employment with a company before April 6, 2012 will still be able to benefit from the one-year service requirement. In any case, if the dismissal is for certain specified protected reasons (e.g., maternity or whistleblowing, but there are many more), no service requirement applies.

It is worth noting that there are also special rules that apply to dismissals that are connected with a transfer of a business.

Once the employer has completed the appropriate procedural steps and satisfied itself that it is fair to dismiss, it must consider what rights

the employee has under his or her contract of employment (see further below).

### *Collective Dismissals*

If an employer proposes to dismiss 20 or more employees at one establishment within a period of 90 days for reasons which are not connected with the employees personally (e.g., because of a plant closure), the employer has an additional duty to inform and consult with employee representatives.

The employer has an obligation to provide certain information to, and consult with, appropriate representatives of the employees potentially affected. Where the employer has recognized a trade union in respect of the employees affected, the union is the appropriate consulting body. If there is no union, another established representative body, such as a Works Council, can act as the representative provided that that function was within the remit of the body when the representatives were elected and the body meets certain other criteria. If no appropriate body already exists for collective consultation purposes, the employer is under an obligation to make arrangements for the employees to elect one.

The consultation should take place as soon as the employer proposes to make the redundancies (i.e., before any firm decision is made). If the employer consults too late, it will be in breach of the requirements. The consultation must start a minimum of 30 days before the first redundancy takes effect if 20 to 99 employees are to be made redundant, or 90 days before the first redundancy takes effect if 100 or more employees are to be made redundant.

Before beginning consultation, the employer must provide the appropriate representatives the following information in writing: (i) the reasons for the proposed redundancies; (ii) the numbers and categories of employees who the employer proposes to make redundant and the total number of such employees employed at the establishment in question; (iii) the proposed method of selecting

employees for redundancy; (iv) the proposed method of putting the redundancies into effect, including the timescale; (v) the proposed method of calculating the amount of redundancy payments to be made to employees; and (vi) since October 2011, details of the number of agency workers working at the employer, the parts of the business in which they are working and the type of work those agency workers are carrying out. The consultation should then be aimed at exploring ways of avoiding some or all of the redundancy dismissals and mitigating the consequences of the dismissals. Consultation must be undertaken in good faith “with a view to reaching agreement” but there is no obligation to reach agreement.

The sanction for a breach of the obligation is a penalty of up to 90 days pay for each employee affected by the dismissals: it does not render the dismissals invalid. The claim can be brought before an Employment Tribunal by the employee, or the appropriate representatives. Even if only one person brings a claim, the Employment Tribunal has the right (although not an obligation) to make an award in respect of all, or any class, of the employees affected.

Employers contemplating mass dismissals also have an obligation to notify the relevant government department no later than 30 days before the first of the dismissals (where 20 or more employees, but less than 100, are being dismissed), or 90 days before the first of the dismissals (where 100 or more are being dismissed).

## 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

All employees in the United Kingdom are employed under a contract of employment. The contract will either be written, verbal or implied by law. In most cases, employees will have a written contract, or at least a written statement of terms and conditions. Sometimes terms are set out in the staff handbook. One of those documents will commonly set out the circumstances in which the employer can terminate the employment.

From a contractual perspective (subject to unfair dismissal legislation), most contracts can be terminated at any time by giving a certain period of notice, which will normally be set out in the terms and conditions. In addition, there are statutory minimum notice periods that are applicable if the express notice clause is lower than the statutory minimum. The statutory minimum periods are: one week if the employee has at least one month's service; two weeks if the employee has at least two years' service; and an additional one week's notice for each additional year of service, up to a maximum of 12 weeks' notice. If the terms and conditions do not expressly state what the notice period is, the courts will impose a "reasonable" notice period. What is "reasonable" will depend on factors such as the nature of the industry, the position of the employee, notice periods of other employees, etc.

Sometimes the terms and conditions will also contain provisions setting out certain dismissal procedures, which need to be followed before an employee is dismissed. If those provisions are contractually enforceable, it will be necessary to follow them, or else the employer will be in breach of contract.

Sometimes an employer will want to pay an employee in lieu of notice, or put him or her on "garden leave" (i.e., the person remains an employee receiving normal salary and benefits, but is not required to work), rather than him or her working through the notice period. The best strategy in such cases will depend on a number of factors in each specific case, including whether the terms and conditions permit the employer to do so, whether there are post-termination restrictions that the employer wants to apply, and tax issues.

Fixed term contracts will often contain provisions that allow earlier termination on notice. Where they do not, they cannot be terminated in the normal course and will expire at the end of the fixed term.

Irrespective of the contractual notice period or the length of the fixed term, all employment contracts can be terminated without notice if the employee behaves in a way that constitutes a fundamental breach of

contract, i.e., a breach which is so serious that it goes to the heart of the contract, such as gross misconduct. The terms and conditions will sometimes set out the sort of conduct that an employer would consider to be a fundamental breach of contract.

Sometimes collective agreements negotiated with trade unions may also be relevant to the termination of employment. Collective agreements are not generally legally enforceable in the UK (although they are if the agreement explicitly states that it is). However, sometimes terms from collective agreements are incorporated into individual employment contracts. That can include provisions dealing with notice, the circumstances in which employment can be terminated without notice and relevant dismissal procedures.

If an employer does not give the amount of notice due to the employee, the employee can claim compensation for breach of contract. The starting point for assessing the level of compensation is the net value of the salary and benefits that the employee would have received during his or her notice period. When calculating the compensation, all benefits in kind are taken into account (e.g., company car, pension contributions, private medical insurance, etc.). However, the employee is under a duty to mitigate his or her losses by seeking alternative employment. If he or she finds alternative employment during that period, any sums he or she earns will reduce the amount for which the employer would be liable. If the employee fails to take reasonable steps to mitigate the loss, the court may reduce the compensation accordingly. However, an additional factor an employer must consider (and which is sometimes more significant for the employer) is that if it breaches the contract, it would not be entitled to rely on any post-termination restrictions contained in the terms and conditions.

If the employer fails to follow a contractual disciplinary procedure set out in the employee's terms and conditions of employment, the employee may be entitled to additional compensation covering the loss of salary and benefits that would have been received during the time it would have taken to follow the procedure. It may also impact

on whether the dismissal was fair for the purposes of the unfair dismissal legislation.

### 2.3. Termination Indemnities

UK law only provides for a statutory termination payment for redundancy dismissals. An employee is entitled to a statutory redundancy payment if he or she has at least two years of continuous employment with the same or an associated employer. The amount of the payment is calculated on a sliding scale based on the employee's age, length of continuous service and salary, and is a multiple of the employee's gross weekly pay for each complete year of service, as follows:

<b>For Each Complete Year Of Service When An Employee Is Aged</b>	<b>Multiplier Of A Week's Pay</b>
Under 22	1/2
22 to 40	1
Over 41	1 1/2

For these purposes, the weekly pay is capped. With effect from February 2012 it is capped at GBP 430 per week, and the sum is increased in line with inflation in February each year. In addition, only up to 20 years of service can be taken into account.

An employer will also have an obligation to make an enhanced redundancy payment if the employee has a contractual right to such a payment. Such rights can derive from the written terms and conditions or verbal agreement, or because the courts imply a contractual right from the employer's previous custom and practice.

### 2.4. Laws On Separation Agreements, Waivers, And Releases

Contractual claims can be settled and waived very easily. A properly drafted waiver signed by an employee, accepting a sum of money (or other valuable consideration) in full and final settlement of all claims,

will be fully enforceable in respect of contractual and other common law claims.

However, special rules apply to most statutory employment protection claims. Employees can only waive the majority of statutory claims by entering into: (i) a compromise agreement; or (ii) a COT3 agreement. Any other form of waiver is ineffective.

Compromise agreements are formal written settlement agreements that must comply with certain conditions. Amongst others, the agreement must be in writing, must contain certain provisions, and the employee must have taken independent legal advice from a qualified advisor (such as a solicitor) on the terms of the agreement. Compromise agreements serve to settle claims that have actually arisen at the time the compromise agreement is entered into. If carefully drafted, they may also be effective to waive other claims.

A COT3 agreement is one that is entered into with the assistance of the government-sponsored agency called the Arbitration, Conciliation & Advisory Service (ACAS). The agency has an obligation to assist parties to an Employment Tribunal claim to settle their dispute. The settlement must be reached through ACAS, which prepares the formal agreement, the COT3, although the wording is agreed between the parties.

## 2.5. Litigation Considerations

Most statutory employment protection claims can only be brought before an Employment Tribunal. The time limits for Employment Tribunal claims are very short. Most claims need to be brought within three months of the act complained of. An employer only has 28 days to respond to a claim from the date it is sent to such employer by the Employment Tribunal. This is a very short timeframe to collect all of the necessary information to prepare a good defense, and it is very important that the employer act very quickly.

Time limits in the traditional courts are much longer. For example, the time limit for bringing a breach of contract claim in the traditional courts is six years from the date of the breach.

The costs regime in the Employment Tribunal is also very different from traditional courts. The general rule in Employment Tribunals is that each party pays its own costs in the case, although over recent years the Tribunals have been more willing to exercise their discretion to grant costs to a successful party (subject to a maximum limit, currently GBP 10,000 but due to increase to GBP 20,000). In traditional courts, the normal rule is that the losing party pays the winning party's costs (subject to an assessment of the reasonableness of those costs by the court). That is another reason for the large number of claims brought before an Employment Tribunal in the UK - there is currently limited disincentive to employees who do not have particularly strong cases.

### 3. Discrimination

#### 3.1. Laws On Employment Discrimination

UK legislation makes discrimination on certain grounds and in certain fields unlawful. Since October 1, 2010, the principal piece of legislation dealing with discrimination is the Equality Act 2010 (“**EA 2010**”).

The EA 2010 brings together the various strands of pre-existing discrimination protection covering: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (called “protected characteristics”).

The legislation is broader in scope than just the employment relationship, but this chapter addresses only the employment aspects. The legislation protects individuals in all aspects of the employment relationship, including recruitment, the provision of terms and conditions of employment, promotion, training and dismissal. It also

applies after the end of the employment relationship, for example, the provision of references.

The EA 2010 is supplemented by a set of Explanatory Notes. The Equality and Human Rights Commission (“**EHRC**”) has also published three statutory Codes of Practice (together with separate non-statutory guidance) governing employment, equal pay, and services, public functions and associations.

### 3.2. Common Concepts

There are a number of concepts that are common to all protected characteristics, as follows:

#### *Direct discrimination*

Direct discrimination occurs where a person is treated less favourably than another because of one of the Protected Characteristics. For example, not promoting an employee because of his or her sex or race. An employer cannot seek to justify direct discrimination, apart from in relation to the protected characteristic of age.

The definition of direct discrimination is also intended to cover associative discrimination (i.e. where the less favourable treatment is because of the victim’s association with someone who has that characteristic) and discrimination where the victim, or someone associated with them, is wrongly thought to have a relevant protected characteristic. This applies across all protected characteristics, except marriage and civil partnership and, arguably, pregnancy and maternity.

There will be no direct discrimination if a disabled person is treated more favourably than someone who is not disabled (for example, their working pattern/hours are changed to accommodate their disability), or if special treatment is given to a woman in connection with pregnancy or childbirth (for example, the provision of enhanced maternity pay).

### *Indirect Discrimination*

Indirect discrimination occurs where someone with a particular protected characteristic is disadvantaged by a provision, criterion or practice of the employer, which also puts other people with the same protected characteristic at a particular disadvantage. However, there will be no discrimination if the provision, criterion or practice in question can be justified on objective business grounds. For example, it may amount to indirect age discrimination to provide a particular benefit, such as extra holiday, to staff with over 10 years' service, because fewer younger workers are likely to have the necessary service. Such a requirement would therefore have to be justified on grounds unrelated to the Protected Characteristic (i.e., age). If so, it will not be discriminatory.

The concept of indirect discrimination extends to all protected characteristics except pregnancy/maternity.

### *Harassment*

Harassment will occur where there is unwanted conduct of a sexual nature or other conduct related to a relevant protected characteristic, which has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The protection extends to all protected characteristics except pregnancy/maternity and marriage/civil partnership.

An employer will also be liable for persistent harassment of its employees by a third party (such as a customer or supplier). Employers will be legally responsible where they know that an employee has been harassed on two previous occasions by someone who does not work for the employer, but nevertheless fail to take reasonable steps to protect the worker from further harassment. It will not be a defense to argue that the employee was harassed by a different individual on each occasion. Conversely, and peculiarly, an employer will not be liable where it exposes a succession of

employees to harassment by the same third party, provided in each case each employee is exposed no more than twice.

A wide range of conduct and behaviors may give rise to a harassment claim. According to the EHRC Employment Code, unwanted conduct covers a wide range of behaviors including “spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour”.

### *Victimization*

Victimization occurs where an employee is penalized for having raised a discrimination complaint or concern in good faith, or has helped someone else to do so. For example, disciplining an employee because he or she has given evidence to an Employment Tribunal in support of a discrimination claim brought by a colleague would be unlawful victimization.

### 3.3. Special Cases

#### *Disability Discrimination*

The concepts applicable to disability discrimination differ slightly compared to the other protected characteristics. In addition to direct and indirect discrimination, harassment and victimization, disability discrimination can also occur where a disabled person is treated unfavorably because of something arising in consequence of their disability.

However, as with indirect discrimination, the treatment will not amount to discrimination if it can be justified on objective business grounds. For example, it may amount to unlawful discrimination for an employer to dismiss a worker because she has had a period of sick leave if they are aware that the worker has a disability and her sick leave has been caused by her disability. The dismissal would

therefore have to be justified on objective grounds. If so, it will not be discriminatory.

Employers are also under a duty to make a “reasonable adjustment” in those situations where working arrangements or physical features of particular premises place a disabled person at a substantial disadvantage. For example, an employer may be required to provide a partially sighted employee with special computer equipment to enable him or her to use the IT systems. It is often a difficult question as to what adjustments are “reasonable” and how far an employer is expected to go. Employment Tribunals will take all relevant factors into account, including the size and resources of the employer. An individual will be covered by the disability provisions of the EA 2010 if he has a physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. An impairment will be treated as having a substantial and long-term adverse effect if it has been present for at least 12 months, or can be reasonably expected to last for 12 months or more.

Although the EA 2010 provides an outline structure of what constitutes a “disability”, much of the detail is supplemented in Regulations and Codes of Practice. Certain conditions are automatically excluded, e.g., kleptomania, pyromania, etc. Individuals suffering from other conditions, such as HIV, cancer and multiple sclerosis are protected from the point of diagnosis.

### *Retirement*

Until recently, it was possible for an employer to require an employee to retire at the default retirement age of 65, provided that a specific procedure was followed. However, with effect from April 6, 2011 the default retirement age and associated procedures were abolished. An employer will now need to objectively justify any retirement dismissal to prevent claims of age discrimination. Retirement is also no longer a fair reason for dismissal. The normal rules of dismissal will therefore need to be applied.

### *Part-Time Workers And Fixed-Term Employees*

There is separate legislation that gives protection to part-time workers and fixed-term employees. In very broad terms, the anti-discrimination provisions prohibit treating part-time workers or fixed-term employees less favorably than colleagues doing the same work on a full-time or indefinite term basis, unless there is an objective business justification for the different treatment. With respect to part-time workers, the law permits benefits to be provided on a pro-rated basis.

### *Equal Pay*

In addition to protection provided under sex discrimination legislation, there is a separate equal pay protection that applies to men and women. The legislation provides that an employee is entitled to be paid the same as a colleague of the opposite sex who does the same work, like work or work of equal value.

#### 3.4. Employee Remedies For Employment Discrimination

Discrimination claims must usually be brought before the Employment Tribunals. As discussed above, the time limits are short and claims must be brought within three months of the act complained of. Where there is a continuing act of discrimination, the time runs from the last act in the chain. A complaint under the equal pay legislation can be made at any time during the employment, or either: (i) within six months of the termination of employment (for claims before the Employment Tribunals); or (ii) six years (for claims before the traditional courts).

The main remedy for a discriminatory act is compensation. In addition, the Tribunal has the power to make a recommendation to the employer that it takes specified steps to remedy the discriminatory conduct.

There are three main elements of compensation that can be claimed: (i) financial losses; (ii) personal injury (including injury to feelings); and (iii) aggravated damages. There is no limit on the level of compensation.

The financial loss incurred as a result of the discrimination will vary significantly in each case depending on the employee concerned (particularly the level of his or her remuneration), the nature of the discriminatory act, and in dismissal cases, the likelihood of the affected employee finding alternative work. There have been a number of cases where employees have received in excess of GBP 1 Million. Those cases tend to be cases involving very high-earning employees who are dismissed and consequently lose large amounts of money. Many other cases are worth significantly less than that. In fact, the average award is between GBP 10,000 to GBP 15,000; however, a better (although very rough guide) is 3-12 months of salary and benefits in dismissal cases. Where the employee is unlikely to work again (in some disability cases for example), it can be substantially more - sometimes loss of salary for the rest of the employee's working life. Employees are, however, under a duty to mitigate their losses.

Personal injury awards are reasonably low in the UK and are not commonly awarded. Much more common is an award for injury to feelings caused by the discriminatory act. The award will generally range from GBP 600 to GBP 30,000, depending on the seriousness of the act complained of.

Aggravated damages are a little less common and are only normally made where the employer has behaved very badly with respect to the employee, often in the aggressive way in which it defends the discrimination claim.

In equal pay claims, once an employee has shown that he or she is entitled to equal pay with a comparator, the employee is entitled to compensation for the difference in pay for the period of up to six years prior to the date of the claim, and is then entitled to the same pay. The

time limits and the period of arrears of pay that can be claimed are longer in certain cases where the employer concealed facts relating to the question of equal pay or where the employee was under a disability.

### 3.5. Potential Employer Liability For Employment Discrimination

Employers are vicariously liable for the discriminatory acts of their employees or agents under the discrimination laws, even if the discrimination occurs without the employer's knowledge or approval. However, employers do have a defense to such vicarious liability if they can show that they took all reasonably practical steps to prevent their employees from acting in a discriminatory fashion, although it is unusual for the defense to succeed once an Employment Tribunal has found that discrimination occurred.

### 3.6. Practical Advice To Employers On Avoiding Employment Discrimination Problems

It is very difficult for an employer to protect itself entirely against discrimination claims, because it is impossible to keep control over the actions of all of its employees for whom the employer will be vicariously liable.

However, by providing regular training to employees (particularly managers) and having strong systems in place around the key points of the employment relationship (recruitment, terms and conditions, promotion, bonuses, disciplinary action and dismissal), the risk of successful claims can be minimized.

Under UK law, in a discrimination case, the burden of proof will pass to the employer reasonably easily, at which point the onus will be on the employer to demonstrate that the decision/conduct being complained of was not discriminatory in order to defeat the claim. In order to do that, it needs solid evidence disproving the discrimination. Therefore, wherever possible, it is very useful to have documentary evidence showing the reason for making decisions. So at the recruitment stage, there should be a clear job description, the

questions asked at the interview stage should be focused on that job description (rather than general questions about hobbies, marital status, etc., which should have no bearing on the ability to do the job), and there should be good notes of why a certain candidate is better than another (which are not tainted by a protected characteristic), etc. Similarly for dismissals, there should be documentary evidence showing the reason for dismissal. If the reason is performance for example, there would ideally be appraisals that indicate the problems, and a proper performance management program should have been completed, which should be documented at each stage. The employer should introduce strong systems at all of the key stages, so the evidential material is there if ever a claim is brought.

Any allegations of harassment or discrimination should be taken very seriously and investigated at an appropriate level. Managers should also be trained to be pro-active in spotting and dealing with any behaviour that may constitute harassment or discrimination.

Generally, the employer should ensure that it has strong equal opportunity and anti-harassment policies in place and that all of its staff are trained in equal opportunity, harassment and discrimination issues, and that training is updated every couple of years.

Disability issues must be dealt with very sensitively. Where an employer knows, or ought to know, that an employee or a candidate has a disability, it must begin thinking about whether any adjustments should be made to the working conditions or interview process. It is very important that the employer does not make assumptions about what the individual can and cannot do. Medical advice will often need to be obtained to guide the employer as to the symptoms of the condition, what impact it has on the employees' capabilities at work and the adjustments that it would be sensible for the employer to make. The process should be conducted with regular consultation with the employee.

Employers should think about the contents of their advertisements (avoid language that could give rise to inferences of discrimination

such as “youthful” and “vibrant”, and target an age diverse population), their application forms, their service-related benefits (can the employer justify seniority related benefits) and redundancy selection (avoid assessing employees on potentially discriminatory objectives).



## United States of America

### 1. Introduction

The United States has a well-developed set of laws prohibiting employment discrimination and harassment against employees falling within specified protected categories. This system of rules stems from federal, state and local laws. In major metropolitan areas of the United States, it is not uncommon for all three sets of laws to prohibit certain types of employment discrimination and harassment.

However, as a rule, employees in general have relatively limited employment rights when compared to many other developed nations. The primary reason for this is a legal concept known as the “at-will” employment rule. This rule of law provides that an employer in the United States is generally free to dismiss an employee for any reason or no reason at all, with or without previous notice, and at any time. Absent a contract or employer policy to the contrary, an employer can terminate an employee without any financial obligation whatsoever to the discharged worker. In essence, an employee works at the will of the employer. This rule of law is found in 49 of 50 states that make up the United States (with the state of Montana that has a statute that limits discharge for reasons other than good cause). Outside of the mass layoff or plant closing context, there is no federal law in the United States providing notice rights or indemnity requirements in the context of the termination of an individual employee.

The at-will employment rule, however, is not interpreted uniformly in all 50 states. Courts in some states interpret the rule broadly, while courts in other states have created exceptions to the rule or otherwise restricted the application of the at-will employment doctrine. In addition, some states provide statutory protections against terminations that narrow the application of the rule.

Litigation involving employment disputes is not unusual in the United States. Indeed, some consider it to be relatively common, as there is little stigma attached to the process by which one may sue their

employer. A sophisticated bar of attorneys representing workers in employment-related litigation is common in most jurisdictions in the United States. Awards are often not limited to reimbursement of wages. Exemplary or punitive damages, which are designed to deter and punish a wrongdoer, are also frequently allowed. Some jurisdictions are considered more liberal or “employee friendly” than other areas of the country (the states of California, Colorado, Michigan, New York and New Jersey are the primary jurisdictions where this observation is relevant). Other areas of the country are considered more conservative or “employer friendly.”

## 2. Terminations

### 2.1. Restrictions On Employers

The at-will employment rule in the United States provides that an employer has no legal restrictions on its ability to dismiss an employee, unless it is based on a reason that violates a law, such as race discrimination. In the past decade, however, the prevailing trend of United States courts has been to grant additional rights to workers. As a result, the at-will employment rule is becoming narrower, and wrongful termination litigation is a fact of corporate life in America.

#### *Contract Restrictions*

The first and most important exception to the at-will employment doctrine is a contract limiting the employer’s absolute right to dismiss a worker. Unlike some countries, the laws of the United States do not require or mandate employment contracts. Although written employment contracts are relatively rare in the United States for middle management and lower-level employees, such contracts are fairly common for high-level executives or key employees. When contracts are for a specific duration (for example, providing employment for two years), employers can generally dismiss workers only for “good cause” or “just cause” unless the contract itself otherwise authorizes the circumstances of a termination. Collective bargaining agreements for union employees are similar in principle, at

least with respect to terminations, although they can be quite different in detail.

In some states, certain oral representations can also restrict employers from dismissing a worker. In essence, verbal statements or representations can create an enforceable contract in certain circumstances. For example, a manager who assures a worker that “*you will have a job here for the rest of your life*” may well have created a contract of employment with the employee in some states. However, most states require written statements, especially for a promise lasting more than a year.

Employers may also be liable to workers in the United States under concepts known as “promissory estoppel” and the “covenant of good faith and fair dealing.” Courts may invoke the doctrine of promissory estoppel to enforce promises made to employees in the absence of a contract. In this respect, a claim of promissory estoppel is often alleged by a worker as an alternative to a breach of an oral contract theory. To recover for promissory estoppel, an employee must show that an employer made a clear oral promise on which the employee relied to his or her detriment, and that it would be unjust to allow the employer to escape its promise. A typical example of this concept arises when an employer promises a job to an individual who quits his or her present job in reliance on such a promise. Additionally, the covenant of good faith and fair dealing is a concept that courts in certain jurisdictions (most notably in California) imply as a term of all employment relationships. In effect, this creates an implied contract requiring employers to have good cause to dismiss an employee.

### *Judicial Exceptions*

Additional restrictions on an employer’s right to dismiss an employee in the United States are the result of judicial decisions created as exceptions to the at-will employment rule. In the United States legal system, judicial decisions create what is called “common law,” a body of law that is based on legal precedents. In most states, the common law provides that an employee who has been dismissed in violation of

a well-established public policy can recover damages against an employer. The most common examples of this restriction are when an employee is dismissed in retaliation for having filed a claim for worker's compensation benefits or for reporting alleged illegal activities of a company to law enforcement agencies. This is known as the tort of retaliatory discharge. Commentators refer to cases involving the reporting of illegal activities as "whistle-blower" cases because the individual seeks protection from retaliation for having raised an alleged illegal act to public attention.

In addition to this public policy exception, the vast majority of states in the United States have contract type claims based on employee handbooks. Basically, if an employee handbook makes promises that are sufficiently definite and specific for an employee to rely on (and fail to contain conspicuous disclaimers negating the promises by providing that the employee handbook does not constitute a contract), courts will enforce such promises as though they constitute an employment contract. Thus, employee handbooks are often enforced as implied contracts between the company and its workers if they contain specific promises - for example, that terminations will be implemented only after progressive counseling steps or for "just cause."

### *Statutory Exceptions*

Finally, federal, state and local laws banning employment discrimination also restrict the ability of employers to dismiss employees in the United States. Typically, such laws allow employers to dismiss a worker for any reason, so long as the reason is not prohibited by statute (e.g., due to the employee's sex, race, etc.).

#### 2.2. Notice Provisions/Consequences Of A Failure To Provide The Required Notice

There are no laws in any jurisdictions in the United States that require an employer to give notice to an individual employee of an impending termination. Of course, employers may be obligated to give notice to

an employee if there is a written contract requiring such notice that the parties voluntarily negotiated. In those circumstances, the consequences of a failure to give the required notice are typical breach of contract damages (i.e., the amount of money equivalent to the number of days or weeks of salary for which notice should have been given but which the employer failed to give to the employee).

In mass termination situations, however, federal law requires the provision of notice to employees in certain circumstances. This is as a result of a federal statute known as the Worker Adjustment and Retraining Notification Act, more commonly known as the “WARN” Act. This statute requires an employer to give 60 days written notice to employees of large-scale layoffs or plant closings. The WARN Act has nothing to do with the right to continued employment. It concerns only an employer’s obligation to provide advance notice of a job loss. The goal of the law is to provide employees with an opportunity to look for other jobs or to seek retraining for other employment opportunities. Regardless of whether notice is given, an employer is free to dismiss or lay off its workers. The WARN Act applies only to businesses that employ 100 or more employees. In general, notice is required in circumstances where an employer dismisses at least 500 workers at one site or, alternatively, more than 50 workers if the total number of workers dismissed is 33 percent or more of the employees at a particular work site. A covered employer must also give notice if an employment site is shut down resulting in employment loss for at least 50 employees. Many states also have laws similar to the federal WARN Act that may apply to a broader number of employees and employers.

### 2.3. Termination Indemnities

There are no laws in the United States requiring the payment of a termination indemnity to an employee who is dismissed by an employer. In the case of a mass layoff situation covered by the WARN Act, an employer that fails to give the required notice can be liable for payment of up to 60 days of compensation to any worker who was entitled to receive the statutory notice.

#### 2.4. Laws On Separation Agreements, Waivers, And Releases

Because of the vagaries of wrongful termination litigation in the United States, it is common for employers to seek a release of liability from workers at the time of their termination. A release or waiver of legal claims will be upheld in the United States if consideration is provided to the employee. Consideration in this context means the employer has given the employee something of value that the company has no legal obligation otherwise to give to the worker. Consideration in most circumstances involves the payment of money. However, consideration is not limited to money; for example, it can include a letter of recommendation, payment of the employee's insurance premiums, or waiving a loan.

The law of separation agreements, waivers and releases may differ in the 50 states. However, if an employer seeks a release of potential claims for age discrimination arising under federal law, a statute known as the Older Workers Benefit Protection Act of 1990 (OWBPA) applies to the release and its negotiation. The primary purpose of the OWBPA is to ensure that employees age 40 or over do not waive any potential age discrimination claims unless they do so knowingly and voluntarily. The OWBPA specifies seven minimum conditions that must be met before a release agreement is valid and enforceable:

- (1) The release agreement must be written in a way that is easily understood by the employees;
- (2) The release must specifically refer to rights or claims arising under the federal age discrimination law so the employee is made aware of his or her rights under this law;
- (3) The employee cannot be asked to waive future claims that may arise after the date the release is executed;

- (4) In return for signing the release, the company must give the employee something of value above and beyond that to which he or she is already entitled;
- (5) The employee must be advised in writing to consult with an attorney prior to executing the agreement;
- (6) The employee must be given a period of at least 21 days (or 45 days in the case of a group termination) within which to consider the agreement; and
- (7) The release must provide that for a period of seven days following the execution of the agreement, the employee has the absolute right to revoke the agreement if for any reason he or she has second thoughts and changes his or her mind.

## 2.5. Litigation Considerations

The majority of employment disputes that entail litigation in the United States involve terminations. Most claims are for “wrongful termination,” and generally involve discrimination allegations, common law theories or both. In the past decade, approximately one in five cases brought in federal courts are over employment-related disputes. Most employees have little to no trouble finding a lawyer who will litigate a case on their behalf. As is discussed below, the fee-shifting nature of employment discrimination laws is such that there is no economic disincentive for workers and their attorneys to bring lawsuits against employers.

## 2.6. Employment Discrimination Laws

Employment discrimination is prohibited by federal, state and local laws of the United States. Federal law prohibits discrimination against workers based on age, sex, national origin, race, color, religion, disability, veteran status, pregnancy, and genetic information. The majority of these prohibitions are found in a law that is commonly referred to as Title VII of the Civil Rights Act of 1964 (**Title VII**). Age discrimination is prohibited by a separate law called the Age

Discrimination in Employment Act of 1967 (**ADEA**), and grants rights to workers 40 years of age and older. The ADEA prohibits intentional discrimination as well as certain policies or practices that may have a disproportionate impact on workers age 40 or over. The Americans With Disabilities Act of 1990 (**ADA**) prohibits discrimination based on a disability. The Genetic Information Nondiscrimination Act of 2008 (**GINA**) prohibits discrimination based on genetic information. Finally, the Civil Rights Act of 1991 establishes remedies to implement Title VII, the ADEA and the ADA and also clarifies various procedural and substantive issues under these laws.

Federal employment discrimination laws are exceedingly broad in scope. The laws protect all types of workers - those who have contracts, those who are employed at-will and even those covered by collective bargaining agreements. The laws also protect applicants for jobs from discrimination in the hiring process. Employers are not required to hire or promote individuals protected by employment discrimination laws or to lower performance standards for such workers. Rather, employment discrimination laws prohibit employers from taking an individual's membership in a protected category into consideration in any employment-related situation (e.g., hiring, firing, promoting, determining pay, etc.).

Most states have employment discrimination prohibitions applicable to private employers that are similar to federal law, although some states actually provide greater protections than Title VII, the ADEA, ADA, GINA and the Civil Rights Act of 1991. Examples of state laws that are broader than federal law include those that prohibit discrimination on the basis of marital status, genetic traits or sexual orientation. Generally speaking, state laws also apply to employers with a smaller number of employees who are otherwise exempt from federal law (Title VII, GINA and the ADA apply to companies with 15 or more workers, and the ADEA applies to business entities with 20 or more employees). In addition, many local governmental units have ordinances prohibiting employment discrimination.

Female employees have special rights in terms of maternity leave and equal pay. A law known as the Family & Medical Leave Act of 1993 (**FMLA**) guarantees female employees the right to take an unpaid leave of absence for medical complications with pregnancy. Unpaid leave under the FMLA is allowed for up to 12 weeks in connection with the birth or adoption of a child, or for serious health conditions of the employee or a family member. The FMLA offers male employees similar unpaid leave protection. The FMLA also prohibits discrimination or retaliation against any employee who exercises the right to take leave under the law. Additionally, the Equal Pay Act of 1972 specifies that employers must pay a female employee the same wage as a male employee for similar work. Most states have similar leave and equal pay laws.

Employees of publicly traded companies are protected against retaliation for corporate whistle-blowing under the Sarbanes-Oxley Act and the Dodd–Frank Wall Street Reform and Consumer Protection Act. These laws make it unlawful to discharge or otherwise take action against an employee who reports suspected corporate fraud in good faith to a federal regulatory agency, any member of Congress or a Congressional committee, or the employee’s supervisor or any company employee with authority to investigate, discover or terminate prohibited corporate conduct. The employee must reasonably believe that the suspected misconduct involves mail, wire or securities fraud; a violation of the Securities and Exchange Commission rules or regulations; or violation of any federal law relating to fraud against shareholders.

## 2.7. Employee Remedies For Employment Discrimination

An employee who wins an employment discrimination case can recover an award equivalent to lost salary and fringe benefits, as well as compensatory damages and punitive damages. Compensatory damages are for the alleged pain, suffering and emotional distress experienced by the employee injured by the employer’s discriminatory conduct. Punitive damages are more in the form of a penalty and are imposed to deter wrongful conduct or to punish a lawbreaker.

By virtue of the Civil Rights Act of 1991, federal employment discrimination laws have a sliding scale of limits on awards of compensatory and punitive damages depending on the size of the employer. Current federal law provides the following caps: USD 50,000 for employers with between 15 and 100 workers; USD 100,000 for employers with 101 to 200 workers; USD 200,000 for employers with 201 to 500 workers; and USD 300,000 for employers with 501 or more workers.

State laws may have different caps on damages and may exceed those under federal law. Employees who win age discrimination cases, as opposed to race or gender cases, are also entitled to a doubling of an award of lost wages and fringe benefits if they can show that the employer engaged in a “willful” violation of the law. In certain situations, a successful employee can secure relief known as front pay, which is an award equivalent to the future monetary damages the worker is apt to experience due to the lingering effects of past discrimination. Reinstatement to a job is also a possible remedy in lieu of front pay. An employee in an employment discrimination case is also entitled to prejudgment interest on the monetary award rendered by the court in their favor. By law, interest is calculated at the prime rate and compounded daily.

Federal and state employment discrimination laws also have special provisions that provide that employees winning their case are also entitled to an award of attorney’s fees. The court will generally award money to a prevailing employee to compensate him or her for their own damages, as well as for the reasonable fees of their attorney. Unlike many jurisdictions, it is difficult for an employer to recover its fees even if it prevails on all claims.

## 2.8. Potential Employer Liability For Employment Discrimination

A worker can sue a company and, in certain jurisdictions or under certain statutes, the supervisor who made the personnel decision at issue. A court can award equitable, injunctive and monetary relief against the employer. In certain circumstances, a court may also

impose damages on management personnel found to be guilty of discrimination.

## 2.9. Practical Advice To Employers On Avoiding Employment Discrimination Problems

In the United States, the prevention of employment-related liabilities is dependent to a large degree on the maintenance of appropriate policies and employee records, contemporaneous documentation of personnel decisions and appropriate decision-making with respect to discipline, evaluation and terminations. Discrimination lawsuits are generally filed by employees, applicants or ex-employees who feel that they have been treated unfairly. In addition, courts and juries in the United States may view anything that has the appearance of unfairness in the workplace as constituting unlawful discrimination if it happens to a member of a protected group. The best way for employers to prevent unfairness or even the appearance of discrimination is to adhere to certain basic guidelines in supervising, evaluating and terminating employees.

These guidelines include:

- (1) Giving clear warnings and instructions to employees;
- (2) Applying all personnel policies equally to all employees;
- (3) Providing candid appraisals of performance to all employees;
- (4) Assuming all employees desire to be promoted;
- (5) Providing equal training opportunities and counseling; and
- (6) Promoting an open-door policy so that communication between employees and management ensures that all possible employee grievances and complaints are passed on and responded to by management.

### 3. Sexual Harassment

#### 3.1. Laws On Sexual Harassment

Sexual harassment can be a serious legal problem for employers in the United States. Sexual harassment is considered to be a form of sex discrimination, and, as such, is illegal under Title VII of the Civil Rights Act of 1964. The statute, however, is silent as to what behavior constitutes sexual harassment. The United States government, through an agency known as the Equal Employment Opportunity Commission (**EEOC**), has issued a detailed policy guidance memorandum concerning various issues involving sexual harassment. Court rulings have also created a set of rules that describe the conduct that constitutes sexual harassment. Furthermore, most state employment discrimination laws mirror Title VII and also prohibit sexual harassment.

Title VII does not make all conduct of a sexual nature illegal if it occurs in the workplace. The EEOC's policy guidance memoranda and court decisions typically consider sexual harassment to be any unwelcome verbal statements or physical conduct of a sexual nature that unreasonably interfere with another employee's job or work environment. Generally speaking, there are two types of sexual harassment. The first type is "quid pro quo" sexual harassment. The second type is "hostile environment" sexual harassment. The lines between these two types of harassment are not always clear, and the two forms of conduct often occur simultaneously.

Quid pro quo sexual harassment occurs in a legal sense when employment decisions on hiring, promotion, transfer, discipline or termination are made on the basis of submission to or rejection of unwelcome sexual conduct. For example, if a supervisor requests sexual favors from an employee, he or she refuses and the supervisor then dismisses or demotes him or her on account of the refusal, the courts will conclude that the employee is a victim of quid pro quo sexual harassment.

Hostile environment sexual harassment occurs where conduct of a sexual nature creates an intimidating, hostile or offensive working environment. It can take many forms, including verbal abuse, discussing sexual activities, commenting on an employee's physical attributes or appearance, uttering demeaning sexual terms, using crude and vulgar language, making unseemly sexual gestures or motions, engaging in unnecessary touching or any of these types of activities in combination or if repeated over time.

### 3.2. Employee Remedies For Sexual Harassment

In cases involving sexual harassment, federal and state employment discrimination laws allow the victim of the conduct to recover compensatory and punitive damages, as well as lost salary and fringe benefits if applicable. The rules discussed previously with respect to recovery of attorney's fees also apply with equal force in a case of sexual harassment. Compensatory and punitive damages for sexual harassment under federal law are capped at a maximum of USD 300,000 for employers of more than 500 employees. However, it is not uncommon for a multi-million dollar award of compensatory and punitive damages to be sought by, and awarded to, a plaintiff suing for sexual harassment under state and local employment discrimination laws.

### 3.3. Potential Employer Liability For Sexual Harassment

The U.S. Supreme Court clarified the rules regarding employer liability for sexual harassment involving the conduct of a supervisor. In two cases decided in June of 1998, the U.S. Supreme Court ruled that employers are absolutely liable for any sexual harassment committed by a supervisor where the victim of harassment suffers a tangible job detriment. In two cases, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the U.S. Supreme Court ruled that:

- Employers may be held vicariously liable to a victimized employee under Title VII for the acts of supervisors that constitute sexual harassment, irrespective of the employer's

policies and practices and even if the employer lacked actual notice of the supervisor's conduct;

- When the supervisor's sexual harassment results in adverse tangible employment action (e.g., a termination, denial of a raise or promotion, undesirable reassignment, etc.) suffered by the worker, the employer's liability is absolute; and
- When the supervisor's sexual harassment does not result in an adverse tangible employment action (e.g., the supervisor makes an unwelcomed sexual advance or unfulfilled threats to deny job benefits unless the employee agrees to sexual favors), the worker nonetheless may recover although the claim is subject to an affirmative defense.

The U.S. Supreme Court also held in the *Ellerth* and *Faragher* cases that employers may avail themselves of an affirmative defense where the worker is not subjected to an adverse tangible employment action. The affirmative defense has two components: (1) the employer must prove that it exercised reasonable care to prevent and promptly correct any conduct constituting sexual harassment; and (2) the employer must prove that the plaintiff unreasonably failed to take advantage of a personal policy or procedure to report, prevent or correct any conduct amounting to sexual harassment. As the second element of the affirmative defense implies, a worker has the practical burden to come forward and complain to management about any incident of sexual harassment.

#### 3.4. Practical Advice To Employers On Avoiding Sexual Harassment Problems

Court decisions indicate that the best possible defense to a charge of sexual harassment is for an employer to have an anti-harassment policy and complaint procedure. Without such a policy, it is very difficult for an employer to defend against sexual harassment charges. Accordingly, the personnel policies of any employer in the United States should include such a policy and a complaint procedure. The

policy should define sexual harassment, prohibit it as a matter of company policy, provide an avenue for aggrieved employees to make complaints regarding what they believe to be sexual harassment, provide for proper investigation of those complaints and authorize disciplinary action against any harassers. To potentially limit or avoid liability, an employer must immediately investigate any complaints of sexual harassment and, where warranted, institute prompt remedial measures to prevent any future reoccurrences of sexual harassment.



## Venezuela

### 1. Introduction

In Venezuela, prior to the new Organic Labor and Workers' Law effective since May 7, 2012 (**OLWL or new law**), workers were entitled to what was known as the “seniority payment”, provided for in the former (now revoked) Organic Labor Law (**OLL or former law**). The seniority payment was paid to the worker upon termination of the employment relationship, regardless of the cause of the termination, but was calculated on a monthly and on an annual basis and consisted of: (i) five days' salary per month of services rendered, as of the fourth month of the worker's services for the employer (monthly component); and (ii) two additional and cumulative days' salary per year of service, starting in the second year, up to a maximum total of 30 additional days' salary per year of service (annual component).

Under the new OLWL, a new seniority benefits system was established, following the mandate provided for in the temporary provisions of the Constitution of December 30, 1999. In essence, the new system maintains the former seniority payment but *as a guaranty of the seniority benefits* and with the following new and features:

1. **Quarterly component:** The 5 days' salary per month worked contemplated in the former law, accrue on a quarterly basis under the new law (15 days per quarter worked), and are credited or deposited based on the last salary earned in the respective quarter. However, if the employment relationship ends during the first 3 months of service, this benefit is paid on the basis of 5 days' salary per each month or fraction of month worked. Likewise, workers who have been working for an employer for less than 3 months on the effective date of the OLWL (May 7, 2012), will receive their first quarterly credit or deposit when they reach 3 months of service.

2. Annual Component: The 2 additional and cumulative days of salary per year of service continue to accrue based on the time worked after the first year, up to a maximum of 30 days' salary per year worked (thus, for the second year of service the worker accrues 2 additional days, for the third year of service the worker accrues 4 additional days, for the fourth year of service the worker accrues 6 additional days, and so on, until stabilizing at a maximum of 30 additional days per year of services). In our view, for those workers who had been accruing their additional days under the OLL, this accrual shall continue gradually (the calculation of these additional days would not start from zero).
3. Destination of the guaranty of seniority benefits: In addition to the existing option of crediting this guaranty in the employer's books or depositing it in a bank trust, as the worker elects, the OLWL adds the option of depositing it with a National Seniority Benefits Fund (*Fondo Nacional de Prestaciones Sociales*), which will be subsequently created and regulated by means of a special law. The option provided for in the Regulations to the OLL, of delivering the annual component (or additional days) of the guaranty of seniority benefits to the workers on an annual basis, is omitted in the new law, which implies that those additional days of guaranty must be credited on the employer's books or deposited in a trust or in the National Seniority Benefits Fund.
4. Interest rate applicable when the guaranty for seniority benefits is credited in the employer's books: As in the OLL, this will be the average between the lending and borrowing rates, as determined by the Central Bank of Venezuela.
5. Calculation of the seniority benefits upon termination of the employment relationship: Upon termination of the employment relationship for whatever reason, the seniority benefits shall be calculated based on 30 days of salary per year of service or fraction thereof exceeding 6 months, based

on the last total or broad salary (including profit sharing and vacation bonus) earned by the worker. If the worker earns a salary per work unit, by the piece, on an hourly basis, on commission or any other variable mode, the basis for this calculation shall be the average total or broad salary (including profit sharing and vacation bonus) earned during the 6 months immediately preceding the termination of the employment relationship. To calculate this, one must take into account the entire time worked by the worker, or the time worked as of June 19, 1997 if the worker started to work for the employer prior to said date. Finally, this calculation is compared with what the worker has accrued as guaranty of seniority benefits, and the worker will be entitled to receive the most favorable amount (not both). In practice, this means that if the seniority benefit was more favorable for the worker than the guaranty, he/she would receive the guaranty plus the respective difference in his/her favor. Otherwise, the worker would only receive the guaranty.

6. Term for Payment: The employer shall pay the seniority benefits within the 5 days following the termination of the employment relationship. In case of delay in such payment, late payment interest will be applied at the lending rate determined by the Central Bank of Venezuela.

## 2. Terminations

### 2.1. Admitted Forms Of Termination

Individual employment relationships may be terminated in Venezuela by either: (i) the employer's unilateral decision (or dismissal), which in turn may be for cause or without cause (subject to the caveat relating to the new labor stability system described below); (ii) the worker's unilateral decision (or resignation), which in turn may be for cause or without cause; (iii) mutual agreement between the parties; and (iv) causes beyond the parties' will, such as death or permanent disability of the worker, acts of God and force majeure. Temporary employment relationships, such as those arising from employment

agreements for a particular project or a stated term, automatically terminate upon completion of the work or the lapsing of the term.

### *Dismissal For Cause*

A dismissal will only be deemed to be with cause when it is based on any of the following causes set forth in Article 79 of the OLWL:

- (i) Dishonesty or immoral behavior at work;
- (ii) Violence, except in case of legitimate defense;
- (iii) Insults or serious disrespect and lack of consideration due to the employer, his or her representatives or members of his or her family living with him or her;
- (iv) Willful act or serious negligence that affects the safety and hygiene of work;
- (v) Omissions or imprudence that seriously affect the safety and hygiene of work;
- (vi) Three business days' unjustified absence from work in one month;
- (vii) Material damage, whether intentional or through gross negligence, to machinery, tools and work utensils, company furniture, raw materials or finished or unfinished products, plantations and other assets of the employer;
- (viii) Disclosure of manufacturing or procedural secrets;
- (ix) Serious breach of the obligations imposed by the employment relationship;
- (x) Abandonment of work (as defined in the OLWL); Or

- (xi) Labor or sexual harassment.

The Regulations to the OLL (which are still in effect to the extent that they do not conflict with the OLWL) provide that it shall be considered a breach of the obligations imposed by the employment relationship for the worker to arrive late for work four times in one month.

Other causes for dismissal are established in specific laws, like the Organic Law on Drugs.

When the worker enjoys special labor protection (e.g: a pregnant female employee and the child's father), the worker may not be dismissed, transferred or his or her conditions detrimentally changed without just cause previously authorized by the Labor Inspector. When the worker does not enjoy special labor protection but enjoys labor stability, the worker may only be dismissed for cause, but the employer may effect dismissal without the previous authorization of the Labor Inspector. However, the employer is required to notify dismissal in writing to the labor courts within 5 business days following dismissal, indicating the reasons for dismissal. If this notice is not given within the deadline, dismissal could be deemed without cause and the worker reinstated with back pay.

#### *Justified Worker's Resignation / Constructive Dismissal*

The worker may terminate his or her employment relationship with cause when the employer is liable for any of the following faults contemplated in Article 80 of the OLWL:

- (i) Dishonesty;
- (ii) Any immoral act that offends the worker or members of his or her family living with him or her;
- (iii) Violence;

- (iv) Insults or serious disrespect and lack of consideration due to the worker or members of his or her family living with him or her;
- (v) The substitution of the employer when the worker considers that the same is not convenient to his or her interests;
- (vi) Omissions or imprudence that seriously affect the safety or hygiene of work;
- (vii) Any act that is a serious breach of the obligations imposed by the employment relationship;
- (viii) Labor or sexual harassment;
- (ix) Cases where the worker has been dismissed without cause and the worker, after reinstatement with back pay has been ordered, resolves to finalize the employment relationship; or
- (x) Any act that constitutes a constructive dismissal.

According to the OLL, the following are deemed circumstances for constructive dismissal:

- The employer's demand that the worker perform a type of work that is overtly different from that which he or she is obliged to perform under contract or by law, or which is not compatible with the worker's dignity or professional capacity, or that the worker render his or her services under conditions that imply a change of residence, except where in the employment contract the contrary was agreed or where the nature of the work implies successive changes of residence for the worker, or if the change is justified and does not cause any impairment to the worker;
- A salary reduction;

- Transferring the worker to an inferior position;
- Arbitrary change in the work schedule; or
- Other similar events that alter the existing work conditions.

Conversely, the following will not be deemed to be constructive dismissal:

- Returning the worker to his or her primary position, after being subject to a trial period in a higher position. In this case, the trial period cannot exceed 90 days;
- Returning the worker to his or her primary position after having performed, on a temporary basis and for a term not exceeding 180 days, a higher position due to absence of the person holding such position; or
- The temporary transfer of a worker, in case of emergency, to an inferior position within his or her own occupation and with his or her previous salary, for a term not to exceed 90 days.

When the worker's resignation is for cause, the worker shall be entitled to receive, in addition to his or her seniority benefits, an indemnity equivalent to the amount of the seniority benefits (just as if the worker had been dismissed without cause and had refused to be reinstated with back pay under the new labor stability system).

## 2.2. Restrictions On Employers

### *New Labor Stability System*

Under the OLWL, an absolute labor stability system is set whereby workers cannot be dismissed without cause. Hence, unjustified dismissals are void and oblige the employer to reinstate the worker and to pay back salary, except if the worker waives his/her right to

reinstatement and, instead, accepts an additional indemnity equivalent to the amount of his/her seniority benefits (double payment or “*doblete*”) and, in certain cases, an indemnity equivalent to back pay accumulated during the proceedings. This is fundamentally different from the relative labor stability system that existed under the OLL, where the employer had the right to terminate the employment relationship by dismissal without cause by paying the worker additional unjustified dismissal indemnities. In the new labor stability system set forth in the OLWL, the worker may choose whether to be reinstated with back pay and continue with the employment relationship, or whether to accept payment of the severance benefits and additional indemnity(ies) for dismissal without cause and terminate the relationship.

The employer must notify the dismissal to the Labor Court, setting out the reasons therefore, within 5 business days following the date of the dismissal.

The worker has 10 business days from the date of dismissal to request his/her reinstatement before the Labor Court. If he/she fails to do this, the worker loses his/her right to reinstatement, but has the right to receive payment of the items that correspond to him/her as a worker.

All workers are covered by the labor stability, except for: (i) upper or senior management employees (“*trabajadores de dirección*”); and (ii) workers hired for an indefinite term, during their first month of service. Workers hired for a stated term or for a specified work are entitled to labor stability until expiry of the term or completion of the work for which they were hired.

If the reinstatement order issued by the Labor Court is final and firm and is not voluntarily complied with by the employer, the court can enforce it and the employer may be exposed to criminal penalties for contempt of judicial authority.

*Special Labor Protection (including bar against dismissal)*

There are certain cases when workers cannot be dismissed, transferred or their conditions detrimentally changed without just cause previously authorized by the Labor Inspector. Therefore, in these cases, dismissal may only be for cause and must be previously authorized by the Labor Inspector through a special procedure established for this purpose, in which the employer must prove the worker's fault or breach. Workers who enjoy this special protection (including the bar against dismissal) are, among others, the following:

- (i) Workers who are promoting the legalization of a workers' union, up to 15 days after the union is registered or the registration thereof is denied;
- (ii) Workers who join a union that is being formed, up to 15 days after the union is registered or the registration thereof is denied;
- (iii) Certain members of the board of directors of the workers' unions (the number of protected workers varies according to the size of the company);
- (iv) All members of a labor union, during their unions' election process up until such time as the newly elected board members are proclaimed;
- (v) The workers during the collective bargaining agreement proceedings and negotiations, up to the finalization of the negotiations or up to the bringing of the proceedings to arbitration. If the collective negotiations are in the context of a Labor Regulatory Meeting (or "*Reunión Normativa Laboral*"), the negotiation is up to 120 days, though this term may be extended;
- (vi) The workers involved in a collective labor conflict or strike, processed in accordance with the OLWL;

- (vii) Workers who have been elected as Prevention Delegates for occupational health and safety purposes;
- (viii) Workers whose employment relationship is temporarily suspended for a lawful cause, such as a sickness or accident, compulsory military service and preventive detention, among others;
- (ix) Pregnant women and the father of the child during pregnancy; and
- (x) Male and female workers for two years after becoming parents or adopting a child of less than three years of age.

There is also a special labor protection (including a bar against dismissal) implemented through a Decree issued by the National Executive. This special protection was originally enforced during the second quarter of 2002, and since then it has been continuously extended to date. With respect to the private sector, it currently protects all workers except for: (i) workers of trust ("*trabajadores de confianza*"); (ii) upper management employees ("*empleados de dirección*"); (iii) those who have less than three months' service; and (iv) seasonal, eventual or occasional workers. The special labor protection contemplated in the Decree that is in effect by the time this article is published (Decree N° 8,732 published on December 26, 2011) will continue to be valid, unless further extended or previously abrogated, until December 31, 2012.

### *Mass Dismissal*

According to Article 95 of the OLWL, a dismissal is deemed to be a mass dismissal when it affects 10 percent or more of the workers in a company with more than 100 workers, 20 percent or more of those in a company with more than 50 up to 100 workers, or 10 or more workers in a company with less than 50 workers, within a term of three months or a longer period if the circumstances are critical. The Ministry of the People's Power for Labor and Social Security (the

“Ministry of Labor”) can suspend mass dismissals and order the reinstatement of dismissed workers with payment of their back salaries and benefits (Regulations to the OLL, still in effect to the extent not in conflict with the OLWL). Under the OLWL, if there are economic or technological reasons forcing an employer to reduce its personnel, the Ministry of Labor may intervene, for public and social interest reasons, to protect the social process of work, guaranteeing the production of goods and services and the right to work, setting forth an instance of protection. During this process, the workers will enjoy special labor protection, and may not be dismissed, transferred or their conditions detrimentally changed without previous authorization from the Labor Inspector. The instance of protection referred to in the OLWL is to be developed in the Regulations to the OLWL, which have not been enacted at the time of writing. In the current Regulations to the OLL, which are still in effect to the extent that they do not conflict with the OLWL, the employer could try to negotiate a personnel reduction with the workers’ union, in the presence of the Labor Inspector. The Regulations to the OLWL could change this when enacted, based on the aforementioned new provisions of the OLWL relating to protection of the social process of work.

### 2.3. Term to Terminate the Employment Relationship without Cause/Notice Provisions

#### *Dismissal With Cause*

The employer has a term of 30 consecutive days to dismiss the worker from the time it became, or should have become, aware of the worker’s serious breach or fault. Failure to do so will result in the fault being deemed forgiven and entitlement to dismiss with cause will cease. The employer must duly notify the competent labor court regarding any justified dismissal within five business days of the date of the dismissal, otherwise the dismissal in principle will be deemed to be unjustified.

*Justified Worker's Resignation / Constructive Dismissal*

Any worker who decides to resign with cause may do so within a term of 30 consecutive days after the date on which he became, or should have become, aware of the employer's fault, otherwise such fault shall be deemed to be forgiven. A worker who resigns with due cause is entitled to the same indemnities as set forth in the OLWL for the cases of unjustified dismissal. When the worker resigns without cause under the OLWL, the worker is required to provide an advanced notice of termination ranging from one week to one month depending upon the worker's seniority.

2.4. Termination Indemnities

Under the new law, dismissals without cause of an employee protected by the new labor stability system who nevertheless resolves to terminate or accept the termination of the relationship, generally trigger the obligation by the employer to pay the following items to the affected worker:

- (i) Unused vacation days (plus rest days and holidays that would be included in each vacation term) and their corresponding vacation bonus(es) (or "*vacaciones no disfrutadas y sus bonos vacacionales*");
- (ii) Pro-rated or fractional vacation days and vacation bonus (or "*vacaciones y bono vacacional fraccionados*"), based on the number of months of services performed during the employment year in which termination takes place;
- (iii) The accumulated seniority benefits ("*prestaciones sociales*");
- (iv) Earned or pro-rated profit sharing ("*utilidades devengadas o fraccionadas*"); and
- (v) The applicable unjustified dismissal payments or indemnities (the indemnity equivalent to the amount of the seniority

benefits or “double payment”, and, in some cases, back pay accumulated during the stability proceedings).

For workers who do not enjoy job stability:

Under the new OLWL, workers who do not enjoy labor stability are generally only entitled to receive items (i) through (iv) of the list above.

Benefits described above, under (i), (ii), (iii) and (iv) are payable to the worker in all cases of termination of his/her employment relationship, regardless of its cause, because they are considered "vested rights". Under the new OLWL, the additional indemnity equivalent to the seniority benefits or “double payment” is also payable in all other cases where the employment relationship terminates for reasons not attributable to the worker’s will.

## 2.5. Laws On Separation Agreements, Waivers And Releases

As a general rule, workers cannot waive their rights. However, it is possible to enter into individual labor settlements to resolve any differences existing between an employer and a worker. To be valid, a labor settlement must relate to dubious or litigious rights, and must be made in writing, setting out a detailed description of the facts that motivate it and the rights included therein. In addition, a labor settlement agreement must be executed before the competent labor official (Labor Inspector or Labor Judge) after the employment relationship has terminated. Agreements related to occupational accidents or illnesses, at least when entered into before the Labor Inspector’s Office (a different conclusion could apply if they are entered into before the Labor Courts), additionally require that the amount of the settlement be equal to or higher than the amount previously set forth in an expert report issued by the National Institute for Occupational Prevention, Health and Safety (**INPSASEL**).

### 3. Employment Discrimination

#### 3.1. Laws On Employment Discrimination

The 1999 Constitution forbids any discrimination based on race, gender, creed or social status or seeking to cancel or impair the recognition, enjoyment or exercising, in equal conditions, of the rights and freedom of any person.

The OLWL forbids discrimination and, in particular, all distinctions, exclusions, preferences or restrictions in the access and in the conditions of employment based on race, gender, age, marital status, union affiliation, religion, political opinions, nationality (with the exceptions set forth therein), sexual preference, individuals with disability or social origin, which deteriorates the right to work by being contrary to the constitutional principles. The Regulations to the OLL, still in effect to the extent not in conflict with the OLWL, forbid arbitrary discrimination based on any other criteria not compatible with the legal system. However, the OLWL provides that provisions enacted to protect maternity, paternity, family, children, adolescents, senior adults and individuals with disability are not considered discriminatory. In particular, Article 346 of the OLWL provides that there cannot be differences between the salary of a female worker who is pregnant or breastfeeding and that of other workers who perform the same tasks in the same organization.

The Organic Law on the Right of Women to a Life Free from Violence states that any person who by means of the establishment of requirements referred to sex, age, physical appearance, civil state, condition of motherhood or not, submission to examinations to discard pregnancy, prevents or conditions the access, ascent or the stability in the job of the women, will be sanctioned with fines ranging from 100 to 1,000 Tax Units. The same fines will be applied when by means of fraud it affects the right of women to earn a legal and just salary, or when their right to earn an equal salary for an equal job is impaired.

Finally, Article 14 of the Regulations to the OLL (still in effect to the extent not in conflict with the OLWL) makes it clear that arbitrary discrimination is not deemed to exist when workers are granted preferences or privileges based on relevant criteria that are consistent with the legal system, such as professional training, productivity, attendance at work, years of service, prudent use of raw materials, dependent family members, union membership (this latter condition could be in conflict with the OLWL) and other similar circumstances, provided such preferences or privileges are of a general nature throughout the company.

### 3.2. Potential Employer Liability for Employment Discrimination

Under the Regulations to the OLL (still in effect to the extent not in conflict with the OLWL), a worker who is subject to discrimination may elect either to:

- (i) Extinguish the employment relationship by invoking a just cause for resignation, in which case the employer is obliged to pay the same indemnities due in the event of an unjustified dismissal; or
- (ii) File an action for constitutional protection for reinstatement of the infringed legal situation.

## 4. Sexual Harassment

### 4.1. Laws On Sexual Harassment

Sexual harassment is regulated in the Organic Law on the Right of Women to a Life Free from Violence and, with specific reference to the workplace, in the OLWL and the Regulations to the OLL. The new OLWL defines sexual harassment as the harassment or non solicited and unwanted sexual behavior of the employer, exercised against the worker on an isolated basis or through a series of incidents, in order to affect his or her labor stability or provide, maintain or retrieve a benefit arising from the employment relationship.

According to the Regulations to the OLL (still in effect to the extent not in conflict with the OLWL), sexual harassment in the workplace occurs when a person seeks sexual favors or responses for him/her or for a third party, or tries to impose an undesired sexual proximity through his/her higher labor rank, with the express or tacit threat of this having a negative effect on the victim's working conditions.

Sexual harassment is deemed to be a crime, and the aggressor (not the employer) will be penalized with one to three years' imprisonment. An employer who is aware of sexual harassment in the workplace must take action to correct the situation and prevent its recurrence. Failure to take such precautions will result in the employer being subject to fines ranging from 50 to 100 Tax Units.

#### 4.2. Potential Employer Liability For Sexual Harassment

According to the Regulations to the OLL (still in effect to the extent not in conflict with the OLWL), a worker who is the victim of sexual harassment may elect either to:

- (i) Terminate the employment relationship by invoking a just cause for resignation, in which case the employer is obliged to pay the additional indemnity due in the event of an unjustified dismissal (which in the OLWL is an amount equivalent to the seniority benefits or "double payment"); or
- (ii) File an action for constitutional protection for reinstatement of the infringed legal situation.

Furthermore, a female victim of sexual harassment in the workplace may claim from the aggressor a sum equal to double the amount of damages suffered for failing to obtain the job, position or promotion to which she aspired, or due to the obstacles encountered in her performance. If monetary damages cannot be determined, an indemnity of between 100 and 500 Tax Units will be fixed by the judge. Under the OLWL, the employer may be sanctioned with a fine

ranging from 30 to 60 Tax Units, without prejudice to the civil and criminal actions to which the affected worker may be entitled.



## Vietnam

### 1. Introduction

Generally speaking, Vietnam's labor laws are employee-friendly, especially on issues related to the termination of a labor contract. Most employment matters in Vietnam are governed by the Labor Code.

### 2. Termination

By law, except where labor contracts are mutually terminated, there are four legal grounds for employer terminations of labor contracts. They are:

- Unilateral termination;
- Dismissal;
- Retrenchment; and
- Merger and acquisition.

#### 2.1. Unilateral Termination By Employer

##### *Grounds for termination*

The employer has the right to terminate a labor contract unilaterally, with a proper formal prior notice, based on the following legitimate reasons:

- (i) The employee regularly fails to fulfill the task as assigned in the labor contract. The phrase "fails to fulfill the task as assigned in the labor contract" pertains to the failure of an employee to fulfill an assigned task or a labor norm as provided for in the labor contract due to subjective reasons despite written warnings sent to the employee at least twice a

month. The threshold for “failure to fulfill the task assigned” must be stated in the labor contract, the collective labor agreement or the internal labor regulations;

- (ii) The employee is subject to discipline and dismissal in accordance with the Labor Code;
- (iii) The employee is ill and no recovery is in sight after having received treatment for a specific period (half of the term for a labor contract for seasonal jobs or a labor contract with a term of less than 12 months; 6 consecutive months for a labor contract with a term of 12-36 months; and 12 consecutive months for a labor contract with an indefinite term);
- (iv) Force majeure events force the employer to cut production and workforce; and
- (v) The employer ceases activities.

### *Procedure and formalities*

In order to terminate a labor contract unilaterally, except in cases where the termination is due to dismissal, the employer or the employee must give the other party 45 days’ prior notice in the case of a labor contract with an indefinite term, and 30 days’ prior notice in the case of a labor contract with a definite term. The employer may pay the employee salary in lieu of the notice period as long as the employee so agrees. Prior notice days are working days.

The prior notice requirement is not applied in the case of dismissal.

If the employer wants to terminate a labor contract unilaterally, the employer must convene the executive committee of the relevant trade union and reach an agreement with them. Where the parties cannot agree, both parties must submit a report to the labor authority. After a period of 30 days from the date the labor authority is notified, the employer has the right to make a decision and is responsible for such

decision. If either the trade union executive committee or the employee concerned disagrees with the employer's decision, either party may request a relevant competent authority to resolve the dispute. After dismissing an employee, the employer must notify the local labor authority.

It is unclear if the employer must notify the labor authority in cases where there is no trade union at the enterprise. However, it is commonly understood that the employer must notify the labor authority before unilaterally terminating an employee. The employer should also expect that when it notifies the labor authority of the unilateral termination, the labor authority could come back with questions and inquiries as to the legal basis of such termination and the severance payment for the employee.

## 2.2. Dismissal

### *Legal basis*

Dismissal may be applied as a disciplinary measure only in the following circumstances:

- (i) The employee commits an act of theft, embezzlement, disclosure of business or technology secrets or other conduct that is seriously detrimental to the assets or interest of the enterprise.
- (ii) The employee recommitts an offense while on a discipline trial.
- (iii) The employee has been absent for a total of 5 days per month, or 20 days per year, without any legitimate reason.

### *Procedures*

Disciplinary action must follow the steps below:

- (i) The employer must first send a request for attendance at the disciplinary hearing to the employee. If the employee has been requested for attendance three times and still does not appear, the employer has the right to conduct the hearing without the employee present, and send the decision to the employee. Since the employee has the right to provide his/her self-report on the case, the employer should attach the self-report form to the request for attendance sent to the employee.
- (ii) The employer conducts the disciplinary hearing.
- (iii) The disciplinary hearing should be conducted with the attendance of the representative of the employer, the representative of the trade union (if any), the employee (unless she/he is absent), witnesses (if any), the defender/lawyer of the employee (if any), and any others assigned by the employer (if any). The disciplinary hearing must be documented (“minuted”).
- (iv) If the trade union does not agree with the employer’s application of disciplinary measures to the employee, the employer must notify the labor authority of the case first and can only issue the decision on the application of disciplinary measures 20 days after the notification.

### 2.3. Retrenchment

#### *Legal basis*

To terminate a labor contract on the basis of redundancy, the employer must comply with the Labor Code provisions on the grounds for termination, procedures and formalities, and compensation.

The following circumstances constitute a redundancy:

- (i) a change to part or all of the employer's machinery, equipment or technology, leading to an increase in labor productivity;
- (ii) a change of product or product structure resulting in a loss of employment; or
- (iii) a change in organizational structure due to a merger or dissolution of a number of sections within an entity.

Procedures required by law and implemented in practice, as well as compensation, are discussed below for each type of termination. In general, compensation and other terms of a collective agreement must be applied if they are more favorable than any individual employee's labor contract.

If the employee is a member of the executive committee of the enterprise's trade union, the committee must approve the termination. If the employee is the chairperson of the executive committee, the employee's immediate supervisor in the trade union must approve.

### *Procedures and Formalities*

In a redundancy scenario, the employer is responsible for first providing re-training opportunities for the employees. If new employment is not available, the employer must give statutory notice by publishing, either internally or externally, a list of employees to be laid off. Individual notice is not specifically required by law.

In order to effectively terminate labor contracts in a redundancy scenario, the employer must notify the local authority and the trade union's executive committee of the layoff. Although the law only requires the employer to give notice to the government, some authorities, such as the local Department of Labor, War-Invalids and

Social Affairs (“DOLISA”) of Ho Chi Minh City, technically require approval before the employer may proceed with layoffs.

Additionally, the employer must consult and agree with the executive committee of the appropriate trade union. If the employer and executive committee disagree, the parties must submit a report to the labor authority. After 30 days, the employer ultimately makes the decision and bears the responsibility for that decision. If the executive committee of the trade union and an employee dispute the decision, they may request resolution in accordance with statutory procedures. If there is no trade union, some employers ignore the trade union consultation step, while other employers seek a written opinion from the local DOLISA on the enterprise’s proposed terms for the layoffs. Obtaining a DOLISA opinion is a cautious step to minimize exposure to any legal risks.

Once a decision has been made, employees are gradually laid-off based on factors such as business requirements, seniority, skill, and family conditions.

#### 2.4. Merger And Acquisition

##### *Legal basis*

When an enterprise merges, consolidates, divides, separates, or transfers ownership, the right to manage or the right to use the assets, the succeeding employer is responsible for the continuance of the employee labor contracts. If there is insufficient employment for all existing employees, a labor use plan must be developed, and allowance for loss of work must be granted to the employees whose labor contracts are terminated.

##### *Procedures*

If all the available employees cannot be utilized, “there must be a plan for labor usage in accordance with the law.” Though not explicit, this language can be understood to mean that the succeeding employer

bears responsibility for developing the plan. The plan must specify the number of employees to be retained, re-trained, retired, and terminated. The trade union must be involved in preparing the plan, and once the plan is implemented, the local governmental body must be notified.

Also, in this type of situation, the employer and executive committee of the trade union will consider the continued performance of, amendment of, or addition to the existing collective agreement or enter into a new agreement based on the labor usage plan.

The Labor Code does not always clearly divide the responsibility for employee issues between buyers and sellers. For instance, “the former employer and the continuing employer shall be responsible to resolve the rights of employees, including specifying responsibility for funding training and for funding ‘loss of work’ allowances for employees whose labor contracts must be terminated.” A loss of work allowance must be issued to terminated employees. If an employee terminates his or her labor contract after a merger or acquisition, the succeeding employer is required to pay a severance allowance that includes the period the employee worked for the previous employer.

## 2.5. Severance Allowance Entitlement

### *Entitlement*

When terminating the labor contract of an employee who has been employed for at least 12 months, the employer must pay such employee a statutory severance allowance equivalent to:

- (i) a half-month salary, plus salary allowance, if there is any, for each year of service for termination of labor contracts in cases of unilateral termination and dismissal; or
- (ii) one-month’s salary, plus salary allowance, if there is any, for every year of service for termination of labor contracts in cases of retrenchment or merger and acquisition.

*Severance allowance calculation*

The statutory severance payment is calculated as follows:

- (i) Scenario I: If the employer and the employee have fully participated in the unemployment insurance (“**UI**”) scheme for the entire period of the employee’s service, the company will not have to pay severance allowance to the employee. (The UI system took effect on January 1, 2009, so this scenario may apply if the company has participated in the UI and the employee was employed after January 1, 2009.)
- (ii) Scenario II: If the employer and the employee have not participated or have not fully participated in the UI scheme for the entire period of the employee’s service, the formula shall be as follows:

$$\text{Severance allowance} = \text{Total duration of employment} \times \text{Salary used as basis for computing severance} \times 0.5^*$$

\* The multiplier is 1 if the employee is retrenched or terminated due to a merger or acquisition.

In which,

*Total working time*

- If the employer and the employee have not participated in the UI scheme at all, the total working time will be the entire period of the employee’s service for the company;
- If the employer and the employee have not participated in the UI scheme for the entire period of the employee’s service (so that they have participated for some months but not all)

Total working time = (The entire period of the employee's service) – (The period(s) participating in the UI scheme)

- If the total working time calculated as above includes any odd months, then the odd months shall be rounded up as follows:
  - (i) From full 1 month to less than 6 months shall be rounded up to half a year;
  - (ii) From full 6 months to less than 12 months shall be rounded up to one year.

*Salary used as basis to calculate severance allowance*

The salary used as the basis to calculate severance allowance will be the average salary of the last 6 months of service stated in the labor contract, including seniority and position salaries and regional and position allowances, if any.

The severance allowance and any outstanding amounts must be settled within seven days from the termination date. In exceptional circumstances, this period may be extended but must not exceed 30 days.

The employee is not entitled to severance allowance if he or she is dismissed under the following circumstances:

- (i) The employee commits an act of theft, embezzlement, disclosure of business or technology secrets or other conduct that is seriously detrimental to the assets or interest of the enterprise.
- (ii) The employee recommitts an offense while on a discipline trial.

## 2.6. Legal Consequences Of Illegal Termination Or Unfair Dismissal

### *Illegal unilateral termination by the employer*

If the Labor Court declares a unilateral termination of a labor contract by the employer illegal, the employer must re-employ the employee and pay the employee the following compensations:

- (i) Salary for the period during which the employee did not work; and
- (ii) Two months' salary, plus allowances, if there are any, representing compensation for psychological damage.

If the employee does not want to return to work, he or she will receive the above-mentioned compensation, together with severance allowance, in accordance with the provisions on the termination of a labor contract.

If the employer does not want to receive the employee back, it must pay the employee the above-mentioned compensation, the severance allowance and an extra amount that is subject to the mutual agreement of both parties.

### *Illegal unilateral termination by the employee*

If the employee unilaterally terminates the labor contract, he or she will not be entitled to the severance allowance and has to pay the employer an amount equal to his or her half-month salary. The employee also must pay the company for any training costs.

## 3. Employment Discrimination

Vietnam has not yet developed a sophisticated set of laws and regulations to deal with employment discrimination issues. However, the main policy is to prevent any kind of discrimination based on sex, race, social class, beliefs or religion.

Vietnamese laws strictly prohibit gender-based discrimination in employment. Women are not to be discriminated against in recruitment, employment, compensation, working conditions and promotion in the workplace. The labor law also prohibits the employer from dismissing or unilaterally terminating the labor contract of a female employee because she is getting married, pregnant, taking a maternity leave or nursing a child under 12 months of age, except in cases where the company ceases its activities. The female employee is also entitled to various preferential treatments during pregnancy, maternity leave and the time she raises a child under 12 months of age.

#### 4. Workplace Harassment

Vietnam has not yet developed a sophisticated set of laws and regulations to deal with workplace harassment issues. The laws generally prohibit maltreatment of workers and the use of forced labor in whatever form. An employer shall have the obligation to implement a labor contract, collective labor agreement and other agreements reached with the employees, to protect the employees' honor and dignity and to treat the employees properly.

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