

# Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws



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# Argentina

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## Introduction

The labor and employment rights that govern Argentina stem from the Argentine National Constitution, international treaties, the Employment Contract Law N° 20,744, as amended (ECL) and several federal statutes, as well as Collective Bargaining Agreements.

The federal government of Argentina is primarily responsible for enacting and enforcing labor and employment laws. The Argentine Constitution grants power to the federal government to enact employment and labor legislation applicable to all provinces. Under this authority, the central government has enacted comprehensive statutory regulations of employment.

The central government also created the National Ministry of Labor to enforce the employment laws in the federal territories, collective bargaining agreements laws and union laws nationwide. Each province enforces the national employment laws within its territory. Among other functions, the National Ministry of Labor analyzes the national employment rates and develops programs for promotion of employment.

The labor authorities of each province are primarily responsible for enforcing Argentine labor and employment laws. One of their key functions is the overseeing of a strict registration requirement, whereby employers must register each employee and maintain essential employment information.

All administrative offices are charged with conducting on-site inspection of working conditions and auditing employers to ensure full compliance with the law. In the event that a violation is found, an employer is entitled to procedurally argue its defense. The administrative office then has the discretion to impose a fine against the employer. The amount of the fine that may be levied varies from province to province.

The provisions of the ECL and any other statutes apply to all employees of the private sector (except agricultural and domestic workers), regardless of their position. The labor laws set out the minimum standards that employers and employees must follow. These provisions apply to all contracts executed under Argentine territory, regardless of the nationality of the parties or the place where the contract has been entered into.

It is neither required nor customary for employers to issue or offer letters or employment contracts when hiring for an indefinite term. However, the written formality may be convenient for defining other issues of the contract, such as salary conditions, work hours, etc. However, special hiring alternatives do require a written agreement, because they are special exceptions to the general rule of indefinite term employment.

The exceptions to the indefinite term employment are the following:

- (i) Probation period: The first ninety (90) days of all indefinite term employment contracts cover what is known as a probationary period. During this period, the employer may discharge the employee without just cause, with 15 days of prior notice and without need of any further payment and/or severance indemnity. An employee may not be subject to more than one probationary or trial period with the same employer.
- (ii) Fixed term contracts: These are available and applicable only in specific and extraordinary cases (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 one-year term, the employee will be entitled to fifty percent (50%) of the indemnity for seniority payable under an indefinite term to employees who are terminated without just cause. The fixed term employment contract may be renewed, but the total length of the relationship may not exceed five years. Because these contracts are an exception to the indefinite term rule, the Courts see these contracts with restrictive criteria. If more than one renewal is made, it will most likely be construed that the employer is mischaracterizing the form of hiring.
- (iii) Contingent-Temporary contracts: These are executed to cover a specific type of work or a specific service, as determined by extraordinary circumstances.
- (iv) Contingent-Seasonal Contract: This is executed based on the kind of activity performed by the employee who provides his or her services only at a specified time of the year.

- (v) Apprenticeships and Internships: The apprenticeship is an employment contract available only for individuals between 15 and 28 years old. Employers and apprentices must comply with a training program. The work timetable may not exceed 40 hours per week. The minimum term of the contract is three months and the maximum term is 12 months. Apprentices are subject to a working limit of 40 hours per week. In all cases, the employer must give a one-month prior termination notice. Upon expiration of the contract, the apprentice is not entitled to any severance payment. In case of early termination without just cause, trainees may claim for severance payments. This contract is not customary because employers prefer to use internships, which are a special alternative for training purposes. Internships are not considered employment and are, therefore, exempt from social security contributions. Internship contracts are available only to students or to certain unemployed youth. There are different alternatives for internships and each one is governed by different rules and proceedings. The term of the internship as well as the work schedule varies in each alternative.

With regard to fixed term contracts and contingent-temporary contracts, 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 further payment and/or 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 (breach of contract). In case of early termination without just cause of a fixed-term contract or a contingent-term contract, 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.

## Terminations

### Restrictions On Employers

As explained above, no legal formality is required to create an employment relationship; however, once created, the relationship is endowed with legal significance and the expectation of certain rights. Employment is assumed to last for an indefinite term and can be terminated by the employer without penalty only for just cause.

In general, under the Employment Contract Law (ECL), the employer and/or the employee may terminate their contract for the following reasons: (i) mutual consent; (ii) employee's resignation; (iii) employer's dismissal of the employee, with or without just cause; (iv) employee's death or total disability; (v) employee's retirement; (vi) employer's bankruptcy; or (vii) by expiration of an agreed fixed term of employment.

Except for the case of trade union representatives and workers council representatives (in which a judicial procedure is required in order to terminate them with just cause), employers are legally entitled to terminate any employment contract, at any time, without just cause. However, in that case, the employer must pay severance to the employee who is dismissed without cause.

Employers who terminate contracts without just cause during the protected period set forth in Law 25,972 (effective as from December 18, 2004) must pay an aggravated penalty. In addition, those employers must give prior notice of the discharge without just cause to the labor authority by complying with certain special procedures.

In this regard, it is worth noting that this aggravated penalty shall not be applied to those workers or employees who have been hired as from January 1st, 2003, provided their employment represents an increase in the employer's total headcount as of December 31, 2002.

The employer may terminate employment with just cause when the employee has engaged in certain activities offensive or prejudicial to the employer, like theft of employer's goods, insulting a superior, lack of loyalty, insubordination, employee's failure to act with dedication and good faith toward the employer, and continuous lack of punctuality and attendance. The activities that may be considered offensive or prejudicial to the employer are determined on a case by case basis, 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 by filing a lawsuit in which the employer bears the burden of proof.

The employees may also terminate the employment contract with just cause (constructive dismissal). Just cause is a serious offense that prevents the relationship from continuing.

When an employee is dismissed with just cause or resigns, or parties agree on a separation by mutual consent, the employer only has to pay the accruals (i.e., wages for worked days; proportional compensation for non-enjoyed holidays and proportional thirteenth salary), and does not have to pay any special compensation.

In all cases, employers are free to make additional payments to the dismissed or resigning employees over the minimum and mandatory severance. These additional payments are treated as bonuses subject to income tax withholdings, but exempted from social security contributions, since they are considered extraordinary and exceptional bonuses (i.e., only upon termination of employment contract).

In certain cases, an employee may be entitled to additional and specific compensations, as the law protects certain categories of employees in a different way.

Some examples of the cases in which an employee might be entitled to said compensation follows: breach of a fixed-term employment contract, employees protected due to their maternity, pregnancy, or wedding, employees who were improperly registered in the payroll book, employees who have suffered discrimination, or union representatives.

Pregnant, nursing mothers and newly married employees who are dismissed without just cause are entitled to an additional severance indemnity payment equal to one year of their salaries.

Employees who are not properly registered in the employer's payroll are entitled to additional amounts that significantly increase the mandatory severance package.

According to the Anti-Discrimination Law N° 23,592, those employees dismissed on grounds of discrimination because of their race, religion, nationality, ideology, political affiliation, union opinion, sex, financial, and social and/or physical condition may demand their reinstatement or any other measure to remove the effect of the discriminatory act or to cease in its performance by means of summary proceedings (according to Section 43 of the National Constitution). Discriminated employees who are reinstated are entitled to back wages. The employees also have the option to terminate the employment contract with cause and claim the mandatory severance payments from their employers under constructive dismissal. Under the provisions of the Civil Code, the adversely affected employees may also claim for a compensation for pain and suffering or emotional distress.

Moreover, as explained above, employment with union representatives may not be terminated, and neither may the employer change their work conditions without just cause, within the term of one year after the end of their representation. The employer must follow a special procedure before the Labor Courts in order to dismiss a union representative with just cause. However, if the procedure is not followed, the representative may choose between being reinstated to his or her job, or receiving, apart from the mandatory severance pay package, an additional severance pay equal to all the salaries that he or she would have received up to the end of his or her representation period, plus salaries for one additional year.

Other cases in which employers are exposed to additional payments include those involving traveling salesmen, lack of payment of the mandatory severance package in due time and failure to provide employment certificates in due time.

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

Employers have the obligation to give prior notice of termination to employees who are dismissed without just cause, as per the following guidelines:

- (i) Employees whose seniority is less than three (3) months must receive a prior termination notice fifteen days in advance of their dismissal (or be provided with a payment in lieu of notice of one half of the employee's monthly salary);
- (ii) Employees whose seniority ranges from three (3) months to five (5) years must receive the prior termination notice one month in advance of their dismissal (or be provided with a payment in lieu of notice of one month of salary);
- (iii) Employees whose seniority exceeds five (5) years must receive the termination notice two months in advance of their dismissal (or be provided with a payment in lieu of notice of two months of salary).

Employees must give their employers a termination notice 15 days in advance.

The notice must always be given in writing.

If employers provide said notice, employees are entitled, during the aforementioned term, to a paid daily license of two working hours, which may be accumulated in one or more working days, in order to look for another job.

Should no prior notice of termination be given, then employers must pay the dismissed employees a compensation in lieu of such omitted notice, net of social security contributions and withholdings, as the case may be. When employees have gone past the probationary period and employers fail to provide notice, the payment in lieu of notice includes the outstanding days of the month of termination, plus the one or two months of salaries. It is worth noting that under Emergency Law 25,561 and other regulations in force, payment in lieu of notice is subject to an 80% aggregate pay.

## **Termination Indemnities**

When employees are dismissed with just cause, or agree on a separation by mutual consent, resign, expire their fixed term contract, or retire, employers only have to pay the accruals.

The accruals are as follows:

- (i) Wages for worked days;
- (ii) Proportional thirteenth salary, and
- (iii) Proportional compensation for non-enjoyed holidays.

When employees are dismissed without just cause, employers also have to pay a severance that comprises:

- (iv) Mandatory severance pay based on seniority;
- (v) Mandatory severance pay in lieu of prior termination notice.

When employment is terminated due to the employee's death, employer's bankruptcy, "force majeure" or lack of or reduction of employer's activities (alien to the employer), the employer must pay a reduced mandatory severance pay based on seniority. Employees are entitled to receive fifty percent (50%) of the mandatory severance pay based on seniority that they would receive under usual termination without just cause.

For purposes of calculating the payments described below, certain permanent or repeated fringe benefits must also be taken into account (except as otherwise indicated in the law).

Employers must pay the severance within four working days of the termination date. In case of malicious delay in honoring the severance, employers could be ordered to pay an aggravated interest rate by the judge, and in certain cases, employers may be ordered to pay a special fine.

Each termination payment item is detailed hereafter:

### **(i) Wages For Worked Days**

The employer must pay the terminated employee's salary for the days worked in the month in which the termination occurs.

This payment is not subject to an additional 80%. It is subject to income tax and social security contributions and withholdings.

### **(ii) Proportional Thirteenth Salary**

Employees are entitled to receive one additional salary per year of work. This thirteenth salary, named in Spanish "*sueldo anual complementario*" and also "*aguinaldo*" is to be paid in two semi-annual installments at the end of each semester (payment is due on June 30 and December 31).

The thirteenth salary is calculated considering the highest remuneration paid (including all benefits) during the corresponding semester, and is to be considered as additional remuneration for the services rendered during such period.

Employees must receive the accrued part of this thirteenth salary at the time of termination of their employment.

This payment is not subject to an additional 80%. It is subject to tax and social security contributions and withholdings.

(iii) **Proportional Compensation For Non-Enjoyed Holidays.**

Employees are entitled to a minimum and continued period of paid annual vacation leave of fourteen (14) calendar days when seniority does not exceed five years; twenty-one (21) calendar days when seniority is between five and ten years; twenty-eight (28) calendar days when seniority is between ten and twenty years; and thirty-five (35) calendar days when seniority exceeds twenty years.

Employees are entitled to the payment for the proportional accrued and non-enjoyed holidays during the year, upon termination of employment.

The following formula is applied to calculate the proportional compensation for non-enjoyed holidays:

Monthly salary		Days worked in the year		Days of vacation according to seniority
-----	x	-----	x	
25 days		365 days		

In addition, the employer must pay the proportional part of the thirteenth salary on this item, which is an additional one twelfth (1/12).

It is debatable whether this payment should be subject to the additional 80%. However, as per Executive Order 264/02 and interpretation of many labor courts, this item should be subject to the extra payment. This compensation is not subject to social security contributions or withholdings, but is subject to income tax withholding.

(iv) **Mandatory Severance Pay Based On Seniority**

The employer must pay the employee a termination indemnity, i.e., a mandatory severance pay based on seniority equivalent to one gross of his or her highest monthly and regular salary of the last twelve months for each year of service or any fraction thereof (in excess of three months). In no event may this mandatory severance pay be lower than one actual gross monthly salary.

For purposes of calculating this severance, the highest monthly and regular salary of the last year has a statutory ceiling: it may not exceed three times the average of all the remuneration set in the applicable collective bargaining agreement ("CBA"). If more than one CBA is applicable to the employer's activity, the one most favorable to the employee shall be applied. This ceiling is applicable for unionized and non-unionized employees. On the average, this statutory maximum amount (three times the average of all the remuneration contemplated in the pertinent CBA) is approximately \$2,000.

However, the Supreme Court of Justice ruled on September 14, 2004, in the case "*Vizzoti, Carlos A. vs. AMSA S.A.*", that the above cap was unconstitutional and set forth that the legal cap related to the CBA may not be lower than 67% of the highest monthly and regular salary earned by the employee during the last year of employment. Therefore, in no event the mandatory severance pay may be less than 67% of employee's salary multiplied by each year of service or fraction thereof (in excess of three months). It is worth noting that over this amount, the employer must apply the aggravated 80% severance payment due to the Emergency Law and related executive orders.

This payment is subject to an additional 80%, but is not subject to any taxes or social security contributions or withholdings.

The Supreme Court of Justice of the Buenos Aires Province has ruled that employers who terminate without cause within the Buenos Aires Province jurisdiction must also pay thirteenth salary on this amount (i.e., an additional 8.33% over the statutory severance on seniority).

Employers may be able to reduce the amount of the mandatory severance pay by proving “force majeure” (i.e., any circumstance beyond the employer’s control like a natural disaster or an act of government), “lack or reduction of work”, “economic or technological reasons”, not attributed to the employer and beyond employer’s control and prevision. Layoffs must be in order of seniority and under similar seniority (started in same semester), layoffs must be in order of family burden. Mass layoffs must comply with a special procedure before the labor authorities, with presence of the trade union organization, whereby the employer must give evidence of the critical situation. Judges are very restrictive as regards the application of this exception.

(v) Mandatory Severance Pay In Lieu Of Prior Termination Notice

As explained above, employers must give prior termination notice in writing to their employees and absence of notice entitles the employees to an indemnity in lieu of notice.

For employees hired after April 6, 1995 in Small and Medium Sized Companies, the notice period is reduced to one (1) month and payment in lieu of notice is one (1) monthly salary (*Law 24,467 defines Small and Medium-Sized Companies when they: (a) do not have more than 40 employees, and (b) have annual billing inferior to: Annual Billing amounts in ARP (not including VAT) for rural sector: \$2,500,000; for industrial sector: \$5,000,000; for commercial sector: \$3,000,000; and services sector: \$4,000,000. As regards companies existing prior to the effective date of this law, said estimation of employees shall be based on the staff existing as of January 1, 1995. Companies going beyond one or both above-mentioned conditions may remain under the special regime of this law for a term of three (3) years, provided they do not double their staff (number of employees in their headcount/payroll) or billing mentioned in the second paragraph hereof.*

The employer must pay the proportional part of the thirteenth salary on this item, which is an additional one twelfth (1/12).

As stated above, this payment is subject to the additional 80%. It is not subject to social security contributions or withholdings, but is subject to income tax withholding.

(vi) Pending Days (Balance Salary Of The Month Of Termination)

In addition, the employer must pay the salary for the days remaining in the month in which the termination occurred.

For employees hired after April 6, 1995, in Small and Medium Sized Companies, this item is not applicable.

The employer must pay the proportional part of the thirteenth salary on this item, which is an additional one twelfth (1/12).

This item is subject to an additional 80%. It is not subject to social security contributions or withholdings, but is subject to income tax withholdings.

### **Additional Compensations**

The employer may also be led, depending upon the circumstances, to pay some additional compensations to the normal and regular severance described above. These addition compensations are as follows:

- (i) Traveling salesmen.
- (ii) Breach of a fixed-term employment contract.
- (iii) Employees protected due to their maternity, pregnancy, or wedding.
- (iv) Trade union organization representatives.
- (v) Non-registered employees.
- (vi) Discriminated employees.
- (vii) Lack of payment of the severance in due time.
- (viii) Failure to provide the employment certificates.
- (ix) Social security contributions.
- (x) Aggravated penalty due to the Economic Emergency.

**(i) Traveling Salesmen**

In case of termination of traveling salesmen for whatever reason, pursuant to the Traveling Salesmen Statute (Law N° 14,546), the employer must pay an additional compensation for clientele.

This special compensation is only due to those traveling salesmen whose seniority exceeds one (1) year.

The compensation for clientele is equivalent to twenty-five percent (25%) of whatever the employee would have received in case of dismissal without just cause, even when the employee is not dismissed without just cause.

**(ii) Breach Of A Fixed Term Employment Contract**

Upon the termination of the contract by expiration of its term, the employee will not be entitled to receive severance, unless:

(a) the fixed term employment contract was executed for a period of 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 (breach of contract).

In case of termination of a fixed-term employment contract that exceeds a one-year (1) term, upon completion of its term, the employee is entitled to fifty percent (50%) of the seniority payable to employees under an indefinite term employment who are terminated without just cause.

In case the employer breaches the contract without just cause, the employee will be entitled to receive the regular severance due to an employee employed for an undetermined term, plus damages, usually set as the remaining salary until the end of the term of the contract.

**(iii) Employees Protected Due To Their Maternity, Pregnancy, Or Wedding**

The ECL provides for an additional compensation when the employer dismisses the employee without just cause during the pregnancy or birth protection period.

The law sets forth a presumption that the termination is due to pregnancy or birth reasons when the dismissal is without just cause during the term of seven and a half (7 1/2) months before or after birth, as long as the woman provides the employer with effective notice about the pregnancy and/or birth.

The ECL provides for a special compensation for the recent mother when she resigns once the three-month maternity leave expires. In this case, she will be entitled to twenty five percent (25%) of the seniority pay.

The ECL also provides for special protection for the married couple. The law sets forth a presumption that the termination is due to the marriage when the dismissal is without just cause during the term of three (3) months before or six (6) months after the marriage, as long as the employee provides the employer with effective notice about the wedding date. The courts have ruled that this presumption applies to women and that men are entitled to protection as long as they provide conclusive evidence that they were discriminated for this reason.

For these cases, the special compensation consists of thirteen (13) months' salaries (i.e., salaries of one year plus the thirteenth salary).

**(iv) Trade Union Organization Representatives**

According to the Trade Union Organizations Law N° 23,551, employers cannot discharge workers council representatives, nor can they change these working conditions without their consent.

Employers must file a special judicial procedure in order to sanction or terminate a representative with just cause.

The Union Law grants the workers council representative the choice, when employers sanction them or dismiss them without following the special judicial procedure, to request reinstatement by means of interim measures or to request a special compensation for damages, equal to the salaries corresponding to the remaining term of representation plus one year of salaries.

(v) Non-Registered Employees

The National Employment Law N° 24,013 and Aggravated Severance Law N° 25,323, rule for additional compensations in case employers fail to register the relationship in the mandatory labor books.

The special compensation under National Employment Law N° 24,013 proceed when: (a) employees demand their correct registration to their employer prior to their termination, and (b) employees send the copy of said demand to the AFIP (National Tax Authority) within the term of 24 business hours after having requested the registration from their employer. Therefore, the fines set forth in Law N° 24,013 may only be enforced whenever employees have previously fulfilled both requirements (the demand to their employer and the notice to the AFIP). Moreover, employers shall be exempt from paying the compensation, provided they answer and wholly fulfill said demand within thirty (30) days.

According to Section 8 of Law N° 24,013, employers who fail to register the existence of the employment relationship shall pay 25% of all accrued remuneration during the employment relationship but under no circumstance before December 25, 1989. Under no circumstance must this compensation be lower than three (3) times the best regular and habitual monthly salary of the employee.

According to Section 9 of Law N° 24,013, employers who fail to register the real date of hiring and register a later one shall pay 25% of all accrued remuneration within the hiring date and the actual registration date, but under no circumstance before December 25, 1989.

According to Section 10 of Law N° 24,013, employers who fail to register the actual salary and register a lower one shall pay 25% of all non-registered and accrued remuneration during the employment relationship, but under no circumstance before December 25, 1989.

In addition, Section 15 of Law N° 24,013 rules that if employees are dismissed without just cause within the two years term after their demand of registration, employers would also have to pay the terminated employees an additional 100% of the regular severance pay for dismissal without just cause.

Finally, for those employees who do not demand their registration during the employment relationship and their employment relationship is not duly registered in the labor books at the time of their dismissals, Law N° 25,323 sets forth a special compensation equivalent to an additional 100% of the seniority pay upon their dismissal without just cause.

Employees' constructive terminations also trigger the same compensations.

(vi) Discriminated Employees

According to the Anti-Discrimination Law N° 23,592, those employees discriminated on the grounds of race, religion, nationality, ideology, political or union opinion and sex, economical position, social condition and/or physical characteristics may request the reinstatement or any other precautionary action to withdraw the effect of the discriminatory act or to cease in its performance. The affected employee may file this petition under Section 43 of the National Constitution, which rules for a summary proceeding that guarantees constitutional rights.

Under the provisions of the Anti-Discrimination Law, the adversely affected employee may also claim for a compensation for pain and suffering or emotional distress) and material damages (lost wages).

In addition, and in accordance to the provisions of Law 23,592, under the ECL, all discriminated employees are entitled to claim the salaries that should have been earned, or terminate the employment contract and claim the regular severance from their employers, as an indirect dismissal.

Employees could claim for additional compensation based on tort rules. Under these Civil Code provisions, employees may claim compensatory damages for pain and suffering and emotional distress. Employees have the burden of proving (a) the damage and (b) their employer's liability. There is no statutory ceiling to the said compensation, and there has not been many cases brought in court for the recovery of damages. Because Argentina's current legislation does not provide for punitive damages, the general rule is that a judgment based on Civil Law provisions should not exceed \$50,000.

Notwithstanding the foregoing, additional compensation for pain and suffering and material damages due to a discriminatory practice may actually be sought according to Law 23,592.

There is not a significant number of judicial cases brought with the Argentine labor courts for discrimination, reinstatement and/or recovery of damages. Rather, most of these cases are associated with wrongful dismissals. Moreover, there is no legal precedent related to discrimination during the hiring process.

#### (vii) Lack Of Payment Of Severance In Due Course

Pursuant to the ECL, employers should pay the accruals and the termination severance, if applicable, within 4 working days as from the termination date.

Employees are entitled to an aggravated interest rate in case of employer's deliberate delay in honoring the pertinent severance. The Courts may impose this penalty.

The Labor Reform Law N° 25,013 sets forth a presumption of malicious behavior when employers do not pay the severance in due course. The Courts must apply the penalty, which shall benefit employees.

Likewise, Law N° 25,323 establishes that when the employer who was conclusively urged by the employee to pay severance (*i.e.*, mandatory severance pay in lieu of prior termination notice and mandatory severance pay based on seniority), denies to make such payment and therefore obliges the employee to bring legal actions or any other kind of prior proceedings to compel the employer to pay them, said compensations shall be increased up to 50%.

#### (viii) Failure To Provide The Employment Certificates

Upon termination of the labor relationship, employers must deliver two certificates to the employees: (a) the Work Certificate required by Section 80 of the ECL, and (b) the Certificate of Services and Remuneration required by the Retirement and Pension Law N° 24,241.

Under Section 80 of the ECL, employers have two (2) working days to deliver the Work Certificate, after employees formally request them.

Executive Order 146/01 amended this term and established that employees have thirty running days as per the termination date to deliver said certificate and employees can only request them after said term expires. Some legal commentators opine that this Executive Order is not constitutional because it has created a term that was not set forth in the ECL.

Employers' failure to comply with said request shall make them liable to pay a compensation to the employee equivalent to three times the employee's highest monthly and normal salary of the last year or during the term of his services, if lower. This compensation shall have to be paid without prejudice to any other penalties that may be fixed by the competent judicial authority to cease of said negative conduct.

#### (ix) Social Security Contributions

Tax Evasion Law N° 25,345 added a new section (section 132 bis) to the ECL regarding the employers' duty to withhold a certain amount from the employees' salary and make the pertinent deposit with the Federal Tax Authority and the Trade Union (if appropriate).

All withholdings must be fully deposited by the time of the termination of the labor relationship. Should employers not have done so, either totally or partially, as from that date onwards and until they effectively make such payment, the employers must pay the affected employees a compensation equivalent to their last monthly salary.

In order for the penalties to be applied, the employees must notify their employers, and the employers have 30 days from the receipt of the notification to comply with the obligation of paying the amounts withheld, the interest incurred on these amounts, and the penalties to the pertinent authorities.

(x) **Aggravated Penalty Due To The Economic Emergency**

Pursuant to the economic and employment crisis of the country, Emergency Law 25,561 and its amendments (in force since January 6, 2002) set forth a suspension to employers' rights to dismissing employees without just cause or due to crisis.

Per Law 25,561, those employers who had dismissed employees without just cause during the protected period were to pay an additional one hundred percent (100%) of the severance. This amount was later reduced to eighty percent (80%) of the severance.

Per Executive Order 264/02, the additional pay was applicable as regards all statutory items that were related to the dismissal without just cause. Therefore, many courts accepted to include the pay in lieu of notice and vacation pay. Some courts went even further and accepted to increase payments due to maternity, union representation, lack of registration, etc.

Effective December 18, 2004, Law 25,972 extends the suspension to dismiss employees without just cause until the official unemployment rate is lower than ten percent (10%). This law provides that employers who dismiss employees without just cause in violation of said suspension must pay their employees the additional amount that the Executive Branch indicates, which shall be applicable on severance due to seniority set forth in Section 245 of the ECL.

The Executive Order 2014/04 rules that the additional amount shall be equivalent to eighty percent (80%) of the severance.

Surprisingly, Executive Order 2014/04 insists that 80% of severance includes all indemnification items related to the termination without cause, ignoring the fact that Law 25,972 clearly limits the additional pay to the severance on seniority. For this reason, we are of the opinion that the additional pay equivalent to eighty percent (80%) should not impact on other items somehow related to the termination, such as pay in lieu of notice, pay in lieu of vacations, penalties due to termination during maternity period, dismissal of a union representative, of someone bound by an employment contract which has been improperly registered, etc.

Law 25,972 confirms the exemption set forth in Executive Order N° 2639/02, which states that this aggravated payment shall not apply to those employees hired as of January 1st, 2003, provided their employment represents an increase in the employer's total headcount as of December 31, 2002.

In addition to the aggravated pay, the regulations in force impose certain procedures before executing a termination without just cause.

Per Executive Order N° 264/02, employers must give prior notice of their employees' dismissal without just cause or due to crisis involving the labor authority, and should comply with the following procedures:

- in the case of *individual dismissals* (as opposed to collective dismissals), employers must give notice of the termination to the Ministry of Labor and to the pertinent union at least within ten days before the actual dismissal date;
- in the case of *collective dismissals*, employers must first file the so-called *Company's Crisis Preventive Proceedings* with the Ministry of Labor. *Collective dismissals* are defined as those dismissals (a) in excess of 15% of the whole staff when employer has less than 400 workers, (b) in excess of 10% of the whole staff when the employer has 400 to 1,000 workers, and (c) in excess of 5% of the whole staff when the employer has more than 1,000 workers.

Should the employer fail to comply with any of the above-mentioned procedures, the labor authority may request to immediately cease the dismissals and to reinstate the employees, and/or impose fines resulting from the infringement of their request. Usually, the labor authority does not exercise these powers.

## **Laws On Separation Agreements, Waivers, And Releases**

Separation agreements under mutual consent must be executed before a notary 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 without just cause and have ordered the employer to pay the statutory severance.

According to Section 12 of the ECL, any agreement that reduces or suppresses the minimum standards set forth in the laws or collective bargaining agreements shall be deemed null and not legally binding. Thus, per this section, employees cannot waive or release employers from payment of any due amount.

However, Section 15 of the ECL sets forth that disputed rights can be settled before the labor or judicial authority, who must issue a grounded resolution approving the terms of the agreements when they are a just and fair settlement of the rights and interests of the parties. Under this provision, settlement agreements are permitted as long as the employees' rights are being disputed. 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.

According to the plenary decision N° 137 of the Labor Appeal Courts of Buenos Aires city, the release clause inserted in a settlement agreement (stating that the employee has nothing else to claim against his or her employer) is valid and enforceable. On the other hand, the employer has entered into such agreement under the assumption that no further claims are to be made.

Therefore, when there is no settlement of a disputed right, the labor authority shall not approve the agreement. In practice, the labor authority does not approve separation agreements with mutual consent, but approves the agreement in which employer and employee agree upon the severance package and terms of payment.

## **Litigation Considerations**

Since employees' silence ought not to be construed as consenting to the terms of their employment, employers are usually exposed to claims against them in connection with issues like unpaid overtime, salary differences due to a wrong categorization of their position, changes in the remunerative structure without their written consent, unpaid commissions, non-registered employment, remuneration or seniority, etc.

The statute of limitations for employment and labor issues is two years. Therefore, employees or former employees may file a claim against their employers pursuing collection of their credit within two years. However, employees can request the proper registration of their seniority or salaries at any time while their employment relationship is in force.

Due to the recent decision of the Supreme Court of Justice declaring the unconstitutionality of the statutory cap for dismissals without just cause, employers are now exposed to claims related to outstanding balances regarding severance on seniority, per the guidelines of this judicial decision. Any payment allocated to dismissal without just cause, made during the last two years, which lacks the approval from the labor authority or a judge, can be challenged.

It is also customary for employees who have their seniority or salary improperly recorded to file claims when they fear that their employment is close to being terminated. It is highly advisable for employers to seek legal counsel before taking any action thereon.

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.

## **Employment Discrimination**

### **Laws On Employment Discrimination**

The Argentine Constitution rules in section 14 for certain labor rights, including the principle of equal pay for equal work. Section 16 rules that all citizens are equal under the law.

The Supreme Court of Justice has ruled that the equal treatment rule should be understood as equal rights under the same circumstances, and that the judges have the authority to decide under the principle of reasonability when equal or different circumstances exist.

Section 75, inserted with the Constitutional Reform of 1994, includes various references to the right to equal opportunities between different classes, especially regarding gender, age and physical impairment.

Section 43 of the Constitution sets forth a procedure to obtain immediate solution when a constitutional right is jeopardized, including any kind of discrimination.

In addition, Section 75 of the Constitution incorporates certain international treaties to the rank of constitutional rights. These treaties are related to human rights and many of them defer to the non-discrimination principle.

Finally, the Constitution authorizes Congress to pass laws that include positive actions that assure the 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 rules against any discriminatory practice. This law 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.

Under this law, those who impede, obstruct or restrict or in any way reduce the plain exercise, under equal basis, of the fundamental rights and warranties acknowledged in the National 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.

This law also aggravates 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.

In addition, there are specific laws that address protection against discrimination due to certain diseases, such as diabetes (Law N° 23,753), AIDS (Law N° 23,798), and epilepsy (Law N° 25,404).

Law N° 22,431, amended per Law N° 25,689, imposes on all governmental agencies and private companies with concession of public services to hire physically disabled but deserving individuals who comprise no less than 4% of their headcount.

In addition, said law sets forth a tax benefit (special deduction for income or capital tax equivalent to 70% of individuals remuneration) when employers hire physically disabled individuals.

Employment regulations also have numerous references to the anti-discrimination principle. The ECL includes several provisions. Section 17 prohibits any discrimination among employees on the basis of gender, race, nationality, religion, union and/or political membership and age. Section 81 rules that employers must treat their employees equally. The law also rules that such equal rights principle is not violated when an employee is treated differently based on his or her productivity, attitude towards work, etc.

Additional sections of the ECL also refer to certain discrimination practices. Title VII of the ECL refers to women's work. Section 172 that prohibits any discriminatory regulation or collective bargaining agreement 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 175 prohibits employers from assigning work at the women's domicile, unless she is specifically hired for that purpose. Section 176 prohibits women from doing hard, dangerous or unhealthy tasks. Section 177 prohibits women from working 45 days before and after birth - the woman the employee has the option to reduce the license before birth to 30 days and extend the license after birth to 60 days. During this period, the employee is entitled to an allowance granted by the social security system equal to her salary. In addition, the law grants to the pregnant employee a protection against arbitrary dismissal. Section 178 sets forth 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 it is noticed 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, employees are entitled in these cases 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, considering the normal and regular monthly salary. The courts have extended this protection to men, when employees show that termination has been decided due to their marital status.

Section 189 prohibits work of minors less than fourteen years of age. Section 187 permits work of minors between fourteen and eighteen years of age and rules for equal pay with the rest of the work force, when they perform similar tasks. Section 190 prohibits work of minors between fourteen and eighteen for more than six hours per day and thirty-six hours per week, although minors above sixteen years of age can work beyond this limit when authorized by the labor authority. Work is prohibited for minors during night shifts - that is, between 8 p.m. and 6 a.m.

Under Section 73, employers cannot force employees to declare their opinion about political, religious or union issues.

According to the Union Law N° 23,551, employers cannot discharge works council representatives, nor can they change their employees' work conditions. A special judicial procedure must be followed in order to sanction or terminate a representative with just cause.

In addition, all collective bargaining agreements define categories with their job positions and salary scales for minimum wages for each position. Employers must frame their employees within the defined categories. Employees who have been performing tasks defined under another category are entitled to collect accordingly.

## **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 intimate suffering. Argentine law does not have specific provisions related to punitive damages.

According to the Anti-Discrimination Law N° 23,592, those employees discriminated against based on race, religion, nationality, ideology, political affiliation, union opinion, sex, economic standing, social condition and/or physical characteristics may request the reinstatement or any other precautionary action to withdraw the effect of the discriminatory act or to cease in its performance. The affected employee may file this petition under Section 43 of the National Constitution, which rules for a summary proceeding which guarantees constitutional rights. Under the provisions of this law, the affected employee may also seek a compensation for emotional suffering and wages.

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

As regards specific payments in the law imposed on employers who violate a mandatory protection period, the ECL only provides for an aggregate pay of one year of salaries when termination is made during pregnancy or after a recent birth, or during a certain period before or after marriage. In addition, the Union Law N° 23,551 grants union leaders the choice, when employers sanction them or dismiss them without following the judicial procedure, to request reinstatement by means of interim measures or to request a special compensation for damages, equal to the remaining term of representation plus one year of salaries. The law also sets forth a fine due to unfair union practice.

In practice, employees usually pursue statutory severance (including specific payment by virtue of an employee's marriage, maternity needs, or the needs of union leaders) due to grounded termination. When no specific payment is foreseen as a sanction (such as discrimination based on disease, sexual orientation, political opinion or affiliation, etc.), courts usually award additional damages due to the emotional suffering. The amount of the award for such suffering rarely exceeds ARP 20,000.

Claims of reinstatement and lost wages are common in the cases of union leaders and very uncommon for the rest of the cases in which employers are charged with discrimination.

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

### **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 instruct 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 rules 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.

As explained above, employers may grant a special treatment to certain employees in a special situation, but it is convenient to keep appropriate records of any such decision, in order to avoid unjustified claims of discriminatory practices.

## **Sexual Harassment**

### **Laws On Sexual Harassment**

Presently, sexual harassment in the workplace is not a pressing legal issue for employers in Argentina. There is no special legal statute or regulation dealing with this issue as regards the private sector and neither have there been many rulings.

The statute for the public administration sets out some rules that can be understood by general public. Sexual harassment in Argentina is defined as a coercive action of a government official that in the exercise of his or her functions takes advantage of his or her work position, inducing another person to consent to his or her sexual requirements, even if the sexual act is not consummated.

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 Section 1071 of the Civil Code, those who arbitrarily interfere in someone else's life by tormenting him or her emotionally or physically, or intruding in his or her privacy will be obliged to cease in such activities, and to give fair compensation.

Legal commentators and judges have defined sexual harassment as the act of pursuing, importuning or bothering a lower-ranked employee in order to obtain a sexual favor, through a repetitive conduct, under the pressure or threat being discriminated against or segregated from the workplace due to his or her refusal to accept the demands.

Legal commentators conceptualize this figure as opposed to the act of seduction. 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.

Sexual harassment is not considered a discriminatory behavior, under the understanding that the harasser only intends to satisfy his or her basic instincts and does not intend to offend his or her victim with respect to his or her gender or personal traits or conditions. On the contrary, the harasser seems to consider the victim a desirable and attractive sexual object. However, the employees' refusal to accept a sexual demand may lead to sanctions, which a labor court may define as unequal treatment or persecution.

The sexual aggressor's conduct is considered illegal because he or she offends his or her victim by undermining him or her and restrains his or her freedom of sexual choice. Employers may thus be held liable for such harassment.

The sexual harassment may lead to a crime under Law N° 25,087 which rules that those who sexually abuse someone through violence, threat, coercion, intimidation, or abuse of an employment relationship, of authority or of power, taking advantage 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.

### **Employee Remedies And Potential Employer Liability For Sexual Harassment**

Employers are directly liable if they are the harassers, or indirectly responsible if the harassers are employees with authority. However, legal commentators agree that harassed employees must prove that their employers have had knowledge of the harassers' conduct and that they have done nothing to avoid it.

Sexual harassment is an offense to the victim that could lead to a grounded termination, and even civil damages for pain and suffering.

Harassed employees are entitled to terminate the employment contract and pursue indemnification from their employers under the ECL, as indirect dismissal. The V Chamber of the National Labor Court of Appeals ruled on April 19, 1994 that sexual harassment carried out by an employer toward a female employee must be considered a fair cause of indirect dismissal, even when a criminal accusation has not been made, and as long as the events have been proved according to the judge (*in re A.S. v. Carnicerías Integradas Coto S.A.*).

In addition, harassed employees may seek additional compensation grounded under tort rules. Under these Civil Code provisions, employees may seek compensatory damages for medical attention, along with pain, suffering and emotional distress. Employees have the burden of proving (i) the damage and (ii) their employer's liability. There is no cap to the amount of this compensation, and there have not been many cases brought to our courts in order to recover damages. In general, our understanding is that a ruling on Civil Law provisions should not exceed \$30,000.

Argentina's current legislation does not provide for punitive damages. However, the draft of the new Civil Code includes punitive damages. The issue is currently being discussed by legal commentators and has not yet been debated in Congress.

When the courts extend the liability to an employer, they argue that the employer has been aware of the harassment and has failed to adopt a measure to punish the harasser.

Employers may dismiss a harasser with just cause. The II Chamber of the National Labor Court of Appeals ruled the an employer may dismiss with just cause a hierarchical employee who has sexually harassed other employees, since the hierarchical superior always represents, in some way, the employer before the employees, and does not seem reasonable to admit using this situation for his or her personal benefit, by putting pressures that violate the individual's sexual liberty (*in re M. L. G. vs. Antigüa S.A.*).

The collection of evidence in these cases is very difficult and courts have been flexible in their evaluation thereof. However, when there is no evidence of the harassment, the courts dismiss the complaint. A Chamber of Appeals of Labor and Civil Matters of Corrientes rejected a claim of harassment and accepted the employee's dismissal with just cause due to accusation without proof of the crime of abuse under Law 25,087 (*in re O. M. vs. Laboratorio Color del Centro*).

## **Practical Advice To Employers On Avoiding Sexual Harassment Problems**

Since there is no statute specifically related to sexual harassment, there is no statutory defense available to employers.

Although there have not been many cases brought to our courts, there are few court rules that may be used as guidelines, like demonstrating that employers have taken reasonable steps to prevent such harassment in the course of employment, through certain management policies, instructions and/or complaint procedures.

Legal commentators agree that employers must be given notice of the offense and the opportunity to amend it, and that legal liability exists for an employer whenever it has actual or constructive knowledge of the illegal conduct. Thus, corporations may assume that if no employee complains about sexual harassment, then sexual harassment has not occurred.

In order to avoid any liability, employers should take immediate action (such extensive investigation and appropriate remedial measures) whenever they receive a notice that sexual harassment has been committed in certain instances.

However, under certain circumstances, the courts may find employers liable because they should have known the exposure in the first place. The VII Chamber of the National Labor Court of Appeals ruled that an employer is liable under the terms of the first paragraph of Section 1113 of the Civil Code (objective liability for employee's actions) for the sexual aggression suffered by a female worker during sea travel. The court said that the employer could not ignore the special circumstances of the maritime work, nor the possible consequence that may have arisen when the employer authorized a woman with twenty-five men to sail on long journeys (*in re T., M. N. vs. Elma S.A.*).

# Republic of Austria

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## 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 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.

As mentioned, Austrian Labor Law still recognizes a distinction between waged and salaried employees. To be qualified as salaried employee, the employee must perform office work, or activities of a commercial nature, or more complex activities of a non-commercial nature, which 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 employee has lost much of its significance. It still has consequences for social insurance, Works Council, membership of trade unions, compensation rules, termination and notice periods. In the following, "employee" refers to salaried employees only.

After 1945, Austria reached a significantly high level in the protection of employee's rights. The purpose of this protective legislation is to lay down measures to protect life, health and morals of the 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 ways of discrimination by an employer.

## Trade Union And Social Partnership ("Sozialpartnerschaft")

Industrial relations and labor law in Austria are characterized by a high degree of centralization and a strong tendency towards compromise. Several bodies represent the employees' and some of them the employers' interests. The Austrian Trade Union Federation ("*Österreichischer Gewerkschaftsbund, ÖGB*") is the most influential Austrian employees' representation organization and is regarded as one of the most highly centralized trade unions in the western world. Its 15 constituent unions are legally subordinate bodies, which may act on behalf of the Federation in certain matters. These 15 constituent unions normally negotiate the national and sectoral collective bargaining agreements, and have a large influence on Austrian wage policies. Membership is voluntary.

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

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

## 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 cannot usually 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.

## Terminations And Dismissals

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

Individual termination may be unilateral, subject to a notice period or by mutual consent. This period varies according to the 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 for the information on termination to have been received by the employee.

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. This notice period ranges from 6 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 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 a frequent practice of employers to release the employee from duty (gardening leave or “*Dienstfreistellung*”) for the duration of all or part of the notice period. During this period the employee remains entitled to receive their full salary and employee benefits.

Furthermore, the employee may immediately terminate their employment contract if they become physically incapable of continuing work, or if the employer does not pay their salary or fails to comply with occupational health and safety obligations, 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 their right to terminate the employment.

An employer may immediately dismiss the employee for reasons of insubordination, disloyalty and other types of gross misconduct, or in 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, the employee will be entitled to either full payment for the notice period applying to ordinary termination, or to have the termination set aside if he or she initiates and wins a claim under the rules for protection against termination.

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 the termination. The principal protected groups are: members of and candidates to the Works Council; pregnant employees up to four months after giving birth; employees doing their prescribed military service and disabled employees.

## 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 way of filing legal action with the labor court. If there is no Works Council, the right to contest the termination rests with each individual employee. If such action is successful, the termination is invalid and the employee will be reinstated and entitled to full salary and benefits for the duration of the labor court proceedings.

An employer must first notify the Works Council of the intended termination. The Works Council may then comment on the termination within five working days. 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 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 five days by filing a lawsuit with the Labor Court. In cases where the company’s employees have not elected a Works Council, the rules involving approval of the Works Council will not apply.

The court may revoke a termination if there is an illegal basis for such termination, 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 employee and, in a balance of interests test, has not been sufficiently justified by the employer.

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

### Protection Against Dismissal

The employer has to notify the Works Council immediately before dismissing an employee and, upon request of the Works Council, has to consult with it within three working days from the intended notification. The dismissal may be challenged at court if the employer has not set any reason justifying the dismissal and if the dismissal is unjust on social grounds. However, dismissal may not be challenged if the Works Council has approved it. The consequences of a legal action against dismissal are identical with the consequences of legal action against termination. The Court will revoke 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 must notify the local office of the Labor Market Service (“*Arbeitsmarktservice*”) in writing that such terminations are intended. This provision applies if at least five employees are to be made redundant in a business with more than 20 and less than 100 employees; or at least five per cent 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 40 or over in any business.

This notification must take place at least thirty days before the first notice of redundancy is issued. Without such prior notification any termination would be invalid. Furthermore, during the thirty-day period following the date of notification, no notice of redundancy 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 “social plan”.

Furthermore, the employer must notify the Works Council before implementing certain measures defined as “major changes” in the business, and this includes any collective redundancy program. Once notified, the Works Council may submit a proposal to prevent, remove or mitigate any negative effects of the program on employees. Where 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 work force, the Works Council may request that the company draw up a “social plan”. A social plan has the purpose of preventing, removing or mitigating any disadvantages in respect of the intended “major changes”.

## Laws On Separation Agreements, Waivers And Releases

As a general principle, concluding an agreement on amicable dissolution may terminate an employment relationship. Such agreement may 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 applies. The amicable dissolution is not subject to any specific form requirement, as such requirements only exist for termination of persons enjoying special protection. The amicable dissolution is the most common way of terminating any employment relationship, as neither the restrictions nor the statutory notice period in the case of a termination by the employer need to be observed.

## 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, then its termination without good cause will automatically require the payment of statutory severance compensation. Severance compensation may only be claimed after a person has been in a post for at least three years. It ranges from a minimum payment of two months' salary to twelve months' salary after 25 years of service.

If an employment relationship commenced after January 1st, 2003, then the statutory severance compensation will be payable through a state-run fund. In 2003, a new system of severance payments came into force. These provisions are applicable to all new employment contracts starting on or after January 1st, 2003. This regulation requires that the employer provide termination indemnities through an individually defined contribution fund (or "*Mitarbeitervorsorgekasse*" - commonly known as the MVK). Moreover, transfers of already existing severance payment claims 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 already existing claims, a mutual agreement is required between the employer and the employee.

## Employment Discrimination

The statutory prohibition against employment discrimination is going increasing significantly in Europe and also in Austria, but it is far from being as relevant to personnel decisions as it is in the United States. This is primarily because Austrian labor law already provides substantial protective rules for employees. Consequently, employment discrimination cases are not frequently asserted in Austria. Therefore, no administrative process for asserting a discrimination complaint exists, such as it does in the United States, and employees may proceed directly to court with such a claim.

## Laws On Employment Discrimination

Although the provisions of the Austrian Equal Treatment Act ("*Gleichbehandlungsgesetz*") equally protect both women and men from discrimination at work on gender grounds, they are principally geared to women's needs, and are in practice 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 plain 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 and professional advancement.

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

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

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

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

Furthermore, no major cases dealing with disability discrimination exist, as 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 Labor Court, as 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.

### **Employee Remedies/Potential Employer Liability For Employment Discrimination**

Any violation of the equal treatment principle entitles the male and female employee having suffered discrimination to lodge claims for damages or for an end to the discriminating situation. However, various time limits have to 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. 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 female or male employee has to prove demonstrably the discriminating situation on which he or she bases his or her claims. 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.

## **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 affirmed, 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 which is undesirable, inappropriate, or indecent for the female or male employee concerned and which 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).



# Belgium

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## Introduction

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

The main statutes are :

- The law of July 3, 1978 concerning the contracts of employment.
- The law of December 5, 1968 concerning the collective bargaining agreements and joint employers' and workmen's boards.
- The law of April 12, 1965 concerning the protection of the employees' salary.
- 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 the annual vacation.
- The law of January 4, 1974 concerning the legal holidays.
- The law of July 24, 1987 concerning interim labour and loan arrangements covering employees.
- The law of June 28, 1966 concerning plant closings.
- Collective bargaining agreement n°24 concerning collective lay-offs / Royal Decree of May 24, 1976 concerning collective lay-off / Law of February 13, 1998 (art. 62 - 70).
- 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 law of February 25, 2003 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 two laymen judges (designated by Royal Decree on the proposal of employers' associations, respectively the unions). Litigation involving employment disputes - especially in the framework of individual terminations - is very usual and part of doing business. A number of laws provide for specific recourse to the Labour Courts if parties fail to reach an agreement as an integral part of the dispute resolution process. Because the Civil Procedure rules provide for very limited discovery only and witness testimony is only allowed in exceptional circumstances, it concerns in general relative routine procedures. Over the years, the number of litigations involving individual terminations has been declining because case-law has become well established on most issues.

## Terminations

### Restrictions On Employers

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

Contracts of employment 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 evidence (i) that the employer abused the termination rights or acted improperly in the termination process and (ii) that such improper behaviour caused harm which is distinct from the termination as such and is not indemnified by the redundancy payments.

Contracts of employment 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 evidence 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 6 months salary.

There are numerous exceptions to the general principles based on:

- specific legal protection which includes but without limitation: 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; termination during suspension of the contract of employment for local political offices; employees who filed a complaint for gender discrimination; prevention advisor / labour physician; dismissal attributed to the introduction of new technologies; employees in charge of the supervision of toxic waste;
- the collective nature of the terminations: 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 Convention of June 19, 1980 have the contract of employment validly governed by a 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.

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

Fixed term contracts of employment can only be terminated before their term subject to 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.

Contracts of employment for an indefinite term 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 and 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.

The notice requirements are as follows:

1. White-collar employees

1.1. Termination by the employer:

- 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 26,912 €: 3 months for each commenced period of 5 years employment.
- Gross annual compensation exceeding 26,912 €: 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 the service years will yield approximately 1 month per completed service year and age, function and compensation level will on a combined basis yield between 3 to 8 months depending on the specific employment details; corrections are to be made in function of case-law and more in particular when the employee combines limited seniority with a substantial compensation package.
- Gross annual compensation exceeding 53,825 €: parties can validly agree in the individual contract of employment 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 which apply for employees whose gross annual compensation exceeds 26,912 € 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).

1.2. Termination by the employee:

- During the trial period (if applicable): 7 days.
- Gross annual compensation not exceeding 26,912 €:
  - seniority does not exceed 5 years: 6 weeks
  - seniority exceeds 5 years: 3 months.
- Gross annual compensation exceeding 26,912 €: 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 26,912 € and 53,825 €) or 6 months (gross annual compensation in excess of 53,825 €).
- Counter-notice: during a notice notified by the employer the employee can give a counter-notice of one month (gross annual compensation < 26,912 €), two months (gross annual compensation between 26,912 € and 53,825 €) or maximum 4 months (gross annual compensation > 53,825 €).

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

## 2. Blue-collar workers

### 2.1. Termination by the employer:

<u>Service years</u>	<u>Notice</u>
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.

### 2.2. Termination by the blue-collar worker:

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

The contract of employment for a blue-collar worker can provide for a trial period of maximum 14 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, the employee has during the notice period the right to remain absent from work for job interviews during 2 half days per week over the last 6 months of the notice and 1 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.

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 / competent 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 3 working days following discovery of the wrongdoing / notification of all relevant factual details by registered mail within 3 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.

## **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 12 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 turn-over) is sufficient to yield the entitlement. The clientele indemnity equals 3 months compensation (i.e., salary and benefits) if the seniority does not exceed 5 years. It is increased with 1 month for each commenced period of 5 years employment after the initial 5 years. The clientele indemnity is exonerated from social security contributions. In case the contract of employment provides for a non-compete covenant, the burden of proof is reversed (i.e., the employer must evidence 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. E.g.:

- pregnant employees: additional indemnity equal to 6 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 10, between 10 and 20 or more than 20) 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 7 months) and closing of a plant or division (currently 128,69 € per year of service and 128,69 € per year of age above 45). The applicable amounts are revised on an annual basis.

## **Law On Separation Agreements, Waivers And Releases**

Parties can validly:

- terminate their relations by mutual consent;
- agree on the terms and conditions of termination once notification of the termination has occurred.

In case 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 (i.e., 3 working days after dispatch if notified by registered mail).

The terms and conditions of termination can remain below the legal requirements. Once an employee is in a position to exercise his/her rights, he/she 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 more beneficial for the employee - and will apply their standard criteria, unless the undertaking covers employees whose gross annual compensation exceeds 53,825 €, 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.

## 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 more in particular the case when the only issues concern the notice period which 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 litigations can in most cases be predicted within a reasonable range and most individual termination cases are covered by out of court settlements.

There is no review of the terms and conditions of settlement by the Labour Court, *i.e.*, also not when the settlement is concluded in the course of the procedure.

Litigations involving an employment dispute take in the average between 9 and 12 months to be tried before the Labour Court and about an additional year in case 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.

Under a recent Supreme Court decision, attorney's fees are recoverable in contractual matters by the plaintiff who is successful in certain circumstances. It is, however, disputed that this decision can apply to a dispute relating to termination indemnities.

## Employment Discrimination

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

- the law of February 13, 1998 which prohibits age discrimination in the recruitment and selection process by prohibiting the indication of a maximum age in recruitment and selection advertisements.
- the law of May 7, 1999 on equal treatment between male and female employees in labour relations which makes discrimination on the basis of sex subject to voidance of the agreements, arrangements or practices which violate the principle, provides injunctive relief (*i.e.*, cease order subject to criminal penalties in case of non-compliance), special protection for the employees who filed a complaint (*i.e.*, demand for re-integration / extra indemnity equal to 6 months compensation or effective prejudice incurred in case of termination / breach of contract, unless the employer can evidence that the redundancy was unrelated to the complaint);
- 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 February 25, 2003 regarding measures against discrimination and which provides for a prohibition of direct and indirect discrimination.

The anti-discrimination provisions stated in the law of May 7, 1999 cover all employment aspects (*i.e.*, interview, hiring process, terms and conditions of employment, equal pay, promotion opportunities, fringes benefits, termination). Specific aspects and more in particular the interview and job offering processes are governed also by distinct regulations (*e.g.* prohibition to refer to sex in advertisements).

Under the law of February 25, 2003, direct and indirect discriminations are prohibited.

There is a direct discrimination if a difference in treatment which lacks an objective and reasonable justification is directly based on sex, alleged race, color, ethnical or national origin, sexual orientation, marital status, birth, wealth, religious or philosophical beliefs, present or future health situation, disability or physical characteristics.

There is an indirect discrimination where a provision, criterion or a practice which is apparently neutral has, as such, an adverse effect on persons to which apply one of the above discrimination reasons, unless this provision, criterion or practice is based on an objective and reasonable justification.

It should be noted that as a result of a decision of the Constitutional Court (“Cour d’arbitrage”) the list of discrimination has been annulled. Therefore, it remains a general prohibition of discrimination, direct or indirect.

Any such direct or indirect discrimination is prohibited in respect of (i) the conditions for access to a salaried or non-salaried employment, including selection and recruitment conditions, (ii) the compensation and termination conditions.

In employment matters, a difference in treatment is based on objective and reasonable justifications where, by reason of the nature of the professional activity or of its conditions of exercise, the characteristic concerned constitutes an essential and determining professional requirement provided that the objective is legitimate and that the requirement is proportionate.

It is worth mentioning that if the employee / applicant can show some elements that indicate the existence of a 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 (*i.e.*, on top of possible civil damages). For example, nullity of the provisions that are discriminatory. Furthermore, the employee who filed a complaint for discrimination can only be terminated for a reason alien to the complaint / discrimination. Otherwise, the employee is entitled to additional severance payments.

## Sexual And Moral Harassment Or Violation At Work

Sexual and moral harassment and violation at work is covered by a Royal Decree of July 11, 2002 and also by the Royal Decree of September 18, 1992.

The Royal Decree of July 11, 2002 defines:

- Violence at work as “*any factual situation where an employee ... is persecuted, threatened or mentally or physically aggressed during the performance of the employment*”.
- Moral harassment (“mobbing”) 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 as “*any form of verbal, non-verbal or physical conduct of a sexual nature of which the author knows or should know that it affects the dignity of women and men on the work place*”.

The employer must, notably, appoint a “Prevention Counselor” (“Conseiller en Prévention”) who must fulfill certain educational requirements. He/she may be chosen inside the enterprise (but so only in enterprises with 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, notably, of receiving the complaints of the victims, and of suggesting solutions to the employer. He/she is also in charge of reporting on the acts of violence or harassment which 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 protection of the employees is organized as follows:

- They may first address the Prevention Counselor or Trustworthy Person, who tries to find a way of solving the conflict through conciliation.

- If conciliation fails, the employee may file a formal complaint with the Prevention Counselor, who immediately advises the employer. The employer must immediately cause the offensive conduct to stop and must also provide appropriate care to the victims. Alternatively, the employee may file a formal complaint with the official in charge of supervising the implementation of the law.
- The employee, or any interested party (including the employer) may initiate action before Labor Courts. Labor Courts have injunctive authority.
- If the plaintiff establishes before the Court facts that permit to presume the existence of one of the offenses mentioned above, the evidential onus is reversed, in that it is up to the defendant to prove that no such offense actually occurred.
- An employee that filed a formal complaint or initiated court action in respect of any of the relevant offenses can no longer be dismissed by the employer except for reasons alien to the facts. The same applies to witnesses. It is up to the employer who wants to dismiss any such persons to prove that the reason for dismissal is alien to the facts.

The Royal Decree of September 18, 1992 provides that the company's internal working rules must contain a general prohibition of sexual harassment and the designation of an individual (or service) with whom a complaint can be filed and who will assist the victims in the complaint procedure and the disciplinary sanctions that can be applied.

## **Brazil**

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## Introduction

As a Federation, Brazil's legal system encompasses local, state, and federal laws, which follow the federative 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 12 months for those who "*frustrate, by fraud or violence, any right contemplated in the labor regulations.*"

## Terminations

### Restrictions On Employers

Brazil's Labor Code provides that an employment relationship exists whenever an individual renders services for compensation to another, 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 generally are 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 dismissal or without cause" 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 50% of the money existing in the employee's Severance Fund account. Severance Funds must be created by the employer for each employee by depositing an amount equal to 8.5% 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. 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 two 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.

### **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 45 years old, who has been with the company for five years or more, requires a longer termination notice (*i.e.*, generally of 45 to 50 days).

### **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 30 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 12 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 12 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 "13th salary") equal to 1/12th of the employee's monthly salary per month of employment (or a fraction thereof equal to at least 15 days), counted from the relevant January 1st to the date of termination;
- (v) Forty percent of the money 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 forty percent (40%) 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 ten percent (10%) over the FGTS balance, for the purpose of updating the FGTS funds. In addition to this social contribution of 10%, the employers are also required to collect monthly to the FGTS account an additional payment of 0.5% of the employee's compensation, for the same purpose of updating the FGTS funds); and,

- (vi) A Severance Fund supplement in an amount equivalent to 11.2 percent (i.e., the regular funding of 8 percent, plus the fine of 40 percent calculated on the 8 percent funding) 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.

### **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.

## **Employment Discrimination**

In cases of any discrimination against the employee, he or she may file a claim seeking the payment of indemnification for moral damages and the company will have to prove that the situation alleged by the employee did not happen.

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;
- 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 2 years.

### **Laws On Employment Discrimination**

In Brazil, the most significant laws on employment discrimination include:

- The Federal Constitution, which contains many articles prohibiting discrimination, but the most important articles are: 5(X), 3(IV) and 5(XLI).
- 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 which requests any type of medical certification to evidence that a female employee or employee candidate is not pregnant; and,
- Federal Decree 2682/98, which puts the International Labor Organization (“ILO”) Convention 168, dealing 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.

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 five months after giving birth (in addition to being entitled to a 120-day maternity leave). A male employee is entitled to a five-day paternity leave upon the birth;
- Employees under the age of 18 may not work between 10 p.m. and 5 a.m., or in certain hazardous, unhealthy, or dangerous conditions, or in any activities that may affect their “morals,” such as casinos and cinemas;
- 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 two years exists between them;
- Two-thirds of all employees in any company having three or more employees must be Brazilian citizens (either Brazilian born or naturalized), and two-thirds of the company’s payroll must be paid to Brazilian citizens (Portuguese citizens and other foreigners lawfully residing in Brazil for more than 10 years, either married to a Brazilian national or having a Brazilian child, are deemed nationals for the purpose of this rule);
- 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 two 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.

### **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, a remedy available in cases of discrimination allows an employee to seek “moral damages” for the pain, suffering, and emotional distress experienced by the employee from the discriminatory conduct. 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. Punitive damages are not available in Brazil.

### **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.

## **Sexual Harassment**

### **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 said 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.

### **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 15 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 employer could be subject to criminal sanctions or jail sentence.

### **Moral Harassment**

In Brazil, the claims for 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 recent 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. The 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 a 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.

Just like the moral harassment, 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.

### **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

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## 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.

## Terminations

### 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. Condonation 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-cause 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.

### **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 mailed 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 24 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, then 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 12-month to 15-month notice therefore 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 wilful misconduct, disobedience, or wilful 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, a number of Provinces prohibit mandatory retirement based upon age.

In cases where more than 50 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 businessman. In certain circumstances, the employer may be asked or required to offset the cost of these programs.

In instances where 10 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.

## Termination Indemnities

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

- (i) The employer has an annual payroll in Ontario of CA\$2.5 million;
- (ii) The employee has at least five years of service; or,

Severance pay is also required where more than 50 employees are dismissed as a result of the closure of all or part of a business. In such cases, the CA\$2.5 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 35 weeks in a period of 52 consecutive weeks

The amount of severance pay required by legislation is one week's pay per year of service to a maximum of 26 weeks' pay. The formula also provides for partial years of service. For example, an employee with ten and one-half years of service will be entitled to severance pay of 10.5 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.

## Litigation Considerations

Until the 1960s, 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 as someone who sued 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 about the employee should be told to record their complaints in writing. Documents regarding the employee's performance should be gathered, reviewed, and safely stored.

## 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. In addition, adjudication of these and other difficult legal questions shows no signs of abating in the foreseeable future.

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 handicap or 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;
- “Handicap” generally includes any physical or mental impairment (some cases have held that an impairment must be chronic to qualify as a handicap, and thus the common flu has been held not to constitute a handicap 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 between the ages of 18 and 65 years (thus, it is not illegal under Ontario human rights law to discriminate on the basis of “age” for employees outside of those ages ; however, this is under review as of early 2005).

In addition to protecting employees 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 directly 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 handicapped individual from applying for a position. In this type of case, the employer may not intend not to hire a disabled employee, but the circumstances have a negative impact. 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.

## 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 monetary remedial authority. In recent cases in which 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).

## 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 handicap, 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 for good faith reasons and that the BFOR was necessary for the efficient and economical performance of the job without endangering the employee, fellow employees, and 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 successfully use a BFOR defence, 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 handicap.

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 handicaps. 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 responsible for the accommodation. 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.

## Sexual Harassment

### 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 Act 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 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, pattings, or pinching; and sexually degrading language.

## **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.

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 \$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.

## **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.

## **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 which 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.

## **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;
- 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.



# Chile

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## Introduction

The Chilean Labor Code (“CLC”) governs employees’ dismissals. Each dismissal must be justified on one of the causes provided in the law. However, employees with authority to represent the employer (*i.e.*, managers, attorneys, and agents) and employees working in confidential capacities may be dismissed without cause. Given that just cause must be invoked as a basis for termination, an employee may not be terminated based on conduct not related to work or the workplace. In addition to the general statutory provisions regulating employment terminations, several types of employees, including union officials, pregnant women, and new mothers, enjoy special job-security protections.

Depending on the circumstances of the termination, the terms and conditions of the labor contract, and the employee’s length of service, an employer may or may not have to pay a severance indemnity to the dismissed worker, as explained below.

## Terminations

### Restrictions On Employers

#### Protection From Termination Under The Fuego

A legal doctrine called the “*fuego*,” or “immunity privilege,” protects some union members and officers from termination of employment in certain circumstances, which include union animus, pregnant employees and employees returning from maternity leave.

#### Termination With Indemnity

Pursuant to Article 161 of the CLC, except in certain circumstances identified in the CLC, a dismissed employee is generally entitled to receive a sum of money, called a severance indemnity, from the employer.

If an employee working under a fixed term employment contract is dismissed without just cause before the expiration of the contractual term, such employee is entitled to payment of an amount equal to full gross salary under the contract from the time of termination to the expiration of the contractual term.

For employees working under an indefinite term contract, the amount of the indemnity depends on the length of service.

The right to a severance indemnity arises if the employer terminates an individual labor contract that has been in place for more than one year based on the economic or other needs of the enterprise (“*necesidades de la empresa*”). The economic needs of the company must be based on reasonable grounds (*i.e.*, restructuring of the company, total or partial shut down, etc.). Indemnity is also available to dismissed employees who had authority to represent the employer or who served in confidential positions, even though such employees may be terminated without the employer having to state a cause (“*desahucio del empleador*”).

#### Termination Without Indemnity

Except as otherwise provided by contract, employment contracts terminate without indemnity, pursuant to Article 159 of the CLC, by (i) mutual agreement, (ii) the conclusion of the particular task covered by the contract, (iii) *force majeure* (*i.e.*, an unexpected and uncontrollable event, such as a natural disaster), (iv) the employee’s death, (v) the expiration of an agreed-upon term, or (vi) resignation.

Pursuant to Article 160 of the CLC, contracts may also be terminated by the employer without a right of indemnity when employees engage in the following misconduct: (i) immoral conduct, (ii) sexual harassment, (iii) destruction of the employer’s property, (iv) illegal strikes, (v) material breach of the employment agreement’s terms, (vi) desertion of work, (vii) unjustified absence, or (viii) other serious misbehavior.

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

Employees dismissed in situations requiring indemnity are entitled to 30 days' advance written notice of termination or to an extra 30 days' pay in lieu thereof, in addition to any indemnity. However, payment in lieu of notice is limited to an amount equal to 90UF.

The UF, or *Unidad de Fomento* (Development Unit), is a monetary unit indexed daily to inflation by the Chilean government. As of June 1st, 2005, 1UF was equivalent to Ch\$17,200 (approximately US\$29).

If notice of termination is provided, a copy must be sent to the Labor Inspectorate.

## Termination Indemnities

### Severance Indemnity

In the cases where the employee is entitled to a severance indemnity, the employer must pay an indemnity equal to one month's salary for each year of service, up to a maximum indemnity of 11 months' pay. For purposes of calculating the indemnity, a fractional year of service greater than six months is counted as a full year. Employees hired before August 14, 1981, are entitled to an indemnity of one month's pay per year of service with no 11-month cap. The monthly salary on which the indemnity is based is limited to 90UF by law, but may be increased by contract.

Employees who may be entitled to a different indemnity under the terms of their contracts must choose between the contractual severance indemnity and the legal severance indemnity; double recovery is not permitted. Employers may negotiate payment of severance on an installment basis, including interest and adjustments, with the approval of the Labor Inspectorate ("*Inspección del Trabajo*"). Breach of the agreement will entitle the employee to accelerate full payment of the severance.

Indeed, the Labor Agency ("*Dirección del Trabajo*") is responsible for labor law compliance, enforcement and interpretation. The Labor Directorate maintains offices called Labor Inspectorates ("*Inspecciones del Trabajo*") throughout Chile, which act as pre-trial, conciliation venues for labor disputes.

When the contract is terminated without indemnity because of the employee's alleged misbehavior, the employee may claim in court that this reason is false. If the employee prevails, the employer must pay the indemnity mentioned above plus a surcharge of 30 to 100 percent, depending on the existence of some reasonable grounds for termination and some level of fault by the employee.

### Substitute Indemnity

Through the AFP system (*Administradoras de Fondos de Pensiones*, or Administrators of Pension Funds), Chilean law has developed a system of substitute indemnity, which is effectively a form of indemnity insurance. This indemnity is financed by monthly employer allocations of at least 4.11 percent of the employee's monthly wage or salary, with the salary to which this percentage applies limited to 90UF. Contributions to this fund can be made only by mutual, written agreement of employer and employee, and only between the employee's sixth and eleventh years of service. This indemnity is payable regardless of the reason for termination.

## Laws On Separation Agreements, Waivers And Releases

### Termination Settlement (Finiquito)

The termination settlement, or "*Finiquito*", is a document providing notice of termination, the conditions of same, the reasons for the termination, and itemization of the social benefits to be received by the employee as part of the termination (certain compensation, indemnification for unjustified firing without prior notice, payment of proportional vacations, etc.).

Although not a mandatory document, the Finiquito is the only legally binding way for the employer to prove the termination of the employment and the conditions under which the contract was terminated. If the Finiquito is duly signed and ratified by both parties before a Notary Public, the President of the Union (only for unionized employees) or before the Labor Inspectorate, it constitutes irrefutable evidence of the parties' obligations, preventing subsequent claims before the Labor Courts for something different than that contained in the Finiquito.

## Litigation Considerations

An employee who feels that his or her dismissal was not justified (*i.e.*, not based on (i) the economic or other needs of the enterprise or (ii) the employee's lack of ability, as discussed above, may sue the employer in the Labor Court. If the employee prevails, the employer must pay a surcharge of 30 to 100 percent over the normal indemnity as a penalty.

The 2001 amendments to the CLC significantly changed employer obligations in the context of employee dismissals, including increasing the severance penalties imposed when an employee's dismissal by his or her employer is unjustified, undue, or incorrectly characterized.

Before filing a claim for wrongful dismissal in the Labor Court, the discharged employee may assert the claim before the Labor Inspectorate, which ordinarily will attempt to conciliate the dispute. If the Labor Inspectorate finds a clear violation of law, it can fine the employer, but it has no jurisdiction to determine whether the employer breached the employment contract or to award damages to the discharged employee.

## Laws On Employment Discrimination

Although unlawful discrimination is prohibited since 1980's by the Constitution, in the employment field such prohibition was only expressly stated by Law N° 19,759, in force as of October 2001.

The role of the amendment introduced by Law N° 19,759 was merely to precise into the Labor Code the rules on unlawful discrimination, expressly defining a concept of employment discrimination, making easier the prevention of it and the application of the anti-discrimination laws. The aim of the Act was to apply ILO Conventions on discrimination. However, the amendment did not include a change on the procedures to enforce such guarantees. It is especially important to point out that the constitutional guarantee against employment discrimination was expressly excluded from the protection of the constitutional actions. Therefore, the only remedies available against employment discrimination are ordinary actions before ordinary labor courts.

For the purposes of the Labor Code (Article 2 (3) of the CLC), discriminating acts are "*the distinctions, exclusions or preferences on the grounds of race, color, sex, age, marital status, union association, religion, politic beliefs, nationality and nation or social origins with the purpose of alter or eliminate the equal opportunities or equal treatment in the employment or occupation*". Nevertheless, distinctions, exclusions or preferences on the grounds of *qualifications* for a particular job would not be considered discrimination. As of the enactment of Act N° 19,759 the prohibition of discrimination is considered as an implicit clause in all employment contracts.

This concept of discrimination applies throughout the employment field. It covers all fields from recruitment, advertising of vacancies, the selection of applicants for interviews and the actual hiring to treatment of employed workers (selection for training, transfers and promotion, as well as a selection for layoff, redundancy, short-time working, death or retirement benefits).

Regarding recruitment, it is prohibited to ask as a requirement for applying any condition relating to sex, race, color, age, marital status, union association, religion, politic beliefs, nationality and nation or social origins, unless the employer may probe that it is the case of a requirement to qualify to a particular job position.

In the case of hired employees, as commented above, the only remedy is to file an action before an ordinary labor court based on "indirect dismissal" due to a material breach of the employment contract's obligations by the employer (Article 171 of the CLC). In that case, the employer will have to indemnify the employee for the wrongful dismissal. This mechanism is burdensome and thus weakens the enforcement of the discrimination prohibition (Labor Agency, "*Fundamental Rights in the Work: Freedom Guarantee and Dignity of Employees*", N°22, November 2004.) Indeed, if the employment contract lasted less than one year, there would be almost no indemnification at all.

This is the reason why there is a bill in the Chilean Congress for the purpose of introducing a new procedure of enforcement of the fundamental rights of the employees.

Aside from the individual enforcement of anti-discrimination laws, the Labor Inspection -a centralized agency belonging to the government- is authorized to impose fines on the employers liable for unlawful discrimination in the terms of the Labor Code. The fines are on the government's benefit and have a maximum for each "event". For this reason, only cases of discrimination involving a large number of employees may be charged with "significant" fines.

In a recent official communication of June 6th, 2005, the Labour Agency announced that recent investigations on newspaper's work advertisements have showed that 12,28% of them were discriminatory and consequently unlawful. The most common cases were those asking a CV with a photography, a certain age or sex of the applicant, and those asking for "good presence" of the applicant. "Good Presence" is a requirement of physical beauty typically asked in Chile in connection with a job position where the employee will have direct contact with the public or clients (e.g., in a front desk). The Labour Agency is considering fining those employers, which may amount up to approx. USD 3,000 per event.

## Laws On Sexual Harassment

Recently enacted Law N° 20,005 published in the Official Gazette dated March 18th, 2005, and enforceable as of March 18th, 2005, regulates the issue of sexual harassment in Chile.

The new law on sexual harassment applies to both the private and the public sector. Sexual harassment is defined as follows:

*"Labor relations shall always be governed by a treatment consistent with human dignity. Contrary to the above, among other conducts, is sexual harassment, understood in the sense that a person improperly, by any means, makes sexual demands upon another, without consent from the person receiving them and which threaten or damage his/her labor conditions or employment opportunities".*

The new law creates a procedure to investigate sexual harassment within the enterprise. The affected worker may file a complaint before the relevant Labor Inspectorate or before the management of the employer.

The penalty for the harassing worker is dismissal for cause, without entitlement to severance/compensation payment. For this purpose, a new letter b) was added to causes of Article 160 N° 1 of the Labor Code (dismissal for cause). In relation to the harassing employer, a new motive is added to indirect or constructive dismissal of which the affected employee can make use, with a right to a legal compensation/indemnity for years of service increased by 80%. Regarding the worker who deceitfully invokes sexual harassment for indirect or constructive dismissal, he or she will be charged with indemnity for civil responsibility and the possibility to be subject to other types of legal claims, including criminal actions.

Ruling N° 1133/36 of March 21st, 2005 of the Labor Agency, sets the interpretation criteria for Law N° 20,005, regarding prevention and sanctions to sexual harassment. Through the mentioned Ruling, the Labor Agency established that, in its opinion, sexual harassment conducts are not limited to physical contact or approach, but also include any other conduct or action on or against the victim that may constitute a requirement of improper sexual nature, including verbal proposals, electronic mail, letters, etc. that threaten or harm the labor conditions or opportunities, even if such harm is of an indirect nature, sufficient to create a hostile and offensive environment that puts the victim's labor conditions or opportunities at risk.

# **The People's Republic of China**

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## 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.

The most comprehensive piece of national employment legislation is the Labor Law of the PRC ("Labor Law"), which became effective on January 1, 1995. The Labor Law provides foundational rules and principles covering most major employment issues in China, including the termination of employment contracts, the protection of female and minor employees, and basic non-discrimination principles, among other things. Since the implementation of the Labor Law, China has passed supplementing and related legislation at both the national and the local levels.

Among the most significant national laws and regulations are the following:

- Opinion on Several Issues Concerning the Thorough Implementation of the Labor Law of the PRC ("Opinion on the Labor Law"), issued on August 4, 1995;
- Measures for Compensation in Connection with Violations of Provisions of the Labor Law on the Labor Contracts ("Compensation Measures"), effective on May 10, 1995;
- Measures for Economic Compensation for Violations and Cancellation of Labor Contracts ("Economic Compensation Measures"), effective on January 1, 1995;
- Measures Concerning Administrative Penalties for Violation of the Labor Law of the PRC ("Penalties Measures"), effective on January 1, 1995;
- Regulations for the Reduction in Personnel by Enterprises for Economic Reasons ("Personnel Reduction Regulations"), effective on January 1, 1995;
- Rules of the PRC on the Handling of Enterprise Labor Disputes ("Dispute Rules"), effective on August 1, 1993;
- Labor Union Law of the PRC ("Labor Union Law"), effective on October 27, 2001;
- Law of the People's Republic of China for the Protection of Disabled Persons ("Law on Protection of the Disabled"), effective on May 15, 1991;
- Law of the PRC Concerning Protection of the Rights and Interests of Women ("Women Rights Law"), effective on October 1, 1992;
- Law of the PRC Concerning the Protection of Minors ("Minors Protection Law"), effective on January 1, 1992; and,
- Regulations Prohibiting the Use of Child Labor (the "Child Labor Regulations"), effective on December 1, 2002.

In addition, the Regulations Concerning Labor Management in Foreign Investment Enterprises ("FIE Labor Regulations"), which became effective on August 11, 1994, deal specifically with labor relations in foreign investment enterprises ("FIEs").

Examples of significant local regulations include the following:

- Shanghai Municipality Labor Contract Provisions, effective on May 1, 2002;
- Beijing Municipality Labor Contract Regulations, effective on February 1, 2002;
- Shenzhen Special Economic Zone Labor Contract Provisions, effective on 15 July 1997; and,
- Guangdong Province Labor Contract Regulations, effective on May 1, 2002.

## Terminations

### Restrictions On Employers

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

#### Expiration Or Ending Of Contracts

In fixed term employment contracts that contain an expiration date, Article 23 of the Labor Law provides that the contract terminates immediately upon that date. In cases of expiration, severance (literally translated from Chinese as “economic compensation”) is not required by national law. In addition, contracts containing conditions of “ending” (zhongzhi) terminate automatically upon the occurrence of those conditions. Regulations also call for the automatic ending of contracts in some cases, such as upon the death of an employee.

#### 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 On Fair Grounds - Notice And Severance Required

An employer can terminate the employment contract by giving 30 days of prior written 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 amendment of the employment contract (this may be 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, but cannot exceed six (6) months. Employees also are permitted to resign during probation without giving notice; after probation, they are generally required to provide at least 30 days of 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 labor discipline or the employer’s rules or regulations.
- (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. For example, an employee being exempted from prosecution by the People’s Courts - because the crime is minor - is regarded as being prosecuted according to the law.)

### Lay-Offs

When an employer needs to reduce its workforce, and is unable to rely on the Objective Circumstances Test mentioned above, the employer may conduct layoffs only if the three (3) following conditions, outlined under Article 27 of the Labor Law, are satisfied:

- (i) The employer is in a period of statutory readjustment when on the verge of bankruptcy or is suffering from major difficulties in terms of production or operation;
- (ii) The employer has explained the situation to the labor union or to all the employees 30 days in advance and has listened to their opinions; and,
- (iii) The employer has submitted a report to the labor administration department.

Whether an employer is suffering from “major difficulties in terms of production or operation” is determined by local regulations and practice. In addition to meeting the above threshold, in order to terminate on this ground employers are required to meet procedural requirements under the Personnel Reduction Regulations. If an employer terminates an employment contract on these grounds, it must pay severance to the affected employees.

### Protections From Termination

In the following instances an employer is restricted from using a reduction in workforce or from terminating on fair grounds:

- 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.
- When an employee is in a stipulated period of medical treatment for an illness contracted or injury suffered by the employee.
- When an employee is pregnant, on maternity leave, and during the one-year nursing period after delivery.
- In other rarer circumstances provided for in laws or administrative regulations.

### 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.

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 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 norm of practice has yet developed.

### Termination Indemnities

Where severance is required, the entitlement is generally calculated as one month’s average wages for each year of service. “Average wages” for these purposes generally means the monthly average of all remuneration - including salaries/wages, commission, bonuses, etc. - paid to the employee during the 12 months prior to termination. In some localities, average wages

are calculated based on full years of service; other localities require calculation based on full or partial years of service. In cases of termination for incompetence and mutual termination, severance is limited to 12 months of average wages. Severance payments are normally due in a one-time lump sum payment on the day that termination becomes effective.

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.

### **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, 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. However, Chinese law is silent on the legal effect of such releases, and courts have not ruled on their enforceability. If a release were challenged, it would be likely to protect an employer against potential liability for any contractual obligations that have been released and waived; however, they are less likely to be effective for waivers and releases of statutory rights, such as the right to severance.

### **Litigation Considerations**

There are four (4) different methods that employers and employees generally utilize in the PRC to resolve employment disputes:

- Consultation.
- Mediation.
- Arbitration.
- 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, the employer, and the labor union. The chairman of the commission is customarily a representative from the labor union. The Dispute Rules are not clear on who should participate and be chairman if the enterprise has no union. Since mediation can be a cumbersome process, employers are advised to have both employers and employees waive the right to mediation in their employment agreements.

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. The party requesting arbitration should submit a written application to the labor dispute commission within 60 days from the date on which the labor dispute arose. If accepted, the commission will form a labor dispute arbitration tribunal of 1-3 arbitrators. During the arbitration, the parties may submit their statements, counter-claims, 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 upon its issuance, and which may be challenged by a party changing its mind only in rare circumstances. An arbitral award will be issued if no settlement agreement or mediation letter issued. The deadline for issuance of an arbitral award is normally 60 days from the receipt of the application for arbitration.

If either party is dissatisfied with the arbitration award, it may file an appeal with the relevant local People's Court within 15 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.

## Employment Discrimination

### 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.

However, these principles are not well developed and there is no specific legislation implementing them.

#### Legally Protected Groups

The Labor Law and related regulations protect employees with disabilities, 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

Chapter 4 of the Law on Protection of the Disabled specifies that disabled employees should be provided with job types and posts that are "suitable" for them. Article 34 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. Article 12 of the Labor Law and Article 21 of 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 should be treated equally on matters of promotion and assessment of professional skills. Further, Article 23 of 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. It 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 90 days, with 15 days commencing before the baby is due. However, the 90-day entitlement can be increased in a number of circumstances, such as when 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 under 16 years of age. Limited exceptions apply to the cases of child entertainers or athletes and to labor for practical education purposes or vocational skill training purposes; 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 16 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 16 but below 18 years of age). For example, Article 28 of the Minors Protection Law prohibits employers from assigning minors to work considered toxic, harmful, or dangerous. Article 64 of 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. Article 65 of the Labor Law requires employers to conduct regular physical examinations of minor employees.

## **Potential Employer Liability For Employment Discrimination**

### General Liability

Several articles of the Labor Law 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 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 49 gives a disabled person the right to take an employer to court or to ask the government to handle a situation where the employer infringes his or her lawful rights or interests.
- According to Article 51, if an employer causes harm to its disabled employee the employer must pay corresponding damages to the employee.
- Article 52 provides for criminal penalties in certain extreme cases.

(ii) Female and Minor Employees

The Labor Law and related regulations set out very specific penalties for employers that discriminate against female or minor employees. If an employer infringes upon the lawful rights and interests of female or minor employees stipulated in the Labor Law or in employment contracts, the employer could be liable for compensation to the injured employees. If the infringement causes salary loss to the employee, the employer is liable to pay the employee the lost salary plus 25 percent of that salary as compensation. If the infringement damages the health of a female or minor employee, the employer is liable to provide medical benefits during the treatment period as stipulated by the State plus 25 percent of the medical expenses

as compensation. In addition, the labor administration department could order rectification and impose a fine. Article 11 to Article 15 of the Penalties Measures specify the fine in each type of violation; however, in general, the fine is under RMB3,000 (around US\$350) per violation.

In addition to the above, violations of the Child Labor Regulations may result in penalties including fines (up to RMB30,000 - around US\$3,500 - in some cases); 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.

Managers and supervisors also may be liable in instances of sex discrimination. According to Article 50 of the Women Rights Law, if the rights and interests of women are damaged in any of the following situations, the unit to which they belong or the superior organization may impose an administrative penalty on the personnel directly responsible:

- Refusing to recruit or increasing the recruitment standard in situations in which women should be recruited pursuant to laws and regulations;
- Violating the principle of “equality between men and women” and damaging the rights of women during allocation of apartments, promotion, or assessment of professional skills; or,
- Dismissing female employees for the reasons of marriage, pregnancy, maternity leave, or nursing.

## **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 by, certified by local authorities, or recorded with local authorities.

## **Sexual Harassment**

### **Laws On Sexual Harassment And Employee Remedies For Sexual Harassment**

Currently, there is no PRC legislation directly regarding sexual harassment. However, provisions of the PRC Constitution, the General Principles of the Civil Law of the PRC and of the Women's Rights Law arguably prohibit sexual harassment-like behavior. In particular, the Constitution guarantees citizens the right to personal dignity, and the General Provisions of the PRC Civil Code (“Civil Code”) specifies that citizens have the right to their reputation, their personal dignity and their honor (or personal respect). Similarly, the Women's Rights Law protects women's rights to personal dignity and reputation. While “reputation”, “personal dignity” and “honor” are not defined, sexual harassment suits have been brought in China - and won - on the basis of the infringement of these rights.

In reported cases, in order to sustain a sexual harassment claim, employees have generally have to show that they were “sexually harassed” in violation of their rights to reputation, personal dignity and honor. While “sexual harassment” has not been defined, in the reported cases it involved a showing of unwanted physical touching and/or lewd language. Plaintiffs have also had to show that they suffered harmful consequences. Notably, awards in reported cases have so far been minimal, the largest being RMB5,000 (less than US\$600). Moreover, claims so far have been by individual plaintiffs against colleagues, rather than against employers of the plaintiffs and defendants.

Probably spurred largely by several widely reported sexual harassment claims in recent years, China's law in this area appears poised to undergo further development. Specifically, the National People's Congress has on its 2005 legislative agenda a draft amendment to the Women's Rights Law that concerns sexual harassment. This would be the first time that sexual harassment would be specifically mentioned and prohibited in PRC law. However, according to reports, the draft amendment is not very detailed, simply stating, “*Sexual harassment against women is prohibited and work units should implement measures to prevent sexual*

*harassment in the workplace,*” and not providing for specific penalties for non-compliance. Moreover, it is not certain that the current draft will be adopted. A proposed “Anti-Sexual Harassment Law” was submitted to the National People’s Congress in 1999, but no action was taken on that proposed law.

For the time being, however, employers still could face liability for sexual harassment if it could be shown that the employer failed to protect employees’ rights under the Labor Law, such as the right to a safe and healthy work environment or be free from coercion, violence, threats or illegal restrictions of personal freedom.

### **Potential Employer Liability For Sexual Harassment**

The Civil Code gives citizens whose rights to reputation, personal dignity and honor are infringed the right to demand cessation of the infringement, restoration of reputation, elimination of the effects of the infringement, the offer of an apology, and to claim compensatory damages. As noted above, to date reported cases have been brought by employees against offending colleagues instead of employers, and awards for such infringements have been relatively small.

Yet, in principle employers could face liability for sexual harassment on the basis of violating Labor Law protections such as those above, in which case remedies could include rectification, liability for compensation, or fines.

### **Practical Advice To Employers On Avoiding Sexual Harassment Problems**

For the time being, employers in China generally do not face sexual harassment claims. However, since lawmakers are considering new rules governing employers, employers should closely monitor developments in this area and prepare appropriate policies and other measures when appropriate.

# Colombia

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## Introduction

In Colombia, Law 141, 1961 (the Labor Code) regulates private employers' employment relations within the principles and guidelines established in Articles 25, 53 and 54, among others, of the 1991 Constitution. These regulations are mandatory, as characteristic of public order rules. The Labor Code develops the principles to be applied in labor relations. These may be of an individual (e.g., labor contracts, vacations, social security, etc.) or of a collective nature (e.g., association rights, collective bargaining).

The 1991 Constitution provides a special protection against discrimination based on age, skin color, gender, religious beliefs, or political opinions. These types of employment discrimination, unfortunately, are common. Articles 25 and 334 provide that the right to work is a social obligation, entitling individuals to special protections from the State. These Articles also establish that the State has the duty to intervene in such a way that employment is guaranteed to the best possible extent.

Under this context, Colombian labor legislation favors 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; by amending and updating dispositions contained in the Labor Code to cover the current world and national context.

Law 797, 2003 reformed some aspects of the Labor Code, amongst which were the payment of indemnities upon unilateral termination, or dismissal, by the employer. However, the causes for unilateral termination with a proven just cause by either of the parties have remained equal, as have the modalities of termination of the labor contracts.

## Termination Of Employment And Separation Payments

The Labor Code establishes that, among other circumstances<sup>1</sup>, a labor contract may be terminated by the unilateral decision of any of the parties thereto, with or without a proven just cause. The labor contract can also be terminated by mutual consent.

Irrespective of the cause for termination, employers must pay employees all outstanding mandatory amounts due immediately upon termination, which may vary depending on the kind of salary agreed upon between the parties. Colombian labor law allows two types of salary arrangements: (1) traditional structure, under which salary and social benefits are paid separately; (2) integral salary structure<sup>2</sup>, under which the mandatory benefits are already deemed to be included pro-rata in the monthly salary payments. Upon termination of employment, employees in the traditional salary structure are entitled to the following minimum legal benefits: pending salaries, severance aid, interest payments on severance, semester bonus, and pending vacations. Employees under the integral salary structure would only be entitled to pending salaries and vacations<sup>3</sup>.

However, depending on the factual situation, additional payments that may arise at the termination of employment include the following:

- (a) Extralegal benefits owed;
- (b) If employment is terminated without just cause, an indemnity for dismissal must be recognized, 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 affiliated with the integral social security system, the employer must recognize pension quotations, plus moratorium interests and health expenses;
- (d) The failure to pay salary and social benefits can also generate a delayed payment indemnity equivalent to one day of salary per each day of delay for a period of 24 months after termination of employment, if such payment has not taken place. If

<sup>1</sup> Article 61 of the Colombian Labor Code, as modified by Article 5 of Law 50 of 1990.

<sup>2</sup> The integral salary must be agreed in writing and it is only applicable to employees earning more than 13 minimum legal monthly salaries. Currently, the minimum monthly integral salary is of Col. Ps.\$4.959.500.

<sup>3</sup> Vacation is a remunerated rest -different from the concept of rest in Sundays and Holidays- equivalent to 15 consecutive working days of paid vacation per each year of services and proportionally for fraction thereof, which can only be accumulated for up to four periods. In the event of termination of the labor contract without having enjoyed the corresponding days of rest, vacation payment must be included in the final liquidation on the basis of 15 days of salary for each full period of pending vacations and proportionally for fractions of a year.

the payment is not made after 24 months, then 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 cannot be waived; and,

- (e) If the severance aid was not deposited in a severance funds, within the dates required by law, the employee who is 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 severance, counted as from February 15 of each calendar year, up to the date of termination of employment, or until the date of the deposit, whatever occurs first. The failure of the employer to pay interest on severance on a timely basis implies that the payment of said interest must be calculated at a rate of 24% of the severance aid.

It is important to point out that the obligation to pay the failure indemnities mentioned does not proceed automatically. The employer's behavior, or the reasons for not paying the social benefits, may be evaluated by the Judge in order to determine whether such conduct was in 'bad faith.' This is a subjective matter, and the employer has the burden of proving good faith. In other words, the employer must prove that the omission was not an intentional act to avoid the law, and there were serious reasons for not making the severance aid deposit.

There is no uniform position in Colombian courts concerning what is considered as 'good faith.' Similar cases have been ruled and evaluated differently. There have been cases in which companies have been acquitted, given the management position of the plaintiff and his responsibility over human resources matters. In other cases, however, such arguments were not useful, and employer companies faced automatic judgments for the failure indemnity.

The general rule of the statute of limitations for labor matters is three years; that is to say, the employee's right to claim the payment of labor debts. The severance, interest on severance and the failure indemnities is three years; beginning with the demand date of the obligation. When the employer receives an employee's claim with reference to the payment owed, the statute of limitations period can be interrupted once, which means that the counting of the three year term commences as of the date of the claim.

#### 1. Termination Of Employment With Just Cause

Just cause for unilateral termination of a labor contract is established by Article 7, Decree 2351, 1965. These employee offences are defined as grave actions that give rise to dismissal (said offences are usually provided in the Internal Work Regulations, in the labor contract or any other labor-regulation). Just cause must be invoked in writing at the time of termination; thereafter, it is not possible to invoke other causes.

When the labor contract is terminated with just cause, the party that makes the decision is not legally obligated to pay an indemnity for dismissal, as long as the facts and the reasons that motivated the decision are real and can be further evidenced. 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. In any case, employers must have serious evidence to demonstrate the just cause and all the documents necessary to support their fair decision in the event of a judicial claim. The employer will have to prove the reasons for termination, while the employee will prove to the judge that there was no just cause.

The following are the just causes for termination of employment as stipulated in the Colombian Labor Code,:

- (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 employers or the 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 or members of the latter's 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 equipment connected with the job, 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 contracts, or work regulations;
- (g) The imprisonment of the employee for more than thirty days, unless he is subsequently acquitted, or his correctional arrest for more than eight days, or even for a lower period, when the reason therefrom is sufficient in itself to justify the extinction of the labor contract;
- (h) When the employee reveals technical or commercial secrets of the employer or discloses matters of a reserved nature, to the detriment of the enterprise;
- (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, which perturbs the discipline of the establishment;
- (l) The systematic omissions of the employee to accept the preventive, prophylactic or curative measures prescribed by the physician of the employer or by the authorities to avoid diseases or accidents;
- (m) The ineptitude of the employee to perform his work;
- (n) The recognition of the retirement or disability pension to the employee, being at the service of the employer; (This just cause can be alleged immediately or in the future, and the event of not using it immediately will not be an issue. Different rulings from our Supreme Court have declared that immediate termination after knowing the pension status of the affected employee is not required and the just cause does not lose its enforceability. The law establishes that the pensioner must have an express recognition of his status and should also be receiving effective payment from the system.) and
- (o) Any contagious or chronic disease of the employee, not of a professional nature, as well as any other disease or wound which disables the employee for his work and when its healing has not been possible for over a period of one hundred and eighty days. (However, the dismissal of the employee for this reason may only be effective upon expiration 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 order to be able to terminate the labor contract in the cases contemplated from (i) to (o), the employer must give the employee an advanced notice of no less than fifteen days.

Special procedures had been established by the law in order to unilaterally terminate a labor contract with cause. Article 2 of Decree 1373/1996, stipulates that in order to terminate the labor contract with just cause due to the deficient work of the employee, the employer must send to the employee two formal written communications with a period of eight business days between the two communications. In these communications, the employer must include the reasons why the employee has deficient work.

## 2. Termination Of Employment With Just Cause

When an employer terminates a labor contract without the existence of a proven just cause, the employer is obliged to notify the said decision to the employee and to pay the corresponding legal indemnity. In order to have appropriate evidence, this notification should be made in writing. From a legal point of view, special formats and minimum prior notice are not required.

If an employee is terminated without a proven just cause as expressly set forth in the law by way of limitation, 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 contract.

For contracts entered into for an indefinite term, the indemnity applies as follows:

- (a) For employees who earn less than ten (10) minimum legal monthly salaries (for 2005, Col. Pesos \$3.815.000), the indemnity is equal to thirty days of salary for the first year of service and twenty additional days of salary for each additional year of service, and proportionally for fractions of the year.
- (b) For employees who earn the ten minimum legal monthly salaries or more, the indemnity is equal to twenty days of salary for the first year of service, and fifteen additional days of salary for each additional year of service, and proportionally for fractions of the year.
- (c) For employees who had more than ten years of service and less than 21 years and 27 days as of December 27, 2002, or that having more than 21 years and 27 days on the mentioned date have waived the reinstatement action, the indemnity is equal to forty-five days of salary for the first year of service and forty additional days of salary for each year subsequent to the first, and proportionally for fractions of the year.
- (d) For employees who had 10 or more years of services on December 31st of 1990, who have not waive the right to reinstatement action, the indemnity is equal to forty-five days of salary for the first year of service and thirty additional days of salary for each year subsequent to the first, and proportionally for fractions of the year.
- (e) For contracts entered into for a fixed duration or for the duration of a specific job (what we understand is not our case), the indemnity is equivalent to the salaries corresponding to the unexpired period of the contract. In case of contracts for the duration of the job, the indemnity cannot be less than fifteen days of salary.

Historically, this legal indemnity has been considered as the complete payment of unemployment compensation. Nonetheless, our Constitutional Court stated in a decision<sup>4</sup> that the amount of the legal indemnity recognized for the wrongful termination of the labor contract was not a definite or final payment, and that the employees could file a complaint pursuing an additional indemnity if they evidenced further damages caused by the unilateral termination of their employment.

Although we are aware of no labor court decisions following this controversial decision, we do believe that the labor judges will follow traditional rules of liability in order to determine the existence of an additional detriment. Under this scenario, the employee must demonstrate, among other things, the existence and value of the damage, and the relation between dismissal and damage, which may be difficult to prove under normal circumstances. Nonetheless, as a consequence of this decision, for every dismissal, there is a high risk of labor litigation and all of its representation and administrative costs.

In accordance with law, the employer must put the notice of termination in writing and deliver the following retirement documents to the employee: (i) labor certificate indicating date of entry, type of contract, last salary earned, and date of termination; (ii) order for the medical retirement exam; (iii) final liquidation of separation benefits (including the legal indemnity for dismissal); and (iv) 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 (3) months of service. Since the vouchers for the last month of service will be one month late, the employer must send them to the former employee's home address via certified courier.

Please note that the failure to deliver the above referenced vouchers will lead to an invalid termination of the employment contract.

### 3. Termination By Mutual Consent

The employment contract may also be terminated by mutual consent. The said agreement should be formalized with a private transaction agreement or a public settlement agreement. The agreement shows that the employee has consented in writing to the termination and the execution of a final full release and settlement agreement. In Colombia, the agreement should be done in a public hearing before a labor court or a labor inspector.

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

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<sup>4</sup> Ruling C-1507 of November 8, 2000.

If the parties terminate the labor contract by mutual consent, the employer is not obliged to pay indemnity for unilateral termination (as there would not be a dismissal). In this latter event, the employer is only obliged to pay social and termination benefits. However, in certain events, it is reasonable to offer a retirement bonus to the employee, which might be the equivalent of the indemnity for dismissal. Such sum is a denominated settlement bonus in the termination agreement for purposes of imputing its recognition to any sum or benefit not paid to an employee during the course of the labor relationship due to an involuntary omission. In any case, the employer can offer additional benefits at its sole discretion to further motivate the employee to agree to the mutual consent arrangement.

In this scenario, a 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 referred as (a), (b) and (c) of Section 2 above.

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#### 4. Contingencies

Unilateral dismissal may leave the door open for a claim related to moral and economical damages caused by termination. Our 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 give proof of the damages, it is advisable that employers avoid long trials and additional attorney expenses.

In Colombia, any person has the right to file a claim, even if termination of employment was formalized by means of a settlement agreement and independent from the fact that the Ministry of Social Protection authorized the dismissal. A labor judge would have to study and resolve the case up to the final instance, even if the employer is finally acquitted. However, if an employee has signed settlement agreements, the probability of confronting a judicial complaint is much more remote; and that according to our present judicial rulings, the termination of the trial should be ordered in the first hearing if the settlement agreement was duly executed.

#### 5. Restrictions On Employers

There are certain events in which the employer cannot freely terminate employment agreements under Colombian regulations. Among other circumstances, there are limitations such as (a) collective dismissal; (b) the right for reinstatement for those workers who by January 1, 1991 had more than ten (10) years of service under the same labor contract; and (c) prior authorization from the Court or the Ministry of Social Protection, which is required for certain special protected employees (i.e., pregnant women, founders or directors of a union, or seriously ill employees).

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

For example, the voluntary reorganization of the business of an employer is not deemed a legal just cause for termination of employment. The collective dismissal of employees requires a prior clearance from the Ministry of Social Protection. Thus, the employer must continue to hire the employees and to pay their wages and give other labor benefits, until such clearance is obtained.

The Ministry of Social Protection, in practice, does not grant such authorization without proper due diligence in order to be certain that the reorganization is really supported due to financial or technical problems or decisions 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, as this is not a “beneficial” decision from a political point of view, the Ministry may take more than six months to approve the collective discharge.

With the permission from the Ministry of Social Protection, the employer is legally authorized to unilaterally terminate the employees without incurring a wrongful collective dismissal, and would only be required to recognize the employees’ mandatory severance and indemnity obligations resulting from termination. Extralegal or settlement benefits need not be recognized, and employment agreements may be terminated with a simple notification letter.

Employees with special privileges, that is to say, employees who cannot be dismissed without just cause,<sup>5</sup> preserve their legal protection if the employer maintains active positions or business units functioning wherein they (employees) could develop their work. This is so even if there is permission from the Ministry of Social Protection to incur a collective dismissal.<sup>6</sup>

## Employment Discrimination

Colombian legislation establishes that extraordinary action or “Tutela action,” that constitutes a more speedy mechanism for the protection of fundamental rights, may be applied if the fundamental rights of an employee are affected by discriminatory actions.

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

On the other hand, Law 931 of 2004 prohibits employers from having any regulation, policy or agreement limiting the participation of older people in recruitment processes, thus violating their right to equality and work. Indeed, 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 if in any case he is willing to occupy a position within the company.

Such legislation encourages employer companies to hire employees based on their work or academic capacities and experience, excluding any requirement based on their physical qualities (such as youth). Employers can also take into account that the longer a person has been in the job market, the more know-how and knowledge the person will have. Furthermore, companies that provide opportunities to older people are contributing to the country’s employment statistics, which can be interpreted as a social achievement.

Employers should use caution in the recruitment process. 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, who possess traits applicable in the job market, who have the maturity to handle specific situations, and who have the knowledge and skills to perform certain activities.

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<sup>5</sup> Employees with union privilege, maternity privilege and those with the right to exercise the reinstatement action (in this last case, workers who by January 1st, 1991 had more than ten (10) years of services under the same labor contract).

<sup>6</sup> Labor Jurisprudence 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, as no job positions are available. Supreme Court of Justice, Labor Court, Decision of February 8, 2002.

# Egypt

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## Introduction

In line with its obligations under the World Labor Organization and the Arab Labor Organization, of which Egypt is a member, Parliament has enacted a new Labor Law, Law N° 12 of 2003 (the “New Labor Law”). The New Labor Law was published in the Official Gazette on April 7, 2003, replacing the former Labor Law N° 137 of 1981.

The New Labor Law, along with certain relevant articles of the Egyptian Civil Code, contains the rules governing employment. The New Labor Law remains to a large extent an employee-biased law, designed to protect the employee. A number of new principles have been introduced by the New Labor Law, including provisions governing termination of employment.

Under the Egyptian New Labor Law, the grounds of termination or non-renewal differ depending on the nature of the employment contract. In general, there are fixed term contracts (with a fixed starting date and a fixed expiration date), indefinite term contracts (only its starting date is known to the parties but its expiration date is not set at the moment of the conclusion of the contract), temporary contracts (those are contracts that fall within the employer’s business activities but require a temporary period to perform or are related to specific assignments), incidental contracts (those are contracts that do not fall within the employer’s business activities and do not require more than 6 months to perform) and seasonal contracts (performed in known seasons).

The New Labor Law indicates specific cases that justify termination of employment, applicable to both fixed term and indefinite term contracts, such as the conviction of the employee of a crime of dishonesty and the right of female employees to terminate their employment in case of marriage, pregnancy or labor by notifying the employer three (3) month prior to the occurrence any of the aforementioned events.

## Terminations

### Termination Of Fixed Term Contracts

First, it should be highlighted that a significant development has been introduced by the New Labor Law which impacts the matters considered hereafter. Under the former Labor Law and the relevant provisions of the Egyptian Civil Code, if a fixed term contract is expressly renewed, or if the parties continue its performance after expiration, the contract is then construed by operation of law as an indefinite term contract.

However, the New Labor Law provides that a fixed term contract may be renewed by the express mutual agreement of the parties for consecutive fixed term(s) without being construed as an indefinite term contract. Nevertheless, if the parties omit to expressly renew the definite term contract and continue to perform same, then it will be construed as an indefinite term contract.

This principle has a significant impact on employment relationships since it gives some flexibility and freedom to both parties, the employer and the employee, to end the contract upon its expiry without being bound to any legal constraints such as following a certain termination procedure or giving any justified reason. This flexibility is based on the rules set out in Articles 104 and 105 of the New Labor Law, which state that a fixed term contract is terminated at the expiration of its term and that parties are allowed to enter into consecutive fixed term contracts if each such term is expressly renewed. However, it is usually advisable to serve a notice on the employee indicating that the employer does not wish to renew the contract. Based on other provisions of the law, it is suggested that the notice be 2 months prior to the term of the contract if the employee has been in service for less than 10 years, and 3 months if the service exceeds 10 years.

Hence, the employer could choose not to renew the fixed term contract upon its expiration or may agree with the employee on its renewal for another fixed term. Should the employer wish to dismiss the employee prior to the expiration of the term of the contract, then he will have to prove that termination is for a just cause as discussed below.

## **Termination Of Indefinite Term Contracts**

Unlike fixed term contracts, indefinite term contracts are relatively more rigid as to their termination.

Although Article 110 of the New Labor Law provides that indefinite term contracts may be terminated by either party by virtue of a prior written notice to the other party, other relevant articles go on to severely restrict and control the use of the right of termination. For instance, said articles determine the rules governing the grounds justifying termination, the timing of the termination and the duration of the notice. Both the employer and the employee are subject to and should abide by such restrictions.

From the employer's side, an indefinite term contract may not be terminated except for an employee's gross misconduct (in this case, it is more of a "dismissal" and not a termination) or if the incompetence of the employee has been evidenced in order for such termination to be justified and legitimate. Further, the legislator, in Article 120 of the New Labor Law, prohibits termination based on discrimination for race, sex, social status, religion, pregnancy or family obligations, the activity or affiliation of the employee to a syndicate or union, filing any complaint or lawsuit against the employer, attaching the entitlements of the employee which are in the possession of the employer and finally, the use of the legal leaves and vacations by the employee. Accordingly, if the employee proves the termination of his or her employment for any of the above listed unjustified grounds, the termination will be regarded as unjustified.

Moreover, the New Labor Law provides for "constructive termination". These are cases where the acts of the employer lead the employee to resign or terminate his or her contract. Such cases would be deemed as unjustified termination by the employer (although in fact it was exercised by the employee) justifying the compensation of the employee. Such acts are determined in Article 121 of the New Labor Law which are the fact that the employer breaches material obligations vis-à-vis the employee or commits any hostile act against the employee or any of his or her relatives.

However, a certain equilibrium is provided in the New Labor Law since the employee also has to comply with certain conditions in order for the termination exercised by him or her to be justified and not abusive vis-à-vis the employer. The employee should have a justified reason for terminating his or her employment, such as having health conditions preventing him or her from performing work, or any such social or economic conditions. But in practice, the employee would probably in most cases be able to establish cause since it is a well entrenched principle that employment cannot be imposed for life.

Both the employer and the employee are required, under the New Labor Law, to take into consideration that such termination takes place at a convenient timing for the work circumstances, in order for such termination not to be abusive.

Resignation submitted by the employee must be in writing, otherwise it will not be admissible. On the other hand, the employee has the right to withdraw his or her resignation within one (1) week of its acceptance by the employer. In case of withdrawal of the resignation, the resignation shall be regarded as null and in-existent. This is in order to give the employee the chance to reconsider the impact of such resignation in an attempt to protect his or her best interests.

Accordingly, the employer should consider that the resignation is effective upon the lapse of the one (1) week period and thus the concerned employee is part of its personnel until such date.

In all cases, unjustified termination implies the right of the party suffering to claim damages against the other party. The claim will then be brought before a quasi-judicial committee, as stated below. If the claimant is the employee and the quasi-judicial committee rules in favor of the employee, then the awarded damages for unjustified termination should not be less than (2) months of total wage per each year of service, in addition to any other legal entitlements of the employee.

## **Dismissal**

The New Labor Law treats the term "dismissal" as a disciplinary measure that could be used by the employer in the occurrence of a gross misconduct by the employee. Certain events are listed as examples in Article 69 of the New Labor Law which include: submission of false certification, being held guilty of an act that causes material damage to the employer, failing to observe safety regulations after being notified in writing, absenteeism without cause for ten (10) consecutive days or twenty (20) intermittent days in one year, divulgence of commercial secrets, competing with the employer, drunkenness during working hours or assault over the employer, or his or her managers.

In order to validly dismiss an employee, the employer should bring a dismissal request to the quasi-judicial committee as described below.

### **Termination In The Context Of A Closure Of Business Or Downsizing**

The New Labor Law confirms the right of the employer to completely or partially close the business or to downsize it for economic reasons in a manner that could affect the workforce and necessitates the termination of employment of some of the employees.

However, the employer should obtain the prior approval of a special committee with respect to the closure of business or the downsizing and thus allowing him to lay off certain employees.

Alternatively, the employer is also granted the option, upon obtaining the approval of the committee and instead of using the right of termination, to temporarily adjust the terms of the employment and/or assign different positions provided not to decrease his or her remuneration below the minimum wage. This provision is an exception to the rule that “the contract makes the law of the parties” and the “acquired right theory” which is extensively applicable in Egypt.

However, if the employee refuses the adjustment of the terms of the employment, said employee shall have the right to terminate the contract, and in this case such termination will be regarded as a justified termination exercised by the employer (although it was decided by the employee).

If the employer terminates the employment of any of the employees for economic reasons in compliance with the above rules, the employer should pay remuneration equivalent to one-month wage per year for the first five years of employment and one month and a half wage for each year of employment thereafter.

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

In order to preserve the interests of both parties to an employment relationship, the party wishing to terminate the employment contract should notify the other party in writing of its desire to terminate. That notice must be submitted two (2) months before the date of termination, if the employee has been employed for an uninterrupted period of less than ten years with the same employer. However, the required notice period is three (3) months before the date of termination, if the uninterrupted period of employment exceeds ten (10) years with the same employer. The prior notice requirement is mandatory, thus the parties may not contract out of that requirement. However, the prior notice period may be increased but not decreased. During the prior notice period, the employment relationship remains in force. However, the employer may exempt the employee from performing his or her work during that period in consideration of granting him or her all rights and entitlements relating to his or her employment.

### **Litigation Considerations**

Due to the large number of employment disputes which are mostly related to termination and dismissal, the New Labor Law has introduced a new dispute resolution system comparable to the “*Conseil De Prud’hommes*” which is in place in France.

Such system provides that if any individual dispute arises between the employee and the employer, the dispute may be reported to the labor office within one (1) week of the dispute seeking the settlement of such dispute. If the labor office fails to reconcile the dispute within ten (10) days, both the employer and the employee have the right to bring the case before the quasi Judicial Committee (formed of two judges, the head of the Manpower and Immigration Department, a member of the Union of Egyptian Employees Federation and a member of the business association of the concerned employer) within fifteen (15) days of the dispute. Said Committee must issue a decision within sixty (60) days as of the date of submitting the dispute for its review.

The decision of the Committee is regarded as a decision issued by the court of first instance, and although an appeal against such decision can be lodged before the court of appeals, this decision is enforceable immediately. If the Committee has refused the dismissal request, the Committee may order reinstatement of the employee and payment of the employee’s entitlements.

However, if the employer refuses to reinstate the employee despite the order of the Committee, then the termination decision will be regarded as an unjustified dismissal leading to the payment of compensation to the employee.

Should the Committee rule in favor of the employee and award damages for abusive dismissal, the employer must pay such damages in the range of at least (2) months in addition to any other legal entitlements of the employee.

## **Discrimination**

The Egyptian Labor Law did not go into discrimination in any form. However, the Law gives certain rights to women such as maternity leaves, as well as different working hours for women when, for instance, the work location is remote.

## **Harassment In The Work Place**

The Law treats harassment in the work place as a criminal offense, which is dealt with by the Egyptian Criminal Law.

# France

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## 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 essentially the Labor Code, Collective Bargaining Agreements, and case law of the French Supreme Court. In addition to the mandatory rules resulting from these various sources of law, employment relationships are also ruled by Internal Regulations (“*Réglement Intérieur*”) that may (or must for companies employing at least 20 persons) 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 or 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.

## Terminations

### Restrictions on Employers

Unless a collective bargaining agreement or the employment contract provides otherwise, an employment agreement can be terminated without any restrictions (*i.e.*, without justification or indemnities) during the probationary period. However, collective bargaining agreements often require a minimum termination notice during the 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 will automatically expire at the end of the term agreed.

Upon the expiration 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. Same indemnity is due in case of early termination not justified by a gross misconduct (*cf.* below). However, this indemnity may be reduced to 6% 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”) by mutual agreement of the parties to the contract, for gross misconduct (“*faute grave*”) of one party, in case of “force majeure” or in the event the employee finds an indefinite-term employment. Apart from these four situations, termination of a fixed-term employment contract is considered a breach of contract by the terminating party, which, upon dispute, would result in damages paid to the other party.

Regarding indefinite-term employment contracts, an employer can terminate the contract at any time, but it must be able to justify from a real and serious cause of termination (“*cause réelle et sérieuse*”) and comply with the applicable dismissal procedure (which varies depending upon 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 a lack of performance, the employee’s negligence, or the employee’s inability to work) and dismissals based on economic grounds (“dismissals for economic reasons”). Dismissals for economic reasons can be 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 or her employment contract that the employer wishes to implement.

Certain categories of workers benefit from a 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 a four-week period after the end of the maternity leave, a woman is deemed protected (called relative protection), such that a dismissal is possible only in the event of the impossibility of maintaining the employment contract based on economic reasons or 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.

#### 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.

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

- 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 or her right to be accompanied by a person of his or 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 the 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. The meeting must take place during working hours;
- If the employer decides to dismiss the employee, the latter must be notified of that decision by a registered letter with return receipt requested which can be sent at the earliest after the expiration of a minimum two full business day period 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 employee's misconduct. The employer must state in this 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 or her work obligation during the notice period, this should be stated in the dismissal letter.

#### Dismissals For Economic Reasons

Pursuant to Article L. 321-1 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 an increasingly 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,
- a collective dismissal concerning at least ten employees,

which could (individual dismissal) or must (collective dismissal) be preceded by a preliminary procedure on the restructuring leading to such dismissals.

### Consultation Procedure On A Planed Restructuring

This information/consultation procedure is generally called Book IV of the Labor Code.

This specific procedure is mainly related to the restructuring and the economic reason 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 once the Works Council has rendered an opinion (non-binding on the company) 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").
- Second Works Council meeting: consultation. The employer must necessarily reply to the employee representatives' opinions and comments.
- If a CA has been appointed by the Works Council during the first meeting, his or her report must be communicated to the Works Council at least 8 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 study the company's economic justifications.

If the Works Council considers that the company did not fulfill 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 can decide that the Works Council was not properly informed/consulted and, on that basis, decide :

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

The Works Council could also launch a specific procedure known as the "Alert Procedure".

Pursuant to Article L. 432-1 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 which 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 be presented to the management of the company.

French law does not provide for a maximum period of time for the CA to carry out his or 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.

## 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 less than 1,000 employees, a Personalized Redeployment Agreement (“*Convention de Reclassement Personnalisée*”) providing psychological assistance, professional counseling and coaching, professional abilities evaluation, and training, in order to facilitate the redeployment of the employee after his or her dismissal. Such measures are put in place by the Employment Agency (“ANPE”). The employee benefits from a 14-day period as of the receipt of the information note to accept or refuse the Personalized Redeployment Agreement. If the employee accepts the Personalized Redeployment Agreement, the employment agreement will be considered as terminated by mutual agreement between the parties as from the expiration date of the 14-day period. However, the employee 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 had he or she refused the Personalized Redeployment Agreement is taken into account. The employer must inform the French Unemployment Fund (“ASSEDIC”) of the employee’s acceptance of the Personalized Redeployment Agreement. During the Personalized Redeployment Agreement, the employee will receive an allowance from the ASSEDIC. However, the employer must pay to the ASSEDIC a contribution equal to two months of the employee’s salary. In a situation where the employee would have been entitled to a 3-month notice period, 2 months would be paid to the ASSEDIC and the remaining 1-month notice period would be paid to the employee. In the event the company would fail to comply with its obligation concerning the Personalized Redeployment Agreement, it would be required to pay to the ASSEDIC damages equal to two 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 program. The duration of such a leave is 4 months minimum and 9 months maximum. The Redeployment Leave takes place during the notice period that the employee does not have 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% of the average monthly gross remuneration received by the employee over the last 12 months. A question today arises as to whether the employee who refuses to benefit from the Redeployment Leave should be offered the Personalized Redeployment Agreement above-mentioned. A draft bill which should be enacted shortly provides that employees within companies with more than 1,000 employees will only be entitled to benefit from the Redeployment Leave and not from the Personalized Redeployment Agreement.
- 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 “*Convention de Reclassement Personnalisée*”/“*Congé de reclassement*” and remind the employee of the remaining period of time for him or 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 Départemental du Travail*” (local Labor Administration) within eight days of the sending the dismissal letter.

### 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;
- Further to the meeting with the employee representatives, the employer must send individual notices of 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 supply such employee with the “*Convention de Reclassement Personnalisée*”/”*Congé de Reclassement*” (as described in the dismissal procedure for one employee);
- At least seven business days after the meeting, dismissal letters drafted as described in the dismissal procedure for one employee must be sent to each employee by registered letter with return receipt requested;
- The employer must then provide notification to the “*Directeur Départemental du Travail*” (local Labor Administration) within eight days of sending 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 of the employee leaving the company. The employer’s answer must also be sent by registered letter with return receipt requested or hand-delivered against a signed release within 10 days following the first delivery (by the postal services) of the employee’s letter of request.

### 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 (Book III of the Labor Code) are more substantial and may be summarized as follows:

This procedure deals specifically with the social consequences of the restructuring discussed during the first part of the procedure (cf. above), i.e., the collective dismissal that should result from said restructuring.

Minimum procedure:

Article L. 321-7-1 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 an appointment results in three Works Council meetings (instead of two).

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

- 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 concerns the economic, financial or technical reasons for the dismissals, the number of employees in the company, the number of lay-offs planned, the professional categories concerned, the criteria proposed to establish the list of the employees to be dismissed (job qualification, family situation, seniority, social particulars making it difficult to find a new job, e.g., age or incapacity), and the schedule planned for the dismissals. The criteria must be considered for each professional category.

This information on the planned lay-offs must be accompanied by a draft Employment Protection Plan (previously known as a “Social Plan”) containing information on the measures proposed to limit the number of lay-offs 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 to find new jobs, etc.).

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

- First Works Council 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 Book III Works Council meeting. Upon reception of this formal notification, the Labor Administration will have a eight-day period to issue a “*constat de carence*”, i.e., a document considering that the Employment Protection Plan is not sufficient and appropriate.
- Second Works Council meeting with information on the planned collective dismissal (and reviewing 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.
- 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 Protection 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 “*Convention de Reclassement Personnalisée*” or a “*Congé de Reclassement*” as mentioned above. The minutes of this meeting and the list of the employees whose dismissals are contemplated must be sent to the Labor Administration.
- Convocation of the protected employees, i.e., the employee representatives (inter alia Works Council members, employee delegates, trade union delegates), to a pre-dismissal meeting.
- Individual pre-dismissal meetings with each of the protected employees.
- Specific Works Council meeting on the dismissal of the protected employees.
- Notification of the dismissal to each employee by registered letter with return receipt requested no 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 expiration 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 timeframe 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 meeting on the contemplated collective dismissal, the head of the company gives written notification to the employee representatives, supplying all “useful information” on the dismissals (cf. above).

- The above-mentioned information is extremely important since, if the 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 Protection Plan, as drafted by the employer, be legally sufficient when initially presented to the Works Council. It must contain proper redeployment measures, the absence of which may lead the Court to suspend the procedure and order the company to resume the consultation procedure from the beginning, even if the Employment Protection Plan is improved or amended based on the Works Council’s comments between the two meetings.
- An insufficient Employment Protection Plan may lead the Court to suspend the individual notification of dismissal to the employees. The Supreme Court, in a famous decision of February 13, 1997, decided to cancel an Employment Protection Plan several years after the individual dismissals had been notified. The Court ordered the reinstatement of the dismissed

employees (which obviously causes 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 requests 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 the Court decides that the employer did not provide all the necessary information to the CA, it can order the postponement of the second meeting thus allowing 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 ("DDTE") must receive all the documents sent to the Works Council prior to its meeting and must receive the minutes of each meeting, including amendments to the Employment Protection Plan, planned dismissals, etc.

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

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

The DDTE verifies :

- (i) the content of the Employment Protection Plan and can propose additions or amendments to the plan. The DDTE can also issue a "*constat de carence*" when the Employment Protection 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. The Courts have jurisdiction to decide whether an Employment Protection Plan is insufficient. However, when the Courts find the employer's Employment Protection Plan legally 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 Protection 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 issue a "*constat de carence*", the employer must resume the entire dismissal procedure and draft another plan which will take into account the DDTE's observations.

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

The employer is not compelled by law to observe the comments and follow the suggestions made by the DDTE, which may not be in the company's best interest. Ignoring the DDTE's comments and suggestions could however be unwise in view of possible future disputes that may be raised by the dismissed employees.

The employer must respond to the Labor Administration before sending the dismissal letters. If the employer was to dismiss the employees before responding to the Labor Administration, Article L.321-8 of the French Labor Code provides for a criminal fine of €3,750 per employee dismissed.

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

### Dismissal Of An Employee Representative

Any employee representative, either member (“*titulaire*”) or alternate (“*suppléant*”) (Works Council member, member of the Sanitation and Working Conditions 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 prior written Labor Inspector’s authorization.

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 its prior authorization by the Labor Inspector, or despite the Labor Inspector’s refusal, the dismissal is null and void, and the employee representative could be reinstated to his or her previous position with payment of any salary lost since the invalid 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 sentence and/or a fine of up to € 3,750.

### 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 or 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 (“*attestation ASSEDIC*”). 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.

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

Under French Labor law, either party can 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 their obligations under the contract. Therefore, unless the employee is released from the performance of his or her duties, he or she will have to work during that period and will continue to receive his or her normal pay. 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 or she normally worked. This amount is subject to both employer and employee 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 provide 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, based on French Labor Code and custom and usage the following minimum notice periods apply:

- for employees with less than six months’ service, the applicable collective bargaining agreements will apply;
- 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);
- executive employees (“*cadres*”) are generally entitled to a three-month notice period, irrespective of their length of service.

## Termination Indemnities

Even where a dismissal meets all of the substantive and procedural requirements, a dismissed employee is entitled to: (i) outstanding holiday pay (“*indemnité de congés-payés*”), which is equal to the cash value of the number of accrued and unused vacation days up through the end of the notice period; (ii) a notice period indemnity (“*indemnité de préavis*”) in cases where the employer decides the employee need not work through the notice period; and (iii) a dismissal indemnity (“*indemnité de licenciement*”), which is a minimum indemnity based on years of service guaranteed by law in the absence of other more favorable provisions, such as those resulting from a collective bargaining agreement.

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

- 1/10th of the average monthly remuneration per year of service for employees with two years of service or more;
- additional compensation of 1/15th remuneration per year of service after ten years’ service.

These dismissal indemnity rates are doubled for economic dismissals.

However, where the dismissal is justified by the employee’s gross misconduct, neither the notice period indemnity nor the dismissal indemnity are 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 valid cause (unfair dismissal), the employee is entitled to additional damages to compensate for the loss he or she has suffered because of his or 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.
- 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).

## Laws On Separation Agreements, Waivers, And Releases

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 or her dismissal. Ultimately, the amount of the settlement payment is a question of negotiation between the employer and the employee.

## Litigation Considerations

Labor courts (“*Conseil de Prud’hommes*”) have jurisdiction for resolving individual labor disputes, whereas Civil courts (“*Tribunal de Grande Instance*”) have general jurisdiction for resolving collective labor disputes. An employee may challenge the grounds used for his or 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 Committee (“*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 Committee (“*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. 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 cases of disputes between an employer and an employee, the doubt must favor the employee. Moreover, from a practical standpoint, French Labor courts generally favor employees.

## Employment Discrimination

### 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, France being a member State of the European Union, the provisions of the Treaty of Rome concerning discrimination are applicable. France has also enforced a number of Conventions signed within the International Labor Organization.

Article L. 122-45 of the French Labor Code provides that no candidate may be turned down from a recruitment process, no employee may be punished, dismissed or be subject to a discriminatory measure (directly or indirectly ) notably with regards to remuneration, training, relocation, appointment, classification, qualification or promotion because of his or her origin, sex, life manners, sexual orientations, 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 or state of health.

Additionally, the EEC Equal Treatment Directive has been incorporated into the French Labor Code. It prohibits employers from:

- Mentioning any condition which is directly or indirectly indicative of sex discrimination in any offers of employment;
- Refusing to employ a job applicant because of his or her sex or by reason of criteria which are directly or indirectly related to his or her sex;
- Assigning, transferring, or dismissing an individual because of sex discrimination, or not renewing their employment on those grounds; or,
- Providing remuneration, training, promotion, classification, or grading to an employee on grounds of sex discrimination.

French law also prohibits indirect discrimination. Indirect discrimination 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 limited to actors (playing male or female roles) and models.

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 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 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 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 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 will of the employee.

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.

## **Employee Remedies For Employment Discrimination**

Under French law, all agreements or actions causing prejudice are considered null and void if they are on the basis of origin, life manner, 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, external appearance, surname, state of health, union involvement, political or religious beliefs, language, or sex. 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 or her chosen career by reason of sex.

Employees who consider 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 burden of proof of the sex discrimination is now on the employee. The employer must then demonstrate that the measures taken were justified and cannot be considered as discrimination. Where a French Labor court finds the 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.

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 2 years and/or fined a maximum of € 30,000.

Any dismissal based on sex discrimination is deemed void and cannot therefore be based on real or serious cause. Thus, the dismissed employee can be immediately reinstated. However, the employee has the option to refuse re-instatement 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.

## **Potential Employer Liability For Employment Discrimination**

The French Labor Code prohibits discrimination in any internal regulations of a company. Any regulation that could or has caused discrimination is void. Article L. 122-45 of the French Labor Code expressly prohibits dismissals or other sanctions by the employer based on grounds of origin, 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, union involvement, external appearance, surname, state of health origins, or political or religious beliefs. Any such dismissal or sanction is deemed null and void and cannot be based on real or serious cause. Thus, a dismissed employee can be immediately reinstated. However, the employee can refuse reinstatement, in which case he or she is then entitled to a minimum of six months of salary and benefits, plus any severance terms available under the applicable collective agreement. In addition, any unemployment benefits paid to such an employee must be reimbursed by the employer to the State. Moreover, the complainant may file an action before the criminal courts to obtain criminal sanctions against the employer. If proven guilty, the employer could incur a maximum two-year imprisonment sentence and/or a fine of up to € 30,000.

## **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.

## **Sexual Harassment**

### **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 regard to employment; (ii) to encourage employers to discipline and punish violators; 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. 122-46 of the French Labor Code provides that no employee, no 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 are prohibited. The hierarchy who engages in such pressure shall also be subject to disciplinary sanctions by his or her employer.

### **Employee Remedies/Potential Employer Liability For Sexual Harassment**

The employee who considers that he or 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 € 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. 152-1-1 of the Labor Code provides that the employer who takes disciplinary measures, who 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 fine of a maximum 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. 112-5 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 or her employment contract resulting from sexual harassment.

### **Practical Advice To Employers On Avoiding Sexual Harassment Problems**

Employers are vested with a general power to prevent sexual harassment in 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 Sanitation and Working Conditions 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.

### **Moral Harassment**

Pursuant to Article L. 122-49 of the Labor Code, no employee should be victim of any repeated acts of harassment on behalf of the employer, its representative or from any person who abuses of the authority attributed by his or her functions, that may be harmful to the employee's basic dignity or would make his or 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 € 15,000 and/or 1 year imprisonment).

Employees must be able to evidence objective facts in order to support their claims.



# **Federal Republic of Germany**

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## Introduction

The labor law of the Federal Republic of Germany (“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.

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 first draft bill of the new Anti-Discrimination Act, in certain cases of discrimination and sexual harassment victims are entitled to demand compensation for material and non-material losses.

## Termination

### Restrictions On Employers

#### Written Form

The termination letter, to be valid, must be in *writing* and *signed* by the competent person, usually the *Managing Director* or *HR Director*. The original signed termination letter must be issued to the employee. On the date the employee holds the notice letter in his hands or was at least able to take notice of the letter, the notice period begins.

#### 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 a minimum of more than 10 employees. Before January 1, 2004, however, this termination protection applied to business units with more than 5 employees. Employees whose employment relationship started in a business unit with more than 5 but less than 10 employees prior to January 1, 2004 keep their protection even if the number of 10 employees is not reached. 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 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.

#### (i) Urgent business Requirements

If the termination is based on urgent business requirements, the following preconditions must be met: (i) the employee’s specific job is cancelled; (ii) there is no possibility to employ the employee in another comparable or suitable position within the company; and (iii) the so-called “social choice” was properly made. In this context, “social choice” means to select for redundancy the employee who would be the least severely affected by the termination. The employees’ years of service

in the company, age, maintenance obligations and a disability of the employee 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 from the “social choice” some employees 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.

(ii) 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 normally not be sufficient to allow a unilateral termination. The labor courts normally require that the employee has 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 employer’s property. For reasons of evidence the formal warning should be in writing.

(iii) Employee’s Person

The most common case for a termination based on the employee’s person 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 to be 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.

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

In case a Collective Bargaining Agreement is applicable, the notice periods follow the provisions contained therein. If no collective bargaining agreement is applicable, the notice periods follow the individual employment agreement or the applicable statute, in case the statutory notice periods should be more favorable to the employee.

The statutory notice periods are as follows:

- The basic notice period is 4 weeks as per the 15th or the end of a 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 the probationary period, which may be concluded for up to 6 months, the statutory notice period is only 2 weeks.

## Litigation Considerations

For terminations under the Employment Protection Act, 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 approx. 80% 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% of all employees who are served notice for termination end up going to court, and those 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, the German legislator has implemented Section 1a of the Termination Protection Act as of January 1, 2004. Accordingly, in case the employer terminates the employment relationship for compelling business reason, he may notify the employee and offer a severance payment of half a monthly 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 termination date. This precondition must be explained in the notice of termination. However, there is no obligation to combine notice of termination with the offer of a severance payment.

## Settlement Agreements

Even if the prospects to win the termination lawsuit appear to be good, the employer might wish to come to an amicable separation. Such an agreement is not subject to the restrictions, which have to be considered in case of a unilateral termination by the employer. By a settlement agreement the parties agree upon an end of the employment relationship. Simultaneously, the employer commits himself to pay a certain amount as a redundancy compensation for the loss of the job.

As far as the financial side is concerned, the following aspects have to be noted:

- First, the employee is entitled to continue work and to receive his salary until the end of his notice period. Also in case an amicable settlement is concluded, the employees normally claim to be paid until that date. Due to 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 to win 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", employees older than 50 years receive a full monthly salary per year of employment, and younger persons a half monthly salary per year of employment. These figures, however, are subject to negotiations.
- Severance payments as compensation for the loss of the job are tax-preferenced. The basic tax-free amount is € 7,200.00. If the employee is 50 years old or more and has served more than 15 years with the company, the tax-free amount is € 9,000.00. If the employee is older than 55 years of age and if he or she has served with the company for more than 20 years, the tax-free amount is € 11,000.00. Any amounts of the severance exceeding the tax-free amount are subject to a slight tax-preference. This preference is, however, not very significant in comparison to the taxation of the regular salary.
- According to new case law, a settlement agreement may cause that the employee is suspended 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  $\frac{3}{4}$ .

## Mass Dismissals

The termination of (i) more than 5 employees in a business unit with more than 20 and less than 60 employees; or (ii) 10% of all, or more than 25, employees in a business unit with at least 60 and less than 500 employees; or (iii) at least 30 employees in a business unit with at least 500 employees, is called a “mass dismissal” if the notices of termination are delivered within a period of 30 days (Section 17 Termination Protection Act).

Any such notice requires the prior information of the local employment office in order to become valid. As a rule, the termination cannot become effective earlier than one month after the information is filed with the local employment office; the regional employment office may extend this period to two months. In case there is a works council in the business, it has to 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 his information of the envisaged mass dismissal. If either the works council or the employment office is informed improperly, the employer runs the risk that the terminations are declared invalid by the labor courts.

If dismissals qualify as a “mass dismissal”, the employer, furthermore, would have to consult with the works council beforehand, and negotiate a so-called “equalization of interests-agreement” and a “social plan” which provides for severance payments to the employees dismissed. 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 might obtain a temporary injunction against the employer.

## 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). It requires that there are facts on the basis of which the terminating party cannot reasonably be expected to continue the employment until the regular termination date. All the circumstances 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 his 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 time of employment may allow a termination without notice.
- Shutting down a business unit usually does not give 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 tight rule often leads to difficulties. Therefore, employers are well advised to initiate investigations already at an early stage if there are grounds to suppose that criminal acts may have been committed.

## Involvement Of Works Council

If there exists a works council in a German operation, it is required by law that the works council be given the opportunity to comment on the intended termination 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. In case the termination is based on compelling business requirements, the employer furthermore has to give his views on the

necessity of the redundancy. He finally has to lay down why he picked the employee according to the criteria of the social choice. 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 terminating. The works council may take up to 1 week to give its statement in cases of terminations with notice and up to 3 days in case of a termination for cause with immediate effect.

## 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, apparently the legislator did not see the need to pass anti-discrimination laws. This is in the process to change soon.

In compliance with the obligation to transpose the EC Directives N° 2000/43, N° 2000/78 and N° 2002/73 into German law, the government has recently introduced the first draft bill for an Anti-Discrimination Act. It is expected that this draft will come into force in the course of 2006.

The following summary is based on the content of the bill:

### (i) Discrimination Grounds

Principal aim of the Anti-Discrimination Act is to prevent or to eliminate discriminations on the following grounds:

- racial or ethnic origin,
- sex or sexual orientation,
- religion or belief,
- disability,
- age.

In particular the Anti-Discrimination Act prohibits discriminations in relation to recruitment, promotion, salary and redundancy. It allows only for limited exceptions to the principle of equal treatment.

According to the draft bill, harassment, including sexual harassment, is regarded a discrimination. The law defines harassment as behavior injuring the dignity i.e. 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, (ii) sexual related physical contact, comments of sexual nature, or a showing or visibly displaying of pornographic presentations, which are clearly disapproved by the person affected. Sexual harassment includes conduct caused at a work site by colleagues, superiors, subordinates, third parties, or the employer.

### (ii) Right of Employees

In case of discrimination, the affected employee may file a complaint with the management. The management then has to check the complaint and to inform the employee about the result.

### (iii) Damages

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 therefore has to take measures to avoid that his employees are subject to discrimination in the working environment.

The burden of proof is shared between the employee and the employer. This means that in the labor court the employee has to 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.

The amount of damages employees can claim has to be assessed by the labor courts. It is rather 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 substantial payments employers will have to make.

(iv) Employer's Obligations

The employer is obligated to protect the employees against discriminations and to take pre-emptive actions. According to the draft bill, the employer will be required to give special training to the employees in order to raise the awareness in his company that discrimination must be avoided. To this end, the text of the Anti-Discrimination 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 announced within each business unit. This information may be provided through the intranet.

(v) Anti-Discrimination Authority

Eventually, a Federal Anti-Discrimination Authority will be established to safeguard the enforcement of the Anti-Discrimination Act. This authority will promote equal treatment and provide independent assistance to victims of discrimination.

# Hungary

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## Introduction

Hungarian labor law has gone through significant changes in the last decade and has become one of the most developed areas of law in Hungary. Since the end of the communist regime, labor law legislation has had to cope with the challenges of the new social and economic system. As a result, and due to the development of the labor market, labor law plays an increasingly significant role in legal relationships in Hungary.

Act XXII of 1992 of the Labor Code (the “Labor Code”) contains several employee protection rules, which apply to all employment relationships. One of the main legal concepts under the Labor Code that significantly protects employees’ rights is known as the “unilateral cogency” employment rule. This rule of law provides that the parties may agree only on terms that are at least as favorable to the employee as the applicable statutory provisions. However, there are certain statutory provisions from which no contractual deviation is allowed.

Employment relations in Hungary are governed by the Labor Code and other labor law legislation, collective bargaining agreements, and individual employment contracts. In the context of labor disputes, courts generally protect employees’ rights by interpreting the provisions of the Labor Code, collective bargaining agreements, and employment contracts in favor of employees. Consequently, courts are usually considered very “employee friendly” in Hungary. Overall, litigation trends reflect a decrease in the number of lawsuits initiated by blue-collar employees, while more and more white-collar employees, particularly executives and key-employees, are initiating labor disputes against their employers before courts in Hungary.

## Terminations

### Restrictions On Employers

The Labor Code provides that all employment contracts and notices must be in writing. This means that the parties to an employment contract may terminate only by giving notice in writing. Further, the Labor Code sets out the reasons for termination by ordinary notice and provides certain restrictions on terminations. The main purpose of the rules regulating termination is to safeguard employees against unlawful terminations by employers.

Pursuant to the Labor Code, an employment relationship may be terminated (i) by “ordinary notice,” (ii) by “extraordinary notice,” (iii) during the probationary period with immediate effect, or (iv) by mutual consent of the employer and the employee. However, the Labor Code prohibits employers from terminating the employment relationship by ordinary notice during the period when the employee is:

- Unable to work due to illness not to exceed one year following expiration of the sick leave period, furthermore, for the entire duration of eligibility for sick pay on the grounds of incapacity as a result of an accident at work or occupational disease;
- On unpaid leave for the purpose of nursing or taking care of children, or a close relative;
- Pregnant, and for three months after giving birth; and,
- During military service (regular or reserve).

Employers are prohibited from terminating workers during these leave periods plus 15 days thereafter (if the periods of leave are longer than 15 days). If these periods of leave are longer than 30 days, no termination may occur during the 30 days following the last day of the leave.

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

#### Termination By Ordinary Notice

An employment contract concluded for a fixed term may be terminated only by ordinary notice if the employer pays the employee an amount equal to one year’s average salary. However, if the remaining period of employment is less than one year, an employer is required to pay only an amount equal to the average salary for the remaining period.

Both the employer and the employee may terminate an employment contract concluded for an indefinite term by ordinary notice. A notice of termination issued by the employer must contain the employer's clear and justified reasons for the termination, unless the employee is an executive as defined under the Labor Code (e.g., managing director, member of the Board of Directors, etc.). Termination notices that fail to include justified reasons are unlawful. The 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.

The reasons justifying termination of an employment relationship may be related only to the abilities of the employee, his or her behavior in relation to the employment, or the operations of the employer. Before giving an employee a notice of termination as a result of an employee's work performance or behavior, an employer must give the employee the opportunity of defending him or herself against the objections raised, unless the employer cannot be expected to do so in the given circumstances. In the case of ordinary notice of termination by the employee, no reasons justifying the termination of the employment relationship need to be included in the notice.

The notice period in cases of termination by ordinary notice must be at least 30 days, but not longer than one year. The terminating party, whether it be the employer or the employee, must give the appropriate notice to the other party. In the absence of an agreement to the contrary, the statutory minimum notice period will apply in cases of termination by ordinary notice.

Under the Labor 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

These provisions, however, do not apply to "executive" employees.

After giving an employee an ordinary notice of termination, the employer must release the employee from his or her obligation to work for up to one half of the total notice period. The purpose of the exemption from work is to enable the employee to look for another job. The employee may select which days or hours he or she will be released from the obligation to work for at least one half of the exemption period. Furthermore, an employee must continue to receive his or her average salary during the notice period.

#### Termination By Extraordinary Notice

An employer or an employee may terminate the employment relationship by extraordinary notice if any important obligation stemming from the employment contract is materially breached by the other party, either intentionally or by gross negligence. An employment relationship also can be terminated by extraordinary 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 extraordinary notice of termination. However, the parties may give concrete examples in the employment contract that may give rise to an extraordinary notice of termination.

In the case of termination by extraordinary notice, the notice of termination must contain the terminating party's clear and justified reasons for termination. No notice period need be given in the case of termination by extraordinary notice, as it has immediate effect. Before giving an employee a notice of extraordinary termination, the employer must inform the employee of the reasons of the intended termination and must give the employee the opportunity to defend against the objections, unless the employer cannot be expected to do so in the given circumstances.

The party terminating the employment relationship by extraordinary notice must exercise its rights within 15 days of becoming aware of the cause for extraordinary termination. However, 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 extraordinary notice is a crime committed by the other party, then the party terminating the employment relationship may exercise its rights prior to the statutory lapse of time.

If the employer terminates the employment relationship by extraordinary notice, no severance payment is due to the employee. If the employee terminates the employment relationship by extraordinary notice, the employer must pay the employee an amount equal to the severance payment to which the employee would have been entitled had the employee terminated the employment relationship by ordinary notice. The rules pertaining to severance payments for termination by ordinary notice also apply. Thus, the employee may claim damages he or she incurred as a result of such termination.

## Collective Dismissals

The Labor Code was recently amended with a view to harmonizing it with the provisions of EU Directives 77/187 and 75/129 relative to the protection of an employee's rights upon a change of ownership and collective dismissals. In the event of a legal succession of an employer, the Labor Code provides that the "working conditions" set forth in the collective bargaining agreement entered into between the employees' representative body or the union and the former employer must be maintained by the new employer until the earlier of: (i) one year after the effective date of the legal succession; or (ii) the collective bargaining agreement is terminated, expires, or is replaced by a newly negotiated collective agreement.

"Legal succession" is defined as:

- any succession pursuant to a legal rule; or,
- the takeover of all or part of the business activities of the former employer (manufacturing unit, shop, or any other place of business), where the takeover is governed by an agreement (e.g., sale and purchase agreement, lease agreement, or an agreement pursuant to which assets are contributed to the capital of another legal entity), provided that the employees are continuously employed.

For a period of one year following a legal succession, the former employer and the new employer are jointly and severally liable to employees for employment-related claims made within that period. Furthermore, if the former employer holds more than 50 percent of all voting rights in the new employer, the former employer will be liable, as a guarantor, for all amounts due by the new employer to an employee pursuant to an employment-related claim, provided that: (i) the employment contract was concluded for an indefinite term, was terminated for reasons related to the activities of the employer (i.e., a reorganization), and was terminated within one year following the effective date of the legal succession; or (ii) the employment contract was concluded for a fixed term, was terminated within one year from the effective date of the legal succession, and the employer paid the average salary for the remaining term of the employment contract.

The employees' representative committee (i.e., union or any committee established by the employees) must be consulted at least 15 days prior to the termination by ordinary notice of a group of employees if the number of employees to be dismissed exceeds certain limits established by law. The competent Labor Center and the employees to be dismissed must be given at least 30 days' notice in writing of such termination. On a sliding scale, those limits are:

Number of Employees	Number Of Employees To Be Terminated
21 to 99	10
100 to 299	10 percent
300 or above	30

## 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 favor of the employee, the termination has no effect. If this occurs, the employer must pay for all damages and loss of salary incurred, except for those amounts that the employee was able to recover from other sources (e.g., unemployment indemnities). The employee, if his or her employment was not terminated by ordinary dismissal, shall also be reimbursed for lost wages and eligible to his or her average earnings payable for the notice period and severance payment payable in the event of ordinary dismissal.

If it is determined by court that the employer has unlawfully terminated an employee's employment, such employee, upon request, shall continue to be employed in his or her original position. At the employer's request, the court shall exonerate reinstatement of the employee in his or her original position if the employee's continued employment cannot be expected. The employer may not be exempted from being obliged to reinstate the employee to her or his original position, if:

- the employer's action violates the requirements of the proper execution of law, the principle of equal treatment or restrictions on termination, or
- the employer has terminated the employment relationship of an employee who was under the labor law protection prescribed for elected trade union representatives.

If the employee does not request reinstatement or if, upon the employer's request, the court exonerates reinstatement of the employee in his or her original position, the court shall order, upon weighing all applicable circumstances - in particular the unlawful action and its consequences -, the employer to pay no less than two and no more than twelve months' average earnings to the employee.

If the employee does not request reinstatement or if, upon the employer's request, the court exonerates reinstatement of the employee in his or her original position, the employment relationship shall be terminated on the day when the court ruling to determine unlawfulness becomes definitive.

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 average earnings falling due for the notice period, or in the case of employees in key positions, to twelve times the employee's average monthly salary.

## Termination Indemnities

If the employment relationship was terminated either by ordinary notice given by the employer, by extraordinary notice given by the employee, or by the discontinuation of the employer's business activities without a legal successor, 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 Average Monthly Salary</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 from the time when the employee would reach the legal retirement age, the severance payment must be increased by an amount equal to three months' salary, provided that the employment relationship was terminated by the employer by ordinary notice or following the cessation of the employer's business activities without a legal successor. No severance payment is due if the employee has already acquired the right to receive a pension, or if the employee was granted an early retirement pension.

Pursuant to the Labor Code, any time spent in prison, performing community work, or on unpaid leave exceeding 30 days (except leave for caring for a child under the age of ten or caring for a close relative) shall not be taken into account when calculating the duration of employment.

## **Laws On Separation Agreements, Waivers, And Releases**

Basically, Hungarian law does not provide rules concerning separation agreements, waivers, and releases. Although it is not prohibited to enter into such agreements with an employee, they are typically only used in cases of termination with the mutual consent of the employer and the employee. Such waivers may be held invalid if they result in: (i) the violation of legal regulations; (ii) the unreasonable difference between the waiver and the consideration; (iii) unfairly taking advantage of the other party's situation; (iv) an essential mistake of any of the parties; or (v) the deception or an unlawful menace of the other party.

## **Litigation Considerations**

Approximately 30 to 35 percent of labor disputes initiated in Hungary relate to unlawful termination. In practice, the courts tend to rule in favor of employees in cases where an employer has failed to comply with the formalities pertaining to the termination notice provided in the Labor Code.

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 Labor 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. Thus, in practice, it is possible that even if it is established that an employee dismissed by extraordinary 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, upon request, could be reinstated and 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 counterclaim in the labor dispute requesting payment of damages caused by the employee.

If the court determines that the ordinary or extraordinary notice of termination issued by the employer is unlawful, and the employee does not request to be reinstated, the employee's employment only will be deemed terminated at the time when the court's judgment establishing the unlawfulness of the termination becomes final and binding. This means that if the employer loses the case, the employee's employment shall be deemed to have never ceased, and the employer must pay the employee's salary and other payments due for the period prior to the date on which the court rendered its final and binding judgment. Consequently, the amount payable by the employer in such a case also will depend on the length of the court procedure, which might take years in Hungary.

## **Discrimination**

### **Laws On Employment Discrimination**

The Labor Code includes a section prohibiting discrimination against employees based on any condition not related to their employment. However, to date, only a few labor disputes have been initiated before the courts by employees claiming that their employer engaged in employment discrimination.

Section 5 (1) of the Labor Code and Act CXXV 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. The prohibition on discrimination applies to the conclusion of employment contracts, the establishment of rights and obligations during the term of an employment relationship, and termination of employment. The Labor Code also requires employers to ensure that all employees are given the opportunity to be promoted to a higher position exclusively on the basis of the duration of the employment relationship, professional abilities, experience, and performance.

Any differentiation resulting from the type or nature of the work performed by an employee does not qualify as discrimination (e.g., a differentiation based on performance). Thus, certain positions may be held by only men or adults because of working conditions or rules on work-related protection.

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 which 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 providing of the salary;
- membership and participation in the employees' organizations;
- promotions;
- enforcement of compensation and disciplinary liability.

In addition to the Labor 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") contains provisions prohibiting discrimination.

### **Employee Remedies For Employment Discrimination**

According to the Hungarian Act III of 1952 on Civil Procedure (the "Civil Procedure Act"), labor 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 labor 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.

### **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 labor court. All such discriminatory terms in the contract are considered null and void. Further, 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 Labor Code (the burden of proof is on the employer in labor disputes involving discrimination). In addition, pursuant to the Government Decree, a labor 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 Labor Supervision prescribes the labor matters that fall within the investigatory powers of the labor supervisions, such as a violation of the prohibition on discrimination. The labor

authorities carry out the labor inspections *ex officio*. Without any special permission or prior notification, the inspector is entitled to enter any workplace, review documents, make copies of documents, and request information from persons at the workplace. 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) requesting the employer to comply with the relevant labor laws; (ii) requiring the employer to cease contravening the relevant labor laws by a certain deadline; (iii) prohibiting the employment in certain circumstances; (iv) initiating proceedings for minor offences; (v) oblige the employer to fulfill its payment obligations deriving from the employment relationship and (vi) making a written proposal to the manager of the labor authority regarding the imposition of a fine on the employer. The fine can range between HUF 50,000 and HUF 2,000,000 (approximately US\$250 to US\$ 10,000) for a first offence if only one labor 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 fine becomes final and binding, the fine ranges between HUF 50,000 and HUF 6,000,000 (approximately US\$250 to US\$30,000).

### **Practical Advice To Employers On Avoiding Employment Discrimination Problems**

As indicated above, employers are obliged to prove that they did not violate the prohibition on discrimination. This means that in a labor 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.).

## **Sexual Harassment**

### **Laws On Sexual Harassment**

Under Hungarian Law, there is no explicit legal definition of the type of actions that constitute sexual harassment or practical guidance as to the remedies available to a victim of sexual harassment before Hungarian courts. Because the concept of sexual harassment is not well defined in the applicable legislation, very few claims have even been submitted to courts.

Despite the lack of specific legislation on this issue, there is a general provision in the Equal Treatment Act that contains a definition of harassment, which may also be applicable by analogy to sexual harassment in an employment relationship. According to said provision, it is generally prohibited to act in a manner that, with respect to the gender, age, nationality, race, ethnic origin, sexual identity, health condition, marital status, religion, political convictions, participation in employee interest groups, or any other condition of a person, aiming that such person shall be frightened, humiliated or put in shame; and it is also prohibited to behave with hostility or aggressively towards any person in connection with the same conditions. Under the Equal Treatment Act, harassment, in general, qualifies as a kind of unfavorable treatment, thereby a harm of the principle of equal treatment and a manifestation of discrimination.

There are also several general provisions of the Labor Code that a person claiming to be a victim of sexual harassment could use as a basis for commencing a legal action. For example, the Labor Code provides that the rights and duties specified by the Labor Code must be exercised and executed properly. In particular, the exercising of rights is not proper if its purpose or result is the curtailment of the legal interests of others, the restriction of another's interests, harassment, or the suppression of opinion. Further, the Labor Code also provides a general prohibition against discrimination. Section 102 (2) of the Labor Code provides that an employer must ensure safe and healthy working conditions for its employees. This rule might be interpreted to include the requirement that a "psychologically" healthy atmosphere must exist in the workplace.

### **Employee Remedies For Sexual Harassment**

In accordance with the relevant provisions of the Equal Treatment Act, the Equal Treatment Bureau, as the authority being in charge, operating under the control of the Hungarian Government, examine harassment cases (*i.e.*, whether the principle of equal treatment was harmed) based on either an individual initiative or on an *ex officio* basis. Depending on the outcome of the examination of the case, the Equal Treatment Bureau may (i) start a court action for the protection of rights of those persons or groups of persons whose rights suffered an infringement; (ii) order to stop discriminative actions or measures; (iii) prohibit the

continuation of unlawful behavior or practice; (iv) arrange for the publication of its resolution establishing the infringement of lawful rights; (v) impose a fine that can range between HUF 50,000 and HUF 6,000,000 (approximately US\$250 to US\$30,000). It is important to note that the same measures cannot only be taken in harassment cases but, in general, when an infringement of the principle of equal treatment occurs, i.e., those can also serve as employee remedies against the employer for any employment discrimination.)

Other than the measures that can be taken under the Equal Treatment Act, a sexual harassment claim may also be submitted individually to the labor courts on the basis of the provisions of the Labor Code. A victim of sexual harassment may recover from the employer all damages caused to him or her in connection with the employment, loss of salary, all costs incurred in connection with the damages suffered, and any moral damages, if applicable.

# Indonesia

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## Introduction

The Indonesian legal system is a civil law system. In Indonesia's civil law system, the courts are not bound by decisions of the courts at the same level or higher. The court will apply the applicable statutes as their basis in examining the case.

The sources of labor law 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. Indeed, some have their roots in the colonial period. In general, these laws and regulations are applicable to all employees, regardless of their position (*i.e.*, regardless of whether they are employed in managerial or non-managerial positions) or their status (*i.e.*, regardless of whether they are employed for an indefinite or a definite term). However, there are some provisions that exempt certain groups of employees from receiving certain benefits, for example: managerial employees are exempted from the requirement to pay overtime.

In an effort to consolidate and synthesize this diverse body of laws and regulations on the protection of workers, the Government enacted Law N° 13/2003 on 25 March 2003 (the "Labor Law"), effective on the same date. The Labor Law contains certain significant new provisions and combines a major portion of the labor laws and legislation into a single legal instrument.

The Labor Law sets out general principles and requirements regarding labor and employment matters in Indonesia. There are certain provisions under the Labor Law that require specific implementing regulations to be issued by the competent authority. Currently there are dozens of implementing regulations issued by the Minister of Manpower and the old implementing regulations which have not yet been replaced by the new ones remain effective to the extent that they do not contravene the new implementing regulations.

Termination of employment, employment discrimination and workplace harassment are matters generally regulated under the Labor Law. Termination of employment is also governed by Law N° 22/1957 on Labor Disputes Settlement ("Law 22/57"), and Law N° 12/1964 on Termination of Employment in Private Companies ("Law 12/64"). Law N° 22/57 and Law N° 12/64 will be replaced by Law N° 2/2004 in January 2006. There are a number of ministerial decrees issued by the Minister of Manpower to implement the general provisions in the Labor Law on the termination of employment, employment discrimination and workplace harassment.

## Terminations

### Restrictions On Employers

In principle, employers are obliged to use all efforts to prevent the termination of an employment relationship. The employer is prohibited from conducting the termination of the employment relationship for the following reasons:

- a worker is absent due to illness according to a physician's statement for a period of not more than 12 (twelve) months;
- a worker is unable to carry out his or her work due to the fulfillment of state duties in accordance with the prevailing laws and regulations;
- a worker performs his or her religious rituals;
- a worker gets married;
- a female worker is pregnant, is in delivery, experiences miscarriage or breastfeeds her baby;
- a worker has a blood relationship and/or a marital relationship with another worker within one company, except if it has been stipulated 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, or a worker carries out activities of the union outside working hours, or during the 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 commission of criminal actions by the employer;

- due to differences of ideology, religion, political alliance, race, skin color, group, sex, physical condition or marital status;
- a worker has a permanent disability condition or is ill due to a work accident or due to the employment relationship 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 for 12 consecutive months.

An important and overriding principle of Indonesian labor law is that the employer may only terminate the employment relationship with a worker after having obtained a decision from the industrial relations dispute settlement agency (currently this is the Regional/Central Committee for the Settlement of Labor Disputes, also known as "P4D/P4P").

Exceptions to the requirement to obtain prior approval for termination apply if the termination of employment occurs:

- during the maximum three month probation period of the worker (as long as the probation period is specifically provided for in writing);
- due to the worker's voluntary resignation, without pressure/intimidation from the employer;
- due to the expiration of the worker's employment agreement with a fixed term for the first time;
- due to the worker reaching retirement age as stipulated under the employment agreement, company regulation or collective labor agreement, or other laws and regulations;
- due to the worker's death;
- due to criminal proceedings resulting in the worker being unable to work for six consecutive months.

### **Notice Provisions/Consequences Of A Failure To Give The Required Notice**

The current Labor Law does not regulate the required period for notice of termination. In current practice, the requirement for an employer to serve a notice of termination to the employee is still applicable as part of the bipartite negotiation process. Bipartite negotiations must take place on at least three occasions within a period of 30 days, in which period the employer is obligated to inform the employees regarding the reasons for termination and to give opportunity to the employee to discuss the appropriate termination package.

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:

- to inform the employee regarding the employer's intention to terminate the employment relationship;
- to give the employee the opportunity to find another job; and
- to discuss the appropriate termination package (when applicable).

This means that if the employee challenges his or her termination of employment, the employer is still obligated to apply for the approval of the termination of employment from P4D/P4P regardless of a specified notice period. 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 P4D/P4P.

### **Payment In Lieu Of Notice**

There is no restriction to include a provision on payment in lieu of notice under the employment agreement. But it should be understood that such a provision in an Indonesian employment agreement would not be applied in the same way as, for instance, in Singapore or in some other common law countries. Payment in lieu of notice does not avoid the statutory requirement to obtain prior approval for termination (except in a case of resignation, for example). Such a provision would not be enforceable if the employee challenges his or her termination of employment and the employer has failed to obtain prior approval from P4D/P4P. Instead of payment in lieu of notice, the employee will be entitled to receive his or her salary during the P4D/P4P

process. The Labor Law requires both the employer and the employee to carry out all of their respective obligations as long as P4D/P4P has not issued its decision. It is contemplated that “respective obligations” means the obligation to continue working (for the employee) and to pay the salary (for the employer).

## Termination Indemnities

In the event of a termination of the employment relationship, the employer is obligated to pay a termination payment. In general, the statutory termination package consists of three elements:

(i) Severance Pay

Severance pay is the payment made to the employee as the result of a termination of the employment, which is calculated as follows:

- one month salary for a service period of less than one year;
- two months salary for a service period of one year or more but less than two years;
- three months salary for a service period of two years or more but less than three years;
- four months salary for a service period of three years or more but less than four years;
- five months salary for a service period of four years or more but less than five years;
- six months salary for a service period of five years or more but less than six years;
- seven months salary for a service period of six years or more but less than seven years;
- eight months salary for a service period of seven years or more but less than eight years;
- nine months salary for a service period of eight years or more.

(ii) Long Service Pay

Long service pay is the payment made to the employee in appreciation of his or her services:

- two months salary for a service period of three years or more but less than six years;
- three months salary for a service period of six years but less than nine years;
- four months salary for a service period of nine years but less than twelve years;
- five months salary for a service period of twelve years but less than fifteen years;
- six months salary for a service period of fifteen years but less than eighteen years;
- seven months salary for a service period of eighteen years but less than twenty-one years;
- eight months salary for a service period of twenty-one years but less than twenty-four years;
- ten months salary for a service period of twenty-four years or more.

(iii) Compensation of Rights

Compensation of rights consists of:

- compensation for annual leave not taken and not yet forfeited;
- travel expenses or costs for the employee and his or her family to the place where he or she was accepted the job;
- compensation for housing and for medical and medical care calculated as 15% of the severance payment plus the service payment for those who meet the conditions;
- other matters as stipulated in the employment agreement, the company regulations or the collective labor agreement.

### Separation Money/"Uang Pisah"

In addition to these three elements, the Labor Law introduced a new element called a "separation payment" ("uang pisah"), which is applicable to the termination of employment if the employee voluntarily resigns. Under the Labor Law, an employee whose duties and functions do not directly represent the Company's interest (non-managerial position) may be entitled to a "separation payment" in addition to the compensation component, provided that the amount of the "separation payment" is stipulated under the employment agreement, the company regulation or the collective labor agreement (CLA). At the present time, there are only a few company regulations, employment agreements or CLA's that deal with this subject although it is becoming more common.

### Formula Applicable To Termination Package

The formula used to calculate a termination package will depend on the reason for termination. For example, employees who are dismissed due to the closure of the company resulting from the company's losses are entitled to the so-called "1x Formula", which consists of (1x severance pay) + (1x long service pay) and (1x compensation of rights). If the closure of the company is not caused by the company's losses, the employees are entitled to the so-called "2x Formula" which consists of (2x severance pay) + (1x long service pay) + (1x compensation of rights). In certain termination of employment cases, such as the termination of employment due to the employee's involvement in criminal proceedings where the employee is not able to work for six consecutive months, the employee will be entitled to long service pay and compensation of rights only.

### Salary During Process

Previously, an employer was obligated to pay an employee's salary during the termination process for up to a maximum of six months or until the P4D/P4P issued its decision, whichever was earlier. The Labor Law does not set such a limitation. It only stipulates that as long as the P4D/P4P has not issued its decision, both the employer and the employee must carry out all of their respective obligations. In this context, "respective obligations" means the obligation to continue working (for the employee) and to pay the salary (for the employer).

### Salary During Detention

The employer is not required to pay salary if a worker is arrested for committing a criminal act. 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% to 50% of the employee's monthly salary.

### Salary During Long-Term Sick Leave

The employer must pay an employee's salary during long-term sick leave as follows:

- first 4 months: 100%
- second 4 months: 75%
- third 4 months: 50%
- subsequent months (until date of termination) : 25%

The employer is only entitled unilaterally to terminate an employee's employment contract after the lapse of a 12-month period of long-term sick leave. Unlike the previous regulation, the Labor Law entitles an employee to apply for the termination of employment due to his or 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 sick leave.

## **Law On Settlement Agreements, Waivers And Releases**

If the employee and the employer reach an agreement in a bipartite negotiation or in the mediation process, the company and the employee can enter into a "settlement agreement". This settlement agreement will need be submitted to the industrial relations dispute settlement agency (through the Manpower Office) along with the application for the decision on the termination of employment. The approval for the termination of employment will be granted without the obligation for the employee and the company to go through the mediation (if the settlement can be reached in a bipartite negotiation) and the industrial relations dispute settlement agency process.

The existing law and regulations do not regulate the content of a settlement agreement. In practice, a settlement agreement will include the following provisions:

- name and address of the employee;
- name and address of the employer/company or its representative;
- date and place of negotiation;
- reason for termination of employment;
- the agreement on the termination of employment and the termination package; and
- the date and signature of the employee and the employer.

In most cases a settlement agreement also include a “release clause”, under which the employee releases and holds harmless the employer/company, its affiliates, its management and its employees from any and all obligations, liabilities, claims in whatever forms, including claims through District Courts, either in the present or in the future. Sometimes this release will be reciprocal.

The agreement on the termination of employment can also be documented in the form of a “negotiated resignation” (see the section below).

## Litigation Considerations

### Negotiated Resignation And Bipartite Negotiation

Unless a statutory exception applies, the employer is obligated to obtain prior approval from P4D/P4P before terminating an employee. The time spent in obtaining a decision of the P4D/P4P can range from 4 to 8 months. One of the key exceptions to the general rule that termination of an employee must first be approved by P4D/P4P is where the employee voluntarily resigns. This in turn has lead labor law practitioners to develop what is known as the “negotiated resignation approach.”

In this preferred approach, the employer will seek to persuade the employee in question to sign a “negotiated resignation letter”. For this purpose, the statutory formula applicable to a termination, increased by some additional incentive for prompt settlement, should be reasonably considered as a baseline severance payment calculation. Under this approach, it is not suggested to proceed with a “termination” as such, because that would involve the official process of going through mediation at the local Manpower Office and then P4D/P4P to apply for a decision justifying the termination of employment. As stated above, the time spent in obtaining the decision of P4D/P4P could range from 4 to 8 months (in a contested proceeding), whereas the essence of the “negotiated resignation approach” is to avoid dealing with the bureaucracy and the considerable wastage of management time, not to mention payment of legal fees--all for the privilege (if the employer wins) of terminating the employee by virtue of the decision of the P4D/P4P.

If, as sometimes happens in practice, the employee refuses to sign a negotiated resignation letter (because he or she does not really see himself or herself as having resigned voluntarily), but does agree on the amount of the termination package, the company and the employee can enter into a “settlement agreement”. The net effect is essentially the same as a negotiated resignation. This settlement agreement document will need to be processed administratively through P4D/P4P (through the Manpower Office) along with an application for termination of employment, but the process is relatively short and approval will be granted without the obligation to go through the mediation and the industrial relations dispute settlement agency process.

The process for obtaining a negotiated resignation or a settlement agreement is conducted in bipartite negotiations.

Minutes should be taken in each meeting. The minutes should include the:

- name and address of the employee;
- name and address of the labor union or other workers’ organizations registered with the Department of Manpower (if any);
- name and address of the employer/company or its representative;
- date and place of negotiation;

- subject matter and reason for termination of employment;
- stated positions of the parties;
- conclusion of the negotiation; and
- date and signature of the negotiating parties.

### Mediation

If negotiation does not work, the company and employee(s) are obliged to first attempt to settle their disagreement through mediation. The mediators will be officials of the Regional or Central Manpower Office who will be present at, and supervise, the negotiations. If the parties agree on the terms and conditions of termination, a “Kesepakatan Bersama” (Settlement Agreement) will be signed by the parties and submitted to the Manpower Office as the supporting document in obtaining the termination approval. If the parties are still in disagreement, the mediator will issue a non-binding recommendation. The parties have the option to accept the recommendation within seven days. If they do not accept, the process will be continued in P4D for individual terminations or in P4P for mass terminations. Although the mediators’ recommendation is not binding on the disputing parties, P4D/P4P usually (but not always) will use this recommendation as the basis for their decision.

### P4D And P4P Process

The process at P4D or P4P will take longer than mediation because the company may have to wait in line with other companies. One P4D is located in the capital city of each province in Indonesia. There is only one P4P in Jakarta, which is located at the Manpower Department. The judges of P4D usually issue their decision within 2 to 4 months. This decision may be appealed to P4P which will also take approximately another 2 to 4 months. The decision of P4P, in theory, is final and binding.

A standard form of P4D/P4P approval application is used. The application must state:

- the name and domicile of the company/applicant;
- the name of the person in charge of the company;
- the name, position and address of the worker whose termination of employment is being applied for;
- the age and number of the worker’s family;
- the service years and date of employment;
- the place the worker was first employed;
- a specification of the latest salary in the form of money and in kind;
- the latest wage received by the worker;
- specific reasons of the Company to terminate employment;
- evidence that negotiations took place;
- the effective date of the termination of employment applied for;
- the place and date of the application for a termination of employment permit; and
- other matters deemed necessary.

### Warning Letters

Prior to termination of an employee because of an employee’s violation of his or her employment agreement, the company regulations or the collective labor agreement, for example, the company should give three warning letters. Each warning letter is effective for a maximum period of six months, unless otherwise stipulated in the employment agreement, the company regulations or the collective labor agreement. If the employee commits a violation following a third letter, the company may apply for approval to dismiss from the industrial relations dispute settlement committee (P4D/P4P). The employment agreement

or the company regulations or the collective labor agreement may stipulate certain mistakes which are subject to the first and final warning. If the employee violates the provisions of the employment agreement or the company regulations or the collective labor agreement within the validity period of the first and final warning, the company may apply for approval to dismiss the employee.

## Discrimination

### 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. In its hiring policies, the employer may not discriminate on the basis of sex, ethnic group, race, religion, skin color or political alliance.

#### Protection For Female Workers

Non-discrimination between male and female workers is a concept that had been introduced long before the effectiveness of the Labor Law. Indonesia has ratified several ILO Conventions dealing with non-discrimination between male and female workers:

- ILO Convention N° 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (by virtue of Law N° 80 of 1957);
- ILO Convention on the Elimination of All Forms of Discrimination against Women (by virtue of Law N° 7 of 1984); and
- ILO Convention N° 111 concerning Discrimination in respect of Employment and Occupation (by virtue of Law N° 21 of 1999).

The right to employment and fair and appropriate remuneration and treatment in 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 Indonesian 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 human basic freedom without discrimination.
- Every citizens have the right to obtain proper work in accordance with the talent, qualification and ability.
- Every person is free to choose the work he or 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 entitlements.
- Every person, male and female, in performing the job that is suitable to his or her human dignity is entitled to a just wage in accordance with his or her performance to ensure the welfare of his or her family.

In addition to the Labor Law, there are ministerial regulations and circular letters issued prior to the effectiveness of the Labor Law, prohibiting discrimination against female employees, such as:

- Circular Letter of the Minister of Manpower N° SE-04/M/BW/1996 on the Prohibition of Discrimination against Female Workers in Company Regulations or Collective Labor Agreement;
- Minister of Manpower Regulation N° Per-03/Men/1989 on the Prohibition of Termination of Female Workers due to Marriage, Pregnancy or Giving Birth.

Despite the above 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 Indonesia still exists in the workplace. For instance, medical benefits of married male employees often covers a wife and children, while a married female employee is entitled to medical benefits as if she is 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 bread-earner of the family. Of course, this will be different if the female employee can prove that she is the bread-earner of the family (for instance, if 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 their menstruation period (so that she 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. Female workers are also entitled to maternity leave, *i.e.*, 1.5 months before and after she delivers her baby and 1.5 months miscarriage leave.

The Labor Law prohibits the employer from:

- employing at night (from 11 pm to 7 am) female workers who are less than 18 years old.
- employing a pregnant female worker who, according to a physician's statement, will endanger her health and the safety of her pregnancy if she works between 11 pm to 7 am.

The Labor Law obligates an employer employing female workers between 11pm to 7 am:

- to provide nutritious food and beverage.
- to protect morals and safety at the place of work.
- to provide transportation from and to the work place.

#### 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 is suitable for the type and level of disability.

There is a requirement for the employment of disabled persons regulated under Minister of Manpower Decree N° Kep-205/Men/1999. Under this Decree, an employer having 100 or more 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.

#### Protection For Child Workers

Basically, an employer in Indonesia is prohibited from employing under age children. This prohibition may be lifted for children of between 13 years to 15 years of age to carry out light duties to the extent that such work does not disturb their physical, mental and social development and health. The employer who wishes to employ children between 13 to 15 years of age must fulfill the following requirements:

- obtaining written permission from the parents or guardian;
- making an employment agreement between the employer and the parents or guardian;
- working hours of a maximum of three hours;
- carrying out the work during daytime and not interrupting school time.

Children of at least 14 years of age 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 or she is present in the place of work, unless proven to the contrary.

Indonesia has ratified ILO Convention N° 138 concerning Minimum Age for Admission to Employment, by issuing Law N° 20 Year 1999.

### **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 for damages caused by the unlawful action of another 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.

### **Potential Employer Liability For Employment Discrimination**

If it is proven that the employer committed a violation of the employment discrimination provisions, the employer will be liable to pay the maximum termination package. If charged under the Civil Code, the employer may also be liable to pay damages to affected employees based on Article 1365.

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 consists 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 Rp 10 million and a maximum of Rp 100 million for the violation of:
  - Article 67 of Labor Law regarding the protection of disabled workers;
  - Article 76 of Labor Law regarding the protection of female workers; and
  - Article 71(2) of Labor Law regarding the requirements to employ children for developing their talents and interests.
- Criminal imprisonment of a minimum 1 year and a maximum 4 years and/or a fine of a minimum Rp 100 million and a maximum Rp 400 million for violation of:
  - Article 68 of Labor Law regarding the employment of children;
  - Article 69 (2) of Labor Law regarding the requirements to employ children for light work

### **Practical Advice To Employers On Avoiding Employment Discrimination Claims**

In order to avoid employment discrimination claims, it is important for employers to include their policies on this issue in the company regulations/collective labor agreement and to provide for sanctions if these policies or rules are violated. It is also important to conduct a special session for the employees (at least once - as part of their orientation program) to discuss employment discrimination issues and spell out the policies of the company. The employees must also understand that the employer requires them to immediately report any violation of the stated anti-discrimination policy.

## Sexual Harassment

### Laws On Sexual Harassment

Sexual harassment is generally considered as exposure to unwanted verbal or physical conduct of a sexual nature. It is an issue which is not regulated in the Labor Law or in general civil law. However, there is a general provision in the Indonesian Criminal Code that bears on this matter.

The Criminal Code specifies a particular “crime 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 Rp. 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 or her own desire.”*

R. Soesilo, a noted scholar of Indonesian Criminal Law, describes decency in this matter as referring to human feelings (embarrassment) in sexual ways. A follow-up issue is that the degrees of decency might differ between one community and another. In his book, Soesilo states that law enforcers will in the end have to determine whether or not a given act is indecent, according to the norms applicable in a given community.

In addition, Soesilo also opined that in order for a person to be subjected to Article 281, he or she must:

- intentionally break the norm of decency in a public place, meaning that the act must be intentionally performed in a place easily viewed or regularly visited by the public; or
- intentionally break the norm of decency in the presence of another person who is present without his or her own desire, meaning that the act does not necessarily have to be committed in a public place, as mentioned above, but may be committed in the presence of one other person, as long as that person has no intention of being present at that place and at that time.

The Labor Law previously stipulated that an immoral act could be used as the basis for immediate termination of employment. However, the Indonesian Constitutional Court (*Mahkamah Konstitusi*) recently issued a decision which, 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 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 Constitutional Court argued that Article 159 put an unfair burden of proof on the employee since the terminated employee was required to prove that he or 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 appears that immediate termination of an employee because of a 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 or her work properly. However, the employer may be required to re-employ the worker if the worker is found not guilty.

To our knowledge, there is no P4D/P4P decisions to date in which an employee was dismissed because of being found guilty of committing sexual harassment.

## **Employee Remedies For Sexual Harassment**

As in the employment discrimination case, an employee may claim for damages caused by unlawful actions based on Article 1365 of the Indonesian Civil Code, as long as such unlawful action has caused actual losses to the aggrieved party.

The employee will also have the right to terminate the employment relationship if the company requires work that endangers the life, safety, health and morale of the worker while such work is not stated under the employment agreement. Based on discussions with the Manpower Department, work which exposes employees to sexual harassment can be deemed as "work that endangers the employees' life, safety, health and morale".

## **Potential Employer Liability For Sexual Harassment**

If the employer is found to have given the employee work that endangers his or her life, safety, health and morale, while such work is not stated in the job description or the employment agreement, if the employee complains and wishes to cease working, the employer is obligated to pay the so-called 2x formula [2 x severance pay] + [1 x long service pay] and [1 x compensation of rights].

In addition to the above, the employer may also be liable to pay damages claimed by the employee under Article 1365 of the Civil Code if it is proven that the company has required work which exposed the employee to the sexual harassment.

## **Practical Advice To Employers On Avoiding Sexual Harassment Problems**

There are no specific training requirements on sexual harassment in applicable Indonesian regulations. In practice, however, 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 a company regulation). The company is obligated to notify and explain the contents as well as provide the company regulations and its amendment to all workers. The policies and standards are established by company management as opposed to being required by law and regulation.



## Italy

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## 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 are set forth by national labor collective agreements (“NLCAs”), company or business unit collective agreements, 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, 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 in cases where a different law has been chosen, the Rome Convention provides that such a choice cannot result in depriving the employee of the protection afforded by the mandatory rules of the law, which would be applicable in absence of choice. Moreover, mandatory provisions of law addressing a peculiar situation may be applied by a judge, notwithstanding the fact that a different law is governing the contract.

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.

## 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 N° 108/1990, and Law N° 223/1991. The restrictions on dismissals found in these laws do not apply to employees who qualify for old-age pensions (i.e., generally 65 for men and 60 for women) or seniority pension (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, but not to exceed 65, while women may chose to work until 65 as well). The restrictions also do not apply to employees during their probationary period. The types of dismissals in Italy include:

- (i) Individual dismissals without need of showing “*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 prosecution of the employment relationship impossible.” Examples of “*giusta causa*” are theft or serious insubordination. Very often a dismissal for “*giusta causa*” has disciplinary nature and, under Italian law, specific mandatory provisions govern the procedures that must be followed in order to first contest disciplinary breaches 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 N° 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 lesser number of workers, or the employer closes branches or eliminates product lines, which make 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 in the dismissal of particular categories of employees, including female employees upon marriage, pregnant women, female employees with a child under one year of age, works council representatives (under certain NLCAAs), and employees disabled due to accidents at work or professional illness.

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

A dismissal must always be in writing; a verbal dismissal is deemed void or non-existent. 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 who receives such a request must reply in writing no later than seven days from the request or the termination is not effective. Most NLCAAs, including those for “*dirigenti*,” provide (although in different ways) that the reasons for termination must also be given within 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 contract for a fixed term. 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 NLCAAs, and may vary within a range of 15 days and 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.

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*.”

### **Collective Dismissals**

The general provisions concerning collective dismissals are set forth by Law N° 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 N° 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; 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 about its outcome. If the parties did not conclude an agreement during this joint review process, the labor office will convene the parties 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, specifying each employee’s name, place of residence, qualifications, position in the company, age, 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 between three and nine month’s “*mobilità*” allowance for each redundant employee (if an agreement has been reached with unions this contribution is reduced to three months).

## 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. Sometimes, “*T.F.R.*” is contributed to complementary pension funds and, 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 the employer 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 cost of termination, 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 “real guarantee” of employment applies to employers that have more than 15 employees within the territory of the same city (“comune”), or more than 60 employees in total. 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 their right to reinstatement upon payment of additional compensation amounting to fifteen months’ salary.

An “obligatory guarantee” of employment is available when the employer has 15 employees or less, 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 of more than 15 employees, but not enough to trigger the “real guarantee” of employment, said indemnity may be increased up to a maximum of 14 months’ salary, depending upon years of service.

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 pension (and that, in the latter case, have not expressly chosen to continue working).

As already mentioned, 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 peculiar situations. *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 ranging up to 12 monthly wages, and if dismissal is not deemed “justified” they can be awarded an additional indemnification of up to 20-30 monthly wages, depending on the applicable collective agreements. Usually, Courts and arbitration panels have very broad discretion in assessing whether dismissal was “justified” and in determining the amount of the relevant award..

## **Laws On Separation Agreements, Waivers, And Releases**

In order to avoid the uncertainties, time, and costs connected with judicial litigation, employers and employees frequently negotiate agreements of termination 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, in itself, 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 the 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 termination or execution of the relevant release or waiver. Releases and waivers reached in court, in front of unions, or 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.

## 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 have been given at a later stage). This term does not apply to *dirigenti* and, under prevailing case law, to employees during a probationary period.

Before resorting to the labor courts, parties willing to start a judicial action must initiate a mandatory conciliation procedure in front of Labor Councils. If conciliation proves to be impossible, or in cases where the Labor Council has not convened the parties within 60 days after receipt of the relevant request, the action may be brought in court. Petitions for an injunction in labor matters may be filed even if no mandatory conciliation procedure has been completed. 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.

## Employment Discrimination

### Laws On Employment Discrimination

Employment discrimination is not as prevalent a source of labor disputes in Italy as it is in other countries. 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 on, 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, or training; pay (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).

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 regarding 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 the 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) holds that a judicial review of discrimination issues based on a contractual duty of good faith is not possible.

## **Employee Remedies For Employment Discrimination**

A number of violations of anti-discrimination laws are punishable by criminal law. Discrimination upon hiring (*i.e.*, not under the other circumstances, such as promotions, transfers, etc.) of a worker is punishable with imprisonment of up to one year. Breach of the provisions against sex discrimination is punishable with a fine, which has the nature of 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, 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.

In cases of sex discrimination, the law provides that in order to prove it, a plaintiff may offer elements of 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, ethnic origin. If such elements of evidence are offered, the burden of proof is shifted on the defendant to prove that discrimination did not take place.

Administrative authorities in charge of enforcing equal treatment laws also may start an 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 should 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 to avoid discrimination against union representatives (e.g., by requiring the union’s consent before a works’ council leader may be transferred) .

## **Potential Employer Liability For Employment Discrimination**

If discrimination has led to the 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 damages have affected an employee’s health, and therefore an employee’s ability to earn a professional income, 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 or sexual orientation, race, ethnic origin the law expressly provides that “non-patrimonial” damages (i.e., damages not consisting of an economic loss) may be awarded.

Damages 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. These types of damages may be covered by the mandatory governmental insurance scheme against accidents at the workplace and occupational diseases; the law governing such insurance scheme also sets forth rules to calculate such damages. Biological damages that are not covered by that mandatory insurance scheme can be calculated with more difficulty, although case law customarily resorts to charts that differentiate monetary damages based on a system of “percentage points” that must be assessed in each case through a medical opinion, as well as based on the age of the affected person.

In recent years case law 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 on a national newspaper. The breach of the court’s orders may lead to criminal punishments, including imprisonment.

## **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 recommendable, both to increase awareness by decision-taking managers about the discrimination issues, as well to help defending 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.

## Sexual Harassment

### 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 of his or her position.

In civil actions, employees complaining of sexual harassment have often resorted to the general provisions establishing tort liability in Article 2043 of the Italian Civil Code, and specifically to the provisions in the Code providing that employers are liable for damages caused by their employees in carrying out their activities.

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.

The Italian laws implementing both Council Directive 2000/78/EC of November 27, 2000 and Council Directive 2000/43/EC of June 29, 2000 (respectively establishing a general framework for equal treatment in employment and occupation and implementing the principle of equal treatment between persons irrespective of racial or ethnic origin), defined harassment as the “... *unwanted conduct ... with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*” Under said laws, harassment is deemed to be a form of discrimination. The definition applies to conducts related to “... *racial or ethnic origin ...*” and “... *religion or belief, disability, age or sexual orientation ...*” but not explicitly to harassment based on sex.

### Employee Remedies For Sexual Harassment

The combination of different provisions, along with the fact that none of them is specifically addressing sexual harassment, 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.

Based on the legal approach, employees have different remedies in cases of sexual harassment. The employee 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).

## 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 in relevant chapter).

## 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.



# Japan

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## Introduction

The primary statute in Japan governing the employment relationship is the Labor Standards Law (“*rodo kijunho*”) (the “LSL”) and an accompanying “Enforcement Ordinance” N° 23 (the “Ordinance”).

Recent amendments to the LSL in 2004 primarily affect two areas related to termination:

- (i) Codification of the standard for dismissal and termination notification standards; and
- (ii) Amendments changing laws about fixed term contracts.

Also relevant to employment relationships are the rules of employment (registered by employers (the “Work Rules”), the individual employment contracts, any existing union labor contracts, and case law.

The LSL sets out basic standards for working conditions. Employers are expected to endeavor to exceed those standards. Any working conditions stipulated in an employment contract falling below such minimum standards are invalid.

## Terminations

### Restrictions On Employers

Dismissal of an employee in Japan can be a difficult and expensive solution. This is attributable in part to the expectation of “lifetime employment” for Japanese employees and the difficulty which seasoned employees have in moving from one job to another with comparable pay considering lack of fluidity in the Japanese job market.

Japanese law does not oblige an employer to enter into a written employment contract upon hiring an employee, and thus an employment contract can be oral. In practice, it is common for Japanese companies to hire an employee without entering into a written employment contract. However, under the LSL, an employer is required to specify in writing the following items to an employee at the time of hiring:

- (i) Matters regarding the method of determination, computation, and payment of wages, dates of closing of accounts, and matters regarding wage increases;
- (ii) The working place and content of the work assignment;
- (iii) The starting time and leaving time, rest hours, paid leave, rest days, holidays, and change of shift times;
- (iv) Matters regarding retirement, including all bases for discipline and dismissal; and,
- (v) In the case of an employment contract with a definite term, the term of employment.

An employer must also specify any company rules relating to the five issues above at the time of hiring. However, these items are typically included in the company’s Work Rules, and an employer may give a copy of its Work Rules to the employee instead of separate individual notice. The matters generally included are:

- (i) A retirement allowance, bonus allowances, bonuses, and minimum wages;
- (ii) Expenses to be borne by workers for food, work equipment, and other such expenses;
- (iii) Safety and sanitation;
- (iv) Vocational training;
- (v) Accident compensation and relief for injury and illness not related to work;
- (vi) Commendations and sanctions; and,
- (vii) Temporary suspensions.

If actual working conditions are different from those stated in the employment contract, the employee may terminate the contract without notice. Working conditions below the standards provided in the LSL are also invalid. In such circumstances, the employer must replace the invalid conditions by the standards provided in the LSL. Working conditions below the standards provided in the Work Rules are also invalid; in those cases, the employer must change its working conditions to conform to the standards provided for.

### Fixed Term Contracts

Whether a contract is for a fixed term or an indefinite length is important in Japan. A fixed term contract that is of questionable enforceability may be deemed to be an employment contract for an indefinite term. This means that, instead of automatically terminating at the end of the contract term, the contract will be deemed continuous, and normal justifiable reasons must be established to justify termination of the employment relationship.

With a cultural backdrop of lifetime employment, the term of an employment contract in Japan can be indefinite. Prior to the 2004 amendments, employers could only set fixed term employment contracts for up to one year, and any more than that would be deemed to be employment with an indefinite term. However, the 2004 amendments expanded that to give employers flexibility and confidence in providing jobs while at the same time giving a certain amount of stability to the employees. Therefore, employers may now have employment contracts for up to three years. For the following special types of employees, the maximum term cannot exceed five years:

- (i) An employee with highly special expertise, technique, or experience in one of the categories designated by the Minister of Labor; or,
- (ii) An employee 60 years of age or older.

The 2004 amendments also introduce standards for the conclusion, renewal and non-renewal of fixed term employment agreements. These standards are designed to protect employees in the current job market where the erosion of “lifetime employment” has resulted in an increase in the use of fixed term employment agreements.

The following outlines the specifics of the new standards for fixed term contracts:

- Upon entering into a fixed term employment agreement, the employer is required to clearly state to the employee whether the agreement potentially allows for renewal. Where renewal is possible, the employer is required to clearly state the standards for the renewal decision, such as any matters to be considered in the determination to renew. Although the employer does not need to state this in writing, the Ministry of Health, Labor and Welfare recommends it to be in writing, and as a practical matter, it should be included in the written agreement to avoid challenge by employees;
- Upon renewal after more than one year of employment, and where there has been at least one renewal already, the employer should endeavor to set forth as long a period as possible in accordance with the actual conditions of employment and the desires of the employee;
- If an employer decides not to renew the fixed term agreement after completion of one year of employment, the employer must provide at least 30 days’ notice to the employee; and
- Where an employer notifies the employee of non-renewal, the employer must issue a certificate stating the reasons for the non-renewal if requested by the employee.

Pursuant to the amendments, the Labor Standards Inspection Office can provide necessary “advice” and “guidance” to help employers apply the new standards.

Notwithstanding the foregoing, an employment contract that requires a definite period for the completion of a project may be entered into with a term that exceeds these maximum periods.

Fixed probationary periods are also common in Japan but do not allow for indiscriminate terminations. Employers also can establish probationary periods for new employees for up to a maximum of one year, although probationary periods of three to six months are most common in practice. A probationary period is still considered regular employment, but the employer may terminate in some cases where the employee is unsuitable for the job. Although an employer has more flexibility in deciding to

terminate an employee on probation, the employer is still required to have a justifiable reason why the employee is not suitable for permanent employment. The particular standards restricting the freedom of employers to dismiss workers during probation are developed in case law.

### Conditions Of Termination

Under Japanese law, an employment contract is terminated when:

- (i) The employee voluntarily resigns;
- (ii) The term of a fixed term contract expires;
- (iii) The employee reaches the retirement age designated by the employer;
- (iv) The employer dismisses the employee;
- (v) The employer does not retain the employee for permanent employment upon expiration of the employee's probationary period; or
- (vi) The employee does not return to work when his or her leave of absence has expired.

In cases where the employer chooses to dismiss the employee, there are several categories of grounds for dismissal constituting justification for termination under case law doctrines, assuming that these are provided for in the Work Rules or employment contract. These grounds include mental or physical incapacity for work, poor performance, delinquent attitude, or lack of cooperation, significant misconduct or dereliction of duty, or economic necessity of the employer.

Whether the grounds are reasonable is a question of fact that depends on the circumstances of the actual dismissal. Under several recent case laws, dismissals caused by poor performance can be justified, but only if the facts and circumstances are adequately proven by objective evidence.

Japanese case law has also developed extensive restrictions on what constitutes justifiable cause for dismissal. An employer may not abuse its rights, and thus, any dismissal not made for justifiable reasons will be void. This restrictive case law supercedes any provision of a contract or work rule that is favorable to an employer. In light of the tradition of lifetime employment and the difficulty of employees in changing employers, Japanese case law has established the doctrine known as the "abuse of the right of dismissal", which is derived from the Civil Code of Japan. Underlying the doctrine is the notion that rights shall be exercised honestly, fairly and loyally.

Under this doctrine, the employer has an additional duty not to abuse its right to dismiss employees. If that right is found to have been abused, a dismissal may be ruled ineffective by a court and the worker may return to work or receive monetary compensation. Accordingly, it is essential that any dismissal be on reasonable grounds in order that it not be found to be an abuse of the right to dismiss (and consequently found to be invalid). "At will" employment is illegal and unenforceable in Japan.

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

Under the LSL, an employer may theoretically terminate the employment of an employee at any time upon giving prior notice of 30 days, or by a payment in lieu thereof, if justifiable reasons exist. However, the following types of termination are strictly prohibited:

- (i) Discriminatory termination on the grounds of nationality, creed, or social status;
- (ii) Termination during a leave of absence for a work-related illness or injury or within 30 days thereafter;
- (iii) Termination during the period of maternity leave or within 30 days thereafter;
- (iv) Discriminatory termination of a female employee;
- (v) Termination of an employee on the grounds of marriage, pregnancy, childbirth, or for having taken maternity leave, paternity leave, childcare leave or nursing care leave; or,

- (vi) Termination on the grounds that an employee is a member of a labor union, has attempted to join or organize a labor union, or has engaged in legitimate union activity.

The requirement that an employer give 30 days' notice can be extended by employment contract, Work Rules, a collective bargaining agreement, or case law. Since the relevant employment contract or Work Rules may place restrictions on termination of the employment, their specific terms should be consulted before a dismissal.

If there is a collective agreement between the employer and a labor union, it might also be necessary to consult with the union prior to a dismissal.

Typically, a dismissed employee will seek an interlocutory "provisional disposition order" to preserve his or her employment status ("*chii-hozen karishobun*"). A provisional disposition order is similar in effect to a preliminary injunction. Requests for a provisional disposition order are almost always granted by Japanese courts.

The amendments codify this doctrine by making void any dismissal made that:

- (i) exceeds the extent acceptable in accordance with socially accepted norms; and
- (ii) does not have objectively reasonable grounds.

Such a dismissal will be deemed as "abuse of the employer's right of dismissal."

Because this amendment simply codifies legal principles recognized by the Japanese courts, the practical impact of this amendment will be limited. However, because the doctrine becomes codified under the LSL, the Labor Standards Inspection Office (LSIO) will have jurisdiction to give advice, issue orders, and punish offenders. Therefore, it is expected that the LSIO will become actively involved in helping employers and employees resolve dismissal disputes in accordance with the laws regarding Encouragement of Resolution of Individual Labor Disputes. The result of the amendment is likely to result in advice and recommendations from, or mediation by, the municipal labor bureaus.

In addition, the 2004 amendments affect termination notification standards. To raise employee awareness of the possibility of dismissal, the amendments to the Labor Standards Law also prescribe that the "grounds for dismissal" must be included in the employer's Work Rules. Moreover, pursuant to new ministerial ordinances came into effect together with the amendments, employers must provide employees with a written explanation of the employer's grounds for dismissal upon entering into the employment contract. This must be presented together with the presently required documentation setting out general terms and conditions of employment.

The new amendments also provide that an employee who receives notice of dismissal from an employer may require the employer to provide a certification setting out the reasons for dismissal. Upon receipt of such a request, the employer must provide the relevant certificate without delay. This may mean providing the certificate before the final day of employment.

#### Larger Scale Dismissals/Personnel Adjustments

In general, the basic concepts and rules concerning the dismissal of individual employees are also applicable to larger scale lay-offs or personnel adjustment dismissals. The three main methods for reducing employee numbers in Japan are adjustments due to economic necessity, the solicitation of voluntary resignations, and involuntary early retirement and resignations.

Against the background of the lifetime employment system in Japan, case law has been established that "adjustment dismissals" ("*seiri-kaiko*") for economic reasons will be lawful where the following requirements are satisfied:

- (i) There must be a strong economic necessity to reduce the number of employees (e.g., the company has been having financial difficulties for at least two consecutive years);
- (ii) Fair and non-discriminatory criteria must be used in the selection of employees to be dismissed;
- (iii) The employer has attempted to use other less drastic methods of reducing staff levels (e.g., transfers to other sections, solicitation of early retirement or voluntary resignations, the suspension of hiring new employees, etc.); and
- (iv) The procedures applied in dismissing the employees must be proper.

In light of the foregoing, the solicitation of voluntary resignations or the implementation of an early retirement program is the most practical way to terminate the employment of an individual employee and to reduce the work force generally.

Voluntary resignation involves the termination of the contract of employment at the option of the employee. It is common in Japan for the employer to discuss the situation with the employee and for those discussions to result in the employee agreeing in writing to voluntarily resign. In general, Japanese labor law requires, as a matter of equal treatment of all employees, that any solicitation of voluntary resignations be directed to all employees of a company. It may be necessary to offer the employees severance pay in the form of a severance incentive program to successfully negotiate a voluntary resignation.

As long as the proposed solicitation of resignations is conducted in a purely voluntary manner and does not involve any element of “force”, there are no restrictions or conditions on the implementation of such a plan. To avoid legal claims, it is advisable that the process for the solicitation of voluntary resignations satisfy the following conditions:

- (i) The solicitation process is necessary for rational economic reasons;
- (ii) “Due process” is observed in the enforcement of the solicitation process; and,
- (iii) The conditions of the solicitation process are reasonable and fair.

It is quite common that solicitation is targeted toward specific employees through a practice referred to as “tapping on the shoulder” (*kata tataki*). In the “tapping on the shoulder” approach, a formal announcement of the company’s intention to solicit voluntary resignations is followed by a series of private interviews between company executives and employees. In these private meetings, the executive conducting the interview can, as appropriate, indicate by implication to each employee: (i) that the company is happy with the employee’s performance and that the voluntary resignation program should be ignored (sometimes referred to as “reverse tapping on the shoulder”); or (ii) that the company is not satisfied with the particular employee’s performance and that the staff reduction would provide an opportune time to seek other employment. This process often results in lawsuits brought by disgruntled employees.

It is common for a company to fail to reach its target of employee reductions after implementing a series of calls for voluntary retirement. In these circumstances, the issue arises as to whether the company may dismiss targeted employees who do not take up the “hint” to voluntarily resign after being “tapped on the shoulder”. In these circumstances, targeted employees who decline to resign or retire voluntarily should not be terminated outright in view of the danger of litigation, unless each termination falls within the requirements for adjustment dismissal for economic necessity or is justified on its own merits.

## Termination Indemnities

The LSL does not require an employer to pay a retirement allowance to its employee upon dismissal, resignation, or any other termination. The LSL leaves this issue to other voluntary regulations and agreements. Therefore, the starting point for analysis is to confirm the retirement allowance rules set out in the work rules or the applicable employment contract. Generally, the retirement allowance rules contain a table outlining the rates of retirement allowance that an employee is entitled to receive upon retirement. The employee’s pay normally will be based on the current monthly salary (excluding bonuses or allowances).

## Laws On Separation Agreements, Waivers, And Releases

When an employee is terminated, a company often asks the employee to sign a release, although this is not an established labor custom in Japan. Apart from the convenience of having written proof of the consent to termination, the release makes the employee aware of important issues such as confidentiality, indemnity, and fiduciary duties. Under Japanese contract theory, each employee has fiduciary and loyalty obligations to the employer during that employee’s continued employment, and therefore a reasonable restrictive covenant during such employment is generally enforceable.

Alternatively, in cases concerning an important employee who is very close to the employer’s proprietary information, an employer may consider paying a certain reasonable allowance in consideration for his or her confidentiality obligations (an “allowance for confidentiality”, or *kimitsu-hoji-teate*) during the employment instead of a payment after the termination of employment. This type of payment may work to provide just cause for securing the full enforceability of a non-competition covenant after termination, given that Japanese case law holds that an allowance paid to an employee during employment, rather than after termination, may serve as compensation that can justify a non-competition obligation.

## Employment Discrimination

### Laws On Employment Discrimination

Under the LSL, an employer cannot terminate the employment of an employee based on nationality, creed, or social status. Further, effective as of April 1, 1999, Japan's "Laws Concerning Equality of Employment Opportunities And Benefits Between Genders" has been revised, making the regulations against discrimination toward women much more stringent.

The new law replaces a prior version of a similar law that had been criticized by women and civil rights organizations alike for being both vague and ineffective. The revised statute specifically prohibits employment discrimination against women in the areas of recruiting, hiring, intra-company transfers, and promotions. The prior law only required that the employers "do their best" to rectify and curtail any gender-based discrimination in these areas.

The revised law not only prohibits gender-based discrimination in various areas of an employment relationship, but also provides specific guidelines as to what employers can and cannot do. For instance, discriminatory ads for men only are specifically prohibited. Asking certain types of interview questions only to members of one gender is also prohibited, such as asking female applicants in job interviews whether they will continue to work even after they are married and have children.

There are, however, some exceptions to the anti-discrimination provisions of the new law. These exceptions make it possible, for instance, for fashion designers to recruit models of a specific gender and for movie producers to do the same with their actors/actresses. High priests and "shrine maidens" who administer Shinto ceremonies can be recruited specifically from among men and women, respectively.

### Potential Employer Liability For Employment Discrimination

The new law provides a mechanism that would publicly reveal the names of employers that violate the law and who do not comply with corrective recommendations issued by the authorities. The new law also makes it easier for aggrieved parties to start a mediation process by allowing one party to the dispute to unilaterally start the process. The law also formally introduces a concept of "positive action", similar to "affirmative action" under U.S. employment law. Employers are encouraged to rectify past and existing discrepancies in the treatment of male and female workers by taking steps above and beyond merely ensuring that gender discrimination is not committed.

## Sexual Harassment

### Laws On Sexual Harassment

Although sexual harassment ("*sekuhara*") is not specifically contemplated as such in Japanese law, the 1998 statute does make reference to it, thereby treating sexual harassment as a form of gender-based discrimination. The 1998 statute recognizes the two common types of sexual harassment discrimination: quid pro quo discrimination and hostile-work environment discrimination.

Besides an action under the directly applicable statute, many sexual harassment cases have been brought before the courts. Under Article 709 of the Civil Code, which provides under general tort law that: "A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom."

Regarding vicarious liability of employers, litigants generally cite Article 715 of the Civil Code. It states: "A person who employs another to carry out an undertaking is bound to make compensation for damage done to a third person by the employee in the course of the execution of the undertaking; however, this shall not apply if the employer has exercised due care in the appointment of the employee and in the supervision of the undertaking or if the damage would have ensued even if due care had been exercised." Awards for sexual harassment generally range from about 800,000 yen to 11 million yen as damages, and those amounts are expected to rise. Given the worldwide trend regarding sexual harassment, however, more specific sexual harassment legislation can be expected in the future, which further defines the concept under Japanese law and the penalties for violations.

## Malaysia

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## Introduction

Generally, Malaysia has a history of cordial industrial relations and there has been no occurrence of crippling worker strikes, lock-outs and demonstrations over the past ten to fifteen years. To promote investments and economic growth, the government encourages a cordial relationship between employers and employees. Problems are usually resolved in an atmosphere of goodwill and negotiation between parties concerned, including trade unions.

The major employment laws in the country that directly impact upon the service of an employee 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 (USD 1= RM3.80) or who is engaged in manual labor, irrespective of salary amount. Employees above this wage level are governed by common law or 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 IRA deals with relations between employers and trade unions, and the prevention and settlement of difference 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.

## Termination

### Restrictions On Employers

In Malaysia, termination of employment falls under the purview of the EA, the Employment (Termination and Lay-Off Benefits) Regulations 1980, and the IRA. Although the provisions of the EA only cover employees earning RM1,500 and below and certain categories of manual labor, 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 Industrial Court, in general, and based on the trend of industrial court decisions, terminations should be motivated by a bona fide business decision such as the cessation and sale of a business, continuing losses 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 in Industrial Court. The IRA also provides for an employee who seeks reinstatement to make representations to the Director-General for Industrial Relations who may, if he thinks fit, refer the matter to the Industrial Court for arbitration.

#### Retrenchment Termination

An employment relationship in Malaysia also can be terminated in cases of retrenchment. Special provisions under the Employment (Termination and Lay-Off Benefits) Regulations 1980 govern termination by retrenchment or the take-over or cessation of a business, and mandate that retrenched E/A 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, provides guidelines for the selection of retrenched 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).

### **Notice Provisions/Consequence For 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, the contract may be terminated by either party 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 a worker 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.

### **Termination Indemnities**

Under the provisions of the Employment (Termination and Lay-off Benefits) Regulations 1980, 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.

## **Employment Discrimination**

### **Laws On Employment Discrimination**

Malaysia has no legislation governing employment discrimination, although the Federal Constitution does state that there shall be no discrimination against citizens on the ground of religion, race, descent or place of birth. On September 28, 2001, Article 8(2) of the Federal Constitution was amended to prohibit gender discrimination through the Constitution (Amendment) (N<sup>o</sup>2) Act 2001. This, however, has yet to be encapsulated in any specific legislation.

On November 19, 2001, the Labor Department of the Malaysian Ministry of Human Resources (“Labor Department”) 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.

The Disability Code prescribes the following responsibilities of private sector employers who intend to engage, or have already engaged, disabled employees:

- (i) to establish and maintain a safe and encouraging work environment as well as to ensure that all basic facilities are provided to disabled employees;
- (ii) to engage the disabled based on capabilities, qualifications, skill sets and productivity;
- (iii) to organize continuous programs for the effective communication and interaction between management, employees and disabled employees;
- (iv) to pinpoint and solve employment-related problems of their disabled employment and to report any insurmountable problem to the nearest Labor Department office; and
- (v) to furnish information on job opportunities for the disabled and on the engagement and termination of disabled employees, to the nearest Labor Department office.

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.

Further, 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”) on September 2001 to reduce the spread of the disease and guide employers and employees in managing HIV/AIDS issues at the workplace.

The objectives of this 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.

### **Practical Advice To Employers On Avoiding Employment Discrimination Problems**

As a first step to minimize discrimination problems at the workplace, employers should set up and implement in-house mechanisms as outlined by the Disability Code and HIV/AIDS Code. Such measures should be implemented despite the Codes not having the force of law, so as to promote positive employee relations.

## Sexual Harassment

### Laws On Sexual Harassment

Malaysia does not have any legislation governing workplace harassment. However, in 1999, the Government promulgated the “Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace” (“Sexual Harassment Code”). The Sexual Harassment Code is not legally binding, but companies are urged to implement it.

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).

### 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**

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## Introduction

Article 123 of the Mexican Constitution provides 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 that 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.

## Terminations

### 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 employer hires a worker to perform tasks under its 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 eliminate this presumption by the execution of employment agreements that set forth 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 to assist 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 eliminate the presumption, most individual employment contracts are entered into for an indefinite term. However, the term “indefinite” is not completely accurate, because Mexican law implies a virtually *permanent* labor relationship under this type of contract. 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) termination of the specific job or the term of the capital investment;
- (iv) the physical or mental incapacity or disability of the employee;
- (v) “force majeure” or acts of God;
- (vi) the self-evident non-profitability of the operation; or,
- (vii) 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 deceives 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.

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

To dismiss an employee without the liability to pay severance, an employer must prove that it acted fairly, by, for example, 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 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.

### **Termination Indemnities**

An employee who is unjustly dismissed or who rescinds the relationship for cause is entitled to receive severance payments comprised of the following:

- (i) Three month's wages, based on those earned at the time of the termination;
- (ii) 20 days' wages per each year of services rendered (this amount does not apply under certain circumstances);
- (iii) a seniority premium equal to 12 days' wages per each year of services rendered (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.

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.

### **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 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 to be valid shall 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.

## Litigation Considerations

As stated above, employment law in Mexico has been slow to adapt to the changing needs of the global marketplace. The reason for this is twofold. First, the level of sophistication and preparation on the part of both labor authorities and practitioners is lacking. Mexican law does not impose any formal requirements on labor litigation practitioners (*i.e.*, a layperson is allowed to represent another in a trial before the Labor Board). The second reason is the ever-increasing number of labor claims filed before Federal and local Labor Boards. The increasing number of claims has created a seemingly insurmountable backlog for labor officials.

## Employment Discrimination

### 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.

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. 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, 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 delivery, during which 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 that are 14 through 16 years old shall be subject to special protection and inspection of the labor department. The Law forbids minor employees to work in places where alcoholic beverages are sold, in places where their morality may be damaged, in submarine or subterranean jobs, dangerous or unhealthy activities, activities in which their physical development might be retarded or in non-industrial establishments after 10 p.m.

Children that are over 14 but under 16 years old are permitted by the Law to work a maximum of 6 hours per day, distributed in two periods of three hours each, with a period of at least one hour between them. In case these children are called to work on Sundays and mandatory days off, the employer shall pay an additional 200% 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 3 to 155 times the minimum daily salary, pursuant to Article 995 of the Law.

## Sexual Harassment

### 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 offence and the circumstances of the particular case.

Unlike the FLL, Article 259-Bis of the Criminal Code typifies 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 new 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 establishes the prohibition of any discriminatory practice that impedes or annuls the acknowledgment of exercise of rights and an effective equal employment opportunity. On this basis, the following conducts should be deemed as discriminatory: (...) III. Prohibiting the free choice of employment or restricting the opportunities to access, stay, or be promoted thereat. 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.

## **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 (3) to 315 times the general minimum daily salary, taking into consideration the seriousness of the offence 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.

## **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.

## **The Netherlands**

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## Introduction

Much of Dutch employment law 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. However, there is a general principle allowing parties to choose a different applicable law (other than Dutch law) to govern the employment relationship, although certain imperative provisions of Dutch employment law can never be excluded.

The primary sources of law which 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 Act on Collective Labor Agreements (“CAO”);
- The Labor Conditions Act;
- The Act on the Reporting of Collective Dismissals;
- The Act on Equal Treatment of Men and Women of 1980; and,
- The General Equal Treatment Act of 1994.

Employment relationships in The Netherlands also may be governed by Collective Labor Agreements, if applicable; internal regulations, if any, of the employer; and by employment agreements.

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 in an employment contract always must be in writing; if it is not, it will be deemed null and void.

## Terminations

### Restrictions On Employers

An employment agreement in The Netherlands will terminate by operation of law after expiration of the initial fixed period of time (as long as 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.

When terminating an employment agreement by mutual consent, no notice has to be given, and the employer and the employee can agree on a reasonable severance package. Typically, an employee will not accept such a termination unless he or she has found another job, as such employees generally are not entitled to unemployment benefits.

There is also no notice period required 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 also can be adjusted by collective bargaining agreements.

Under Dutch law, a fixed term employment agreement terminates by operation of law on the expiration of the agreed upon period. However, during this fixed term, the agreement can be terminated only by giving notice after having obtained a court decision or a dismissal permit from the Organization for Work and Income (in Dutch: *Centrum voor Werk en Inkomen*, hereinafter “CWI”) and only if a premature notice period has been explicitly provided for in the employment agreement. 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, which succeed each other with less than three months in between.

If a chain of fixed term employment agreements covers 36 months or more, or if a chain of three fixed term employment agreements is continued, the service is then deemed to be for an indefinite term. However, if an employment agreement is entered into for less than three months and follows immediately on an employment agreement for 36 months or longer, the employment agreement is not deemed to be an indefinite term employment agreement.

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 divulging of trade or professional secrets.

Terminations with immediate effect for cause must have reasons that are extremely urgent and sufficiently serious to justify immediate and irrevocable termination. The risk of 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 CWI to give notice or a court decision). However, the court, in its discretion, may reduce the amount of salary to be paid.

### **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 CWI. The CWI will grant a dismissal approval only if there is a valid reason for dismissal, such as improper performance, reorganization, or business economic reasons. In the event of an organization for business economic reasons, the employee may respond to the employer’s request for a dismissal approval with only a *pro forma* defense, in order to secure rights to employment benefits. In that event, a dismissal procedure usually takes approximately four weeks.

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 functioning. The employer also must prove improper performance by the employee.

In case of a recession or reorganization, the employer must prove to the CWI 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 to 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 in principle be made on the basis of seniority, meaning that, in cases of equal performance and age, the employee hired first is to be dismissed last.

Until a dismissal approval is obtained, a notice of termination is null and void. After having obtained the dismissal approval, the appropriate notice period must first be given. Notices of termination should be given at the end of the month, unless another day has been appointed by written agreement, internal regulations, or by 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 for contracts that have lasted 5 to 10 years; three months for contracts of 10 to 15 years; or four months for contracts that have lasted 15 years or longer. These notice periods can be shortened by collective bargaining 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 impossible because of a statutory prohibition against terminating an employment agreement by giving notice (for instance, during illness or pregnancy). Notice of termination is impossible during an employee’s illness (for a maximum of two years), unless the illness arose after the CWI 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 or even 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).

In case of termination by court decision, after an amicable settlement has been reached, the parties may agree in advance that the employee will receive an agreed upon redundancy payment. The parties may submit such proposals during a court hearing, and the court is often willing to honor such a stipulation. In general, an oral hearing is no longer required. In such cases, the employee would submit a pro forma defense in order to maintain his or her rights to unemployment benefits. In the case of a pro forma dissolution, the employee will only be entitled to unemployment benefits after a fictional notice period.

### **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 in comparison with the interests of the employer. Whether the effects are too harsh depends 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 does not have any grounds to commence proceedings based on the Dutch Civil Code.

In both proceedings based on obviously unreasonable dismissal and on dismissal due to substantially changed circumstances, Cantonal Courts tend to award compensation. On January 1, 1997, the Cantonal Courts introduced a new uniform formula on a nationwide basis. According to this 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 employees age 40 and over are multiplied by 1.5, and those of employees age 50 and over are doubled. The basis of the formula is the fixed gross monthly salary, plus all fixed and agreed salary components. Other perquisites, 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 termination of an employment contract.

The adjustment “C- factor” is a new element for the purpose of weighing any special circumstances of the case. If a job becomes redundant due to a business reorganization, this is generally known as a “colorless” 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.

Redundant employees are, in principle, entitled to employment benefits equivalent to 70 percent of the last earned salaries with a certain maximum. The duration of such benefits depends on the tenure and age of the employee.

### **Collective Redundancies**

In cases of collective redundancies, the employer must follow the procedure before the CWI if 20 or more employees are involved. In principle, there is no difference between the CWI’s review of an individual dismissal request and that of a collective request on account of Article 6 of the Special Decree on Employment Relations (“BBA”). In all cases, the dismissal must meet the standards of justice. 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 CWI with many indications as to how to apply the standards of reasonableness. In any event, the CWI must balance the interest of the employer and those of the employees. In addition, the CWI 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 CWI 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 CWI'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 Councilor 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."

The Act concerning the Reporting of Collective Dismissals also 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 CWI-area must report its intention in writing to the CWI, and give the grounds for the decision.

The employer also must report its intention to the relevant trade unions and consult with its Works Council. The obligation to report and to supply additional information provides trade unions with the opportunity to start negotiations with the employer about 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 CWI when the director considers the individual dismissal applications.

If an agreement is reached on a social plan, authorization by the CWI generally is a mere formality. Once the employer has received authorization from the CWI, it can proceed with the dismissals by giving due notice of termination.

A rule of thumb often applied for calculating collective redundancy schemes is based on the formula used by the Dutch Cantonal Courts in calculating severance pay in cases of dismissal. However, the employer may choose to offer the employees a supplementary payment on the amount they will receive from employment benefits.

### **Law On Separation Agreements, Waivers, And Releases**

In principle, it is possible for an employee to release an employer of termination indemnities (for example, in an employment agreement). However, such a waiver will not oblige a court to honor it. In a procedure, a court will weigh all the facts and circumstances, will judge the case on its own merits, and will use the Cantonal Court formula as a guideline. However, a court might consider the release as a reason to mitigate the compensation, but that depends 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 parties are not allowed to infringe the court's authority in this respect.

# Employment Discrimination

## 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 disparate impact on 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 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 Grounds Of Age

On May 1, 2004 the Act on the Equal Treatment on the basis of Age in Employment has entered into force. The Act on the Equal Treatment on the basis of Age in Employment prohibits direct and indirect age discrimination in - amongst others - recruiting and selecting of employees, terms and conditions applicable to the employment relationship and 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 Handicap or Chronic Illness has entered into force. The Act on the Equal Treatment on grounds of Handicap or Chronic Illness prohibits direct and indirect discrimination on the grounds of a handicap or a chronic illness in - amongst others - recruiting and selecting of employees, terms and conditions applicable to the employment relationship and entering into and termination of the employment relationship. Direct and indirect discrimination on the grounds of handicap or chronic illness is not prohibited if the discrimination can be considered "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 Handicap or Chronic Illness. Also, 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 Handicap or Chronic Illness the prohibition on discrimination includes the obligation on 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 conditions and terms 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 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.

### **Employee Remedies For Employment Discrimination**

Any stipulation, provision, or personnel decision that is inconsistent with equal treatment legislation is void. It therefore follows that a 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. Amongst others, the employee may seek dissolution based on urgent or weighty reasons of his or her employment contract and request a substantial amount of compensation due to the discriminatory acts of the employer. If it is the employer who petitions for dissolution and this petition is motivated by discriminatory reasons, the employee may invoke absence of a weighty 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 is 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, the employee that states he/she has been discriminated against only needs to put forward facts that will arise the suspicion of discrimination. It is the employer who will then have to show that he or she did not violate the provisions of the legislation.

The employee (and others) may request the Equal Treatment Commission to investigate whether the employer is discriminating. The opinion of the Equal Treatment Commission has no legally binding effect. However, the Commission may seek a judgment, if the relevant employee does not object, 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.

### **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 as high as EUR 4.500,- 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 stipulates 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 stipulates 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.

### **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.

## **Sexual Harassment**

### **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 the 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.

### **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 has been exerted of any other nature and proof can be furnished that the harassed person could not offer resistance, Article 242 of Dutch Criminal Law applies as well.

The 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.

### **Potential Employer Liability For Sexual Harassment**

In certain circumstances, the employee may request a court to 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. To be liable, the courts have ruled that 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 on the basis of diligent employeeship. 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;

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- (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.

### **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 task to prevent any form of sexual harassment. Thus, it is advisable to establish a clear code 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 scheme and the steps to be taken to assert a complaint.



# Philippines

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## 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 impressed with public interest. Labor contracts should yield to the common good. In case of doubt, all labor legislation and all labor contracts should be construed in favor of the safety and decent living for the employee.

## Terminations

### Restrictions On Employers

In the Philippines, an employer has a right to hire, dismiss, and discipline employees, whereas the employee has a right to security of tenure. The employee's right to security of tenure means that he or she may be dismissed only for one of the causes defined in the Labor Code of the Philippines ("Labor Code"), and only after the observance of the appropriate procedural due process by his or her employer.

An employee may be dismissed only for the just and authorized causes provided by law. In these respects, 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 his or her 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 reposed in him or her by his or her 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 foregoing.

The authorized causes for termination of employment are as follows:

- (i) Installation of labor saving devices;
- (ii) Redundancy;
- (iii) Retrenchment 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.

### **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 his or her 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 latter of the charges against him or her. After serving the notice, the employer should afford the employee an opportunity to be heard where 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 a second notice to the employee to inform the latter of its decision to dismiss him or her.

In case of employment termination due to an authorized cause other than disease, the employer should serve a written notice of termination to each affected employee and to the appropriate regional office of the Department of Labor and Employment 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 for its monetary equivalent.

For employment termination due to disease, 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 or any phase thereof, or by 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.

### **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. Significantly, 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 retrenchment 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 giving a bigger separation pay out of its own generosity. However, it may be required to give a bigger separation pay depending on employee agreement, company policy or practice.

## Law On Separation Agreements, Waivers, And Releases

A separation agreement, waiver or release from the employee will not bar him or her 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 the foregoing, it is prudent to still 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 said document is binding on the parties and may not later be disowned.

## 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 as 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 raffled off 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. In case of any doubt between the evidence of the employer and the employee, the doubt is resolved in the employee's favor in line with the constitutional mandate to afford full protection to employees.

## Employment Discrimination

### 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.

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, 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 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”), otherwise known as the “Magna Carta for Disabled Persons”

RA 7277 provides that no disabled person shall be denied access to opportunities for suitable employment. A qualified disabled employee is subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as a qualified able-bodied person. Furthermore, no employer shall discriminate against a qualified disabled person by reason of 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 disabled job applicant 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 disabled person 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 disabled employee, by reason of his or her disability, than the amount to which a non-disabled person performing the same work is entitled;
- (v) Favoring a non-disabled employee over a qualified disabled employee with respect to promotions, training opportunities, study and scholarship grants, solely on account of the latter’s disability;
- (vi) Re-assigning or transferring a disabled employee to a job or position he or she cannot perform by reason of his or her disability;
- (vii) Dismissing or terminating the services of a disabled employee by reason of his or her disability, unless the employer can prove that he or she impairs the satisfactory performance of the work involved to the prejudice of the business entity, provided, however, that the employer first sought to provide 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 disabled applicant or employee 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 disabled persons from membership in labor unions or similar organizations.

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.

#### 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 less 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.

### **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 thereof. 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.

## **Sexual Harassment**

### **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 in the hiring or in the employment, re-employment or continued employment of the said individual, or in granting said 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 said 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;
- (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.

### **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.

### **Practical Advice To Employers On Avoiding Sexual Harassment Problems**

Aside from complying with its duties and obligations as set forth above, it is also in the employer's interest to 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**

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## Introduction

Labor relations in Poland are primarily governed by the Labor Code. Labor law also regulates collective labor agreements and other collective arrangements, as well as the rules and statutes that specify the rights and duties of the parties in employment relationships. The provisions of collective labor agreements, statutes and rules cannot be less favorable to employees than the provisions of the Labor Code or other legislation.

The basic principles of Polish labor law, as defined in the Labor 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 related to the performance of identical tasks; equal rights of men and women in labor relations; the ban on any forms of discrimination and mobbing; the right to obtain fair remuneration for work; the protection of employee's rights; employees and employers' rights to establish or join labor and employer's associations and organizations; and the right of employees to limited participation in the management of the employer's business.

The State Labor Inspectorate supervises and controls compliance with all labor laws, including the provisions on work safety and hygiene.

By Act of July 26, 2002 and November 14, 2003, Polish employment system was significantly amended. The primary purpose of these amendments was to decrease the financial and administrative burdens imposed on small and medium size businesses and to prepare Poland to the accession to the European Union.

## Terminations

Each agreement signed between the parties shall 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 be of indefinite duration. It is possible to enter into a separate contract for a trial period of up to three months.

### Restrictions On Employers

The restrictions on employers will depend on whether the contract is terminated upon a notice period or without such a notice.

#### (i) Termination upon a notice period

Employers cannot dismiss employees:

- who will reach retirement age in no more than four (4) years if the entire employment period enables those employees to acquire the right to retirement benefit after having reached that age;
- during holiday leave or any period of justified absence up to a limit defined by law.

Other legally protected categories of employees include:

- those who are pregnant or have recently given birth;
- those on childcare leave;
- employees in unionized companies who are members of a trade union governing body; and
- social labor inspectors.

No general protection on pregnancy grounds exists for individuals undertaking a trial period of less than one month with an employer.

#### (ii) Termination without notice period

A contract of employment may not be terminated without notice due to the fault of the employee if one month has elapsed since the employer became aware of the circumstances warranting such termination. Prior to such termination the employer must seek the opinion of the trade union representing the employee.

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

#### **Termination Upon A Notice Period**

Either party may terminate the employment contract with notice if that contract is for an indefinite term or a trial period. A fixed term contract for a period longer than six months may be terminated upon notice if it includes a provision for termination upon two weeks' notice.

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 term, 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 Labor Court. The trade union representing the employee should receive the reasons for the termination of the agreement in writing.

The length of notice of termination for an employee on a contract for an indefinite term depends on the actual length of employment at the time notice is given. The notice periods required by the Labor Code are as follows:

- two weeks if the employee has been employed for less than six months;
- one month if the employee has been employed for at least six months, but less than 3 years;
- three months if the employee has been employed for at least three years.

If an employee appeals against his or her termination and, during the court proceedings, it is determined that the notice of termination of the contract for an indefinite term was unjustified, or that it is contrary to the provisions on termination of employment contracts, the court, upon the employee's request, will 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 or her job on the original conditions, 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.

#### **Termination Without Notice**

An employer is entitled to terminate a contract of employment without notice due to the fault of the employee if:

- the employee commits a serious breach of his or her basic duties as an employee;
- the employee commits an offence that renders further employment at his or her post impossible, if the offence is obvious or has been confirmed by a court judgment;
- the employee loses, through his or her own fault, a license necessary for the performance of work at his or her post.

An employer is entitled to terminate a contract of employment without notice without the employee's fault if:

- the employee is incapable of working due to illness and such incapacity lasts: longer than 3 months, in cases where the employee has been employed in the same business establishment for less than 6 months, or longer than the illness-allowance period in cases where the employee has been employed in the same establishment for at least 6 months or where the incapacity was caused by an accident at work or is the direct result of performing his or her work tasks;
- the employee is absent from his or 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 labor court and request reinstatement on the former conditions of employment, or to receive compensation.

An employee is entitled to terminate a contract of employment without notice if:

- a medical certificate has been issued that states that the employee's work is harmful to his or 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 or her state of health and vocational skills;
- the employer committed serious violation of its basic duties towards the employee.

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 labor court and request compensation.

## Mass Lay-Offs

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 employment establishments which employ less than 20 employees.

Mass redundancies are deemed to take place where an employer employing at least 20 persons within a period of 30 days terminates the employment relationships by notice or by mutual agreement of the parties, with:

- at least 10 employees, if the employer employs less than 100 persons; or
- 10% of the employees, if the employer employs at least 100 but less than 300 persons; or
- 30 employees, if the employer employs 300 or more persons.

### Procedure For Mass Lay-Offs

Pursuant to the Law on mass lay-offs, the procedure for mass lay-offs is as follows:

- (i) Employers shall 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 labor issues connected with the lay-offs, including in particular the possibility of re-qualifying or professional training, as well as finding other employment for employees laid off;
- (ii) The employer shall 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 resolve labor issues connected with the intended lay-offs. Where the lay-offs are covered by cash benefits, employers shall 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 labor 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 agreements agreed with 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 union representing the employee about the termination of each employment agreement. The company trade union must register any protest within five (5) days from receiving this information;

- (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 shall notify the proper labor 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) Notice of the lay-offs may not be given to employees before notification of the local Labor Office, or, in the event that this 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 labor office, or if this is not required, no sooner than 30 days from conclusion of the agreement or issue of the regulations;
- (xi) Termination notices are delivered in accordance with the regulations regarding the periods of termination notice, special protection of employees, etc.

In respect to protected employees (for example, persons 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 the period of their protection.

Employment contracts concluded for a fixed term or for the period of the performance of a specific task may be terminated upon two weeks' notice.

In the case of contracts of employment concluded for an indefinite period of time 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 2-month period of notice.

#### Severance Payments For Mass Lay-Offs

A severance payment is made to dismissed employees in accordance with the rules applicable to the calculation of the cash equivalent for unused holiday leave.

The amount of the severance payment depends upon the length of employment of the employee with the given employer as follows:

- the equivalent of one month's salary, if the employee has worked for less than 2 years;
- the equivalent of two months' salary, if the employee has worked for 2 to 8 years;
- the equivalent of three months' salary, if the employee has worked for more than 8 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, unless the employer decides not to follow this limitation.

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

It is quite common that parties to an employment agreement decide to have it terminated upon a mutual consent, even if a termination notice had good grounds, because an agreement is not subject to the restrictions that have to be considered in the case of a unilateral termination by the employer. By way of the separation agreement the parties should agree to an end of the employment relationship to occur on a specified date. Generally, an employer would commit itself 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 or her notice period).

## Litigation Considerations

As presented above, employees may challenge the employers' decision on dismissal (including termination of employment agreement upon a notice period and termination of employment agreement without notice) before a court of justice. Filing a suit against the employer such employees may request:

- reinstatement and/or
- indemnity for the time of being unemployed.

From a practical standpoint, as such claims are free of charge and as the courts tend to rule in favor of the employees, it is quite common that dismissed employees decide to such action, yet court's decisions on reinstatement are made rather rarely and the indemnity is usually limited to an equivalent of the employee's recent remuneration received prior to the dismissal.

## Discrimination

### Laws On Employment Discrimination

Provisions of the Polish law related to discrimination were adjusted (as of January 1, 2004) to reflect the EEC Directives and are valid since May 1, 2004.

On the basis of the modified Labor code, employees are entitled to equal treatment in the areas of: initiating and dissolving 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- or part-time basis.

Equal treatment in employment means that there can be no discrimination of any sort, directly or indirectly.

Signs of discrimination also are:

- activities aimed at encouraging another person to violate the principle of equal treatment in employment;
- behavior aimed at or which has the effect of violating someone's dignity, or of demeaning or humiliating an employee (harassment);
- sexual harassment that is any unacceptable behavior 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 behavior 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:

- refusal to employ if justified by the nature of the work, the conditions in which the work is performed, or professional requirements of employees;
- dissolving employment conditions with regard to the number of working hours, if justified for reasons not related to employees;
- use of means which differentiate the legal status of an employee due to parental care, age or disability of an employee;
- 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 specified period of time aimed at balancing the chances of all or a significant number of employees differentiated 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, which violate the principle of equal treatment in employment are invalid. The respective labor law regulations apply and supersede such provisions and if there are no such regulations in the labor law, those provisions must be replaced by appropriate provisions of a non-discriminatory nature.

### **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 severance payment that cannot be lower than the minimum monthly salary. It should be noted that there is no maximum level of severance payment that can be claimed by the employee. Burden of proof that there has been no breach of the principle of equal treatment rests with the employer.

## **Sexual Harassment**

### **Laws On Sexual Harassment**

On the basis of Polish law, sexual harassment should be understood as *“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 and candidate applying for work who were subject to the above presented actions are also entitled to present such claim.

### **Employee Remedies For Employment Discrimination/Potential Employer Liability For Employment Discrimination**

As sexual harassment is one of types of discrimination, the rules presented in section related to the discrimination apply respectively.

## Russia

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## 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 Labor Code of the Russian Federation (“Labor Code”). In addition to this core legislation, the 1992 Federal Law On Collective Agreements and Accords, as amended, the 1995 Federal Law “On The Procedure For Resolving Collective Labor Disputes”, and the 1996 Federal Law “On Trade Unions and Their Rights and Guarantees of Their Activities”, also govern the manner in which labor relations are developed.

The Labor Code sets minimum employment standards, which cannot be overridden by the agreement of the parties. Accordingly, any provision in an employment contract which negatively affects an employee’s entitlement to these minimum employment standards is not enforceable.

## Terminations

### Restrictions On Employers

The dismissal of an employee on the initiative of management is strictly regulated and may only be carried out in accordance with the provisions of the Labor Code. “At-will” employment relationships are generally not permitted, except in the case of the employment of a company’s head. As Russian labor law requires compliance with a number of different formalities when dismissing an employee for cause, details of the specific procedure to be followed in each case should be obtained prior to terminating the employment relationship.

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 78 – 84, 278 – 280, 288, 292, 296, 307, 336, 341, and 347 of the Labor Code.

Article 77 of the Labor Code provides that an employment relationship may 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 (Item 2 of 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 (Article 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 organization’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 73 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 (Second paragraph of Article 72 of the Labor Code);
- (ix) Refusal of the employee to transfer to another locality due to relocation of the employer (First paragraph of Article 72 of the Labor Code);
- (x) Circumstances beyond the control of the parties (Article 83 of the Labor Code);
- (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, which would entitle an employer to unilaterally terminate its employment relationship with an employee. Article 81 of the Labor Code applies regardless of whether the employment relationship is for a fixed term or an indefinite term. 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 organization or termination of activity by the natural person acting as the employer;
- (ii) Reduction in the number of employees or staff positions at the organization (also referred to as “staff redundancy”);
- (iii) Unsuitability of the employee for the job position held or the job performed, as a result of:
  - Health reasons in accordance with the corresponding medical certificate;
  - Insufficient qualifications as confirmed by the results of the employee’s formal evaluation.
- (iv) Change of the owner of the organization’s assets (applies to the head of the organization, his 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 or her.
- (vi) Single gross breach by the employee of his or her employment duties as follows:
  - Absenteeism (absence from the workplace without justifiable reasons for more than four consecutive hours in the course of working day);
  - Reporting to work under alcoholic, narcotic, or other intoxication;
  - Disclosure of a legally-protected secret (including State, commercial, service, and other secrets) which became known to the employee in connection with his or her performance of employment duties;
  - Committing at the place of work a theft (including petty theft) of the property of others, embezzlement, willful destruction or damaging of property, if this has been established by a court conviction or by a resolution of a body duly authorized to impose administrative sanctions, and if this conviction or resolution has come into legal force;
  - Breach of work safety requirements by the employee 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 continuation of work;
- (ix) Taking of an unfounded decision by an employee who is the head of the organization (the head of the branch or representative office of the organization), his deputies, or the chief accountant of the organization, if the decision resulted in the breach of safekeeping of the organization’s property, or illegitimate use of that property, or other damage to the property of the organization;
- (x) Single gross breach of employment duties by the employee who is the head of the organization (the head of the branch or representative office of the organization) or his or her deputies;
- (xi) Provision by the employee to the employer of forged documents or deliberately false data upon the conclusion of the employment agreement;
- (xii) Termination of authorized access to State secrets if the job concerned requires access to State secrets;
- (xiii) On grounds that are provided for in an employment agreement with an employee who is the head of the organization or a member of its collective executive body;
- (xiv) In other cases that are provided for by this Code and other Federal laws.

In respect of the head of the company, 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 organization in accordance with the legislation on insolvency (bankruptcy);
- (ii) In connection with a decision to early terminate the employment agreement, taken by an authorized body of the legal entity, the owner of the organization's assets, or a person (body) authorized by the owner;
- (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 which constitute cause and would permit an employer to unilaterally terminate an employment relationship:

- (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 dismissed on the grounds that are specified in the employment agreement;
- (ii) An employee holding a secondary job may be dismissed where another employee is hired to do the job and if the job is his or 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 gross breach of the charter of the educational institution, repeated within a period of one year;
  - Any use of teaching methods involving physical and/or psychological violence or force on a student;
  - 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.
- (iv) An employee of a representative office of the Russian Federation abroad may be dismissed before the expiry of the term of employment in the following cases (Article 341 of the Labor Code):
  - In case of emergency in the host country;
  - 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;
  - Where the established quota of diplomatic staff or support personnel of the corresponding representative office is reduced;
  - Where the employee fails to observe the customs and laws of the host country and the generally accepted code of conduct and morality;
  - Where the employee fails to perform the obligations he or she assumed on behalf of his or 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 in the territory of the corresponding representative office;
  - Where the employee is in single gross breach of his or her employment duties and of the secrecy requirements with which the employee was familiarized at the time of concluding the employment agreement;
  - Where the employee is temporarily disabled for a period of more than two months, or where he or she develops a medical condition that prevents him or her from working abroad, in accordance with a list of illnesses approved pursuant to the procedure established 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 3 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 handicapped), other persons bringing up children of these ages and categories without the assistance of their mother cannot be dismissed on the initiative of the employer except for the cases set out in Article 81 (iii- a), (v) - (vii), (x) and (xi) of the Labor Code (please refer to 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 adequately perform his or her job due to insufficient qualifications, as confirmed by employee evaluation process, or 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 or her. The trade union must decide whether to permit the dismissal within seven work days of being notified by the employer of its intention to dismiss the employee. The employee must be dismissed within one month of receiving the trade union's consent. Article 269 of the Labor Code provides that employees who are younger than 18 years of age in cases other than the liquidation of organization may only be dismissed with the consent of the corresponding State Labor Inspectorate and the Commission on Minors and Protection of Their Rights.

As a general rule, an employment contract is concluded for an indefinite term. A fixed term employment contract may only be concluded in the circumstances specifically described in Article 59 of the Labor Code (generally, where the position is itself 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 fixed term is terminated when the term of the contract expires unless employment relations effectively continue and neither of the parties require the relations to be terminated or, at the initiative of the employer for the reasons set out in Article 81 of the Labor Code. For seasonal or temporary workers (those employees who work less than 2 or 4 months), an employer may terminate the employment relationship at any time on the grounds set out in the Labor Code as well as on the additional grounds included in the Regulations on the Special Working Conditions for Seasonal, Temporary and Other Categories of Workers ("Employment of Temporary Workers"). These additional grounds are as follows:

- (i) Suspension of work at an enterprise, institution or organization for a period of more than one week for production-related reasons or a curtailment of operations;
- (ii) Failure of the employee to report to work for more than two consecutive weeks due to temporary disability; and
- (iii) Non-performance of the responsibilities placed on the employee by the employment agreement or internal regulations.

Employees who are dismissed on the grounds set out in Employment of Temporary Workers are not entitled to receive severance pay unless otherwise agreed on by the employer and employee.

### **Notice Provisions/Consequences Of A Failure To Provide 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 expiration of this two-week period. Any provision in the employment agreement which imposes additional notice requirements on the employee cannot be enforced by the employer. Such notice requirement is extended to at least one month in respect of the head of the company willing to terminate his or her employment (Article 280 of the Labor Code).

In the event that an employee is hired as a seasonal worker, he or she is free to terminate the employment relationship upon three days 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 entail the employee's reinstatement in the job.

## **Termination Indemnities**

In certain instances, an employee who is unilaterally dismissed by an employer has the right to receive a termination indemnity. Pursuant to Article 178 of the Labor Code, an employee is entitled to receive a severance payment in an amount of not less than two weeks' average wages when dismissed because he or she: (i) is unsuitable for the job position held or the job performed due to health reasons which make it impossible to continue this job; (ii) is drafted or enlisted into the army or alternative service; (iii) is replaced by the employee who previously held the position; or (iv) refuses to be transferred to a new location with the employer.

As stated above, 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 which is equal to one month' average salary. In the event that he or she has not been able to secure alternative employment following the date of termination, he or she may be entitled to receive up to two additional month's average wages as severance.

## **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. Pursuant to Article 9 of the Russian Civil Code, however, an individual is not legally entitled to waive his or her rights. It is therefore questionable whether a waiver and release of claims by an employee will be upheld by a Russian court. To date, there has been little or no litigation on this issue.

## **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 or she believes that he or she has been unjustly dismissed or if the employer has committed any other similar violations of Russian labor law. In connection with this action, an employee is 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 right to seek moral damages in labor law cases was first introduced into court practice by a Decision of the Supreme Court of the Russian Federation in December 1994. In March 1997, the Code of Labor Laws of the Russian Federation then in effect was amended to include an employee's right to claim moral damages in cases of wrongful termination. The Labor Code enacted in 2001 has confirmed the employee's entitlement to seek moral damages in employment litigation (Article 394 of the Labor Code). The remedy for wrongful dismissal is reinstatement of the employee in his or her former position and repayment of all back wages from the date of dismissal until the date of reinstatement.

## **Employment Discrimination**

### **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 which 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 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 take 70 days before and 70 days after the birth of a child as maternity leave and receive temporary disability allowance during the period of this leave. Following the maternity leave period, the employee is entitled to take a further period of leave until the child reaches the age of three. This is partially paid from the social benefit funds and partially unpaid. Please note that this additional leave can also be taken by the father 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 which 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 nor 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 and such work is not against medical advice for health reasons.

## **Sexual Harassment**

### **Laws On Sexual Harassment**

There is no specific legislation which prohibits sexual harassment in the work place. 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 it appears that this provision of the criminal code is broad enough to include claims of sexual harassment in the work place, it does not seem that there is any court practice on this issue.

# Saudi Arabia

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## Introduction

### The Governing Law

Saudi labor legislation, not unlike the economic development of the Kingdom of Saudi Arabia, is a relatively recent phenomenon. The *Shariah*, the basic body of Islamic law set forth in the Holy Quran, and the Sunna (the words and deeds of the Prophet Mohammed), prevails in Saudi Arabia. The Saudi authorities are, however, permitted to supplement the *Shariah* and do so through the issuance of regulations, decrees and circulars.

During the major part of the first half of the twentieth century, the economic development of Saudi Arabia was, to a large extent, in a pre-industrial stage and the role of labor relations was limited. When they existed, labor relations were regulated by the *Ijara* contract which in the *Shariah* applies to things as well as to persons. However, with rapid industrialization and economic advancement of Saudi Arabia, attempts to regulate labor relations were made by the government. The current statutory regime governing labor relations is provided in the Saudi Labor and Workmen Law, which was issued pursuant to Royal Decree N<sup>o</sup> M/21 dated 6/9/1389H (corresponding to 16/11/1969G), as amended and supplemented by various resolutions and circulars (the “Labor Law”).

The Labor Law is generally considered to be a well conceived piece of legislation that is significantly more comprehensive in scope than previous regulations on the subject. The Labor Law organizes, in a fairly detailed manner, the rights and obligations of employers and employees, and provides certain protection to the male and female employees. The Labor Law is statutory legislation which is not supplemented by case law since the Saudi Courts (including Labor Commissions) do not report their decisions and are not bound by any system of precedent. The foregoing leaves Saudi Courts with considerable discretion when adjudicating disputes between parties since matters are reviewed on a case-by-case basis.

### The Courts

The Labor Law established Primary and Supreme Commissions for the Settlement of Disputes which have jurisdiction over labor disputes. There is one Primary Commission for the Settlement of Disputes in each of the cities of Riyadh, Jeddah and Dammam. Each of the Primary Commissions is composed of three (3) members, which must be “*experienced in legal matters*”. The chairman of each Primary Commission must hold a degree in *Shariah* and at least one of the other two members must hold a degree in either *Shariah*, administrative or “civil” law.

The Primary Commissions have exclusive and final jurisdiction over labor disputes relating to (i) claims not exceeding ten thousand Saudi Riyals (SR10,000, i.e., approximately 2,667 US\$); (ii) requests to stay the dismissal of employees; and (iii) the imposition of fines on employees. The Primary Commissions also have jurisdiction in the first instance over labor disputes relating to (i) claims exceeding ten thousand Saudi Riyals (SR10,000); (ii) termination; and (iii) labor injuries regardless of the amount involved.

The Supreme Commission for the Settlement of Disputes is located in Riyadh. It is composed of five members of whom three represent the Ministry of Labor, one from the Ministry of Commerce and Industry, and one from the Ministry of Petroleum and Mineral Resources. The members of the Supreme Commission must be “*experienced in legal matters*”.

The Supreme Commission has exclusive jurisdiction to render final decisions on appeal of decisions rendered by the Primary Commissions in the first instance. The Supreme Commission is also competent to sanction violations of the Labor Law.

### Procedure

Pursuant to Article 177 of the Labor Law, the Council of Ministers has issued Resolution N<sup>o</sup>1 dated 4/1/1390H (11/5/1970G) which sets out the Rules of Procedure and Conciliation and Arbitration before the Primary Commissions and the Supreme Commission (the “Rules of Procedure”).

Article 2 of the Rules of Procedure provides that no claim or defense shall be entertained unless the party submitting or raising it has an existing interest. A party may imply a third party provided such third party could have been a party to the action when it was originally filed.

Article 13 of the Labor Law and Article 6 of the Rules of Procedure provide that claims involving any violation of the Labor Law are time-barred after the lapse of twelve (12) months from the date of the violation. Those articles also provide that claims relating to any right provided in the Labor Law are time-barred after the lapse of twelve (12) months from the date of termination of employment. However, the right of the employee to seek a stay of execution in case of termination lapses if the employee fails to submit an application to this effect to the Labor Office within fifteen (15) days of being notified of his or her termination, without prejudice to his or her right to claim for damages within twelve (12) months from that date.

As a matter of practice, labor complaints must first be submitted to the Labor Office located in the area where the employee works. If the dispute is not settled amicably by the Labor Office, it is referred to the Primary Commission located in that region. The parties may appear either in person or through a representative holding a notarized power of attorney. If the defendant does not appear at the first hearing, another hearing will be scheduled. If the defendant fails to appear a second time without an acceptable excuse, the Primary Commission may issue a default judgment against the defendant.

Article 183 of the Labor Law provides that in all cases, the parties to a dispute may by mutual agreement submit it to arbitration rather than to the Commissions. Article 183 further provides that the arbitration agreement must specify the timeframe and the rules of procedure of the arbitration. The arbitrators' award can be appealed before the Supreme Commission, unless the arbitration agreement expressly provides that the arbitrators' decision is final.

An arbitral award must be registered with the competent Primary Commission within one week from the date of its issuance. Following its registration, the Chairman of the relevant Primary Commission issues an execution order after which the award can be executed.

## Terminations

### Restrictions On Employers

The Labor Law imposes some restrictions on an employer's right to dismiss an employee; however, governmental approval is not required. In general, certain changes made by the employer to essential elements of the relationship (such as responsibilities, place of performance and compensation) without the consent of the employee may be treated by the Labor Commission as a constructive termination of the employment relationship, thereby entitling the employee to indemnification.

The Labor Law recognizes two basic types of employment contract: fixed term contracts (for a specified period of time) and indefinite term contracts (for an unspecified period of time). Generally speaking, a fixed term contract is terminable only for "cause" prior to the expiration of the defined term. Indefinite term contracts may be terminated for "cause" or for a "valid reason" at any time during the employment relationship. A definite term contract becomes indefinite if the parties continue to observe it after the completion of the term (the prevailing view among Labor Commissions is that this should also apply even if the labor contract expressly provides for a renewal of the employment term for a further specified period.)

#### Termination By Employer For Cause

Pursuant to Article 83 of the Labor Law, an employer may terminate a fixed term or indefinite term employment contract without notice or liability for an end-of-service award or termination indemnity if the employee commits an egregious for "cause" act. Article 83 lists the for "cause" bases for termination, as follows:

- (i) the employee has assaulted his or her employer or supervisor;
- (ii) the employee has failed to perform his or her main contractual obligations, obey orders or obey posted safety rules after written warning;
- (iii) it is proved that the employee adopted a bad conduct or is guilty of a dishonest or dishonorable act;
- (iv) the employee has willfully caused material loss to the employer;
- (v) the employee has misrepresented himself or herself, or forged papers to obtain employment;

- (vi) the employee has been hired on probation and is found to be unsatisfactory during his or her probationary period;
- (vii) the employee has absented himself or herself inordinately;
- (viii) it is proved that the employee left the hospital or any place provided for his or her treatment without permission from the person supervising his or her treatment;
- (ix) the employee has divulged trade secrets concerning his or her work to third parties.

Any termination under Article 83 requires the employer to give the employee a “show-cause notice” permitting the latter to present a defense. The employer has to prove that any discharge was for cause and the employee has the right to appeal the dismissal to the local Labor Office within fifteen (15) days.

#### Termination By Employer For Valid Reason

Indefinite term employment contracts may also be terminated for a “valid reason”, without liability for the payment of a termination indemnity; however, the employee would be entitled to notice and the payment of an end-of-service award. Article 73 of the Labor Law provides that:

*“If the [labor] contract is for an indefinite term, either party may cancel it for a valid reason, subject to giving the other party a thirty day prior notice in respect of employees employed at a monthly rate, and a fifteen days prior notice in respect of other employees.”*

Therefore, a thirty (30) day notice period is required (at least for employees employed at a monthly rate) to dismiss an employee with an indefinite term contract. Alternatively, an indemnity corresponding to the employee’s last monthly pay must be paid to the dismissed employee.

The Labor Law does not expressly contain any provision defining a “valid reason” for termination, although the standard is clearly less stringent than “cause”. The determination of whether a termination was made for a “valid reason” is made by the Labor Commission on a case-by-case basis. Arguably, the employer’s contractual obligations, impossibility or frustration of purpose, business considerations (thus, business/economic considerations such as a loss of contracts or economic downturn requiring the scaling down or closure of the employer’s office would likely provide valid reasons for termination of an employee’s contract), or the employee’s incompetence, all constitute a “valid reason”. Employment contracts sometimes cite specific examples of “valid reasons” for termination but these will not necessarily be considered binding by a Labor Commission.

### Termination Indemnities / Reinstatement

#### Termination Indemnity

If a fixed term contract is terminated prior to the expiration of its term in a manner that does not comply with the Labor Law, the employee may be able to successfully argue for payment of the remainder of the contract period.

If an indefinite term employment contract is terminated by the employer without “cause” or a “valid reason”, the dismissed employee could be entitled to a termination indemnity as provided for under Article 74 of the Labor Law (this termination indemnity is separate from the end-of-service award, which is commented on below.) The traditional practice of the Labor Commissions has been to award (in average cases) the aggrieved employee an indemnity of three (3) month’s pay, but this can vary a good deal.

#### Reinstatement

The Labor Law also provides that a Labor Commission may decide that the employer must reinstate a wrongfully dismissed employee, pay his or her wages in arrears and consider the employee’s service as “uninterrupted”. Reinstatement, however, is rarely granted in practice, particularly with respect to non-Saudi employees. As mentioned above, the Labor Law provides that “[n]o case or claim relating to any of the rights provided for in these regulations shall be heard after the lapse of twelve months from the date of termination of the contract”, and an aggrieved employee’s claim for a termination indemnity could, in principle, be time barred.

## End-of-Service Award

Upon termination otherwise than for cause, an employee is ordinarily entitled to an end-of-service award equal to half a month's "wage" for each year of employment for the first five (5) years, and a full month's "wage" for each subsequent year. "Wage" is broadly defined to include not just base salary but also the value of every cash or in-kind allowance or benefit payable to the employee on a regular basis pursuant to his contract or as an "acquired right", resulting from the conduct of the parties. The calculation is based on the last wage being paid at the time of termination and is pro-rated for fractions of a year. The only elements of the "wage" that can be excluded by contract from the end-of-service award calculation are commissions "*and similar elements of the wage that by their nature are subject to increase and decrease.*" Housing allowances that are paid in cash or in-kind are ordinarily included as part of the wage. Air travel tickets granted to an employee would also be considered part of the employee's wage as well as the payment of bonuses that are made on a regular basis. Certain officials at the Ministry of Labor have taken the view that a transportation allowance is considered in the nature of expense reimbursement rather than compensation and therefore should not be included in the wage, but Labor Commission decisions on this issue have been inconsistent.

If the employment relationship ends due to the employee's resignation, the end-of-service award is generally reduced or eliminated. If an employee resigns for "cause" ("cause" in this case is defined by Article 84 of the Labor Law as the employer's breach of the labor contract, assault against the employee, unfair treatment of the employee, the employer's misrepresentation of the contract's terms at the time of employment and jeopardizing the employee's health or safety) under either a fixed term or indefinite term employment contract, he or she is entitled to full severance benefits. An employee who resigns prior to completing a fixed term contract or within the first two (2) years of an indefinite term contract would not ordinarily be entitled to an end-of-service award. If an employee under an indefinite term contract resigns having served at least two (2) years but less than five (5), he or she is entitled to one third (1/3) of the normal end-of-service award. If he or she has served at least five (5) years but less than ten (10) he or she is entitled to two thirds (2/3) of the normal award. If he or she resigns after at least ten (10) years of service, he or she is entitled to the full end-of-service award.

Upon dismissal of a non-Saudi employee, the employer is generally required to repatriate such employee to his or her home country at the employer's expense. Employees are also entitled upon termination to compensation for accrued vacation.

## Law On Separation Agreements, Waivers and Releases

Technically speaking, nothing under Saudi law obliges an employer and an employee to enter into separation agreements or execute final release undertakings. That said, any employer should not pay a dismissed employee his or her final entitlements (i.e., end-of-service award, accrued vacation, etc.) before the employee signs a final release stating that he or she has received his or her final entitlements in full, and that he or she releases the employer from any further obligations to him or her.

Upon termination of employment, the employee is also entitled under Article 86 of the Labor Law to a "service certificate" which sets out the period of his or her employment, the salary and benefits he or she was receiving. This would be a separate document from the final release, however.

## Discrimination

### Laws On Employment Discrimination

Any discussion of discrimination at the workplace in the Saudi context must necessarily take into account the general principles of Islamic Law as they are applied in Saudi Arabia. While various provisions of the Saudi Labor Law provide specific protection to the disabled or mandate the universal application of the social benefits provided under the Social Insurance Regulations, some aspects of Saudi law necessarily differ from the Western "norm". For instance, the Labor Law expressly prohibits the co-mingling of men and women in the workplace. Furthermore, women (as well as adolescents and juveniles) may not be employed in hazardous operations or harmful industries, nor may they be employed to perform night shifts (with the exception, in the case of women, of certain professions, such as nursing).

Female employees are entitled to maternity leave for the four (4) week period preceding the expected date of delivery and a for a six (6) week period thereafter. During this maternity leave, the female employee is entitled to half pay if she has been employed for at least one (1) year, and to full pay if she has been employed for at least three (3) years as of the commencement date of the leave. However, if a female employee takes her annual vacation during the same year she took her maternity leave, she will then only be entitled during such vacation to half pay or to no pay, depending upon whether she received half pay or full pay during her maternity leave. Medical expenses related to pregnancy and delivery must be paid by the employer. The Labor Law prohibits an employer from terminating the employment of a female employee while she is on maternity leave or during an illness resulting from work or delivery, provided she is not absent from work for longer than six (6) months. A female employee cannot be dismissed during the six (6) months preceding the expected date of delivery, except for a “valid reason” under the Labor Law.

In addition to the protection granted to pregnant female employees, the Labor Law provides some protection to the physically or mentally disabled. The Labor Law provides for the rehabilitation of a disabled person whose capacity to perform and maintain a suitable job is diminished as a result of a physical or mental infirmity. The Labor Law states in that regard that an employer who employs fifty (50) or more employees and the nature of whose activities allow for the employment of disabled and vocationally rehabilitated employees must employ such employees. Up to two percent (2%) of such an employer’s work force should be composed of rehabilitated employees, and their employment may be effected by nomination from the Labor Offices or otherwise. The Labor Law also provides that if an employee becomes unable to perform his or her job as a result of a work injury but is able to perform a different job with the same employer, that employer must employ him or her in that other capacity. The employer would cease to be under this obligation if one percent (1%) of the workforce is reassigned to different positions as a result of this regulatory requirement.

Specific protection against discrimination is also granted to Saudi employees who are recognized under the Labor Law as “*equal in their right to work in all areas of Saudi Arabia without discrimination.*” Furthermore, foreign employees may not be paid more than Saudis having the same degree of competence, technical proficiency and academic qualifications, except within the limits of the need to attract qualified foreign personnel. The basic obligation for the employment of Saudis is imposed under Article 45 of the Labor Law which requires companies operating in the Kingdom to have Saudi nationals comprise no less than seventy five percent (75%) of their workforce. This requirement, although in the Labor Law from its inception, has seldom been enforced and as a result few employers took it seriously. In 1996, however, the Saudi government became much more focused on the issue and Council of Ministers Decision N° 50 dated 21/4/1415H (corresponding to 27/9/1994G) (“CMD 50”) was issued requiring all employers with twenty (20) or more employees to increase the percentage of Saudis among their workforce by five percent (5%) annually, and restricts certain activities (e.g., personnel recruitment positions, receptionist, government relations officer, security guard) to Saudi employees only. The applicable minimum percentage reached thirty percent (30%) in 2001, which has been applied to the present day.

It is also worth mentioning that more generalized protection against discrimination is provided in the Social Insurance Regulations, which state in Chapter II Article 4 that the social benefits granted there-under are mandatory with respect to “*all employees, without discrimination as to nationality, sex or age.*” The prevention of discrimination is therefore clearly of concern to the Saudi legislator, although the body of law regulating employment discrimination is rather sparse at present.

### **Employee Remedies For Employment Discrimination**

Generally speaking, an employee could be entitled to damages arising from the discriminatory act the employee would be able to prove before a Saudi court. However, Saudi Courts typically only award damages that are actual, direct and easily quantifiable in nature and tend not to award indirect, consequential or special damages which typically constitute the bulk of a discrimination claim. The probability of an excessive damages award for a discrimination claim therefore appears unlikely.

## **Potential Employer Liability For Employment Discrimination**

An employer could be subject to certain penalties provided for violating the provisions of the Labor Law. Specifically, an employer that violates the provisions of Article 45 of the Labor Law, which relates to the “Saudization” requirements, could be subject to a fine of not less than five hundred Saudi Riyals (SR 500) and not more than one thousand Saudi Riyals (SR 1,000). Furthermore, employers that are not able to demonstrate they are in compliance with Saudization requirements could also be blocked from obtaining work visas for their non-Saudi employees to enter and work in the Kingdom.

The Labor Law also provides that an employer could be subject to fines of not less than five hundred Saudi Riyals (SR 500) and not more than one thousand Saudi Riyals (SR 1,000) for violations of Chapter X of the Labor Law which applies to protections for female and juvenile employees. Furthermore, the employer could be ordered to pay compensation for damages resulting from violations of Chapter X; however, as mentioned above, such damages are not likely to be excessive since Saudi courts typically only award damages that are actual, direct and easily quantifiable in nature.

## **Sexual Harassment**

There are at present no specific statutory laws in Saudi Arabia which govern sexual harassment in the workplace and such matters would likely be reviewed under the general principles of the *Shariah* mentioned above. Given the lack of precedent, it would be too speculative to advise on the possible causes of action and remedies that might be available.

Moreover, employers in Saudi Arabia must be aware of the Labor Law provisions which prohibit the co-mingling of males and females in the workplace. For instance, the major banks in Saudi Arabia typically have separate sections that service male and female patrons, and male and female employees of the bank are similarly segregated. Labor Office inspectors have discretion to visit an employer’s workplace in order to ensure that employers are complying with the foregoing requirement.

# Singapore

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## 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, and the Factories Act.

## Terminations

### Restrictions On Employers

Singapore's Employment Act applies generally to persons who have entered into or work under a contract of service. It does not apply to persons employed in managerial, executive, or confidential 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.

### 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, it generally 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, executive, or confidential” 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.

## Termination Indemnities

### Retrenchment/Redundancy Payments

Currently, no law exists specifically compelling 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, executive, or confidential 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.

## 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.

## Employment Discrimination

### 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, neither sexual nor racial discrimination is illegal. The government has stated that it believes legislation in this area 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, executives, and persons in a confidential position are not covered by the Employment Act, they do not enjoy this protection.

## Sexual Harassment

### 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

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## Introduction

Labor law in Spain can be considered the group of rules that protect an employee in his or her employment relationship and that determine the conditions applicable to life in the workplace.

The basic sources of Spanish labor law include the following:

- 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);
- Laws 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 and thus may be inconsistent.
- Collective bargaining agreements: Collective bargaining agreements or “CBA’s” are detailed, binding agreements negotiated between unions (and/or other employee representatives) and employers associations (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 agreements apply only to a specific province or limited geographical area, or, if the 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 agreement’s rules.
- Employment contracts: The law regulates whether contracts (whether oral or written) can be entered into for a fixed term or whether they must be with an indefinite term, as is the general rule. Also, the law regulates a number of special types of employment relationships (e.g., top executives, commercial agents, house-workers, and others), which are not subject to certain 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 over the individual’s subjective rights. Collective disputes arise only when collective interests are involved, but not where the interest is exclusively an individual interest that happens to affect more than one employee on an individual basis.

- Mediation, Arbitration And Conciliation

Conciliation is a procedure which aims at encouraging a transaction between the parties with the ultimate goal of avoiding judicial proceedings. In both individual and collective disputes, Spanish law imposes the obligation to attempt conciliation before filing any 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. The arbitration provided for under Spanish law is private and voluntary. Mediation and arbitration procedures are typically initiated for collective disputes.

## Terminations

The Labor Act lists the various reasons justifying 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”, dismissal, constructive dismissals, etc. The various types of terminations have different applicable rules and consequences, and the comments here-below are limited to (i) a brief reference to the termination of fixed term contracts due to the expiration of their term, and (ii) a more thorough introduction to the rules on dismissals of employees under ordinary, indefinite term contracts.

### Termination Of Contracts For A Definite Or Fixed Period

Unless otherwise terminated earlier, definite or fixed term employment contracts automatically come to an end at the conclusion of their fixed term. If the employment relationship continues de facto for any reason, however, 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 a severance compensation of 8 days of salary per year of service.

### Termination Of Ordinary, Indefinite Term Contracts

Ordinary employees under the Labor Act may only be dismissed with cause after any trial period has expired (during the trial period, the contract may 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, which we discuss briefly below.

#### (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.

Disciplinary dismissals must be notified 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 the claim. After trial, the Labor Court may declare the dismissal justified, unjustified, or null and void.

If a Labor Court finds those 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, then the dismissal may be declared unjustified. In this event, the employer has five days as of the Court decision notification date to choose between reinstating the employee or paying severance compensation. If the dismissed employee is a labor representative, the labor representative chooses, not the employer.

Severance compensation for unjustified dismissals is computed on the basis of 45 days' gross salary per year of employment with a maximum of 42 months' salary. The employee's salary for these purposes includes fixed and variable salary, as well as salary in kind, but does not include certain benefits that are considered "social" in nature. In addition to the severance compensation, the court in cases of unjustified dismissals will order the payment of interim salary, which is the salary from the date of dismissal through the date the court's judgment is notified, which is normally in the range of three to four months of salary.

The need to pay interim salary may be eliminated or limited, however, if the company ab initio acknowledges that the dismissal is unjustified and deposits the amount of the severance compensation required with the labor court, so that the employee can directly receive the payment from the court. Given the costs of litigation and the potential costs of interim salary, companies in practice often simply acknowledge that the dismissal is unjustified and pay the severance compensation up front.

In addition to the possible finding of justified or unjustified dismissal, the labor court can alternatively find that the dismissal was null and void. The labor court will declare the dismissal null and void in a number of specific cases, which primarily include the following:

- The dismissal is based on discrimination prohibited by the Constitution or by Law, or if the dismissal violates the employee's fundamental rights or public freedoms. These cases can include cases of retaliation against the employee for legitimately exercising his or her rights.
- Automatically in cases where the employee has requested or is enjoying maternity rights unless the court finds that the dismissal was justified.
- When the collective dismissal should have been used but was not used.

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 surrounding circumstances to ensure that no cause for a finding of a null and void dismissal exist.

## **(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 two months have passed from the date the new conditions were implemented;
- An employee's absence from work, even if justified, which exceeds 20 percent of the work days in two consecutive months, or which exceeds 25 percent of the work days in any four months in a twelve month period, where the workforce suffers from chronic absenteeism;
- When the company needs to phase out job positions based on organizational, productive, economic or technical grounds. If the grounds are economic, the measure should contribute to overcoming the company's negative economic situation. If the grounds are productive, organizational, or technical, the measures should have the purpose of overcoming the difficulties that prevent the company from functioning well, due to its competitive position in the market or the market demand, through a better organization of its resources.

This 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's procedure, the employee must be given a letter of dismissal and provided a 30 day prior notice or salary in lieu thereof. The company at the time the letter is provided must simultaneously pay the severance compensation of twenty days of salary per year of service, any period of less than one year of service being prorated by months, up to a maximum of twelve months of salary.

If the procedural requirements for objective dismissals are not strictly followed, the dismissal will be null and void and the company may be required to reinstate the employee with back pay. In addition, if the dismissal is based on discrimination, if it interferes with maternity related rights, or if it 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, as in disciplinary dismissals, the employer is given the option to either immediately reinstate the employee with back pay or to terminate the relationship, paying a severance compensation of 45 days per year of service up to a maximum 42 months' salary (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 be 33 days of salary per year employed, up to a maximum of 24 months of salary, instead of the 45 days' salary per year, up to 42 months). As in disciplinary dismissals, if the person dismissed is an employee representative, the employee exercises the option instead of the employer.

Also like in disciplinary dismissals, the court will in cases of unjustified dismissal also award interim salary, which is the salary from the date of dismissal through the date the court's judgment is notified (normally three to four months' salary). As explained above, the need to pay interim salary may be eliminated or limited if the company up front acknowledges that the dismissal is unfair and deposits the severance compensation for the employee with the labor courts.

If the court finds the dismissal to have been justified, the contract will be declared to have terminated, and no compensation will need to be paid other than the 20 days' salary per year of service (up to 12 months' salary) which 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 organization reasons equals or exceeds the following:

- Ten employees in companies with less 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.

It is worth noting that spreading out the dismissals over consecutive ninety-day periods to avoid the collective procedure and instead qualify for the above more simple 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 compute for purposes of the threshold and (ii) how the 90 day periods and/or consecutive 90 day periods should be counted. 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 can apply on which employees should be dismissed first (e.g., employee representatives have "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 file a petition for authorization with the labor authorities and simultaneously initiate a consultation period with employee representatives. The petition 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 and, in companies with over fifty (50) employees, a social plan adequately to prove and support the measures proposed.

The employee representatives must, in addition, be given written notice of the proceedings and be provided a copy of the economic and legal documentation and a copy of the social plan. If the dismissal affects more than fifty percent (50%) 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 must last at least fifteen (15) days in companies with less than fifty (50) employees and at least thirty (30) days in companies with fifty (50) employees or more. The applicable collective bargaining agreement, however, may require a longer consultation period.

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 in an attempt to negotiate a possible agreement.

- Administrative Authorization

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 labor authorities will issue a resolution within fifteen (15) days authorizing the termination of the labor relationships.

If no agreement is reached during the consultation period, within fifteen (15) days the labor authorities will, depending on whether the documents submitted reasonably evidence the need for the proposed measures according to the legal causes, issue a resolution approving or rejecting, wholly or partially, the employer's petition.

If the dismissals are authorized, the employee will be entitled to twenty (20) days of salary per year of service, up to a maximum of twelve (12) months of salary, unless the company has agreed to provide a greater severance compensation. If the dismissals are not authorized, then the employer will not be allowed to dismiss the employees. In any case, the labor authorities' decision can be appealed before the courts of the contentious-administrative jurisdiction.

The advantages of reaching an agreement with employee representatives during the consultation period are substantial since the labor authorities will normally not authorize collective dismissals unless the legal requirements have been strictly met or unless an agreement has been reached with the employees. If the authorization is not granted, unlike objective dismissals, the employer will not be able to dismiss the employees by simply paying them the severance compensation of forty-five (45) days of salary per year of service. Thus, oftentimes agreements reached during the consultation period entail costs for such dismissals well in excess of forty-five (45) days of salary per year of service.

## Discrimination

### Laws On Employment Discrimination

The basic source of 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 applicable in the field of employment that implement the Spanish Constitution 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 to not be directly or indirectly discriminated against 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, sexual orientation, affiliation with a union (or lack thereof), or language within the Spanish state.

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 contains direct or indirect unfavorable discrimination on grounds of age or handicap 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, religious 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 of employer relation thereof; 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 Offences Or Harassment**

Article 4.2 (e) of the Labor Act states that employees have the right to privacy and to the consideration due to their dignity, including protection against verbal or physical offences of a sexual nature and against harassment based on racial or ethnic origin, religion or beliefs, disability, age or sexual orientation.

- **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.

## **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, Act 39/1999 establishes rights in an attempt to reconcile professional and personal aspects of the employee (e.g., leaves of absence).

## 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 equal to 45 days of salary per year of service, up to a maximum of 42 months. 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 Infractions and Fines in the Social Order Act classifies the following acts or omissions as very serious employment offences and authorizes the imposition of fines ranging from 3,005.52 euros to 90,151.82 euros. The offenses which may be sanctioned include the following:

- Unilateral decisions of employers involving directly or indirectly adverse discrimination based on age or disability or, either favorable or adverse, 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, family links with other employees within the firm and language within Spain;
- Any decision of the employer that constitutes an 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;
- Harassment based on racial or ethnic origin, religion or beliefs, disability, age and sexual orientation when it takes place within the realm of the Company's power, 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 such infractions;
- Establishing conditions through advertised job offers or through any other means that constitute discrimination, either favorable or adverse, with respect to access to employment for reasons of sex or kinship with other employees.

Additionally, note that where the equal treatment principle is infringed, courts may award the employee a 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, inter alia, on grounds of ideology, religion or beliefs, 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 offence, and penalizes, 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 to discrimination, hatred or violence against groups or associations for reasons of racism, anti-Semitism or other reasons relating to ideology, religion or beliefs, 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 6 to 12-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.”*

## **Sexual Harassment**

### **Laws On Sexual Harassment**

Under Spanish law, there is no specific statute regarding sexual harassment at the workplace. However, there are a number of scattered provisions, which altogether constitute a framework protecting employees against 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 work place as a breach of the employment contract and, hence, as a valid cause to dismiss the harasser. In this respect, certain Collective Bargaining Agreements are including sexual harassment expressly as a valid cause for dismissal.

### **Employee Remedies And Potential Employer Liability For Sexual Harassment**

The employee remedies and the employer’s potential liability for employment discrimination 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 work place, the employer could be considered to have failed to comply with 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 equal to 45 days of salary per year of service, up to a maximum of 42 months of salary.

Additionally, the employee could claim an additional compensation for damages caused by the harassment.

#### **(ii) Administrative Sanctions**

Sexual harassment when it takes place within the realm of the Company’s powers regardless of who the agent of the harassment may be, can be deemed as a very serious employment offence and therefore may be sanctioned with a fine ranging from 3,005.52 euros to 90,151.82 euros.

#### **(iii) Criminal Sanctions**

Section 184 of the criminal code states that the sexual harassment constitutes a criminal offence. Depending on certain circumstances, the corresponding sanction may consist either of a fine, or imprisonment in particularly serious cases ranging from five (5) months to one (1) year. Imprisonment is highly unusual in practice.

# Sweden

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## Introduction

The relationship between employers and their employees is highly regulated in Sweden, particularly as it relates to the termination of employees. In addition to a number of laws affecting employment, many aspects of labor relations are also regulated by collective bargaining agreements and individual employment contracts. With respect to employment discrimination and sexual harassment laws, a number of regulations have been implemented during the last fifteen years, which extend numerous protections for employees.

Among others, the primary legislation governing employment relations in Sweden include:

- The Labor Disputes Act (1974:371);
- The Co-Determination in the Workplace Act (1976:580);
- The Employment Protection Act (1982:80);
- The Equal Opportunities Act (1991:433);
- The Act on Measures Against Ethnic Discrimination in Working Life (1999:130);
- The Act Against Discrimination of Disabled in Working Life (1999:132);
- The Act Against Discrimination in Working Life on the Basis of Sexual Orientation (1999:133);
- The Act Against Discrimination of Part-time Employees and Employees on Fixed-term Employment (2002:293); and
- The Act on Prohibition Against Discrimination (2003:307).

## Terminations

### Restrictions On Employers

A contract of employment for employees other than top executives, is governed by the Swedish Employment Protection Act (1982:80). The law favors employees. Contracts of employment can differ from the Employment Protection Act only in certain respects and terminations must be based on objective grounds. Objective grounds may be attributable to the employee personally, such as mismanagement, or to the employer, such as redundancy. Summary dismissals may only take place due to the employee's gross negligence.

If an employer considers terminating an employee based on circumstances relating to the employee personally, the case must be examined carefully. In practice, three elements are relevant in determining objective grounds, 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 legal grounds exist for termination or, in extreme cases, summary dismissal.

The case law on termination due to personal circumstance is extensive. The Swedish Labor Court, which is the supreme court in labor law disputes, has tried several hundred cases in the last two decades. It is therefore recommended that guidance is sought in case law before dismissing an employee on personal grounds.

Before an employer can dismiss an employee, the employer must first attempt to relocate the employee to 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 of 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, which usually means that the employee who has been with the company the shortest time has to leave first.

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

Employers are required by the Employment Protection Act to provide employees a period of notice from one to six months. The notice period depends on the age of the employee, if employed prior to January 1, 1997, and the length of service if employed from January 1, 1997.

Collective bargaining agreements also 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 before. The information must also be given to the employee's union, if applicable.

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 must consult with the union(s) concerned *before* any final decision being taken by the employer according to the Swedish Co-Determination at Work Act. The obligation to consult comprises both the question whether there is a redundancy situation and the questions of which employees that should be dismissed in accordance with the above-mentioned priority rules.

As for a termination due to personal reasons of the employee, the union concerned may request for consultation after being informed about the pending termination, in which case the employer has to wait with 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.

## Termination Indemnities

In cases of wrongful termination, the indemnities for which the employer is liable are considerable.

If an employee contests the objective grounds for termination, 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 will have to pay the employee salary and benefits during this period. If the employee is successful, he or she will remain employed, and may also be entitled to general damages. In case the employer refuses to comply with a court order to retain the employee, the employee may also be entitled to damages for his or her economical loss.

In normal cases, general damages may range from SEK 30,000 to SEK 80,000 (approximately US\$ 4,000 to US\$ 10,000). Damages for economical loss is 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 ten years of employment, and 32 months' salary for employees with at least ten years of employment. For employees over 60 years of age the damages are raised to respectively 24, 36 and 48 months' salary.

## Laws On Separation Agreements, Waivers, And Releases

There are no specific provisions in Sweden regarding separation agreements. However, such agreements are recognized instruments when dismissing employees. Such agreements often regulate the termination of the employment and also the benefits to which the employee is entitled. The 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.

## Litigation Considerations

The Labor Disputes Act (1974:371) covers the 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' or employees' organization or an employer who is a party to a collective bargaining agreement.

Disputes concerning non-union employees or employers who have not entered into collective bargaining agreements 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.

## Employment Discrimination

### Laws On Employment Discrimination

As of April 1, 1999, Sweden implemented several new laws against discrimination that encompass a larger number of employees. The legislation includes the Act on Measures Against Ethnic Discrimination in Working Life (1999:130), the Act Against Discrimination of Disabled in Working Life (1999:132), and the Act Against Discrimination in Working Life on the Basis of Sexual Orientation (1999:133). A couple of years later, the Act Against Discrimination of Part-time Employees and Employees on Fixed-term Employment (2002:293) and the Act on Prohibition Against Discrimination (2003:307) was implemented. The new acts, in conjunction with the Swedish Equal Opportunities Act (1991:433), place a large burden on employers to protect against and eliminate discrimination.

The Equal Opportunities Act prohibits direct and indirect discrimination on the grounds of sex and places a general obligation on an employer to promote greater equality between the sexes. Discrimination is prohibited with respect to recruitment, termination, employment conditions, promotion, training, and supervision.

With 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 factors which are not connected to the sex of the persons.

The Act on Measures Against Ethnic Discrimination in Working Life replaced a previous law on ethnic discrimination, which had received substantial criticism. The new act forbids employers from discriminating against job applicants or employees on the basis of race, skin color, religion, nationality, or ethnic origin. The new act also covers both direct and indirect discrimination and is applicable even if the employer has no discriminatory intent.

The Act Against Discrimination of Disabled in Working Life protects disabled job applicants and employees against both direct and indirect discrimination. A disabled person may for example not be treated less favorably than a non-disabled person has or would have been treated in a similar situation. The act is applicable even if an employer has no discriminatory intent.

The Act Against Discrimination in Working Life on the Basis of Sexual Orientation forbids employers from discriminating, directly or indirectly, against job applicants and employees on the basis of their sexual orientation. By sexual orientation is meant homosexual, bisexual or heterosexual orientation. For a finding of discrimination, it is not necessary for an employer to have a discriminatory intent.

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 works 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 reasons.

The Act on Prohibition Against Discrimination prohibits direct and indirect discrimination, harassment and instructions to discriminate with respect to ethnic origin, religion, sexual orientation or disability, in among other things (i) labor market policy activities, (ii) in connection with financial support, permits, registration or similar arrangements that are needed or may be of importance in enabling an individual to start or run a business, (iii) in connection with qualification, certification, authorization, registration, approval or similar arrangements that are needed or may be of importance in enabling an individual to engage in a certain occupation, and (iv) in connection with membership of or participation in an employees' organization, employers' organization or occupational organization.

### **Employee Remedies/Potential Employer Liability For Employment Discrimination**

Violation of the Equal Opportunities Act by an employer may result in a liability to pay damages. An Ombudsman for Equal Opportunity ("*Sw. Jämställhetsombudsman-JämO*"), together with a Commission, initiates, directs, and supervises efforts to promote equality. The Ombudsman may also bring charges against an employer on behalf of the job applicant or employee.

Under the Act on Measures Against Ethnic Discrimination in Working Life, the Act Against Discrimination of Disabled in Working Life and the Act Against Discrimination in Working Life on the Basis of Sexual Orientation, employers that discriminate against an applicant or employee are liable to pay general damages. An employee can also claim damages for the economical loss. The Government has appointed an Ombudsman Against Ethnic Discrimination ("*Sw. Ombudsman mot etnisk diskriminering*"), a Disability Ombudsman ("*Sw. Handikappsombudsmannen*") and an Ombudsman Against Discrimination on the Basis of Sexual Orientation ("*Sw. Ombudsmannen mot diskriminering på grund av sexuell läggning*"), which are entrusted with the task of supervising and enforcing the respective acts. The three Ombudsman may bring charges against an employer on behalf of the job applicant or employee. All acts requires employers to investigate harassment on discriminatory grounds by other employees and undertake measures necessary to make sure that such harassment stops. If an employer fails to undertake active measures, the employer may be liable to pay damages to the employee.

If an employee is discriminated 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 damages to the employee for the violation and for the employee's economical loss.

The three Ombudsman are also to supervise compliance with the Act on Prohibition Against Discrimination. Anyone who discriminates a person in a manner that is prohibited under the Act on Prohibition Against Discrimination shall pay damages for the violation that the discrimination implies. A company is generally liable for discriminating acts committed by its employees.

### **Practical Advice To Employers On Avoiding Employment Discrimination Problems**

Employers in Sweden must pay careful attention to the various discrimination regulations. 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.

# Sexual Harassment

## 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.

In 1992, the first legislation on sexual harassment was adopted in the Equal Opportunities Act. Under the Act, an employer must ensure that no employee is sexually harassed. The Act further contains a provision against harassment, resulting from the employee's rejection of a sexual invitation by the employer or the employers' representative. The harassment as such is not penalized under the Act, but a perpetrator of the harassment may be charged criminally under the Swedish Penal Code.

## Employee Remedies For Sexual Harassment

Employees who have been sexually harassed by their employers are entitled to damages. The employees are also entitled to damages if the employer has not taken the appropriate measures against sexual harassment in the workplace. Generally, damages in Sweden to employees are considered to be moderate, but have lately increased. However, it is unusual that damages of more than SEK 80,000 (approximately US\$10,000) are awarded.

A complaint should be delivered to the employer or to the local union representative. The employer then has an obligation to start an investigation. If the employee does not think that the complaint is dealt with properly, he or she can then make a complaint to the Equal Opportunities Ombudsman, who may start an investigation and act as a representative for the harassed employee.

## Potential Employer Liability For Sexual Harassment

According to the Equal Opportunities 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, the employer may be liable to pay damages to the employee for the violation caused by the omission.

## Practical Advice To Employers On Avoiding Sexual Harassment Problems

Every employer should prepare a policy relative 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 not sufficient, 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 can be undertaken against the perpetrator of the harassment, depending on the seriousness of the acts committed, including transfer, termination, or summary dismissal.



# Switzerland

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## Introduction

Compared to the laws of most European countries, Swiss employment law is quite liberal, particularly in relation to terminations of employment contracts. Apart from gender discrimination and sexual harassment, Swiss law does not require an employer to treat all its employees the same under similar conditions. Only a discrimination of a single or a small group of employees might be prohibited if it amounts to a violation of such person'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.
- The Federal Statute on the Information and Consultation of Employees in the enterprises.

The Swiss Code of Obligations contains Switzerland's labour relationship rules. It comprises 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 be waived only by contractual terms that place the employee in a more favourable position than the legal ones. Mandatory provisions are compulsory for the parties, so that they 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 the employees working in industrial and commercial enterprises, the working hours, the time of 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. 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 8,000 can be applied to.

## Terminations

### Restrictions On Employers

Swiss law prohibits employers from terminating employment relationships, provided the employment lasted for more than three months or is entered into for a fixed term of more than three months, during the following 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 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 up to 30 days in the first year of service, for up to 90 days as of the second year of service until and including the fifth year of service, and for up to 180 days as of the sixth year of service; and,
- During pregnancy and during the 16 weeks following the lying-in of an employee.

A notice given during one of the forbidden periods is 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 forbidden period, the running of the notice period is only suspended and continues once the forbidden period is terminated.

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 the reasons for the termination in writing. The refusal to provide such a reason does not affect the validity of the termination, but is a hint for an abusive termination, which is sanctioned under 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 do not exist); 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; or,
- In connection with a collective dismissal without prior consultation with the employees' representative body or, if there is none, the employees.

An abusive termination is valid. The party which abusively gave notice must, however, 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. If the consultation proceeding in connection with a collective dismissal has not been observed, the indemnity may not exceed two months' wages of the dismissed employees. 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.

### **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. The only exception is a termination without notice for cause.

Both the employer and the employee may terminate an employment relationship at any time without notice for cause. This applies to both employment for a fixed term and 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 or prevention from performing work through no fault of his or her own, in particular due to illness, never constitutes a 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 which 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, 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.

If the parties have not agreed on notice periods, the agreement can be terminated during the probation period at any time by respecting a notice period of seven days. Once the probation period has ended, the employment can be terminated in the first year by respecting a notice period of one month; in the second year and up to and including the ninth year of service by respecting a notice period of two months; and thereafter by respecting a notice period of three months, always to the end of a calendar month.

## **Termination Indemnities**

The employer is free to renounce on the employee's performance of the notice period. Even if the employer does so, the full salary due during the notice period has to be paid. In case the employee is entitled to commissions or other variable salary components, they have to be calculated and paid as if the employee had continued to work during the entire notice period. If the employee assumes 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.

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 judge may fix it in his or her discretion taking into account all the relevant circumstances. The severance pay fixed by the judge may, however, not exceed an amount equal to the employee's wages for eight months.

The judge may reduce or deny a severance pay if the employment relationship was terminated by the employee without a valid reason or by the employer without notice for cause, or if the payment of the severance would cause hardship to the employer. The severance pay will be reduced by the amount of the benefits 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 the employer is 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.

## **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, renounce 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 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.

## **Litigation Considerations**

Under Swiss law the party which asserts a claim based on a certain factual situation must prove such situation. This means that an employer who 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.

Due to the fact that a termination is only valid at the time when the other party received the notice, the terminating party must prove that and when the other party received the notice. Unless the employment contract requires a specific form, it is advisable to hand out the notice of termination to the employee and have the employee 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.

## **Discrimination**

### **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 which 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 a 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.

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. Since July 1, 2005 the employee is entitled to a maternity pay equal to 80% paid by the state-run insurance of her last average monthly salary but capped at CHF 5,160. 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 whatever 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 20 years old may not work after 10 p.m. (this latter threshold shall, according to a project of the federal government, be reduced to 18 years).

### **Employee Remedies For Employment Discrimination**

The law presumes gender discrimination where the person alleging a discriminatory act furnishes *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.

## Potential Employer Liability For Employment Discrimination

The sanctions in case of a violation of the obligation to treat both genders equally depends 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 salaries for the job.

The sanctions are more severe if an *existing* employee is discriminated against based on his or her gender, marital status, or family situation. If such person is terminated because of gender discrimination, the terminated employee may not only ask for a compensation of up to a maximum of six months salaries but also seek reinstatement. 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.

## 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 the present situation on the labour market, the salaries have to be adjusted over a relatively short period of time. In addition, the Swiss Federal Supreme Court required the employer, in a case where a man was hired at a higher salary than a female employee in a similar position, to submit evidence of the market conditions which allegedly required the employer to pay a higher salary to get the employee sign the employment contract.

Employers should be particularly attentive to indirect gender discrimination and should, in particular, thoroughly assess whether a different treatment of part-time workers does not amount to an indirect gender discrimination.

## Sexual Harassment

### Laws On Sexual Harassment

Under the Federal Act on Equal Treatment of Women and Men (the “Act”), 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.

### 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 and 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.

### **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 sanctioned. 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 which employees can initiate if they consider themselves to be victims of a sexual harassment.

# Republic of China (Taiwan)

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## Introduction

The Republic of China (“Taiwan”) has certain mandatory laws for employee protection. The major piece of law concerning termination of employment is the Labor Standards Law (LSL), while two other applicable laws of Enterprise Merger & Acquisition Law (M&A Law) and Mass Severance Law (MSL) supplement the special requirements for employment termination under certain circumstances.

Promulgated in 1984 and expanded 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 pay. In particular, 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 the employment contract or even if the employer has paid a severance fee.

There are exemptions to the LSL for a managerial person who is appointed by the board of directors (e.g., general manager), 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 may interpret the LSL independently without being bound by the opinions of labor authorities, i.e., the Council of Labor Affairs (CLA) in the central government and the Labor Bureau in the local governments. In practice, however, the court judges rather heavily rely on the rulings issued by the labor authorities. In case where the rulings by the labor authorities are contradictory, the courts make their decisions based on their interpretations of the relevant law provisions.

Under circumstances, which meet the definition of mergers provided under the M&A Law (effective from February 6, 2002), the requirements for statutory termination cause of LSL are relaxed and some more advantageous mechanisms are available for the employers (e.g., buyer and seller in the situation of mergers).

On the other hand, if termination of employment involves a certain number or ratio of employees during a period of 60 days, MSL will come into play and require the employer to follow certain more requirements for termination procedures, such as negotiation with the representative of the dismissed employees, etc.

Taiwan’s laws concerning employment discrimination and harassment against employees are much more advanced since the Two Genders Work Equality Law (Equality Law) has become effective on March 8<sup>th</sup>, 2002. In addition, there are other general laws or regulations including criminal law or social order maintenance regulations, which also provide punishment on sexual harassment.

Litigation involving employment disputes has become more prevalent than ever in Taiwan since the LSL was expanded to cover most industries in Taiwan and harassment disputes also occurred more often, given the effect of Equality Law. There are very few discrimination disputes filed in labor authorities and no court cases at all.

## Terminations

### Restrictions On Employers

Articles 11 and 12 of the LSL provide the two categories of statutory termination 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.

### Cause For Layoff

Article 11 of the LSL outlines the circumstances under which an employer can terminate a labor contract *with* advance notice and severance pay (which may be called “Cause for Layoff” in practice), when:

- The employer’s business is suspended or assigned;
- There is an operating loss or business contraction;
- A “force majeure” event necessitates business suspension for more than one month;
- 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,
- A particular employee is confirmed to be incompetent for the work required of him or her.

### Cause For Dismissal

Article 12 of the LSL outlines circumstances under which an employer may terminate a labor contract *without* advance notice or severance pay (which may be called “Cause for Dismissal” in practice), when:

- An employee misrepresents any fact at the time of signing his or her labor contract in a manner which might mislead the employer and cause the employer to sustain damage;
- An employee commits violence or utters gross insults at the employer, the employer’s family members or agents, or fellow employees;
- An employee has been sentenced to temporary imprisonment in a confirmed judgment, and is not granted a suspended sentence or permitted to commute the sentence on payment of a fine;
- There is a gross breach of the labor contract or a gross violation of work rules;
- 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,
- An employee is absent from work without proper cause for three consecutive days or six days in a month.

In all of these situations of Cause for Dismissal (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.

### Severance Pay/Notice Provisions

If an employer terminates an employee because of the Cause for Layoff, the employee is entitled to a severance pay calculated on his or her seniority and prior notice (or payment in lieu of notice). For example, if a company is to lay off an employee being confirmed as incompetent for the work required of him or her, it may invoke Article 11(5) of the LSL as the Cause for Layoff to terminate the employment and pay him or her severance pay and advance notice (or payment in lieu of notice).

Article 17 of the LSL provides the calculation formula for an employer to give severance pay to an employee who is dismissed due to Cause for Layoff outlined under Article 11 of LSL. It requires a severance pay 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. Nevertheless, as the LSL extends to apply to different industries gradually, the calculation for paying severance pay is based only on the service years after the LSL’s application, not necessarily from the first day of employment at the company. There may be exceptions where the company has promised to recognize the employee’s service years even before the LSL applies. Whether there are such promises by the employer to the employee shall be based on by the company’s special severance plan, work rules, employment contract with employees, etc.

Article 16 of the LSL outlines notice requirements for contracts terminated due to Cause for Layoff 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.

In an employment termination due to Cause for Dismissal under Article 12 of the LSL, the employer is not obligated to provide severance pay nor advance notice to the dismissed employee. However, 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 termination based on Cause for Dismissal. Therefore, it is recommended that an employer's work rules describe its Cause for Dismissal with specificity.

### **Consequences Of A Termination In Violation Of The LSL**

An employment agreement cannot be terminated at the employer's wish unless any of the statutory causes for termination exists under the above relevant articles. If an employer dismisses 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.

### **Termination Of Employment In situations Of Different Applicable Laws**

#### **LSL**

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 working for the surviving company. In such cases, the employees who consent to be transferred to the new employer (*i.e.*, the surviving company) will not receive a severance pay from the merged company, but the surviving company must acknowledge their prior seniority.

According to the interpretation rulings of the CLA, the employees have the right to decide at their discretion whether they may (or may not) consent to such an arrangement in order to maintain their benefits based on seniority, such as the entitlement to pension, severance pay, annual leave, etc.

#### **M&A Law**

The M&A Law also deals with the termination of employment as well as transfer of employees following mergers. In the definition by the M&A Law, mergers refers to a general scope of mergers including (1) combination: joining of a company with another whereby the surviving company categorically assumes all rights and obligations of the other company; or a newly set up company categorically assumes all the rights and obligations of the vanishing company, (2) acquisition: a company's act of obtaining shareholding, business or assets of another company in consideration for shareholding, cash or other assets, and (3) spin-off.

To invoke the M&A Law, the newly set up company or the acquiring company will have the obligation to issue notices to employees who are to be transferred 30 days prior to the effective date of transfer, regardless of the seniority of the employees. In comparison, the LSL requires an advance notice between 10 to 30 days, depending on the seniority of the employees who will be laid off. Further, the M&A Law clearly provides that new terms and conditions of employment is to be attached to the letter of transfer so that employees can clearly understand what they are being offered, while the LSL does not have such a specific requirement.

Similar to the LSL, consent from employees to such transfers is still required under the M&A Law. However, the M&A Law sets down a specific time frame (which does not exist in LSL), requesting the employee to respond within 10 days of receipt of transfer notice; otherwise the employee is deemed to have accepted the transfer and hence cannot claim for severance pay. As such, this provision of M&A Law allows companies the ability to gauge time frames for actions more easily.

Employees who are not transferred by the new company or who decide to reject the transfer will be entitled to severance pay in accordance with the same calculation formula under the LSL. Employees transferred will have their years of service acknowledged and carried forward to the new employer. This mirrors entitlements for employees transferred under the LSL.

The M&A Law further provides that if the employees who have decided to be transferred or have been deemed to be transferred (due to no response within ten days after receipt of transfer notice) declines to be transferred for personal reasons later, they will have no right to claim severance pay. Therefore, practically, the only circumstance where severance pay will not be required to be made is where employees who have earlier accepted the offer to be transferred or are deemed to be transferred later reneged on their decision. In comparison, under the LSL, during a transitional period before actual transfer (e.g., effective date shown on the labor insurance card) if an employee declines an offer after first agreeing to be transferred, he or she may still claim his or her entitlement to severance pay. Under the M&A Law however, it is clear that such employees are not entitled.

The M&A Law also includes a specific provision dealing with the pension fund of the merged companies. Previously under the LSL, the pension fund cannot be transferred to the new employer, nor can it be utilized to make severance (or retirement pay for employees who are qualified for retirement) unless the company is liquidated. However, under the M&A Law, where a company following a merger, does not survive, the pension fund may be used to make severance and retirement pay for non-transferred employees and the remainder of the fund will then be transferred to the pension fund of the new employer. Where a company acquires or spins off a part of its business, the pension fund may similarly be used to make severance or retirement pay. The remainder will then be transferred to the pension fund of the acquiring or spun-off company in proportions of the employees to be transferred.

#### MSL

The MSL requires a company which will layoff a certain number or ratio of employees to follow further procedures including an advance notice of 60 days to all the affected employees and the labor authorities, a negotiation with the representative of affected employees including the criteria for selecting employees to be laid off, etc. The employers who do not follow the MSL may be subject to auditing by the labor authorities, and in particular, the employers who do not pay the required severance pay to the laid off employees may be prohibited from leaving the country of Taiwan.

### **Law On Separation Agreements, Waivers, And Releases**

There are no mandatory legal requirements 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 dismissal in order to avoid future arguments as to whether or not the termination of their employment was legitimate.

Taiwanese law does not require consideration for such separation agreements, waivers, and releases. However, at an employment termination due to Cause for Layoff, if an employer does not provide any additional payment in addition to the legally required severance pay, it has no right to ask the employee to sign a release of potential claims in return for receiving severance pay.

Taiwanese courts usually will more strictly examine whether a Cause for Dismissal under Article 12 of the LSL exists or not, since the employer does not pay any severance pay nor notice for such kind of employment termination. In comparison, if an employee is dismissed based on Cause for Layoff and is paid severance pay, the Taiwanese courts are less strict in examining the termination causes. In case the employee has signed a release of potential claims for termination, it is very unlikely that the courts will render a decision in favor of the employees.

### **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. Further, Taiwanese law does not require the party who loses a lawsuit to pay for the adverse party's attorney fees.

## Employment Discrimination

### Laws On Employment Discrimination

The Equality Law sets down the general principles against discrimination due to different genders, including discrimination in the course of recruitment, examination, appointment, assignment, designation, evaluation and promotion, in the case of holding or providing education, training or other work-related activities, providing various welfare benefit measures, paying remuneration, retirement, severance, leave of absence, dismissal, etc. It also prohibits discrimination when an employee marries, becomes pregnant, engages in child-birth or child-raising activities, causing him or her to leave his or her job, or apply for leave without pay.

In comparison with the Equality Law, which only deals with discrimination related to sex, the Constitution provides general principles concerning the other kinds of discrimination. Article 7 of the Constitution provides that “*All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law.*”

However, Constitution cannot be 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/her own fault, wrongfully injures the rights of another is bound to compensate him/her 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.*”

Another law relating to employment discrimination is the Handicapped Welfare Law. Article 17 of this law requires a private organization that has 100 or more employees to hire handicapped employees, totaling at least 1 percent of the whole staff. Violation of this article will subject the employer to a contribution to the handicapped welfare fund established by the Taiwanese government. The amount of the contribution is equal to the basic salary of the handicapped employee that the employer failed to hire in compliance with the regulations.

### Employee Remedies For Employment Discrimination

If an employee suffers from sex-discrimination by the employer, he or she may file a complaint with the company internally or the competent authorities externally (*i.e.*, the labor authority or court) directly based on the Equality Law.

Although it is a general principle in legal proceedings that a claimant shall bear the burden of proof for the claim, the Equality Law makes a contrary rule for the employer to bear the burden of proof of non-discrimination, if an employee or an applicant makes a prima facie statement of the discriminatory treatment.

With regard to a lawsuit based on discrimination other than sex-related factor (such as religion, race, etc.), an employee who wins the claim can recover damages caused by the discrimination. However, Taiwanese law does not provide a specific rule to determine actual damages. In addition, pursuant to the general procedural rules, the employee, as the claimant, shall still bear the burden 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.

### Potential Employer Liability For Employment Discrimination

With respect to a complaint based on sex-discrimination pursuant to the Equality Law, the employer may receive the employee’s complaint internally or be subject to investigation by the competent authorities outside the company.

In case of a complaint within the company, the employer is required to establish a complaint system to coordinate and handle the complaint filed by an employee. Such system has to comply with the government’s guideline or standard. Otherwise, the employer may be found to have violated the legal requirements.

In terms of the complaint externally, the employer may be subject to an investigation by the labor authority due to the employee's administrative complaint and/or a lawsuit with the court. If the employee files a complaint with the labor authority and it is found to be true about the employer's discriminatory act, the employer will be subject to an administrative fine between NT\$10,000 and NT\$100,000. If the employee takes a lawsuit in court, procedurally he or she may require legal aid and, in case of applying for injunction against the employer, his or her burden for putting up a security bond may be exempt or reduced. If the employee prevails in the lawsuit, the court will grant him or her the compensation for damages, a reasonable amount of compensation even for such damage that is not a purely pecuniary loss, and rehabilitation of his or her reputation.

If the discrimination is not sex-related, an employee can still 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/her 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.

### **Practical Advice To Employers On Avoiding Employment Discrimination Problems**

In Taiwan, there are more and more cases brought alleging employment discrimination. The Equality Law requires an employer to establish a complaint system, including a committee of employees and employer's designated persons to handle a sex-discrimination complaint. The selection and procedures for such a committee should be properly documented in order to prove the company's compliance with the procedural requirements in the first place. Further, it should be noted that the law prohibits the employer from dismissing, transferring or taking any disciplinary action that is adverse to the employee who files a complaint or any other employee who assists the complaint.

## **Sexual Harassment**

### **Laws On Sexual Harassment**

There are different kinds of sexual harassment laws in Taiwan. As a major piece of anti-sexual harassment law, the Equality Law sets down the general principles against sexual harassment, which is defined in Article 12 of this law to include two circumstances:

- (i) in the course of an employee executing his or her employment duties, any one makes a sexual request, uses verbal or physical conduct of a sexual nature or with an intent of sex discrimination, causes him or her a hostile, intimidating and offensive working environment and infringes on, or interferes with, his or her personal dignity, physical liberty or affects his or her job performance;
- (ii) an employer explicitly or implicitly makes a sexual request toward an employee or an applicant, uses verbal or physical conduct of a sexual nature or with an intent of sex discrimination as an exchange for the establishment, continuance, modification or assignment of a labor contract, or as a condition to his or her designation, remuneration, personal evaluation, promotion, demotion, reward and punishment.

An employer shall prevent and correct sexual harassment from occurrence. When an employer knows of the occurrence of sexual harassment, immediate and effective correctional and remedial measures shall be implemented. For an employer hiring over thirty employees, measures for preventing and correcting sexual harassment, related complaint procedures and punishment measures should be established and openly displayed in the workplace.

If the behavior of sexual harassment involves threats or violence, it may become a more severe criminal offense. The harassed employee may allege criminal charge 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.*" Furthermore, Article 304 of the Criminal Code may

be implicated by sexual harassment. It provides that threats against another person to do a thing which 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 3,000 yuans (*i.e.*, NT\$9,000).

Finally, 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 NT\$6,000. However, the measure is more in the manner of an administrative policy and only the insignificant monetary fine is imposed in case of violation.

### **Employee Remedies For Sexual Harassment**

When an employee or an applicant is damaged by the sexual harassment, he or she may invoke the Equality Law to claim for compensation to be paid by the employer and the harasser jointly. The claim include compensation for damage, a reasonable amount of compensation even for such damage that is not a purely pecuniary loss, and the rehabilitation of the harassed person's reputation.

In case of sexual harassment involving criminal offense, the employee may file a criminal complaint against the harasser as well as a civil lawsuit against the employer and harasser jointly to claim for his or her damages due to sexual harassment. With respect to the criminal complaint, the employee shall file it with the police or prosecutor, while a civil claim has to be filed with the court after the prosecutor indicts the harasser in the criminal charge. The possible offenses of sexual harassment under the Criminal Law 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). The complaint can be filed by either the actual victim or the victim's spouse.

### **Potential Employer Liability For Sexual Harassment**

If a company's employees, managers, or even customers are found to have engaged in sexual harassment against an employee, the company may be found liable to compensate the employee. Under the Equality Law, the burden of proof lies on the employer to prove that he or she has complied with this law to provide all preventive and correctional measures required, and despite his or her exercising necessary care in preventing this damage from occurring, the damage still happens. If the employer is able to prove so, he or she may be found to be not jointly liable with the harasser. However, in the situation where the court finds the employer to be not liable but hence the employee cannot obtain compensation from the harasser only, the court may still, on the employee's application, take into consideration the financial conditions of the employer and the injured party, order the employer to compensate for a part or the whole of the damages. The employer who has made compensation has a right of recourse against the harasser.

In terms of sexual harassment based on Criminal Law, the employer will not be liable for criminal charge. In terms of civil claim, 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 an employer to exercise reasonable care in the selection and supervision of its employees) also can be applied as a general applicable law for compensation of damages due to 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 be found not liable.

### **Practical Advice To Employers On Avoiding Sexual Harassment Problems**

The Equality Law requires an employer to set up an anti-sexual harassment system and complaint procedure. Establishing such a system, therefore, is the first step in compliance with law. Further, with such a system, the employer will have a chance to prove its preventive and corrective measures as well as necessary care in handling a sexual harassment case. Hence, there will be a chance for the employer to deny its liability for compensation.



## **Thailand**

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## 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 Law, 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.

## Terminations

### 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 concluded 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.

### 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 maximum 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, 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 in advance or pay them special compensation in lieu of the advance notice equaling 30 days' wages. An employee who does not wish to go to the new workplace can cancel the employment contract and claim a special compensation at the rate of not less than 50 percent of the rate of the statutory severance pay.

### Termination Indemnities

An employer is required to provide severance pay to a dismissed employee, subject to certain exceptions, 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:

Period Of Service	Rate Of Severance Pay
120 days but less than 1 year	Not less than last wages for 30 days' wages
1 year but less than 3 years	Not less than last wages for 90 days' wages
3 years but less than 6 years	Not less than last wages for 180 days' wages
6 years but less than 8 years	Not less than last wages for 240 days' wages
10 years or more	Not less than last wages for 300 days' wages

In cases of a reduction in the number employees due to structural changes by the employer, employees who have worked consecutively for six years or more 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, but not exceeding 360 days. Additionally, the law entitles employees who have worked for one year or more at a company to at least six working days a year as annual holiday. In the event that the employee has any unused annual leave, he or she is entitled to payment of wages for the relevant portion upon termination.

Certain exceptions exist to the requirement of severance pay for employees with a fixed term contract of no longer than two years when the termination of employment is in line with his or her employment period. This includes employees who perform:

- (i) Work on a particular project that is not the normal business or trading 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.

Severance pay is also not required in cases where the termination of employment occurs if 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) Is sentenced to a term of imprisonment by a final judgment, except for a petty crime or an offence committed through negligence.

In cases where the employee has been brought from elsewhere 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 if:

- (i) The contract had 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 brought.

## **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 is required to sign a letter of resignation and a release whereby the employee waives his or her rights to claim any further damages 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.

## **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 relations between the employer and employee have 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.

## **Employment Discrimination**

### **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 maternal term. 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<sup>o</sup>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, the employer may instruct a pregnant female employee to work in an executive position, academic capacity, administrative capacity, a capacity concerning finance or accounting, or to work overtime on a working day provided that the consent of the employee has been obtained.

The Labor Protection Act prohibits children under 15 years from undertaking employment. It also imposes procedures and restrictions when employing children under 18 years of age in order to protect their well-being, such as prohibiting a minor to work 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.

### **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 a 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 make compensation for willfully or negligently injuring the life, body, health, liberty, property, or any right of another person.

Violation of the anti-discrimination provision under the Labor Protection Act subjects the employer to a fine not exceeding Baht 20,000. Moreover the injured employee may claim damages from the employer on the ground of a wrongful act.

## **Sexual Harassment**

### **Laws On Sexual Harassment**

The Labor Protection Act prohibits an employer, work chief, supervisor, or inspector from sexually harassing a woman or child employee.

However, such prohibition does not extent to cover harassment against male employees or among employees of the same ranking. Also, the law is silent as to what activity would constitute sexual harassment whether the employer, particularly in the case where it is a company or other forms of corporate entities, will be also liable for the sexual harassment committed by its directors, officers or the relevant employees. No court decisions exist to make determination on such issues.

Violation of the harassment provision may result in a fine not exceeding Baht 20,000 (approximately US\$500). The harassed employee also would have a claim for damages on the grounds of the wrongful act under the CCC.

# United Kingdom

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## Introduction

The UK has seen an ever-increasing amount of employment protection legislation since the 1970s, and the protection has continued to grow significantly in the last few years.

Employment protection in the UK is primarily statutory in origin. As well as 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) which 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.

A growing proportion of 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 which 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 (3) 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. 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 100,000 cases in 2004.

Most claims in England and Wales are heard by specialist Employment Tribunals. A much smaller number of claims, including larger contracts, are heard before the UK's traditional courts (the High Court or County Court).

## Terminations

### 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 which 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 (5) reasons which 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 and has been discussed in the case law over the last 30 years or so. There are also new minimum statutory procedures which need to be followed and which provide for the basic principles of fairness, including giving advance written notice of the proposed dismissal and providing relevant information; holding a hearing at which the employee can make representations; and offering the employee a right to appeal. It is not sufficient just to follow the statutory minimum procedures - the procedures set out in case law still need to be followed - however, if the statutory procedures are ignored, the dismissal is deemed to be automatically unfair.

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 c.GBP60,000 (this is the maximum figure as at 2005, 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 statutory minimum procedures will lead to the dismissal being treated as automatically unfair, and will enable the Employment Tribunal to increase its normal award by between 10-50% (but it cannot be increased to more than the statutory maximum).

The general rule is that only employees with at least one year of continuous employment with the same or an associated employer are covered by the unfair dismissal legislation. However, if the dismissal is for certain specified protected reasons (e.g., maternity or whistleblowing), this one year service requirement does not apply.

It is worth noting that there are also special rules which apply to dismissals which 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).

### Mass 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 representative. 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, 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 leaves it 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 redundancies; (ii) the numbers and descriptions 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; and (v) the proposed method of calculating the amount of redundancy payments to be made to employees. 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. The obligation is not to negotiate, only to consult in good faith.

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 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).

## 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 be 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 which are applicable if the express notice clause is lower than the statutory minimum. The statutory minimum periods are: one (1) week if the employee has at least one (1) month's service; two (2) weeks if the employee has at least two (2) 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 imply 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 out 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 which the employer wants to apply, and tax issues.

Fixed term contracts will often contain provisions which 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 which 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 which 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 contracts of employment. 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 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 which 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 to 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, the employer 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 which 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.

## Termination Indemnities

UK law only provides for a statutory termination payment in respect of redundancy dismissals. An employee is entitled to a statutory redundancy payment if the employee 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:

### For Each Complete Year Of Service

When An Employee Is Aged	Multiplier Of A Week's Pay
18 to 21	½
22 to 40	1
41 to 65	1 ½

For these purposes, the weekly pay is capped. Currently it is capped at £280 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, verbal agreement, or because the courts imply a contractual right from the employer's previous custom and practice.

## 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 which 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 are only effective to settle claims which have actually arisen at the time the compromise agreement is entered into: they are not effective to waive other claims (even if the agreement says that it does).

A COT3 agreement is one which 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, who prepares the formal agreement, the so-called COT3, although the wording is agreed between the parties. One advantage which COT3 agreements can have over compromise agreements is that in a COT3 agreement it is sometimes possible to waive certain claims which have not arisen as at the date of the agreement.

## 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 3 months of the act complained of, (although there is an automatic extension to 6 months in certain cases where the employee raises an internal grievance with his or her employer about the issue within specified time-frames). 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 in which to collect all of the necessary information to prepare a good defense and it is very important that the employer acts 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 6 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 there is some limited scope to obtain a costs award. In contrast, 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 little disincentive to employees who do not have particularly strong cases.

## Discrimination

### Laws On Employment Discrimination

The categories of individuals who are protected by UK discrimination legislation has increased significantly over the last 10 years. The protected categories now include:

- Sex (including pregnancy, married status, and gender re-assignment);
- Race (including color, nationality, or ethnic or national origin);
- Disability;
- Sexual orientation (including heterosexuals, homosexuals and bisexuals);
- Religion and belief (which is defined very broadly and includes any religion, or a religious or similar philosophical belief).

From October 1<sup>st</sup>, 2006, employees will also be protected from discrimination on grounds of age, although no draft regulations have been published as at the date of this publication.

#### Discrimination On Grounds Of Sex, Race, Sexual Orientation And Religion & Belief

The legislation which deals with discrimination on the basis of sex, race, sexual orientation, and religion and belief all follow a similar structure. They prohibit four (4) different types of discriminatory behavior: (i) direct discrimination; (ii) indirect discrimination; (iii) victimization; and (iv) harassment. The disability discrimination legislation is structured differently and is dealt with separately below. The legislation is broader in scope than just the employment relationship, but this chapter only addresses 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 following the end of the employment relationship, for example, providing discriminatory references.

Direct discrimination occurs where, in the employment context, an employer treats an individual less favorably than another directly because of one of the protected characteristics. For example, it is direct discrimination for an employer to recruit a male rather than a female, simply because of the female's gender, or for an employer to dismiss a gay employee because it finds homosexuality offensive. There is no defense of justification to this type of discrimination. The law applies to applicants and ex-employees, as well as existing employees.

Indirect discrimination occurs where an employer applies a provision, criteria or practice, which is not directly based on one of the protected characteristics, but in practice it operates to the detriment of a greater proportion of individuals in one of the protected groups compared to others. An example is a policy which states that part-time employees will not be entitled to join a pension scheme. Although the practice is not based on a protected ground, in some companies the majority of part-time workers will be female. Consequently, the practice is to the detriment of a greater proportion of women compared to men. Therefore, it is potentially indirect discrimination. However, in contrast to direct discrimination, an employer has a defense if it can justify the provision, criteria or practice on objective grounds which are not tainted by the protected characteristics.

Victimization occurs where an employer treats an individual less favorably because he or she has either alleged or brought a claim under the relevant legislation, or has given evidence or information to another person who has brought or alleged a claim under the legislation. For example, it is victimization for an employer to dismiss an employee because he or she gave evidence against the employer in a race discrimination claim brought by a colleague.

Harassment is explained separately below.

### Discrimination On Grounds Of Disability

The disability discrimination legislation is structured slightly differently, because of the different issues which it raises.

Discrimination by an employer under the DDA can occur in five (5) ways: (i) direct discrimination; (ii) disability-related discrimination; (iii) failure to make reasonable adjustments; (4) victimization; and (5) harassment.

The legislation sets out a definition of “disability” and only covers individuals who fall within the definition. The definition is complicated, but in broad terms covers any individual who has a physical or mental condition which substantially affects his or her ability to carry out normal day-to-day activities (not necessarily activities required to be done at work), and which has lasted, or be likely to last, for at least 12 months.

Direct discrimination is the same as that discussed above in respect of the other protected grounds. The less favorable treatment has to be because of the fact that the individual is disabled, rather than because of a symptom arising from the disability. Again, direct discrimination can never be justified.

Disability-related discrimination occurs where an employer treats an individual less favorably than another for a reason related to his or her disability. For example, if a disabled employee is dismissed because of poor time-keeping, and that poor time-keeping is caused by the disability, it is potentially discrimination. However, this type of discrimination can be justified by the employer. To do so, the employer must show that it behaved reasonably in all of the circumstances, and the Employment Tribunal will balance all of the relevant factors, including the size and financial strength of the organization. Large corporations are often expected to be more accommodating than very small employers.

The legislation also requires employers to make “reasonable adjustments” in respect of disabled employees (and applicants for jobs), to any provision, practice or criterion, or to any physical feature of the employer’s premises, which places the disabled person at a substantial disadvantage compared to others. 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.

Finally, an employer must not victimize an employee with a disability. The rules are the same as those in respect of the other prohibited grounds.

### Part-Time Workers And Fixed-Term Employees

There is separate legislation which 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. In respect of 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 which 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.

## 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 (3) months of the act complained of, or six (6) months if an internal grievance is raised within specified time-limits. 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 within six (6) months of the termination of employment.

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 (3) main elements of compensation which 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 GBP1 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 in 2004 was between GBP6,000 to GBP7,000; 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 £500 to £25,000, 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 in respect of 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 (6) 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 which 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.

## **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. However, it is unusual for the defense to succeed once an Employment Tribunal has found that discrimination occurred.

## **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 minimised.

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 which indicate the problems, and a proper performance management programme should have been completed, which should be documented at each stage. The employer should introduce strong systems all of the key stages, so the evidential material is there if ever a claim is brought.

Any allegations of harassment 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 which may constitute harassment.

Generally, the employer should ensure that it has strong equal opportunity policies in place and that all of its staff are trained in equal opportunity 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 which it would be sensible for the employer to make. The process should be conducted with regular consultation with the employee.

Although discrimination on the grounds of age is not yet unlawful (and we do not yet know what will be included in the legislation), it is sensible for employers to start thinking about how it may impact on their business. Employers should think about the contents of their advertisements (avoid language which could give rise to inferences of discrimination such as “youthful” and “vibrant”, and target an age diverse population), their application forms (perhaps remove date of birth, and consider abandoning chronological information requirement), their service related benefits (can the employer justify seniority related benefits), and redundancy selection (avoid assessing employees on potentially discriminatory objectives).

## **Harassment**

### **Laws On Harassment**

Harassment is a distinct form of discrimination where the harassment is on the grounds of sex, race, disability, sexual orientation or religion & belief.

The definition of harassment is not identical in each piece of legislation, however, in essence they are very similar. Harassment occurs where, on one of the protected grounds, a person engages in conduct which is unwanted by the recipient, and the conduct has the purpose or effect of violating that other’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive working environment.

A very important element of the harassment legislation is that the focus is primarily on how the conduct is perceived by the recipient, not what is intended by the alleged harasser. There is no limit to the types of conduct which can constitute harassment; it simply needs to be unwanted by the recipient. Examples are offensive comments or “jokes”, unwanted touching or staring, physical abuse, and displaying offensive visual material, such as e-mail attachments, posters, or computer screen savers.

Conduct does not need to be directed at the employee who complains for it to constitute harassment. It is enough that the employee is exposed to it in the same environment.

### **Employee Remedies For Harassment**

Unlawful harassment is a form of discrimination. The remedies are as set out in the Discrimination section above. In harassment cases, in practice direct financial losses is less common, although it is not uncommon for employees to resign as a result of the harassment and claim loss of salary and benefits as part of their claim.

### **Potential Employer Liability For Harassment**

The same rules as to employers’ vicarious liability apply to harassment as they do to other discrimination claims (as described above).

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## **Practical Advice To Employers On Avoiding Harassment Problems**

The legislation provides a statutory defense to employers who demonstrate that they took reasonable steps to prevent harassment from occurring in the course of employment (as is the case with other discrimination claims). Some key ways to try to avoid harassment in the workplace include:

- Implementing strong anti-harassment policies which make it clear that harassment is not acceptable, explains what constitutes harassment, and informs employees of what to do if they notice or experience harassment. Obviously, the policy should be published to all employees in a way which ensures that they read it;
- Ensure all employees are properly trained in anti-harassment issues, in accordance with the employer's policy, and re-train employees at regular intervals;
- Ensure that managers are well trained in both spotting and dealing with potential harassment, and leading by example;
- When allegations of harassment are made, deal with them promptly and appropriately. Small problems can often be stopped most effectively at an early stage.

However, as with discrimination, it is in the nature of employment that it is impossible to prevent harassment entirely. However, the more it can do to prevent it, the better its position when it comes to defending a claim.



## **United States Of America**

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## 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 free to dismiss an employee for any reason, without notice, and at any time. The termination can be made without any financial obligation whatsoever to the discharged worker. In essence, an employee works at the will of the employer. This rule of law stems from the laws of all 50 states that make up the United States. There is no federal law in the United States - applicable to or in all fifty states - providing notice rights or indemnity requirements in the context of the termination of an 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 the norm, as there is no 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 not limited to reimbursement of wages and exemplary or “punitive” damages, which are designed to punish a wrongdoer, are often allowed. Some jurisdictions are considered more liberal or “employee friendly” than other areas of the country (the states of California, Colorado, Michigan and New Jersey are the primary jurisdictions where this observation is relevant). Moreover, while conservative generally, some states, such as Texas, are known for large jury awards and thus are not seen as “employer-friendly”. Conversely, some areas of the country are considered more conservative or “employer friendly” than other jurisdictions.

## Terminations

### 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 for a reason that violates a statute, such as race. However, the clear trend of courts in the United States in the past decade 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), workers generally can be dismissed 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.

Employers also can be restricted from dismissing a worker by virtue of some oral representations. 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. Most states require written amendments, especially for a promise lasting more than a year.

Employers also may be subject to contractual liability to workers in the United States under concepts known as “promissory estoppel” and the “covenant of good faith and fair dealing”. Courts will 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 upon 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 their present job in reliance upon such a promise. The covenant of good faith and fair dealing is a concept which 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 upon 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 example of this restriction is when an employee is dismissed in retaliation for having filed a claim for worker’s compensation benefits or reporting alleged illegal activities of a company to law enforcement agencies. This is known as the “tort of retaliatory discharge”. Commentators refer to these cases as “whistleblower” cases as 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 upon (and fail to contain conspicuous disclaimers negating the promises by providing that the employee handbook does not constitute a contract), such promises will be enforced by courts 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, as discussed below, 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.).

## **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 specifying such notice that the parties had 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” law. This statute requires an employer to give 60 days written notice to employees of large-scale layoffs or plant closings. The WARN law 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. Regardless of whether notice is given, an employer is free to dismiss or layoff its workers. 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. The WARN statute 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.

## 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 law, an employer that fails to give the required notice can be liable for payment of up to 60 days of compensation to any worker to whom the employer failed to provide notice but who was entitled to receive the statutory notice.

## 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 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 is a function of the common law of all 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 over the age of 40 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, including:

- (i) The release agreement must be written in a way that can be easily understood by the employees;
- (ii) The release specifically must 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;
- (iii) The employee cannot be asked to waive future claims that may arise after the date the release is executed;
- (iv) 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;
- (v) The employee must be advised in writing to consult with an attorney prior to executing the agreement;
- (vi) The employee must be given a period of at least twenty-one days within which to consider the agreement; and,
- (vii) 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.

## 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.

## 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, and pregnancy. 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 right to workers

40 years of age and older. That law prohibits intentional discrimination as well as certain policies or practices that may have a disproportionate impact on workers over 40. The Americans With Disabilities Act of 1990 (“ADA”) prohibits discrimination based on a disability. Finally, the Civil Rights Act of 1991 establishes damages remedies to implement Title VII, the ADEA, and the ADA, as well as clarifying 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.

All but two of 50 states have employment discrimination prohibitions applicable to private employers that are similar to federal law (the exceptions are Mississippi and North Carolina). Most state statutes mirror the protections of federal law, although some states actually provide greater protections than Title VII, the ADEA, the ADA, 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 smaller employers who are otherwise exempt from federal law (Title VII 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. An FMLA unpaid leave is allowed for up to 12 weeks in connection with the birth or adoption of a child, or with respect to serious medical conditions caused by pregnancy. The FMLA also prohibits discrimination or retaliation against any employee who exercises the right to take leave under the law. The Equal Pay Act of 1972 specifies that women must be paid 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. The Act makes 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 report must involve suspected 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.

## **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 for 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 upon the size of the employer. Current federal law provides the following caps: US\$50,000 for employers with between 15 and 100 workers; US\$100,000 for employers with 100 to 200 workers; US\$200,000 for employers with 200 to 500 workers; and US\$300,000 for employers with 501 or more workers. In contrast, state laws prohibiting employment discrimination generally have no limits or caps on the size of compensatory or punitive damage awards available to employees suing their employer. State laws have different caps on damages and may exceed those under federal law.

Employees who win age discrimination cases, 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.

Employment-related litigation in the United States is also very expensive because of a special rule regarding attorney's fees. Federal and state employment discrimination laws have special provisions which 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 fees of their attorney. Generally speaking, there are no caps on the amounts for recovery of attorney's fees. Unlike many jurisdictions, it is difficult for an employer to recover its fees even if it prevails on all claims. A frustrating fact of the U.S. legal system is that an employee does not have to pay the attorney's fees of the employer where the employee loses his or her case.

## **Potential Employer Liability For Employment Discrimination**

A worker can sue a company, the supervisor that made the personnel decision at issue, or both. A court can award equitable, injunctive, and monetary relief against the employer. In certain circumstances, damages also may be imposed upon management personnel found to be guilty of discrimination. Because employment discrimination litigation allows the employee to recover their attorney's fees, the practical effect of this attorney's fee rule is to increase the exposure and cost of employment-related litigation.

## **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 upon the maintenance of appropriate 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 often 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:

- (i) Giving clear warnings and instructions to employees;
- (ii) Applying all personnel policies equally to all employees; Providing candid appraisals of performance to all employees;
- (iii) Assuming all employees desire to be promoted;
- (iv) Providing equal training opportunities and counseling to all employees;
- (v) 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.

## **Sexual Harassment**

### **Laws On Sexual Harassment**

Sexual harassment is a very serious legal problem for employers in the United States. Title VII of the Civil Rights Act of 1964 makes sexual harassment illegal. It is considered to be a form of sex discrimination. 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 memoranda 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 generally consider sexual harassment to be any unwelcome verbal statements or physical conduct of a sexual nature which 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 a 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.

### **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 US\$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.

### **Potential Employer Liability For Sexual Harassment**

The U.S. Supreme Court recently 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 the cases entitled Faragher v. City of Boca Rotan, 118 S.Ct. 2257(1998), and Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257(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: (i) the employer must prove that it exercised reasonable care to prevent and promptly correct any conduct constituting sexual harassment; and (ii) 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.

### **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-sexual 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, and authorize disciplinary action against any harassers. To avoid liability under the law, 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

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## Introduction

In Venezuela, prior to the 1997 reform of the Organic Labor Law (OLL), upon termination of their employment relationship workers were paid an “indemnity for seniority” (commonly known as “prestaciones sociales”), which consisted of 30 days’ salary per year of service. This indemnity had to be deposited each year in a bank trust or accredited to the employer’s books, but the amount had to be adjusted upon termination of the employment contract, in accordance with the last salary earned by the worker. Furthermore, if termination of the employment contract was the result of an unfair dismissal, in most cases the employer had to pay double the amount of the indemnity for seniority.

In the labor reform of June 19, 1997 the indemnity for seniority was replaced by another benefit called “seniority payment”. The seniority payment is also paid to the worker upon termination of the employment relationship, but is calculated on a monthly basis and consists of five days’ salary per month of services rendered, as from the fourth month of the worker’s services for the employer. This is equivalent to 45 days’ salary for the first year of services and 60 days’ salary for each subsequent year. In addition, the employer is obliged to pay two additional days’ salary per year, starting in the second year, up to a maximum total of 30 additional days. Thus, a worker may accrue up to 90 days’ seniority payment per year upon completing 16 years of service.

A major problem for companies under the former system was that the actual and final cost of the indemnities were only realized when the employment relationship was terminated, because the calculation was based on the last salary earned. The system also impaired the worker because employers refrained from granting major salary increases due to the impact they would have on labor indemnities. The current system corrected these problems by establishing a scheme whereby employers know and can forecast the labor cost, and workers have access to better compensation increases.

However, one of the transitory provisions of the new Constitution of December 30, 1999 orders that the OLL be modified in order that seniority payment be calculated according to the worker’s last salary and based on his years of service. This leads to presume that Venezuela will shortly return to a system similar to that existing prior to the 1997 labor law reform.

## Terminations

### Notice Provisions And Termination Indemnities

#### Admitted Forms Of Termination

The OLL admits the following causes for termination of the employment relationship:

- the mutual consent of the parties;
- the causes outside the control of the parties, such as death or permanent disability of the worker, the non-culpable bankruptcy of the employer, acts of God and force majeure;
- the worker’s resignation; and
- the dismissal by the employer.

Additionally, in employment contracts for a fixed term and for a specific task, respectively, the expiration of the term and completion of the work are causes for termination.

#### Dismissal With Cause

The dismissal of a worker will only be deemed to be with cause when it is based on any of the following causes set forth in Article 102 of the OLL:

- (i) Dishonesty and 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 representatives or members of his family;

- (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 (3) 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 default on the obligations imposed by the employment relationship; and
- (x) Abandonment of work.

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 fault. Failure to do so will result in the fault being deemed forgiven and entitlement to dismiss with cause will cease, although dismissal without cause may be effected upon payment of the indemnities for unfair dismissal. The employer must give notice to the Labor Court regarding any justified dismissal within five business days of the date of the dismissal, otherwise the dismissal will be deemed to be unfair.

#### Justified Worker's Resignation / Constructive Dismissal

The worker may terminate his/her employment relationship with cause when the employer is liable for any of the following faults contemplated in Article 103 of the OLL:

- (i) Dishonesty;
- (ii) Any immoral act that offends the worker or the members of his/her family;
- (iii) Violence;
- (iv) Insults or serious disrespect and lack of consideration due to the worker or the members of his/her family;
- (v) Omissions or imprudence that seriously affect the safety or hygiene of work;
- (vi) Any act that is a serious default of the obligations imposed by the employment relationship; and
- (vii) Any act that constitutes a constructive dismissal.

According to the OLL, the following are deemed to be circumstances for constructive dismissal:

- The employer's demand that the worker perform a type of work that is overtly different from that which he/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 he/she render his/her services under conditions that imply a change of residence, other than when this has been agreed upon in the contract or if 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; and
- Other similar events that alter the existing work conditions.

To the contrary, the following will not be deemed to be constructive dismissal:

- Returning the employee to his 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 employee to his 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; and
- The temporary transfer of a worker, in case of emergency, to an inferior position within his/her own occupation, and with his/her previous salary, for a term not to exceed 90 days.

Any worker who decides to resign with cause may do so within a term of 30 consecutive days after the date on which he/she 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 OLL for the cases of unfair dismissal.

#### Unfair Dismissal

Permanent workers who have been employed for more than three months and who are not management employees enjoy job stability. The unfair dismissal of such workers is possible, but in such cases the employer must pay them an indemnity for unfair dismissal and an indemnity in lieu of advanced termination notice, both provided by Article 125 of the OLL and which are described below, in addition to the regular labor benefits due to them:

#### Indemnity For Unfair Dismissal

The indemnity for unfair dismissal is equivalent to:

- (i) 10 days' salary if the term of service is more than three (3) months but does not exceed six months;
- (ii) 30 days' salary per each year of service or fraction of a year greater than six months, up to a maximum of 150 days' salary.

This indemnity is paid on the basis of the salary earned by the worker at the time of termination of the employment relationship.

#### Indemnity In Lieu Of Advanced Notice Of Termination

The indemnity in lieu of advanced notice of termination is equivalent to:

- (i) 15 days' salary if the term of service is more than one month and up to six months;
- (ii) 30 days' salary if the term of service is more than 6 months but less than one year;
- (iii) 45 days' salary if the term of service is equal to or greater than one year;
- (iv) 60 days' salary if the term of service is equal to or greater than two years, but not more than 10 years;
- (v) 90 days' salary if the term of service is more than 10 years.

This indemnity is paid on the basis of the salary earned by the worker at the time of termination of the employment relationship. The salary base, however, cannot exceed the equivalent of 10 minimum urban monthly salaries.

### Restrictions On Dismissals

#### Mass Dismissal

The OLL forbids mass dismissals. According to Article 34 of the OLL, a dismissal is deemed to be a mass dismissal when it affects 10% or more of the workers in a company with more than 100 workers, or 20% of those in a company with 50 to 100 workers, or more than 10 workers in a company with less than 50 workers, within a term of three months, or a longer period if, in the opinion of the Labor Ministry, the circumstances are critical. The Labor Ministry can suspend mass dismissals and order the reinstatement of dismissed workers. If there are economic or technological reasons forcing an employer to reduce its personnel, the reduction must be agreed to by the workers' union or the workers.

### Bar Against Dismissal

There are certain cases when workers cannot be dismissed, not even by paying them additional compensation, unless their dismissal has been previously authorized by the Labor Inspector through a special procedure established for this purpose in which the employer must prove the worker's fault. Workers who enjoy this special protection or "bar against dismissal" are, among others, the following:

- (i) Workers who are promoting the legalization of a workers' union;
- (ii) Workers who join a union that is being formed;
- (iii) Members of the board of directors of the workers' unions (the number of protected workers varies according to the company' size);
- (iv) All workers, during their unions' election processes;
- (v) All workers interested in the collective bargaining agreement, while the same is being discussed and for up to a maximum of 270 days;
- (vi) All workers interested in a collective labor conflict, while the same is being resolved;
- (vii) Workers who are members of their companies' Industrial Safety and Hygiene Committees;
- (viii) Workers whose employment relationship is suspended for a legal cause, such as a sickness or accident, compulsory military service, and police detention, among others;
- (ix) Pregnant women and for up to one year after giving birth.

### Laws On Separation Agreements, Waivers And Releases

Workers cannot waive their rights. However, it is possible to reach individual labor settlements to resolve any differences existing between an employer and a worker. To be valid, a settlement must be made in writing, setting forth a detailed description of the events that caused it and the rights included therein, and must be executed before the competent labor official (Labor Inspector or Labor Judge) upon termination of the employment relationship. Settlements entered into during the term of the employment agreement are not valid.

## Employment Discrimination

### 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 OLL and its Regulations (OLLR) forbid any discrimination regarding work conditions based on age, gender, sexual preference, race, marital status, religion, political affiliation, social status or any other discrimination based on relevant criteria that are not compatible with the legal system. However, the OLL makes clear that the special provisions issued to protect maternity and family are not deemed to be discriminatory, nor those designed to protect minors, the elderly and disabled persons. In particular, Article 394 of the OLL provides that there cannot be differences between the salary of a woman who is pregnant or breastfeeding and that of other workers who perform similar tasks in the same organization.

A worker who is subject to discrimination may elect either to:

- (i) Extinguish the employment relationship by invoking a just cause for withdrawal, in which case the employer is obliged to pay the same indemnities due in the event of an unfair dismissal; or
- (ii) File an action for constitutional protection for reinstatement of the infringed legal situation.

Finally, Article 11 of the OLLR 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 and other similar circumstances, provided such preferences or privileges are of a general nature throughout the company.

## Sexual Harassment

### Laws On Sexual Harassment

Sexual harassment was regulated in a specific manner for the first time in Venezuela in the Law on Violence against Women and the Family, which became effective on January 1, 1999. Subsequently, the OLLR regulated the same matter, but with specific reference to the workplace.

Generally, sexual harassment occurs when a person seeks sexual favors or responses personally 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 an 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 3 to 12 months' 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.

A worker who is the victim of sexual harassment may elect either to:

- (i) Extinguish the employment relationship by invoking a just cause for withdrawal, in which case the employer is obliged to pay the same indemnities due in the event of an unfair dismissal; or
- (ii) File an action for constitutional protection for reinstatement of the infringed legal situation.

Furthermore, a worker woman 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. If the sexual harassment causes pain and suffering, the aggressor may be also bound to pay such damages and medical treatment required by the victim.

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