

Employment law at a glance

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An international guide  
to employment law across  
28 countries

# An international guide to employment law across 28 countries

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# Introduction

In today's global economy all international businesses need advice that offers integrated solutions to their global employment issues, particularly when they are working across jurisdictions and juggling different regulatory requirements.

Clyde & Co's employment team are recognised leaders in the delivery of HR legal services. Our experienced employment practices in the UK, the Middle East and across Asia Pacific have a long track record of advising both local and international businesses on employment issues, employee benefits and immigration law.

In 2016, Clyde & Co became the official UK affiliate member of L&E Global, an international alliance of law firms which specialise in labour relations, employment and immigration law and employee benefits.

Clyde & Co has been working with members of L&E Global since the network's inception in 2011 but has now formalised this relationship by becoming an affiliate member. Together, we can provide our clients with the most effective and efficient global HR legal support available in the market.

Our technically excellent advice is clear, concise and straightforward. We focus on anticipating potential issues and offer creative, timely and constructive solutions. We don't sit on the fence - we will give you an opinion. We also make it our business to understand your priorities and commercial pressures so we can ensure that your expectations are met.

This guide gives you a brief outline of the employment law regime across the key jurisdictions covered by L&E Global and Clyde & Co. If you would like any more details about these or any other countries, please contact:



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# Europe highlights

## European Union

- EU employment law protects the rights of workers across the EU. However, these laws often operate differently in different member states as most EU employment law is created at EU level and is then brought into national law by each member state
- Areas covered by EU law include:
  - Working time, part-time and fixed-term work
  - Protection from discrimination, the protection of pregnant workers and equal pay rights
  - Informing and consulting workers on workplace issues, including collective redundancies and business transfers
  - Protection of employees' rights on a business transfer
  - Protection of personal data

## Austria

- Non-EU nationals must obtain an employment permit, a work permit, and an exemption certificate or a Red-White-Red card to work legally in Austria
- Legislation regulates basic employment protection and entitlements, and practically every employer and employee is subject to a collective bargaining agreement
- There is no national minimum wage but salaries must comply with collective bargaining agreement provisions regarding industry-wide minimum salaries
- Austrian law does not restrict terminating employment to specific conduct or causes.
- Although the termination procedure differs for blue and white collar workers, Austria is moving towards unifying these procedures

## Belgium

- All labour documents and labour-related communications with employees must be in Dutch, French or German, depending on the location of the employer's operating unit
- The notice period regime, which applies to blue and white collar workers, is based solely on length of service
- Employer notice periods in Belgium are lengthy for long-serving employees – e.g. employees with eight years' service are entitled to 27 weeks' notice and with 17 years' service, to 54 weeks' notice
- Well-being and anti-discrimination laws have great importance in Belgian labour relations, in particular in relation to the treatment of psychosocial risks in the workplace

### France

- Usually, employees work 35 hours a week. Only hours worked at the request of the employee's superior will be regarded as overtime
- French employment law offers wide powers to “representative” trade unions and also to elected staff representative bodies
- For indefinite term contracts, there must be real and serious grounds for dismissal – there are two types of valid grounds: personal and economic
- Severance payments are only awarded if the employee has the minimum required length of service and this is provided for in the relevant collective bargaining agreement
- New guidelines for awarding unfair dismissal damages have recently been introduced

### Germany

- Employees who are not from the EU/EEA require a residence title and work permit
- A statutory minimum wage of EUR 8.84 per hour generally applies to all employees in all sectors of business. Aside from the statutory minimum wage, there are special regulations and collective bargaining agreements within certain sectors
- Overtime pay is not expressly regulated by law, but is subject to the employment agreement, collective bargaining agreements and works council agreements
- Trade union representatives support employees and works councils, but do not have participation rights within a company. However, works councils have far-reaching co-determination rights, which limit the employer's rights to unilaterally execute certain measures
- Due to the high level of protection against dismissal, it is reasonably common for employees to challenge their dismissal in court, where the parties often agree on termination on the basis a severance payment is made

### Italy

- From 2015, new recruits gain gradual protection, directly linked to their length of service
- For each industry sector, there is a National Collective Bargaining Agreement that regulates the employment relationship
- Poor performance is not a statutory reason for dismissal
- The grounds of dismissal must be given in the termination letter; failure to do so renders the termination invalid
- Reinstatement is no longer the sole remedy for unfair and wrongful dismissal; this has largely been replaced by an award of damages, calculated on the basis of length of service

### Luxembourg

- The labour market in Luxembourg is characterised by the number of commuters from Belgium, France and Germany, which represents over 50% of the labour force
- The Labour Code came into effect on 1 September 2006 and regrouped all existing employment rules
- The termination of contracts is strictly regulated by the Labour Code with specified notice periods depending of the employee's length of service
- The right of workers to strike is implicitly guaranteed by the Constitution under the freedom of association but is only possible under specific conditions. A peace obligation exists for the duration of a collective labour agreement. Moreover, to be legal, every strike or lockout movement must first be referred to the National Office of Conciliation
- Overtime is strictly regulated and is only permitted with prior authorisation from, or notification to the Minister for Employment



# Europe highlights

## The Netherlands

- The maximum probationary period is two months
- In 2015, a number of legislative provisions were introduced, making it increasingly difficult to dismiss employees which has led to more settlement agreements being used
- Employees with at least two years' service are usually entitled to a payment on termination, which amounts to approximately 1/3 of a month's salary for each year of service
- In most cases, employers cannot terminate an employment contract without seeking permission from the Employee Insurance Agency or applying to the sub-district court
- New rules for fixed-term contracts apply, including the use of non-competition clauses and a payment equal to one month's salary on termination

## Norway

- Norway adopts most EU labour law legislation as part of the so-called EEA-Agreement with the EU
- In some respects, the law in Norway is even more employee-friendly than EU legislation, such as the rules governing business transfers
- There is no statutory minimum wage, but wage provisions can be set by collective agreements
- There are a number of restrictions on fixed-term contracts, including the length of the term and the number of employees in the workforce on fixed-term contracts
- Employees may not be dismissed unless it is objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee

## Poland

- Given its low personnel costs, Poland is currently Europe's main outsourcing hub
- The Polish tax and social security system is ever-evolving
- Overtime is only permitted in certain circumstances
- Fixed-term contracts have become more widely used recently
- In the case of large employers, trade unions are active and have a strong presence
- There has recently been a steady rise in the number of independent contractors

## Romania

- Most disputes involve financial claims from employees, usually for overtime payments, working conditions, bonuses etc
- Employers often face collective actions by employees which are usually initiated by unions
- Employers have the right to regulate working hours but special legal provisions, which are usually stricter than the EU rules, limit this right
- Great importance is given to the form of the documents drafted by the employer. Court cases usually involve verifying the form of these documents and a large number of decisions are based only on this issue
- Collective negotiation is mandatory for companies with more than 21 employees however this doesn't necessarily have to result in a collective agreement

### Spain

- In principle, employment contracts are presumed to be for an indefinite term. There are, however, a limited number of fixed-term employment contracts
- In most cases the probationary period cannot exceed two months
- Freedom of association and representation are fundamental rights under the Spanish Constitution
- Termination can be based on objective or disciplinary grounds
- Dismissals are null and void if the termination is discriminatory or involves protected employees

### Sweden

- Probationary periods and fixed-term employment are permitted, provided certain requirements are met
- Approximately 70% of employees in Sweden are members of a trade union
- Although there is no national minimum wage, collective bargaining agreements usually provide for minimum salary levels and annual minimum salary increases
- **Positive discrimination:** employers can choose a candidate because of their gender if they are seeking to redress a gender imbalance in the workforce or in a particular position, provided the candidate is equally, or almost equally, qualified for the job as the other candidates

### Switzerland

- Compared with other jurisdictions, Swiss employment law is employer-friendly
- There is a limit to the number of non-EU and non-EFTA nationals who are permitted to work as management-level employees or specialists in Switzerland
- Switzerland has stable labour relations and strikes are rare
- If employees work overtime in excess of the statutory limit (45 or 50 hours, depending on the category of worker) the employer must pay them a supplement of 25% of their hourly wage
- In principle, employers may terminate an employment relationship for any reason but employees have a statutory right to request written reasons for their dismissal

### UK

- Termination of employment is process-driven so that if the right procedure is followed, liability can usually be avoided
- Discrimination and whistleblowing laws provide a high degree of protection in the workplace; claims are frequently brought in the tribunals and compensation is based primarily on financial loss (with no cap), although there aren't any punitive damages
- Although union representation is declining, workplace representation is becoming more common, but is generally not problematic for employers
- Women are entitled to take one year's maternity leave, and this leave can be shared with their partner; maternity pay can also be shared but is limited to 39 weeks, capped at GBP 140.98 except for the first six weeks
- Gender pay reporting rules for companies with at least 250 employees are in force from April 2017



# Austria

Like most EU Member States, Austria's approach to employment policy fosters a legal environment that provides broad protection and rights for employees. The legal regime comprises a complex combination of overlapping EU and Austrian legislation, broad collective bargaining agreements, shop-floor agreements, and individual employment agreements.

The different classifications of employees are defined by statutory provisions, but although these formal distinctions still exist on paper, they are slowly losing their significance as Austria moves towards unifying its laws in respect of blue and white collar employees. However, employers have consistently resisted change because extending white collar employees' rights would result in increased costs for employers.

# Issues arising on hiring individuals

## Immigration

In order to work legally in Austria, a foreign national (who is not an EEA-national) must comply with the Employment Act 1975 and obtain an employment permit, a work permit, an exemption certificate or a Red-White-Red card.

An Austrian employer may recruit a foreign national for employment in Austria, but the individual must apply for approval and an employment permit from the regional employment office. This employment permit allows a foreign employee to work in the specifically designated position for the specified employer for a maximum period of one year. The employment office will decide whether to issue the employment permit based on three criteria: (1) an analysis of the current labour market, and whether the market will benefit from employing a foreigner; (2) an assessment of whether any public policy issues conflict with issuing the employment permit to the foreigner; taking into account the specific circumstances of the employment agreement; and (3) an evaluation of whether the employer complies with applicable working conditions minimum wage requirements, and the Social Security Act.

## Employment structuring and documentation

The majority of Austrian employment agreements are for an indefinite term. An employment agreement can be terminated by either party giving notice without good reason, the consensual termination of employment, or summary dismissal for misconduct or some other substantial reason.

An individual employment contract is not required to be in writing; an employment contract exists when an individual undertakes to provide services to another person or corporate entity for a specific (definite or indefinite) period. However, like shop-floor agreements, employment agreements must comply with the relevant statutes, or collective bargaining agreements (CBA). An employment agreement may confer additional rights and entitlements than are provided for under the legislation, but never fewer. A probationary period may be included in the agreement, which allows the employer or the employee to terminate the employment agreement at any time during the probationary period without giving notice.

While statutes, such as The Salaried Employees Act, regulate basic employment protections and entitlements, practically every employer and employee in Austria is party to a CBA. The formation of CBAs is regulated by The Labour Relations Act, which governs areas such as the election and tenure of employee representatives on works councils, and the role of works councils in internal, social, personal and business matters.

CBAs are negotiated at industry level, and apply to the employment agreements of all employees within a particular industry, whether or not they are unionised. They cover a very wide range of employment issues, and are the foundation for Austrian employment law policy.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

Austria has no national minimum wage, and instead relies on industry-specific guidelines set out in the relevant CBA. Employees' salaries must comply with CBA provisions regarding industry-wide minimum salaries. An individual employment agreement that stipulates a lower salary than that stated in the relevant CBA is considered void from inception.

Overtime work is generally permitted in Austria. Blue collar workers most frequently receive overtime pay. Overtime payment schemes are usually agreed to on a CBA-by-CBA basis, but where overtime is not covered in the employment agreement, the Working Time Act applies. This stipulates that overtime should be 25% higher than the employee's wage for any additional hours worked up to the statutory maximum of 40 hours, and 50% higher for overtime worked in excess of the 40 hours maximum. Overtime performed on Sundays, public holidays, or between midnight and seven o'clock in the morning will attract a 100% wage supplement.

## **Social insurance**

Austria has a contribution based, pay-as-you-go social security system that provides benefits in the three broad spheres of health insurance, unemployment support, and pension entitlements. The pay-as-you-go model means that pensions and benefits paid out within one fiscal year are directly financed by contributions from the workforce in the same fiscal year.

Current workforce contributions are calculated according to an individual's gross monthly salary, including the monetary value of any non-monetary benefits like a company car, or corporate-owned residences. Employee contributions generally amount to approximately 18% of their gross income. The employer's contribution is approximately 21%.

# Issues arising on termination of the employment relationship

## **Business transfers**

Austrian law states that, generally, in the case of a business transfer, all employees who are part of the business affected are automatically transferred to the transferee. The transfer of employment rights includes any unsettled employment claims against the transferor, even if the facts underlying those claims occurred before the business transfer.

Austrian law states that, prior to the transfer, the employer must notify the works council of the planned transfer, and of the implications of the transfer on the relevant CBAs. However, there are no legal penalties for failure to comply with these notification requirements.

## **Terminating employment**

Austrian law does not restrict terminating employment to specific conduct or causes. The bulk of statutory and CBA regulation on termination concerns mandatory notice periods and termination dates. As with much of Austrian employment law, termination procedure regulations differ for blue and white collar workers. Blue collar termination regulations are usually dictated by CBAs. Procedures for dismissing white collar employees are laid out in The Salaried Employees Act, which provides that employers must give at least six weeks' notice. There is no requirement to state a reason for termination. Regardless of their length of service, if employees wish to terminate their employment they must give one month's notice.

In addition to the notice requirements, standard termination procedures must also comply with specific statutory or contractually designated termination dates. These are unrelated to the notice period requirements, and usually operate to extend employment from the last day of the notice period to the designated termination date.

As an alternative to the stringent requirements of the notice procedure, employers and employees may agree a termination date, to avoid the notice requirements. The employee is, however, still entitled to their statutory severance payments and cannot legally waive those rights. In this situation, waivers of severance payment and/or annual leave payments are null and void.

The Austrian statutory severance pay system is in a state of transition. There are currently two severance pay schemes that apply: the "old system" applies to employment agreements created on or before 31 December 2002, the "new system" applies to all employment agreements created after December 2002.

The "old system" provides for a sliding scale of severance pay, with the employee's entitlement increasing with length of service. Severance pay entitlements apply once an employee has worked for the same employer for a continuous period of three years.

The "new system" stipulates that employers must withhold 153% of their employees' gross monthly wages (including special payments) and pay this to an independently managed severance pay provider.

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# Belgium

Belgium has fairly extensive protective labour laws. Moreover, collective bargaining between the so-called ‘social partners’, i.e. the employer and the trade unions, plays a very important role in shaping labour law rules. As a rule, the termination of an employment contract is not subject to any prior administrative or court approval in Belgium.

Since 2014, the rules on the calculation of notice periods have changed significantly. Moreover, employees now have the right in principle to ask for the concrete reasons which led to their dismissal. The Belgian federal government is making efforts to lower the costs of employing people in the framework of the “tax shift” from labour to other forms of income. The federal government is also enacting legislation to simplify and modernise labour legislation in relation to working hours. In addition, the legal retirement age for workers retiring from 1 February 2030 has been raised from 65 to 67.

# Issues arising on hiring individuals

## Foreign nationals

European treaties provide for the free movement of persons within the European Economic Area (EEA) and Switzerland. This means that employees who are citizens of one EEA Member State or Switzerland are, in principle, free to work in another Member State without a work permit.

A foreign worker, non-EEA national or Swiss national who wants to work in Belgium under an employment contract must have a work permit. There are three types of work permits (A, B and C), but in most cases, foreign nationals are eligible for a work permit B only (valid for one specific position with one specific employer and for a maximum of 12 months, but renewable).

For the “B” work permit, an employer that wishes to employ the foreign worker must also obtain prior authorisation from the competent regional Minister. Both documents must be obtained before starting work in Belgium. In practice, both applications are filed at the same time by the employer or his agent.

Some categories of workers are exempt from these requirements and others benefit from relaxed rules. Depending on the foreign national’s country of origin, they may need a visa to enter Belgium. On arrival, the foreign worker must also apply for a Belgian residence permit (foreign identity card A).

## Employment structuring and documentation

In principle, an employment contract may be written or verbal. However, the following employment contracts and/or clauses (without limitation) must be in writing: (1) training clause; (2) non-competition clause; (3) employment contracts concluded for a fixed term or for a specific project; (4) replacement contracts; (5) employment contracts for students; (6) part-time contracts; (7) temporary work or interim work; (8) working from home; (9) arbitration clauses for highly paid employees with high management responsibilities; and (10) in certain cases, employment contracts concluded with a foreign worker.

For some of these exceptions, the contract must be signed before workers actually start their job. A number of specific employment contracts such as replacement contracts, student contracts or contracts for homeworkers also need to include a number of predetermined elements. Sanctions for failure to comply with the written contract requirement include: the nullification of the clause or contract; allowing the employee to terminate the contract without notice;

and the creation of a legal presumption that the contract was concluded for an indefinite term (an open-ended employment contract).

In principle, the parties are free to agree the terms of their employment contract; however both parties are subject to mandatory legal and regulatory conditions, and in some cases, collective bargaining agreement requirements which tend to make up an integral body of the employment contract. Neither party can contract out of these requirements and conditions.

A unique characteristic of the Belgian system is that employment contracts and all other employment related documents between the employer and the employee must be worded in French, Dutch or German, depending on the location of the employer’s operating unit. If the operating unit where the employee works is in the Flemish region; the employment contract must be drafted in Dutch, if it is in the Walloon region, it must be drafted in French, and if it is in the German-speaking region, the contract must be in German. For the Brussels region, the employment contract must either be in French or Dutch, depending on which language is used by the employee.

However, in the context of a cross-border employment contract, the European Court of Justice rendered a landmark decision in April 2013 stipulating that the principle of freedom of movement of employees allows the parties to draft the contract in a language other than the official language of the state where the workplace is located. Consequently, the Flemish Decree on the use of languages in social relations has, to a certain extent, been amended accordingly.

The standard type of employment contract used in Belgium is the full-time indefinite term contract. With the exception of the mandatory requirements referred to above, a written contract is not required.

Fixed term contracts are permitted, but a written contract must be produced by the commencement of employment at the latest. Failing this, contracts for a fixed term are deemed to be open-ended contracts. There is a limit to the number of times that parties can enter into consecutive fixed-term contracts.

Trial periods no longer exist; except in relation to student contracts and interim and temporary employment contracts where the first three days of effective employment are the trial period during which both parties can end the contract without notice or payment in lieu.

# Issues arising during the employment relationship

The minimum wage, annual leave and working time are fixed, according to the industry sector, by collective bargaining agreements. However, the minimum wage may not be lower than the guaranteed average minimum monthly pay, fixed by national collective bargaining agreement CBA, which currently amounts to EUR 1,590.64 gross (for employees aged at least 20 and with at least one year's service). In many sectors of industry, the sectorial minimum wage is a lot higher than the guaranteed average minimum monthly pay that must be respected when, on industry level, no CBAs are entered into.

In addition to their monthly gross salary, workers are entitled to single (i.e. normal salary) and double holiday pay and in most sectors, the payment of an end of year bonus is mandatory.

In principle, the maximum average working time is 38 hours per week and eight hours per day. Yet the maximum working week may be lower in some industry sectors, depending on the relevant CBA. There are several statutory exceptions to this rule. For instance, in the case of shift work, it is possible to work up to 11 hours per day and in the case of continuous work, even up to 12 hours.

Under certain conditions, flexible working time schedules with a weekly working time exceeding 38 hours may be introduced provided the quarterly or yearly average remains at 38 hours per week.

Daily minimum working time is three hours but statutory exceptions exist.

Overtime is in principle prohibited, although there are several exceptions to this rule. Where overtime is authorised, overtime pay is at least 1.5 times the worker's regular rate of pay and twice his/her regular rate if the overtime is performed on a Sunday or a Public Holiday.

Workers also benefit from paid compensatory rest periods.

Rules relating to working hours and overtime do not apply to sales representatives, homeworkers, domestic servants and employees in a managerial role or a position of trust within the company. Working at night, on Sundays and during Public Holidays is only allowed in a few strictly regulated cases.

Workers are entitled to remuneration for ten official Public Holidays. If a Public Holiday falls on a Sunday or on a day on which the worker does not work, the employer must grant a day in lieu.

The number of days' annual leave entitlement is determined according to the number of days worked (and deemed to have been worked, e.g. where the worker was on maternity leave or sick leave) during the preceding calendar year, referred to as the 'holiday reference year'. Generally, for a full holiday reference year, workers have the right to 20 or 24 days' annual leave, depending on whether their working regime includes a five or six day working week.

Workers who are starting their careers or who are re-starting work after a long time off are entitled to additional holiday after an introductory period of three months, so that they have the opportunity to benefit from four weeks' leave over a period of one year. The worker will receive holiday pay that is equal to their regular salary and this will be financed through a deduction from the double holiday pay for the following year.

## Trade unions

By application of the constitutional freedom of association, there are no restrictions on the creation of a trade union. However, only a select few unions are granted a specific role and specific rights by law.

Traditionally, unions choose not to organise themselves under a form that would give them a separate and complete legal personality. As a result, they only exist as legal entities to perform specific acts that are assigned to them by law. Unions, but not their members, essentially enjoy immunity from responsibility.

Representative unions have a place on the National Labour Council and the Joint Committees (committees at industry level where collective bargaining agreements are negotiated). In addition, they have the power to: (1) conclude collective bargaining agreements with one or more employers or representative employers' organisations; (2) put forward candidates for elections to the Works Council and the Committee for Prevention and Protection at Work; (3) ensure that the correct procedure is observed for the election of representatives; (4) depending on the circumstances, form a Union Delegation within the company; (5) propose lay judges to sit on the Labour tribunals and Labour Courts of Appeal; (6) represent their members before Labour Courts; and (7) in some circumstances, engage in legal action on their own behalf to defend the interests of their members.

Workers have the right to choose whether or not to join a trade union.

## Social insurance

Unless otherwise stated by an international agreement, salaried workers working in Belgium for an employer established in Belgium or at an operational office in Belgium, will in principle be subject to the Belgian social security scheme for salaried persons.

It is impossible to deviate from the Belgian social security scheme by special agreement as this would be null and void by law.

In the scheme for salaried persons, both workers and employers have to pay contributions to the National Social Security Office. The employer's contributions amount to approximately 30% for white collar workers and approximately 35% for blue collar workers.

Workers' contributions are fixed at 13.07% and are deducted from their gross salary.

The social security system covers old-age and survivor's pensions, unemployment benefits, sickness and disability benefits, insurance for accidents at work and for occupational diseases, family allowances and annual leave.

## Well-being

Following a number of modifications to the law on the well-being of workers, psychosocial risks are now defined more broadly in the sense that a connection with acts of violence, bullying or sexual harassment does not have to be proven in order to demand action from the employer. The employer also has to take measures to diminish the possibilities of stress caused by poor work organisation, labour conditions or interpersonal relations on the work floor. In addition, the law provides for specific procedures for psychological interventions and an obligation on employers to conduct a risk assessment for work-related stress in the company.

# Issues arising on termination of the employment relationship

## Business transfers

Under Belgian law, the transferor and the transferee have an obligation to inform their respective employee representative bodies (i.e. the Works Council, or in the absence thereof, the Trade Union Delegation, or in the absence thereof the Committee for Prevention and Protection at Work) about a proposed transfer (which includes a merger, concentration, take-over, closure or other important structural change negotiated by the company). The workers must be informed individually about the proposed transfer where: (i) there is only a Committee for Prevention and Protection at Work; or (ii) there are no employee representative bodies within the company.

The transferor and the transferee must also consult the employee representative bodies in particular about the impact of the transfer on employment prospects for the workforce, the work organisation and employment policies in general.

The information and consultation process should take place before a decision on the planned transfer is made. Failure to comply with this obligation would render the employer liable to criminal sanctions (a fine of EUR 400-4,000, multiplied by the number of workers employed in the company, up to a maximum of EUR 400,000) or to administrative sanctions (a fine of EUR 200-2,000, multiplied by the number of workers employed in the company, up to a maximum of EUR 200,000) in accordance with Article 196 of the Penal Social Code.

When there is a transfer, all workers working in the transferred business division are automatically transferred to the transferee. In principle, the workers may not oppose the transfer unless it would entail serious modifications to an essential element of their employment contract (e.g. salary, place of work, duties).

The rights and obligations of the transferor arising from the employment contracts and existing on the date of transfer are automatically transferred to the transferee. It is prohibited for both the transferor and the transferee to dismiss workers on the grounds of the transfer, apart from dismissals for just cause (serious misconduct) and dismissals based on technical, economic or organisational reasons.

The transferor and transferee are jointly and severally liable for transferred workers and the National Social Security Office is in place for the debts existing at the date of the transfer.

## Terminating employment

All workers with more than six months' service now have the right to be informed of the reason for their dismissal. Previously, and except in certain circumstances, only blue collar workers and workers dismissed for serious cause enjoyed this right. If the employer fails to inform the worker of the reason for dismissal, the worker can require the employer to give an explanation. If no (timely) explanation is provided, the employer owes a lump-sum civil fine of two weeks' salary. The worker is entitled to dispute the reason for dismissal before the Labour Court.

Except on grounds of serious cause, open-ended employment contracts may only be terminated by one of the parties by serving notice or by payment of an indemnity in lieu of notice (equal to the salary, inclusive of benefits, at the time of termination corresponding to the duration of the notice period). The notice must be given in writing and in the correct language, stating when the notice period starts and its duration. If the employment contract is terminated with the payment of an indemnity in lieu of notice, no formalities need to be complied with.

As part of the recent Belgian labour law reform, notice periods for blue- and white-collar workers are now aligned for contracts taking effect from 1 January 2014. These notice periods are fixed by law and only depend on the worker's seniority. They are expressed in weeks.

For open-ended contracts that took effect before 1 January 2014, the notice period to be observed in case of dismissal comprises two parts which must be added up. The first part is based on the worker's length of service acquired before 1 January 2014 and is calculated according to transitory rules; the second part is based on the worker's length of service as of 1 January 2014 and is calculated on the basis of the new regime.

The new legislation also provides for transitory measures for blue collar workers of certain labour-intensive and competitive industries (e.g. construction, clothing, diamonds industry, etc.). All of these derogations (i.e. shorter notice periods) are temporary in nature. Therefore, from 1 January 2018, the same notice periods will apply to all sectors.

Workers engaged under an open-ended employment contract may now claim damages (ranging between 3 and 17 weeks' salary) in the Labour Court if their dismissal is "unjustified". An "unjustified dismissal" is where the dismissal: (1) is for reasons unrelated to the worker's capability or conduct, or to the operational requirements of the undertaking; and (2) would never have been decided upon by a normal and reasonable employer.

Some workers enjoy special protection against dismissal, so they may not be dismissed on certain grounds (e.g. pregnant women may not be dismissed because of their pregnancy) or cannot be dismissed except for specific reasons provided by law (e.g. employee representatives in the Works Council and Committee for Prevention and Protection at Work and non-elected candidates may only be dismissed for serious cause with prior approval of the Labour Court, or for economic or technical reasons that have been recognised by the competent Joint Committee).

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# France

In France, employment law provides employees with a good level of protection. Nevertheless, this legal environment is constantly changing as a result of government reforms and case law evolution. There have been recent developments, in particular, in relation to union representation and collective bargaining agreements; working time; mutual termination agreements; and collective redundancies. In France, choosing the wrong option may result in costly individual or collective litigation.

# Issues arising on hiring individuals

## **Immigration**

EU citizens do not need a work or residence permit if they hold a passport or other identification proving that they are EU citizens. All non-EU citizens must obtain a work permit to work in France. The relevant prefecture (i.e. local government representative) will consider the employment situation within the local region (département) when deciding whether to grant a work permit. If the foreign national is living abroad, the employer must apply to the local French unemployment authority. The application is then forwarded to the employment authorities. If they decide that the foreign national can work in France, they issue a temporary one year work permit.

## **Employment structuring and documentation**

Employment contracts are generally not required to be in writing, but certain forms of employment contracts must be in writing: fixed-term contracts; part-time contracts; and temporary employment contracts. Verbal fixed-term contracts are unequivocally deemed to be indefinite term contracts and verbal part-time contracts are deemed to be full-time contracts. Employers should provide employees with a written statement of the essential terms governing the employment relationship.

Indefinite term contracts should contain the following information: (1) identification of the parties; (2) the employee's job title or a description of their duties; (3) working time; (4) the employee's compensation including bonuses; (5) the place of work; (6) the start date; (7) the length of the probationary period; (8) holiday entitlement; (9) the applicable collective bargaining agreement (CBA); and (10) the length of the notice period.

In contrast with indefinite term contracts, a fixed term contract must comply with certain requirements as to content and form in order to be valid. However, employees working under fixed term contracts have the same statutory individual rights as those working under indefinite term contracts. The employer and the employee may agree on a probationary period, which can be renewed (only once) in certain circumstances, and during which either party may terminate the employment contract without any formality. If both parties are satisfied at the end of the probationary period, the employment contract becomes definitive.

# Issues arising during the employment relationship

## Wages, annual leave and working time

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights under the law, regardless of any provision to the contrary in their employment contract. These minimum working conditions are set out in particular in the French Labour Code and the applicable branch CBA.

The minimum gross monthly wage in 2016 was EUR 1,480.27 (approx USD 1,580) for a 35 hour work week. All employees who are employed under an ordinary employment contract (either indefinite or fixed term) are entitled to the minimum wage.

Usually, employees work 35 hours a week. In addition, employees must not work more than: (1) an average of 44 hours a week during any 12 consecutive weeks; (2) 48 hours during any given week; (3) ten hours a day; and (4) 220 hours of overtime a year (subject to the applicable CBA).

Overtime is defined as the hours worked in excess of the statutory weekly working hours. Only hours worked at the request of the employee's superior are regarded as overtime. However, the employer has the duty to ensure employees do not exceed the daily and weekly limits.

Employees are entitled to a minimum of five weeks' paid holiday per year. In addition, there are about ten public holidays every year. The law and CBAs grant additional paid leave for employees who have reached a specific length of service and for family related events.

Over the last few years, new regulations have been introduced to facilitate Sunday work and evening work, in particular for tourist and commercial zones. Sunday and evening work must first be validated through a company agreement and employees must remain free to choose whether to work these hours, for which they must be paid double.

## Trade unions

Under French employment law, the function of the trade unions is to defend the rights and moral and material interests of their members. However, French employment law offers wide powers to the so-called "representative" trade unions, i.e. those which are recognised as representing a group of employees, regardless of whether these employees are members of the trade union. The trade union may be represented at several levels (in the company, at regional level, national level, etc.).

Representative trade unions have wide powers. Most notably, they have the exclusive right to introduce candidates at the first round of voting for the staff representative bodies. In addition, they appoint a representative to be a member of the works council.

Elected staff representative bodies (works council, health and safety committee, group) also have important powers in companies with more than 50 employees: they must be informed and consulted prior to any significant project, and in relation to collective redundancies.

## Social insurance

Social security contributions in France are divided into employee contributions, which are deducted from salary, and employer contributions, which are not an element of remuneration and are payable by the employer in addition to remuneration.

Social security contributions are calculated by reference to the basic salary paid for work performed. Most allowances and other cash payments are subject to social security contributions as well as tips and certain benefits-in-kind for private use.

# Issues arising on termination of the employment relationship

## Business transfers

There is no legal requirement in France to inform every employee before a business transfer, but there is a legal requirement to inform and consult the works council (if one exists) before deciding on the transfer. However, in practice, employees commonly receive a brief letter advising them of the change of employer, in an attempt to achieve a seamless transition and build a relationship with the new entity.

An employee cannot object to a transfer, as the transfer takes effect automatically. A refusal could constitute grounds for dismissal for disciplinary reasons. This automatic transfer applies to all types of employment contracts (fixed term contracts, trial contracts, contracts suspended for illness, etc.).

Employees who enjoy a protected status (e.g. employee representatives) will also see their contract automatically transferred, and depending on the circumstances their representative role may carry over. However, when the transfer concerns only part of a business, their transfer must be authorised by the Labour Inspector.

## Terminating employment

In the case of an indefinite term employment contract, there must be real and serious grounds for dismissal. There are two types of valid grounds: personal grounds and economic grounds. Once the employer believes that there are valid grounds for dismissal, he must send a letter inviting the employee to a meeting, giving them at least five working days' notice. This letter must set out the time and place of the meeting and the employee's right to be accompanied by a fellow employee or an outside party.

In the case of dismissal on economic grounds, the employer must also make every effort to find employees facing redundancy another position in the same company or group, worldwide, before termination. It must also ensure that employees can adapt to their new role by way of training programmes.

Non-compliance with these rules may render the redundancy unfair. Since the Law no. 2013-504 of 14 June 2013, collective redundancy plans must also be authorised by the local Labour Administration, failing which subsequent terminations are deemed null and void.

Employees who are made redundant must be given priority for the subsequent one year period if their previous position, or a similar position, becomes vacant with their former employer.

Severance pay is only awarded if the employee has the minimum length of service required by the French Labour Code or the applicable CBA (typically one year). The amount of severance pay depends on the employee's length of service and the relevant CBA provisions.

Employees who are unfairly dismissed can challenge their dismissal before the Labour Tribunal. If the judges find the dismissal is unfair, they may grant compensation.

Employees are entitled to a minimum of six months' pay in compensation if the dismissal is deemed unfair provided they have worked for the employer for at least two years and the employer has more than 11 employees. Compensation is usually financial, but in the case of dismissals that are void, employees have a right of reinstatement. New guidelines for awarding unfair dismissal damages in France have recently been introduced.

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A nighttime photograph of a bridge with a large, illuminated arch structure over a river. In the background, the spires of a Gothic cathedral are visible against the dark sky. The bridge's arch is lit with warm yellow lights, and the river reflects the lights. The cathedral spires are also lit, with a cross visible on the central one.

# Germany

German labour and employment law is divided into two areas: individual employment law and collective labour law. Individual employment law concerns relations between the individual employee and their employer, while collective labour law regulates the collective representation and organisation of employees as well as the rights and obligations of employees' representatives. It is not consolidated into a single labour code: the main sources are Federal legislation, case law, collective bargaining agreements, works council agreements and individual employment contracts.

# Issues arising on hiring individuals

## **Immigration**

In principle, employees who are not German nationals and would like to work in Germany require a residence title and a work permit before entering Germany unless they are: (1) EU nationals or (2) nationals of a European Economic Area (EEA) member state (Iceland, Liechtenstein, Norway), or Switzerland.

## **Employment structuring and documentation**

The employer has a statutory obligation to provide the main contractual terms in writing to the employee no later than one month after their employment commences. The terms and conditions of employment are regulated principally by statute, employment contract, collective bargaining agreements and works council agreements.

Generally employment contracts are entered into for an unlimited period. A fixed-term contract is possible, provided the term is agreed in writing before the employment commences. A fixed-term employment relationship may also be justified on objective grounds, which are set out in statutory law (e.g. temporary increase in work volume, substitution of an employee during parental leave). If no objective grounds exist, fixed-term employment is limited to a maximum duration of two years, provided there was no previous employment contract with the same employer. A fixed-term contract ends automatically without written notice at the end of its term. If the employment continues after the fixed-term contract expires, the agreement is deemed to be for an indefinite period.

The employer and employee may agree to a probationary period, which is limited by law to a maximum of six months.

## **Foreign secondees**

The rights of employees who are only temporarily posted to work in Germany are generally determined by foreign labour law. However, to ensure fair competition and to protect the interests of employees in certain business sectors (including construction, commercial cleaning and postal services sectors) a number of working conditions apply including: (1) maximum work periods and minimum rest periods; (2) minimum paid annual leave entitlements; (3) minimum wage, including overtime (pursuant to the relevant collective bargaining agreement); (4) regulations on health, safety and hygiene at work; (5) maternity/parental leave and youth protection; and (6) antidiscrimination provisions including prohibitions on gender discrimination.

# Issues arising during the employment relationship

## Wages, annual leave and working time

The statutory national minimum wage (NMW) was raised to EUR 8.84 per hour on 1 January 2017. The NMW does not apply to employees under 18, trainees or interns. The rate of the NMW will be reviewed every two years by a commission representing both employers and trade unions.

Aside from the NMW, there are special regulations and collective bargaining agreements in certain sectors (e.g. the construction industry), most of which have a minimum wage. As of 1 January 2017, sector-specific minimum wages may not be lower than EUR 8.50 per hour.

As a general rule, remuneration is determined by mutual agreement. The salary is set out in the individual employment contract, either specifically or by reference to a collective bargaining agreement. In addition to the obligation to observe the NMW, a salary of less than two thirds of the relevant usual wage is contrary to public policy and such an agreement is generally considered to be void.

The statutory maximum working time is eight hours per day from Monday to Saturday. Working on Sundays and public holidays is generally not permitted, unless expressly allowed by legislation. The statutory maximum weekly working time limit is 48 hours.

Overtime pay is not expressly regulated by law but is subject to the employment agreement, collective bargaining agreements and works council agreements.

Employees who work a five day week have a statutory entitlement to 20 days' paid annual leave. However, it is more typical for employees to receive between 25 and 30 days' leave, depending on their seniority and the type of business.

## Trade unions

The formation, function and internal democratic structures of trade unions are protected by constitutional law. The main function of trade unions is to conclude collective bargaining agreements which can be done with either a single employer or an employers' association. Trade union representatives also support employees and works councils but do not have participation rights within a company.

Collective bargaining agreements have immediate and binding effect on the individual employment relationship in the same way that statutes do if one of the following requirements is met: (1) the employee is a member of the relevant trade union and the employer is a member of the relevant employers' association or concluded the collective bargaining agreement itself; (2) the Federal Ministry of Labour and Social Affairs has declared the collective bargaining agreement to be generally binding; or (3) the employment contract provides for the contractual application of a particular collective bargaining agreement.

## Social insurance

All salary payments are subject to tax and social security contributions (pension, unemployment, health, accident and nursing care insurance). These must be withheld from an employee's salary by the employer and paid to the respective institutions.

In general, the employer and the employee each pay half of the social security contributions. The employers' contributions are paid in addition to the agreed salary, calculated on the basis of the employee's gross salary, subject to a maximum amount. Contributions to the employee's accident insurance are made solely by employers.

# Issues arising on termination of the employment relationship

## **Business transfers**

Under German law, all of the transferor's employees automatically transfer to the transferee on their existing terms and conditions of employment. Before the transfer, each "affected employee" must be informed in writing about the transfer: the reasons, the background, the social and legal implications of the transfer and any "measures" planned by the transferee.

Employees are entitled to object to the transfer of their employment without giving reasons for their objection. In this case, their employment will continue with the transferor. If the transferor is no longer in a position to employ them, a dismissal for operational reasons may be socially justified.

## **Terminating employment**

Under German law, employment can be terminated by mutual consent, by expiry of a fixed-term contract or by notice given by one of the parties. To be legally effective, the notice and the termination agreement must be in writing. Notice given by the employer must be the original document in writing and signed by a legal representative of the employer. All other forms of notice (i.e. verbal notice, or notice given by email or fax) are void.

If the employer terminates the employment without having first informed and held a hearing of the works council (if there is one) as well as the representative body for severely disabled employees (when the employment of an individual with severe disabilities is terminated), the dismissal is also void. If the dismissal is void, the employee is entitled to reinstatement and continued remuneration.

Protection against dismissal is divided into general and special protection. Special protection is provided to employees who may be at greater risk of dismissal, such as disabled or pregnant employees and works council members. In such cases, the permission of relevant government authorities is required before terminating their employment contract.

The right to dismiss employees is substantially restricted by the German Act on Protection Against Unfair Dismissal. The Act applies if: (1) a business establishment generally has more than ten employees; and (2) the employee has worked in the same company or business establishment for six months without interruption. If the Act applies, a termination is justified only if it is based on reasons relating to: (1) the person; (2) their conduct; or (3) compelling operational requirements which preclude the continued employment of the employee in the establishment.

Severance payments are paid at the end of employment if: (1) the employment agreement provides for a contractual severance payment; (2) the parties agree on a severance payment (in or out of court); (3) the court dissolves the employment in return for a severance payment being made if it finds that, despite the termination being invalid, continued employment would be intolerable either for the employer or the employee; or (4) a social plan concluded with the works council in connection with a mass dismissal provides for severance payments. The following (non-binding) formula is often used to calculate severance payments: monthly gross salary multiplied by years of employment, multiplied by a factor of x (where x is generally a number between 0.5 and 1.5, but may be lower or higher, depending on the circumstances).

Due to the high level of protection against dismissal, it is not uncommon for the employment to be terminated by a termination agreement. This may occur at any time, with or without a severance payment. Statutory unfair dismissal protection does not apply in such cases.

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# Italy

Italian employment law has always been employee-friendly, reflecting the principles of the Italian constitution. However, the global economic downturn has forced Italian legislation to enhance flexibility in the job market and attract foreign investment. From 2015, new hirings have “gradual” protection directly linked to length of service. The remedy of reinstatement has practically disappeared except for some very specific cases.

Italy is currently experiencing important political, social and legal changes, and employment lawyers are witnessing first-hand how this impacts on businesses and their employees. Italian employment law was overhauled by the “Jobs Act” which made important changes to the entire system of employment contracts.

# Issues arising on hiring individuals

## Immigration

Italy does not have specific immigration rules regarding the hiring of European Union (EU) citizens as they can move and work in every EU country without limitation.

In contrast, non-EU citizens are subject to immigration control. Visas and different work permits are necessary in the following situations:

- Hiring non-EU citizens: non-EU citizens cannot work in Italy without a work permit. The Italian Government sets an annual limit (quota) on the number of permits issued. Those wishing to work in Italy must follow a specific immigration procedure, which includes compliance with the limitation of the annual quotas. Provided the annual quotas have not been exceeded, a non-EU citizen must request a work visa, provided they already have an offer to work in Italy
- Secondments of non-EU citizens: working in Italy under a secondment arrangement is not subject to annual quota limitations and authorisation can be obtained by following a simplified procedure
- Under Legislative Decree no. 136/2016, the Italian legislator has regulated international secondments in Italy in line with the new European Directive. The aim of this Decree is to identify bogus international secondments by improving cooperation and information at international level and by imposing a duty of transparency and communication on companies

## Employment structuring and documentation

In line with a European Directive, the following information concerning the main terms and conditions of employment must be set out in writing in the employment contract, and provided to the employee within 30 days of the commencement of their employment: (1) the parties; (2) the start date and the duration of any trial period; (3) the date of expiry, if the employment is for a fixed term (where these contracts are permitted by law); (4) the salary, method for calculation, frequency of payment, and any particular term or condition relating to the salary and fringe benefits; (5) working hours; (6) annual entitlement to paid holiday; and (7) the employee's duties and the applicable work "category" as set out in the Civil Code.

Generally employment contracts are entered into for an unlimited period. A fixed-term contract is possible for a maximum period of three years and ends automatically without written notice at the end of its term.

Under Legislative Decree no. 81/2015, it is no longer possible to sign new project based contracts. All collaborative relationships characterised by continuous performance of the job by the worker and by the employer organising and coordinating the work, must be considered as subordinate employment relationships.

Employment contracts can provide for a trial (probationary) period. During this period, each party is free to terminate the contract without notice and without payment in lieu of notice. Usually the specific duration of the trial period is set by the applicable collective bargaining agreements.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

Salary is usually paid at the end of the working month, as established in the company policies or by the collective agreements, with the employer deducting all applicable social security contributions and withholding taxes.

The salary paid to employees must be stated in a pay slip (produced by the employer or by a third party on the employer's behalf) which must include the period of service to which the salary relates, the amount and value of any overtime, together with all the elements making up the sum paid as well as all deductions made in accordance with Italian law. Moreover, in addition to the usual 12 monthly payments, Italian law provides for one annual 13th payment, usually one month's pay, to be made at Christmas time. Furthermore, collective agreements or even individual contracts may provide for a 14th payment, usually paid in July.

The maximum length of the working week is established by collective agreement. However, the average weekly working time cannot exceed 48 hours, inclusive of overtime. Average working time must be calculated over a period of four months however, the applicable collective agreement can extend that term for objective, technical or organisational reasons.

The needs of a particular company may, in exceptional circumstances or on an occasional basis, require employees to work beyond their usual working hours. Overtime is regulated by law and by the applicable collective agreement. Article S of Legislative Decree 66/2003 provides that normally the collective agreement governs the conditions for performing overtime work and that, in the absence of any provisions of the collective agreement, overtime is only permitted to a maximum of 250 hours per year, provided both employer and employee agree.

Legislative Decree 66/2003 provides for a minimum of four weeks' holidays per year, but the applicable collective agreement may provide a more generous holiday allowance.

## **Trade unions**

Unions are free to regulate their internal activities as they deem appropriate. Legally, collective agreements only bind individuals who are actually members of the union that is a signatory to the agreement. Like all private law contracts, only the signatories are bound and, therefore, only those employers and workers who have specifically given a mandate to an employers' association or a union to represent them may benefit from the collective agreement concluded on their behalf. Although this is the legal rule, in practice, once a collective agreement is concluded, even non-union members typically accept its terms.

## **Social insurance**

Both employers and employees are required to pay social security contributions. Receipt of pension benefits is contingent on payment of the social security required to be paid by law. For employees, pensions are either linked to the amount of contributions paid as a percentage of the employee's overall salary during their entire working life, or to their age.

# Issues arising on termination of the employment relationship

## Business transfers

Article 2112 of the Italian Civil Code provides employees with a high degree of protection in the context of the transfer of an undertaking. These protections include, for example: (1) the automatic transfer of employees along with their employment contracts to the transferee; and (2) joint liability on the part of the transferor and the transferee for all outstanding benefits accrued to employees at the time of the transfer (unless the transferor is released from its obligations by the employees).

## Terminating employment

Under Italian law, any termination of employment must be justified. Justifiable reasons for terminating an employment contract can be divided into three main categories (1) objective justified reasons - these relate to job losses caused by the employer's economic situation for reasons relating to production, work organisation, or proper functioning; (2) subjective justified reasons - these occur when the employee commits any breach of their contractual obligations or is guilty of negligence in the performance of their duties, but the behaviour is not so serious as to constitute a dismissal for just cause; or (3) just cause - this indicates any serious misconduct or breach that renders the continuation of the employment impossible, including theft, riot, serious insubordination, and any other behaviour that seriously undermines the fiduciary relationship with the employer.

Notice of dismissal must be in writing and must detail the reasons on which it is based. Indeed, under the system introduced by the Fornero Reform, the grounds of dismissal must be given in the termination letter: failure to do so renders the termination invalid.

For the first time in our legal system, in a recent Court Ruling (25201/2016), the Court of Cassation stated that it was possible to fairly dismiss an employee due to economic reasons and in order to increase profitability. In fact, article 41 of Italian Constitution states that an entrepreneur is free (and it is lawful) to take decisions in order to make his Company more efficient and profitable, without interference from a judge.

Italian law provides for the payment of a deferred form of remuneration, otherwise known as a severance payment ("Trattamento di Fine Rapporto" (TFR)). Along with other minor statutory termination payments, the TFR must be paid to employees whenever an employment contract is terminated, irrespective of the cause of termination. The amount of the TFR varies depending on the employee's salary and length of service.

Any dismissed employee may bring legal action if they consider that their dismissal was not properly justified. The action before the labour court must be preceded by an out-of-court appeal against the dismissal (within 60 days of the dismissal).

Historically, the sole remedy for unfair or wrongful dismissal was reinstatement. However, for employees hired after 7 March 2015, under Legislative Decree no. 23/2015, the remedy of reinstatement has practically disappeared and has been replaced by an award of damages, calculated on the basis of the employee's length of service. For those employees, the remedy of reinstatement will apply only in very limited circumstances, namely:

- Dismissals which are null and void because they were for discriminatory or retaliatory reasons, during maternity leave, because of marriage, or other reasons specifically provided by law
- Dismissals which were not given in writing
- Dismissals on the grounds of justified subjective reasons or just cause where the facts on which the dismissals are based are found to be non-existent, regardless of any evaluation of their seriousness

The employee is entitled to resign giving the notice set out in the collective agreement as applicable to their particular employment. An employee may resign without notice for just cause, and will be entitled to payment in lieu of notice plus damages for consequential loss.

In 2016, a new electronic procedure was introduced for effecting resignations and terminations of employment relationships by mutual consent: the employee must file the resignation or mutual termination online on the National Institute of Social Security Contributions website. The form must be submitted to the employer and to the competent Local Labour Office ("Direzione Territoriale del Lavoro") and can be revoked within 7 days.

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# Luxembourg

The labour market in Luxembourg is characterised by the number of commuters from Belgium, France and Germany, which represents over 50% of the labour force. In Luxembourg, the social peace is of utmost importance and normally secured by regular dialogue between social partners. Due to the codification of employment laws over the last few years, Luxembourg labour law is increasing in volume. Examples include recent simplification Act reforming staff representatives in Luxembourg and a bill reforming parental leave which is currently in discussion in the Chamber of Deputies.

# Issues arising on hiring individuals

## **Immigration**

A third-country national (i.e. a non-EU/EEA national) who wishes to work in Luxembourg must apply for a stay permit (serving as a work permit) from the Immigration Directorate of the Ministry of Foreign and European Affairs.

The types of stay permits for which a third-country national can apply are principally:

- Work permits for a job for less than three months
- Work permits for a highly qualified employee for a job for over three months

After five years' residence, these individuals may apply for long-term resident status.

## **Employment structuring and documentation**

The employment contract is individual and must be in writing from the start of the employment. Only the employee has the right to establish the existence of the contract by any means, in the event no written employment contract exists. Employment contracts concluded verbally are automatically deemed to be permanent employment contracts.

The standard contract in Luxembourg is for an indefinite term. A fixed-term contract is only permitted for carrying out a specific type of work over a defined period of time. The duration of fixed-term contracts cannot exceed 24 months including the possibility of two renewals. If a compulsory element of a fixed-term contract is not included, it is deemed an indefinite employment contract.

An agreed trial (or probationary) period may be written in both indefinite and fixed-term contracts. The general principle is that the trial period cannot be less than two weeks and not more than six months, depending on the qualification of the employee. Neither party can terminate the employment during the first two weeks of the trial period.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

Parties are free to negotiate the employee's basic salary, but they must respect the minimum social wage which applies to all employees in Luxembourg. The applicable minimum wage varies according to the professional qualification of the employee and according to an index.

The current minimum wage is: EUR 1,922.96 for non-qualified workers, and EUR 2,307.56 for qualified workers.

Even if it is not required for the employer, it is common to provide the employee with benefits in addition to the basic salary such as luncheon vouchers or additional health insurance, depending on the employee's position.

Standard working time is limited to 8 hours per day and 40 hours per week, excluding higher-ranking employees (senior executives). The maximum limit for a working day is 10 hours and 48 hours for a working week. A rest period of 11 hours every 24 hours and of 44 hours for every 7 day period must be respected. In addition, collective bargaining agreements may provide for other (longer) breaks.

In Luxembourg, overtime is strictly regulated by law and is only permitted with prior authorisation from or notification to the Minister for Employment. Where permitted, overtime is limited to two hours per day and the total working hours per week must not exceed 48 hours. For any overtime worked, employees are entitled to compensation in the form of salary or leave.

Each employee benefits from a minimum of 25 days paid leave per year. Some collective bargaining agreements provide for more holidays (for example in the banking and insurance sectors). In addition, there are 10 statutory public holidays established by the Labour Code.

## **Trade unions**

The right of workers to strike is implicitly guaranteed by the Constitution under the freedom of association but is only possible under specific conditions. A peace obligation exists for the duration of a collective labour agreement. Moreover, to be legal, every strike or lockout movement must first be referred to the National Office of Conciliation

## **Social insurance**

The Luxembourg social security system has been codified into a single unified system, with two national healthcare and pension insurance administrative units, and a central administrative unit in charge of data processing, membership records and contributions of all affiliates to the various schemes.

The rates of contributions apply to compensation and earnings up to a maximum of five times the applicable minimum social wage. The employee's and employer's contributions are the same (approximately 3.05% for sickness and maternity and 8% for retirement).

The healthcare insurance provides reimbursement of medical costs and compensation for sick leave, maternity leave, adoption leave, leave for family reasons etc. The pension insurance allocates statutory pensions to its affiliates and grants loans for construction or renovation. Invalid pensions are also envisaged in Luxembourg law. Accident insurance is financed by employer's contributions.

The normal old age pension is generally granted at the minimum retirement age of 65, provided a 120 month contributory period of compulsory, voluntary or elective insurance or purchase periods has been completed. However, there are exceptions to this minimum retirement age where the worker can retire at the age of 57 or 60 under certain conditions.

# Issues arising on termination of the employment relationship

## Business transfers

In the event of a business transfer, all employees' rights and duties arising from the employment relationship with the seller that existed on the date of the transfer are automatically transferred to the buyer. After the transfer of an undertaking, employees are protected against the termination or the unilateral modification of their employment contracts for economic reasons for a period of two years (such protection could be provided for in a collective bargaining agreement).

The buyer assumes all rights and obligations arising under the employment relationship with the seller. In addition, if a collective agreement remains applicable, the terms of employment can only be modified after the collective agreement expires.

## Terminating employment

The collective redundancy procedure must be applied by an employer who intends to dismiss at least 7 employees, for reasons that have nothing to do with the employees' attitude at work, over a period of 30 days, or at least 15 employees over a period of 90 days.

**Dismissals with notice:** A preliminary interview to discuss the reasons for the planned dismissal with the employee is required for employers who employ 150 persons or more. This invitation has to be sent to the employee by registered mail or handed to them, together with an acknowledgement of receipt.

The length of the notice period depends on the employee's length of service, from 2 to 6 months' notice for the employer and half that period for the employee.

**Dismissals with immediate effect:** Employers may terminate the employment contract with immediate effect if the employee's actions or behaviour qualify as gross misconduct (faute grave).

Employers must pay a legal severance payment to any employee dismissed with notice if they have at least 5 years' service. Entitlement to severance pay depends on the employee's length of continuous service with the same employer and can amount to a maximum of one year's salary. This payment becomes due when the notice period expires.

Severance payments do not have to be made in the case of termination for gross misconduct.

A large number of settlement agreements are concluded in Luxembourg in order to avoid a court claim. The standard provisions for settlement agreements are that they must be concluded in writing and the agreement must be reached with mutual concessions made by each party. The mutual concessions should be detailed comprehensively and precisely. Any other provisions are normally freely negotiable and included by mutual consent between the employer and the employee.

If an employee considers their termination is unfair, they can bring a claim in the Luxembourg labour courts for moral and material damages to cover financial loss.

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# The Netherlands

Dutch employment and labour law is elaborate and relatively complex. Dutch employment law is divided into individual and collective law and is closely related to social security law. Substantial and fundamental changes were made to Dutch employment and labour laws in 2015, including the introduction of stricter requirements for dismissals. These stricter requirements seem to have led to more settlement agreements being used.

# Issues arising on hiring individuals

## **Immigration**

If the employer wants to hire a foreign employee, the employee must have a residence permit that authorises him/her to work. The employer may also obtain a work permit and/or residence permit on behalf of the employee.

Employees who are Dutch nationals or who are from one of the countries of the European Economic Area (other than Croatia) are exempt from these rules.

## **Employment structuring and documentation**

Under Dutch law, an employment contract may be concluded verbally or in writing. Under the Dutch Civil Code, the employer will nonetheless need to inform the employee in writing of (among other things): (1) the name and residence of the parties; (2) the place where the work is to be carried out; (3) the position; (4) the date employment commences; (5) if the employment contract is for a fixed period of time, the time period; (6) the salary and the payment intervals and, if payment is dependent on work being performed, the amount of work to be performed per day or per week, the price per item and the time that will be involved in performing the work, etc.

An employment contract can be agreed for a fixed period (fixed-term contract) or for an unspecified period of time (an indefinite or permanent contract). An employer is allowed to offer an employee three consecutive fixed-term contracts (with intervals not exceeding six months) in a period of 24 months. If there is a fourth contract or if the period of 24 months is exceeded, the contract will become an indefinite contract by operation of law.

A probationary period must be laid down in writing. In the case of both an employment contract for an indefinite period and for a fixed period of two or more years, the maximum probationary period is two months. In other cases, the maximum probationary period is one month. A probationary period is not allowed in an employment contract for a fixed period of six months or less.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

In principle, employer and employee are free to agree the employee's wages. However, the Act on Minimum Wages and Minimum Holiday Allowances contains certain minimum wages and minimum holiday allowances, which are normally adjusted twice a year. A Collective Bargaining Agreement (CBA) may also contain salary scales that are binding on individual employees.

The amount of working hours depends on the industry and the kind of work performed. In general, an employee is only allowed to work a maximum of 12 hours per day, for a maximum of 60 hours per week. Over a period of four weeks the average maximum number of working hours is 55 per week. Over a period of 16 weeks the average maximum number of working hours is 48 hours per week. Provisions on working hours in an individual employment contract which do not conform to the Working Hours Act may be null and void.

Employees are entitled to a statutory minimum number of days' annual leave, equivalent to four times their weekly working hours. In other words, a full-time employee is entitled to a statutory minimum of 20 days' leave per year.

## **Trade unions**

Trade unions play an important part in collective dismissals (where there are 20 or more dismissals within three months). Under the Collective Redundancy Notification Act employers must inform the unions when they report their intention to implement collective dismissals to the Work Placement Branch of the Employee Insurance Agency. Failure to follow the rules under the Act may lead to the dismissals being void. After the report has been made, the employer and the trade unions discuss the possibility of avoiding collective dismissals or of reducing the number of employees to be dismissed, as well as the possibility of alleviating the consequences of dismissal. To that end, in most cases a social plan (i.e. termination package) is negotiated, including the statutory transitional payment (see below) or an equivalent provision (in the event that the social plan has a CBA status).

## **Social insurance**

The Dutch social security rules can be subdivided into social insurance benefits (sociale verzekeringen) and social welfare benefits (sociale voorzieningen). The difference between these two is in the funding. Social insurance is funded by compulsory contributions paid by employees and employers. All employees are automatically insured. Social welfare benefits are financed from central government funds.

# Issues arising on termination of the employment relationship

## Business transfers

The employer must consult with the works council (or another employee representative body) about a proposed decision regarding the transfer of activities. The employer must provide the works council or employee representative body with information about the basis for the proposed decision, the consequences for employees, and the proposed “measures” to be taken to alleviate the consequences for employees. The employer must also inform the individual employees about the transfer and the consequences for those employees.

Under Dutch law, in the case of a transfer of undertaking, all of the transferor’s employees automatically transfer, to the transferee on their existing terms and conditions of employment. For one year after the transfer, the transferor and transferee are jointly and severally liable for the obligations under the employment contracts insofar as these obligations accrued before the transfer.

## Terminating employment

A fixed-term employment contract or a contract for a specific project will end by operation of law on expiry of the term or completion of the project without notice being given. However, for employment contracts that have a fixed-term of six months or more, the employer must notify the employee one month before the term ends whether the employment contract will be extended and, if so, on what terms. If the employer fails to do so, they will owe the employee compensation equal to one month’s salary. If the employer does give notice but does so too late, the employer will owe the proportionate part of that compensation (i.e. for the days on which the notification was late). It is possible to give notice in advance, at the time the contract is entered into, that the contract will not be extended.

An open-ended employment contract can be terminated by: (1) the employer giving notice after receiving permission from a government organisation; (2) court proceedings; (3) mutual consent; (4) dismissal because of an urgent reason; or (5) notice by the employee.

The employer must either ask the Employee Insurance Agency (UWV) for permission to terminate an employment contract (other than summary dismissal or dismissal during a trial period and specific categories of employees for which an exception can be made) or must start legal proceedings to set aside the employment contract at the sub-district court. This involves what is known as the preventive review for the intended dismissal of the employee.

The law determines which dismissal route to follow, depending on the grounds for dismissal. Employers must apply for permission to give notice at the Employee Insurance Agency, in the case of business-economic grounds (i.e. jobs becoming redundant) and long-term incapacity for work. For all other grounds, the employer must go to the sub-district court.

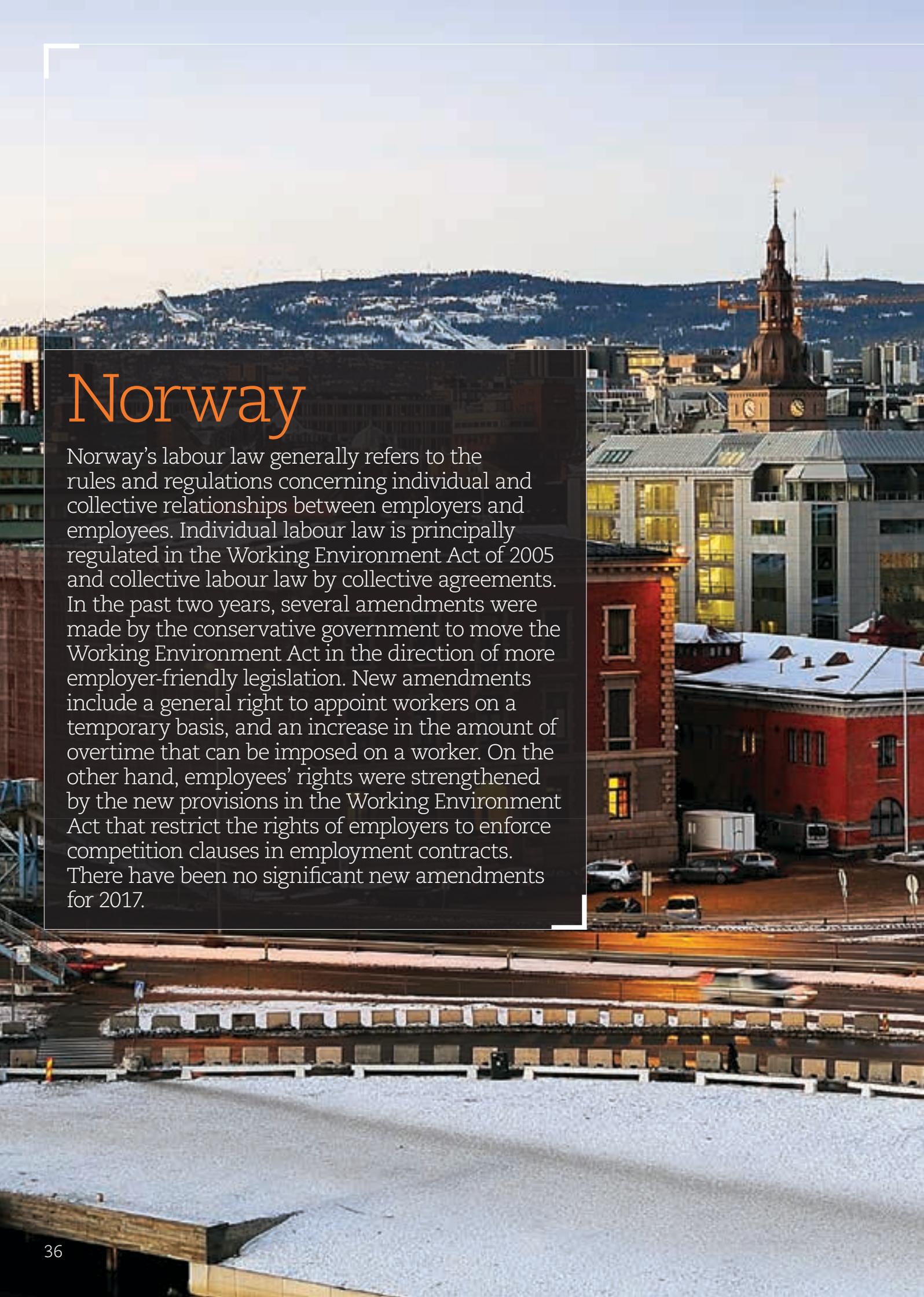
Terminating or setting aside the employment contract is possible only if there is: (1) a reasonable ground for dismissal and 2) reassignment within a reasonable period is not possible or is not appropriate, with or without training. There is an exhaustive list of the reasonable grounds for dismissal. Every ground, in accordance with the intention of the legislature, is strictly assessed by the Employee Insurance Agency or the sub-district court.

The employer and employee may appeal against the decision of the sub-district court, firstly to the Court of Appeal and then to the Supreme Court. They may also appeal against the decision of the Employee Insurance Agency, firstly to the sub-district court, then to the Court of Appeal and then to the Supreme Court. The employee may ask to be reinstated or alternatively may ask for fair compensation on appeal. If the first request for termination is denied, the employer may again ask to terminate the employment relationship at the sub-district court (against a decision of the Employee Insurance Agency), the Court of Appeal, and then at the Supreme Court.

In July 2015, the statutory transitional payment was introduced. Every employee is entitled to this payment if their employment contract is terminated (even by operation of law) and they have at least 24 months’ service, subject to a few exceptions (including dismissal for urgent cause). The payment amounts to roughly one-third of a month’s salary for each year of service.

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# Norway

Norway's labour law generally refers to the rules and regulations concerning individual and collective relationships between employers and employees. Individual labour law is principally regulated in the Working Environment Act of 2005 and collective labour law by collective agreements. In the past two years, several amendments were made by the conservative government to move the Working Environment Act in the direction of more employer-friendly legislation. New amendments include a general right to appoint workers on a temporary basis, and an increase in the amount of overtime that can be imposed on a worker. On the other hand, employees' rights were strengthened by the new provisions in the Working Environment Act that restrict the rights of employers to enforce competition clauses in employment contracts. There have been no significant new amendments for 2017.

# Issues arising on hiring individuals

## **Immigration**

Foreign employees from outside the EU/EEA/EFTA area, including self-employed individuals, must hold a residence permit with the right to work in Norway. There are different types of permits, depending on whether the individual is a skilled worker, an unskilled worker (such as seasonal workers and seafarers on board foreign ships), a specialist, a student, a researcher, etc.

A residence permit can be obtained from the Foreign Service Mission or the Norwegian Directorate of Immigration.

## **Employment structuring and documentation**

The Working Environment Act requires employment contracts to be in writing. The contract must (at a minimum) contain the following elements: (1) names of the parties; (2) place where the services will be performed; (3) professional group or sector; (4) date of commencement; (5) estimate of the duration of employment for temporary contracts; (6) trial period; (7) number of days' annual leave and holiday pay; (8) notice periods; (9) wage and wage payment procedures and additional remuneration and benefits, if any; (10) the agreed daily and weekly working hours; (11) length of breaks; (12) working time arrangements; and (13) applicable collective agreement.

The primary rule is that employees should be hired on a permanent basis. However, temporary employment may be agreed in certain situations stipulated by law. For example, if the work is: of a temporary nature; as a temporary replacement for another person or persons; as a trainee; or with athletes, trainers, referees and other leaders within organised sports. Since 2015, employers may also hire an employee on a fixed-term contract for up to 12 months. Certain restrictions apply to this including that the number of employees on fixed-term contracts may not exceed 15% of the total workforce within an undertaking. Furthermore, a quarantine period of 12 months applies after the fixed-term contract expires. This means that the undertaking cannot hire any other employee on a fixed-term contract to do the same type of work before 12 months after the fixed-term contract has expired. The undertaking may however, hire an employee on a permanent basis to do the same work, or hire an employee on a fixed-term contract on other grounds (i.e. as a substitute for another employee doing different work).

If the requirements for temporary employment are not met, the employee will be considered a permanent employee.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

There are no statutory regulations concerning minimum wages. However, wage levels and minimum wages are usually laid down in collective bargaining agreements. If the employment contract is subject to a collective bargaining agreement (CBA), the provisions of the CBA apply to salary as well as to work and recruitment conditions.

Changes have been made to the regulations on the average calculation of working hours, overtime work and Sunday work. The amendments make it possible for employers and employees to reach agreements regarding the average calculation of working hours without the involvement of unions or the Labour Inspection Authority

Normal working hours should not exceed nine hours in a 24 hour period, and 40 hours over seven days. However, for certain groups, such as shift workers, the normal working hours are less. Employers and employees can agree the maximum normal working hours calculated as an average over a maximum period of 52 weeks, but with a limit of ten ordinary hours in 24 hours, and 48 hours work in seven days. Other arrangements can also be reached through agreement between the employer and the employees' elected representatives, in undertakings bound by a collective pay agreement or with the consent of the Labour Inspection Authority.

Overtime is only permitted when there is an exceptional and time-limited need for it. Overtime must not exceed 12 hours over seven days, 30 hours over four consecutive weeks, and 200 hours during a period of 52 weeks. However, overtime hours can be extended by the same mechanisms as normal working hours.

Employees must receive extra pay for overtime, at least 40% more than what they earn during regular working hours.

Minimum holiday rights for employees are outlined in the Holiday Act, which grants employees a minimum of 25 working days' annual leave per year. The term "working days" includes Saturdays. Employees over 60 years of age are entitled to an additional six working days' annual leave.

## **Trade unions**

Under the Labour Disputes Act, a union is defined as "any association of workers or workers' associations when the association has the purpose and interests of promoting workers' interests to their employers." There is no requirement that the union has its own statutes, or board etc. A union is, however, often a member of a larger association or confederation.

Trade unions' rights are regulated by the Labour Disputes Act. Generally, trade unions have the right to enter into collective agreements. Collective bargaining agreements between employees' and employers' organisations are usually negotiated every two years.

## **Social insurance**

Individuals who work or are resident, in Norway are obliged to be members of and to pay contributions to the Social Security Scheme. Employers have to pay social security contributions on wages and other remuneration. The obligation to pay employer's social security contributions can apply even if the employer is not engaged in activity in Norway and even if the employee is not liable to pay tax in Norway.

# Issues arising on termination of the employment relationship

## Business transfers

The Working Environment Act protects employees' rights in the event of a transfer of an undertaking. It applies if the undertaking is an "autonomous entity which retains its identity after the transfer".

The rights and obligations of the transferor, arising out of the contract of employment or employment relationships in force on the date of the transfer, transfer to the transferee.

The transferee is also bound by any collective pay agreement that was binding on the transferor. This does not apply if, within three weeks of the date of the transfer, the transferee notifies the trade union in writing that it does not wish to be bound. However, the transferred employees have the right to retain their individual working conditions that follow from a collective pay agreement that was binding on the transferor. This applies until the collective pay agreement expires or until a new one is concluded that is binding on the transferee and the transferred employees.

## Terminating employment

The Working Environment Act provides that a dismissal must be objectively justified on the basis of circumstances relating to the operation of the business, the employer or the employee.

Norwegian employment legislation does not specify or indicate by way of example what kind of conduct on the part of the employee is sufficient to justify dismissal. This must be determined on the basis of a consideration of all of the circumstances of the case. An employer can assert different reasons for dismissals based on the employee's breach of contractual terms and conditions, such as poor performance, misconduct, absence, etc.

In individual dismissals based on the employee's conduct, there is no statutory obligation to give a written warning or to consider other suitable available work for the employee, but these are circumstances that are often taken into account in considering whether the dismissal was justified.

There is no statutory right to severance pay in Norway. The only payment that the employee is entitled to is payment during the notice period in accordance with the terms of employment.

Since 1 January 2016, competition clauses, which protect an employer's business after the termination of employment, are regulated by a new provision in the Working Environment Act (section 14A). The effect of the new provision is that competition clauses are only valid if they are in writing and can only be enforced to the extent necessary to protect the employer's trade secrets and know-how. Furthermore, a competition clause is only valid for a period of up to one year after the employment contract is terminated. However, the competition clause cannot be enforced if the employment contract was terminated by the employer for reasons not related to the employee. Should the employer decide to enforce the competition clause, the employee is entitled to financial compensation which is equivalent to regular salary, with a cap of NOK 740 608. Therefore, employees who earn up to NOK 740 608 will receive full compensation. For income earned in excess of NOK 740 608, the employee should be paid a minimum of 70% compensation.

The current limit on termination of employment on account of age is 72 years. This means that an employment contract can be terminated when the employee turns 72 years old, without any further reason. However, undertakings may set a company-specific age limit of 70 years which will be valid if the limit is made known to employees, is practiced consistently by the employer and employees are entitled to a satisfactory pension scheme.

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# Poland

Poland is well known for its low personnel costs. Due to this fact, it is currently Europe's main outsourcing hub, with companies such as Amazon, General Motors, Dell and various major banks moving plants and shared service centres to Poland. Easy access to qualified employees results from a state-paid university system, which produces many highly specialised and innovative workers, especially in the field of IT, engineering, and investment industry (KYC) and accounting.

# Issues arising on hiring individuals

## **Immigration**

The current regulations on employing foreigners in Poland differentiate between citizens of EU member states and other countries. There are also differences depending on the type of work performed by a foreigner. In the case of some professions, a permit is not required, while for other professions, simplified procedures apply.

Foreigners from EU member states and from states within the European Economic Area as well as their family members have unlimited access to employment within Poland. Foreigners from other countries must obtain a work permit and an entry visa if they want to work in Poland.

As a rule, it is the employer, rather than the non-EU citizen, who must obtain a permit. Most importantly, work permits are required for employees of foreign companies seconded to work for a term longer than 30 days in a six month period (with certain exceptions). Work permits are granted for a maximum 3 year period (with exemptions) but can be renewed.

## **Employment structuring and documentation**

The most typical type of contract is the unlimited-term contract. Recently, however, there has been a trend to depart from this form of employment toward fixed-term contracts or agreements in civil law. A fixed-term employment contract terminates either on an agreed calendar date or on the date of a particular defined event in the future.

From 2016, amendments to the regulations on fixed-term employment contracts came into force as a result of the ruling of the Court of Justice of the European Union on 13 March 2015 stating that notice periods in fixed-term contracts constitute “employment conditions” and as such should not be subject to different treatment solely on the basis of the term of the contract.

As a result, amendments regarding the lifting of differences between the status of employees hired for a fixed-term and for an indefinite term have been introduced. Furthermore, a 33-month maximum period for fixed-term contracts has been introduced.

Regardless of its type, the employment contract should define the parties to it, the type of contract that it is, the date of its conclusion and the conditions of work and remuneration, in particular the kind of work, the work location, the remuneration (reflecting the type of work performed and the individual components of the remuneration), working time, and the date of commencement of work.

The employment contract should be concluded in writing. If not, then on the employee's start date at the latest, the employer should confirm in writing to the employee; the parties to the contract, its type; and the terms and conditions before the employee is allowed to work. In addition, the employer must notify the employee in writing about certain other terms relating to pay (as indicated in the Labour Code) within seven days of entering into the employment agreement. All changes to terms and conditions, including pay, must be in writing.

# Issues arising during the employment relationship

## Wages, annual leave and working time

The employee's remuneration is determined by reference to the employment contract. The most popular and important criteria for determining salary include the type of work to be carried out and the qualifications required to perform the work and the quantity and quality thereof. However, employees have a guaranteed minimum wage, which is set pursuant to the principles and the procedure provided for in the Act on Minimum Wage. If, however, a higher minimum salary has been set in collective labour agreements or the remuneration rules and procedures, then the employer is obligated to respect such agreements instead of the Act.

Certain working time regulations have been amended, including a wide acceptance of using settlement periods up to 12 months.

Working time may not exceed eight hours a day and 40 hours in an average five-day working week over an agreed reference period, which does not exceed four months. Now, working time regulations also allow an employee to work on Sundays and public holidays if such work involves the transmission of electronic data to a recipient in a country where the relevant days are working days. The employer must give the employee another day off work in lieu.

This means that a normal week always has an average character and its character may vary depending on the system and organization of the working time. The Labour Code in certain circumstances allows the reference period and the working time per day to be shortened or extended. The weekly working time (including overtime) may not, however, exceed an average 48 hours per week over the agreed reference period.

Overtime is only permitted in two situations: if it is necessary to conduct a rescue mission to protect human life or health, to protect property or the environment, or to remove a breakdown; or in the event of an employer's special needs. It is the employer which assesses whether it has special needs which justify overtime.

Employees are entitled to annual, uninterrupted, paid leave of up to 20 or 26 days, depending on the number of years worked. Annual leave is granted on the days which are the employee's working days. At the employee's request, their leave may be divided into parts. However, at least one portion of the holiday leave should last not less than 14 consecutive calendar days.

From 2 January 2016, parental leave can be taken for an additional 32 weeks (when giving birth to one child at one birth) or 34 weeks (when giving birth to two (or more) children at one birth), after 20 weeks' maternity leave and may be used by either parent. The parent on parental leave will receive 60% or 80% of their basic allowance. The rate depends on the amount of allowance received during maternity leave - if it is 100%, then the parent on parental leave receives 60% of their basic allowance, and if it is 80%, they receive 80% of their basic allowance.

Employees are entitled to remuneration for annual leave which they would have received had they been working.

## Trade unions

The essence of the right to freedom of association is an unrestricted right to establish trade unions and to join such organisations.

The structure of trade unions in Poland is defined by Statute and they have a separate legal personality. Trade unions represent employees and protect their dignity, rights and material and moral interests, both collective and individual. They also have a right to represent employees' interests internationally. Trade unions participate together in creating advantageous conditions for work, life and rest.

The special character of trade unions results from the fact that they were granted the right to negotiate and conclude collective labour agreements and other settlement agreements.

## Social insurance

The principles of social insurance coverage and the rules relating to social insurance contributions are regulated in the Act on Social Insurance System, under which the employees are subject to mandatory pension, disability, health and accident insurance. The total contribution for each individual insurance type is calculated on the basis of the employee's remuneration and is deducted by the employer to be paid to the Social Insurance Agency.

# Issues arising on termination of the employment relationship

## **Business transfers**

The position of employees employed in an entity which is transferred to another employer in its entirety or in part is set out in the Labour Code, which provides that their employment relationship transfers to the new entity. Consequently, it steps into the shoes of the former employer and acquires any and all rights resulting from the employment relationship with the previous employer and all obligations to which the previous employer was subject. The employees preserve with the new employer, the rights they were entitled to prior to the business transfer, and they are bound by the same duties which they had towards the previous employer.

## **Terminating employment**

An employment contract can only be terminated on the grounds listed in the Labour Code collective labour agreements and employment contracts cannot specify alternative grounds for termination. Under the Labour Code, employment contracts can only be effectively terminated: (1) under a settlement agreement between the parties; (2) by a unilateral statement by either party honouring the notice period (termination on notice); (3) by a unilateral statement by either party without honouring the notice period (termination without notice); (4) on the expiry of the term for which the employment agreement was concluded.

Terminating an employment contract without notice is a unilateral statement of will made by one party to the other, which immediately terminates the employment relationship. The Labour Code lists three reasons for an immediate termination where the employee is at fault. The list is exhaustive.

Where employment is terminated as part of a group dismissal or if there is an individual dismissal for reasons which do not relate to the employee personally, then if the employer employs at least 20 employees, the employee is entitled to a severance payment, which is calculated by reference to the employee's length of service and their salary.

An employee who considers that their employment was terminated in a manner that is in breach of the current provisions of the law or that was unjustified can file an appeal with a labour court.

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# Romania

In Romania, over the last 20 years, employment legislation has been constantly changing as a result of government reforms. Nevertheless, the legislation provides a wide range of protection for employees. Romanian employment legislation is principally governed by the Labour Code and Social Dialogue Law. There are also special provisions on employment health and safety and insurance for accidents at work and industrial diseases.



# Issues arising on hiring individuals

## **Immigration**

In Romania, citizens of the EU or of the EEA do not need a work or residence permit. Foreign citizens (who are not EU or EEA citizens) must obtain a work permit to work in Romania. Work permits are issued by the Romanian Office for Immigration. As a rule, work permits are issued for a one year period. The number of work permits issued every year is limited and the number issued is determined by the government. For 2016, the number of work permits that could have been issued was limited to 5,500.

## **Employment structuring and documentation**

Individual employment contracts are usually unlimited term contracts, but the employment relationship can also exist for fixed-term and part-time contracts.

According to the Romanian Labour Code, any kind of individual employment contract must be in writing (this condition affects the validity of the contract), in the

Romanian language as a result of both parties' consent. Before the employment relationship commences, the employer must finalise the terms of the employment contract and register it with its employees' electronic program (ReGeS). Employers that do not register individual employment contracts will be subject to financial sanctions.

Before finalising the terms, or amending the terms of an individual employment contract, the employer must inform the person offered employment or the employee, about the essential clauses to be included in the contract or to be amended, as the case may be. The minimum content for the initial offer is stated by law.

Employment contracts for both a fixed or indefinite (unlimited) term may contain a probationary period clause.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

The current minimum gross base monthly wage is RON 1,250 for all full-time employees. The minimum gross monthly wage is currently RON 1,450.

The maximum average working time is 40 hours per week, or 48 hours with overtime, and eight hours per day. In exceptional circumstances, working hours can exceed 48 hours per week provided that the average working hours calculated over a four month period do not exceed 48 hours per week, including overtime. The minimum daily rest time is 12 hours and the minimum weekly rest time is 48 consecutive hours.

## **Trade unions**

Under the Constitution and the Romanian Labour Code, every employee has the right to become a member of or to set up a trade union. There must be at least 15 employees in the company to set up a trade union.

The representative trade union is entitled to receive any necessary information (including financial information) from employers for the negotiation of collective labour agreements and other employment related agreements.

Trade unions play a key role in collective bargaining but they also have significant information and consultation rights. In addition, trade unions have the right to register petitions and to represent their members' interests before a Tribunal.

## **Social insurance**

In Romania, employers must retain and pay social security contributions (contributions to the social security system, health system and unemployment system). These contributions are divided between employee and employer contributions.

The average employer's social security contributions can be up to 30% of the employee's gross salary and the employee's contribution up to 20%. However, these payments are made solely by the employer. These contributions relate to the amount of salary paid to the employee.

# Issues arising on termination of the employment relationship

## **Business transfers**

The transfer of an undertaking, business or part of a business is governed by the Labour Code and Law No. 67/2006 which provide strong protection for employees affected by the transfer.

Prior to the transfer, both the transferor and the transferee must consult the trade unions or the employees' representatives with respect to the legal, economic and social implications of the transfer.

All of the transferor's existing rights and obligations arising out of the employment contracts and collective labour agreements transfer to the transferee, except where the transferor is subject to a restructuring or insolvency procedure. Nevertheless, the transfer is not a valid reason for the individual or collective dismissal of transferring employees.

## **Terminating employment**

Under Romanian law, the employment contract may be terminated by law, by mutual consent or by notice given by one of the parties. The grounds for dismissal must be real and serious and there are two types of valid grounds (1) subjective grounds, such as serious or repeated disciplinary offences or poor performance or professional unfitness; and (2) economic grounds.

A dismissal for reasons unrelated to the employee as an individual, (the termination of the employee's position), can be the result of one of several objective reasons, such as closing down a workplace or business and must be for a genuine and serious reason. An employer can dismiss an employee even if the company does not have financial difficulties but simply wants to be more cost efficient.

Dismissals on economic grounds may be individual or collective. Where employees are dismissed on economic grounds, they are entitled to benefit from active measures designed to limit unemployment and they may be entitled to compensation under the terms of the law and the applicable collective labour agreement

Employees who consider that they have been unfairly dismissed can challenge their dismissal before the Employment Tribunal. If the judges find the dismissal unfair, they will reinstate the employee and award compensation for the amount of the employee's salary from the date of dismissal to the date of the Tribunal's decision or the date that the employee is reinstated (and will grant reinstatement every time they annul the dismissal, if the employee has asked for this).

The law provides several time limits for bringing an unfair dismissal claim; which is generally within 45 calendar days of the date the employee became aware of the relevant act which gave rise to the claim.

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An aerial photograph of a city at sunset. The sky is a warm orange and yellow. In the foreground, a large, ornate, light-colored building with classical architectural features like columns and arches is visible. The city extends into the distance with various buildings and a hazy horizon. A semi-transparent dark grey box is overlaid on the left side of the image, containing text.

# Spain

As is the case in other European countries, Spanish labour law is very comprehensive and provides significant protection for employees. Labour law regulates individual and collective relationships between employees and employers, the scope of which extends to other related areas such as social security, health and safety at work, special employment relationships and procedural law.

# Issues arising on hiring individuals

## **Immigration**

Foreign employees from outside the European community, including self-employed individuals, must obtain an administrative authorisation or work permit from the Immigration Bureau to work in Spain.

## **Employment structuring and documentation**

Generally, Spanish labour law is not prescriptive about the form of the employment contract. Employment contracts may be verbal or in writing. However, during the term of a verbal contract, either of the parties may require it to be put in writing.

Notwithstanding the general “freedom of form” principle, where an employment contract is for a period of more than four weeks, the employer must provide the employee with the following information in writing within two months of the commencement of employment: (1) the names of the parties to the Agreement; (2) the date of commencement and (contemporary contracts) the estimated term of employment; (3) the place of work; (4) the professional group or category; (5) the remuneration; (6) hours of work; (7) annual leave; (8) notice period; and (9) any applicable collective agreement.

In addition, certain employment contracts must be in writing, temporary employment contracts; contracts involving special labour relations (such as lawyers, top managers or commercial representatives); part-time contracts; and traineeship and training contracts.

In principle, employment contracts are presumed to be for an indefinite term. Nonetheless, there are, a limited number of fixed-term employment contracts. If the employee continues to work past the original term of the fixed-term contract, the relationship becomes indefinite and the employee will be entitled to the standard severance on termination.

If there is no special provision in an applicable collective bargaining agreement, probationary periods cannot exceed six months for qualified technicians or two months for other workers.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights regardless of what is stated in their employment agreement. These rights are principally set out in the Workers Statute and applicable collective agreements.

An employee's remuneration can be monetary or in the form of benefits in kind, which can represent up to 30% of the employee's total remuneration.

The maximum working week is 40 hours, calculated as an average over a year. By agreement, flexible working schedules can be arranged, but with a limit of nine ordinary hours of effective work per day, unless provided otherwise in the relevant collective bargaining agreement. Overtime cannot exceed 80 hours per year.

After one year's continuous employment, employees are entitled to a minimum of 30 calendar days' paid annual leave. In addition, there are fourteen public holidays per year, which may differ slightly by region.

## **Trade unions**

The Spanish Constitution grants unions the authority to promote and defend workers' economic interests. It also empowers them to represent workers in collective bargaining. Unions are also part of the preliminary mandatory conciliation step before disputes can be presented to government conciliation agencies.

Freedom of association and representation are fundamental rights under the Spanish Constitution. All employees are represented by elected representatives. There is no distinction between blue and white collar representatives.

It is for employees to start the election process and employers have no obligation to promote them.

## **Social insurance**

In Spain, the Social Security's national insurance contributions cover: (1) common contingencies, for situations included in the Social Security's general regime; (2) professional contingencies, which covers expenses resulting from accidents at work and occupational diseases; (3) overtime; and (4) other concepts, such as unemployment, training or the Wage Guarantee Fund.

The Social Security offers public medical care to all affiliated workers.

# Issues arising on termination of the employment relationship

## **Business transfers**

The Workers Statute requires employees to be informed and consulted in the event of the transfer of an undertaking about matters including the date or proposed date of the transfer, the reasons for the transfer, the legal, economic and social implications for the employees and any “measures” envisaged in relation to the employees.

Employment contracts are automatically transferred with the business to the new employer.

Employees’ rights and obligations are also transferred including special benefits and retirement compensation.

## **Terminating employment**

Termination can be based on objective or disciplinary grounds.

Dismissals based on objective grounds can be justified for business reasons which can be economic, technical, organisational and/or productive. Other objective grounds established by law are the worker’s incompetence, their inability to adapt to technical change, or lack of attendance.

The labour law provides that a party seeking to terminate an employment agreement must give the other party a minimum of 15 days’ notice. This does not apply to interim contracts. The parties may agree longer notice periods.

Reasons for disciplinary dismissals include: (1) repeated and unjustified tardiness or lack of attendance to work, (2) lack of discipline or insubordination, (3) verbally or physically abusing the employer, or others; (4) contravention of contractual good faith and misuse of trust; (5) continued decline in the worker’s performance; (6) intoxication due to alcohol or drugs which causes a negative effect at work; and (7) harassment based on: race, religion, birth, gender, age, disability, opinion, social condition and sexual orientation.

Dismissals will be deemed unfair if the grounds are not sufficiently serious or if the employer is unable to provide sufficient evidence that the employee has done something under those grounds.

If a dismissal is found to be unfair, the employer must reinstate the employee or make a severance payment equivalent to 45 days’ salary per year of service up to 12 February 2012 with a cap of 42 months, or 33 days’ salary per year of service after 12 February 2012 with a cap of 24 months.

Dismissals are null and void if the termination is discriminatory or involves protected employees (e.g. employees on maternity leave, employee representatives) in which case the employee is entitled to reinstatement. An infringement of the employee’s fundamental rights will also make the dismissal null and void.

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A narrow street in a Swedish city, likely Stockholm, with colorful buildings (yellow, red, and grey) and a church spire with a green dome and a cross on top in the background. The sky is blue with some clouds.

# Sweden

Swedish law and collective bargaining agreements provide a comprehensive legal framework. For example, mandatory laws provide, strong employment protections for employees, but terms and conditions of employment as well as co-determination procedures, are mainly regulated through collective bargaining agreements. Although employers are not obliged to enter into collective bargaining agreements, they must negotiate with any trade union that requires such an agreement. However, it is important to note that employers have certain consultation and information obligations towards trade unions, even if they are not bound by a collective bargaining agreement.

# Issues arising on hiring individuals

## **Immigration**

European Economic Area (EEA) citizens are entitled to work in Sweden without obtaining a work permit or residence permit. For Swiss citizens, a residence permit, but not a work permit, is required. Non-EU and EEA citizens must have a work permit, as well as a residence permit, before entering Sweden to work.

However, experts and some other employee categories may work in Sweden under certain circumstances without a work permit. Depending on the length of the work conducted in Sweden, tax issues will arise. For example, the employer may have to pay social security contributions.

## **Employment structuring and documentation**

The Employment Protection Act provides and governs the different types of employment that are permissible in Sweden. As a general rule, employment agreements are entered into for an indefinite term (open-ended contracts), but in certain circumstances fixed-term employment is acceptable.

A fixed-term contract generally terminates automatically when the agreed employment term lapses, unless otherwise agreed. However, if explicitly agreed, fixed-term employment may be terminated in advance provided there are objective grounds to justify termination.

Under the Employment Protection Act, employers must provide employees with certain information in writing within one month of their start date. The following information must be included: (1) information about the employer and employee; (2) the date of commencement of employment and place of work; (3) information about the position; (4) the duration of the employment; (5) the notice period; (6) salary and other benefits; (7) the number of days' annual leave; (8) working hours; (9) the collective bargaining agreement, if applicable.

# Issues arising during the employment relationship

## Wages, annual leave and working time

There are no legislative provisions regarding minimum wages. So employers and employees are free to agree on any salary level. However, collective bargaining agreements normally contain provisions regarding a minimum salary level as well as minimum annual salary increases.

Working time is regulated in the Swedish Working Hours Act but these provisions may be deviated from by collective bargaining agreements. Under the Act, the statutory ordinary working time is limited to a maximum of 40 hours per week. However, in certain circumstances, ordinary working time can instead be an average of 40 hours per week over a reference period of a maximum of four weeks. Ordinary working hours together with overtime hours in each seven day period must not exceed an average of 48 hours over a period of a maximum of four months. During each 24 hour period, employees are generally entitled to 11 hours rest. Normally, the period between midnight and 8am must be included in the rest period.

Employees are entitled to paid annual leave and compensation in lieu of annual leave. The minimum entitlement is 25 days' leave per year.

The leave qualifying year runs from 1 April to 31 March and the following 12 months is the vacation year, when leave may be taken. During annual leave, employees have a right to be paid to the extent that they have qualified for that. So their vacation may consist of both paid and unpaid days. Employees may carry over days not taken in excess of 20. Generally, any saved paid annual leave must be used within five years.

Most collective bargaining agreements contain different provisions from the Annual Leave Act, in particular in relation to calculating paid annual leave and accruing leave.

## Trade unions

The Swedish labour system is based on the principles that law and collective bargaining agreements together provide a comprehensive framework.

There are approximately 110 parties on the Swedish labour market, of which 60 are trade unions, and 50 are employers' organisations. The parties have agreed on more than 650 collective bargaining agreements regarding salary and general employment terms and conditions.

Almost 90% of all employers in Sweden are members of an employers' organisation. A significant proportion of employees working in Sweden, approximately 70%, are members of a trade union.

Through membership of an employers' organisation, employers are bound by the collective bargaining agreements applicable to that organisation. Employers must also apply the terms and conditions in collective bargaining agreements to employees who are not members of a trade union.

## Social insurance

There is no obligation in law for employers to provide employees with different insurance cover (except insurance included in the statutory employer social security contributions), such as group, life insurance, or work injury insurance. However, employers who are bound by collective bargaining agreements must take out certain insurance, in addition to that to the employer social security contributions.

Generally, employer social security contributions for 2017 are 31.42% of the employee's gross salary (paid in addition to salary). These contributions are statutory and include specific charges, such as old-age pension, survivor's pension, fees for health insurance and work injury.

# Issues arising on termination of the employment relationship

## **Business transfers**

In Sweden, the EU Acquired Rights Directive is implemented by the Employment Protection Act. The Act stipulates that in conjunction with a transfer of business, or part of a business, from one employer to another, the employees will automatically be transferred to the acquiring company on the same terms and conditions. The transferring company may not terminate employment contracts solely on account of the business transfer.

Although, dismissals pre-transfer may result in damages or even a ruling of invalidity, post-transfer, the acquiring company is free to initiate a redundancy programme in accordance with Swedish law.

The employees may refuse to transfer and in that case, they remain employed by the transferring company. Where the transferring company has no business left, these employees will be made redundant.

## **Terminating employment**

Under Swedish law, severance payments are not mandatory but the individual contract may provide for such a payment to be made.

According to the Swedish Employment Protection Act, employment may only be terminated by the employer on objective grounds - either shortage of work (redundancies), or personal reasons (serious misconduct or disloyalty). However, the employer and employee are free to enter into a settlement under which the employee receives compensation, and the employment may then be terminated without breaching the strict rules of the Act.

If the employee's misconduct or disloyalty is extremely serious, the employer may summarily dismiss the employee (i.e. immediate dismissal without notice).

In the case of wrongful termination, the employee may challenge this and the dismissal may be declared invalid by the court. The employer may be obliged to pay salary and benefits during the court proceedings, punitive damages (normally not exceeding SEK 100,000), compensation for economic loss (which is normally between 16 and 32 months' salary) and litigation costs for both parties.

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# Switzerland

Compared to other jurisdictions, the legal regime governing employment relationships in Switzerland is generally more liberal and favourable to employers. This is partly because trade unions are less influential in Switzerland in comparison to many EU countries, but also because traditionally unemployment has been, and remains, relatively low in Switzerland.

Public law labour protection regulations cover, among other things: working hours and breaks; special protection for young employees, pregnant women and breastfeeding mothers; work-related injury insurance; and industrial accident prevention. Some of these provisions can be modified in favour of employees, while others cannot be modified at all.

# Issues arising on hiring individuals

## **Immigration**

Currently, Switzerland has a dual system for the admission of foreign workers. Nationals from EU or EFTA countries benefit from the Agreement on Free Movement of Persons and, in general, do not need a work permit if residence is taken in Switzerland. This situation may change due to discussions in parliament following a public vote to reintroduce immigration quotas with the European Union.

For EU or EFTA nationals carrying out services for up to 90 days per year, an online notification procedure applies (both for the company posting workers and for the posted worker). If services will be rendered over this 90 day threshold, a work permit is required. The online notification procedure also applies to companies based in Switzerland employing foreign workers for up to three months.

With respect to non-EU and non-EFTA nationals, only a limited number of management-level employees, specialists and other qualified employees are admitted from all other countries (subject to a quota determined by the Federal Council). If non-EU or non-EFTA nationals, without residence in Switzerland, work in Switzerland temporarily for more than eight days for a Swiss company, such employees must be reported to the authorities in advance even if no work or residence permit is required.

## **Employment structuring and documentation**

Under Swiss law, an employment contract is a contract whereby the employee is obliged to perform work in the employer's service for either a fixed or an indefinite period of time, and the employer is obliged to pay salary either based on the time period or the work performed. Although generally speaking an employment contract is not required to be in any specific form, and may also be agreed verbally or by implication, certain contractual provisions are only valid if agreed in writing (e.g. restrictive covenants, exclusion of compensation for overtime, notice periods which are different to statutory law etc.). Moreover, Switzerland has implemented the European Union Directive No. 533/91. Consequently, with employment contracts for an indefinite term, or for longer than one month, within one month of the commencement of employment, the employer must inform the employee in writing of: the names of the contracting parties; the commencement date; the employee's job; salary and any additional benefits; and the length of the working week.

# Issues arising during the employment relationship

## Wages, annual leave and working time

Salary is usually paid at the end of the calendar month, as established in the company's policies or by collective agreement, with the employer deducting all applicable social security contributions and withholding taxes.

The Swiss Labour Act determines the maximum weekly hours of work, distinguishing between two categories of employees: (1) workers employed in industrial enterprises and white-collar workers (office workers, technical staff and other salaried employees) as well as sales staff in large retail undertakings; and (2) other workers, mainly workers in the construction sector and craftsman, in commerce as well as sales staff in small retail undertakings.

The maximum working week is 45 hours for the first category and 50 hours for the second. If an organisation employs both categories of employees, the 50 hour maximum applies to both categories. Within these limits, the actual hours of work are fixed by collective agreements and individual contracts. The Labour Act does not apply to working hours and overtime for employees in senior management.

Under Swiss law, there are two categories of overtime work. The first category applies to employees working more than the working hours stipulated in the contract, up to the maximum working time allowed under the Labour Act. Under the Code of Obligations, any overtime not compensated for by time off must be paid at a rate at least 25 percent higher than the employee's wage, unless there is an agreement to the contrary in writing (i.e. a collective agreement or individual employment contract). Generally, management contracts state that any overtime is included in the standard wage.

The second form of overtime work relates to hours worked in excess of the Labour Act limits of 45 or 50 hours, when the mandatory overtime rate is 25% higher than the employee's hourly wage. The Labour Act specifies that for white-collar workers and sales staff in large retail undertakings, this supplement is only due if the overtime exceeds 60 hours per calendar year.

## Trade unions

For many decades, Switzerland has enjoyed relative stability in labour relations, with most conflicts being resolved amicably. The basis of the "labour accord" goes back to 1937, when the trade unions and employers in the metalworking industry signed an agreement to regulate the conduct of disputes. On the one hand, the unions undertook not to use strikes as a weapon to settle grievances, while on the other, the employers agreed to accept arbitration to resolve wage claims. As a result, strikes are rare, although occasionally workers may stop work for a few hours as part of a campaign. Lengthy strikes are even more unusual, although not entirely unknown.

Every employee has the right to decide whether to join a trade union or not. The unions are financed through the contributions made by their members. The Swiss Federation of Trade Unions (Gewerkschaftsbund/Union syndicale suisse) is the umbrella body for 16 trade unions in industry and construction, and is Switzerland's largest employees' organisation. A second umbrella grouping is Travail Suisse, with 13 member organisations.

## Social insurance

The Swiss social security system includes the following schemes:

- Old-age and survivors' insurance (AltersundHinterbliebenenversicherung, AHV)
- Disability insurance (Invalidenversicherung, IVG)
- Military income loss insurance (Erwerbsersatzordnung)
- Unemployment insurance (Arbeitslosenversicherung, ALV)
- Occupational benefit plan (Berufliche Vorsorge, BVG)
- Accident insurance (Unfallversicherung, UVG)
- Sickness insurance (Krankenversicherung, KVG)
- Family allowances (Familienzulagen)

Swiss employers are fully liable for social security contributions in respect of their employees. This system, however, only applies to resident employers and non-resident enterprises with a permanent establishment in Switzerland.

Contributions are borne fifty-fifty by employer and employees. The employer withholds the employee's share, deducting it from salary at source. The rates are, in general, based on gross salaries.

# Issues arising on termination of the employment relationship

## Business transfers

Where the employer transfers a business or a part of a business to a third party, the employment relationship and all attendant rights and obligations pass to the acquiring company on the day of the transfer, unless the employee refuses to transfer.

If the employee refuses to transfer, the employment relationship ends on expiry of the statutory notice period, until then, the acquirer and the employee are obliged to perform the contract. The transferring employer and the acquiring company are jointly and severally liable for any employment claims which fell due before the transfer, or which fall due between then and the date on which the employment relationship could normally be terminated, or is, terminated following the employee's refusal to transfer.

When transferring a business to a third party, they must inform the organisation that represents the employees or, where there is none, the employees themselves, in good time before the transfer takes place, of: (1) the reason for the transfer; (2) the legal, economic and social consequences for the employees. Where "measures" are envisaged as a result of the transfer that would affect the employees, the employer should consult them in good time before the relevant decisions are taken.

## Discrimination claims

The Federal Act on Gender Equality provides that employees must not be discriminated against, directly or indirectly, on the basis of their: sex, marital status; family situation; or pregnancy. This prohibition applies in particular to hiring; the allocation of duties the provision of working conditions; pay; basic and advanced training; promotion; and dismissal.

Recent court decisions apply these principles in an analogous way to other forms of discrimination (i.e. nationality, race etc.).

## Terminating employment

A contract for an indefinite term terminates on the expiry of notice given by either party (ordinary termination). The minimum notice period is set out in the Code of Obligations. The parties may not, however, reduce the notice period to less than one month, subject to any longer periods provided for in collective bargaining agreements. There are certain periods during which a notice of termination is invalid (e.g. during pregnancy).

In principle, no cause for termination of the employment relationship is required. Nevertheless, under the laws to protect against abusive termination, employees have a statutory right to request written reasons for their dismissal.

Termination of employment must not be "abusive". An employer who terminates employment abusively must pay the employee compensation, up to a cap of six months' pay. If either party has "significant cause", it may terminate the contract at any time without prior notice, and may claim compensation from the other party for the damage caused. But if the employer terminates the contract with immediate effect without a significant cause, it must compensate the employee for the damage caused to them as a result, in addition to compensation for abusive termination (up to six months' pay).

With respect to termination agreements, case law provides that the mandatory provisions of the Code of Obligations must be taken into account and the agreement must include benefits for both the employer and employee. Otherwise a judge may declare the termination agreement null and void.

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# UK

For some time, the balance of employment rights in the UK has fallen squarely in favour of employees. The introduction of employment tribunal fees has resulted in a significant drop in claims, meaning that employers would appear to be less at risk of claims for technical breaches of the law. Nevertheless, most businesses are still very conscientious about wanting to be seen to be “good employers”, but if not, the bottom line remains that, provided they are prepared to pay sufficient compensation, employers in the UK can usually achieve what they wish.

# Issues arising on hiring individuals

## **Immigration**

Any non-EEA national seeking entry or permission to remain in the UK for the purpose of employment may need to apply under Tier 2 of the Points Based System via an approved UK Visas and Immigration. Pending Brexit related negotiations, EEA nationals (aside from Croatians) have the right to enter, remain in and work in the UK without a work permit.

## **Employment structuring and documentation**

The standard type of employment contract in the UK is an “open-ended” contract terminable on notice (subject to the protection which the law provides on unfair dismissal). A contract of employment need not be in writing and may be partly written and partly verbal. Although the contract itself need not be in writing, employees who have been employed for one month or more must be given a statement containing certain terms and conditions of employment within two months of commencing work with an employer.

The most common employment relationship is that of full time permanent employment but an increasing number of staff have flexible working arrangements. This may include working part time, through fixed term contracts or through an agency. UK law gives special protection for these types of workers. Zero hours contracts are becoming more common in the UK. New regulations prohibit the inclusion of exclusivity clauses in such contracts. There are also special rules relating to apprentices, trainees and young persons.

# Issues arising during the employment relationship

## Wages, annual leave and working time

Employers must pay employees and workers at least the national minimum wage. There are four hourly rates for the national minimum wage, the top rate currently being GBP 7.05 (for workers aged 21+). The National Living Wage, for employees aged 25 and over is currently GBP 7.50 per hour. Employees and workers are entitled to 5.6 weeks' paid annual leave (pro-rated for part-timers). Workers may not work, on average, for more than 48 hours per week, but can agree to contract out of this working time limit.

Agency workers are entitled: (1) from day one of an assignment to the same rights as comparable permanent employees in relation to access to shared facilities and job vacancies; and (2) after 12 weeks of an assignment to additional rights - in particular the same basic working and employment conditions as comparable permanent employees, including those relating to pay, annual leave and working time and rest periods.

## Family rights

Pregnancy rights include health and safety protection and the right to reasonable paid time off for ante-natal care. Family rights to leave and pay have been subject to major reform in Great Britain with the introduction of shared parental leave and pay which applies to all qualifying working parents of children. Whilst the default position of 52 weeks' maternity/adoption leave for employed mothers/adopters remains, those employees are entitled to give up their leave and pay and share it with the father/their partner (i.e. whoever shares the main caring responsibility for the child at the date of birth/adoption). Employees with 26 weeks' service also qualify for Statutory Maternity/Adoption Pay which is calculated as follows (1) six weeks at 90% of salary; and (2) 33 weeks currently at a flat rate of GBP 140.98, or 90% of salary if that is lower. ShPP follows the same flat rate for up to 37 weeks. Employers with enhanced maternity pay arrangements need to consider how to treat employees on shared parental leave.

Fathers/co-adopters continuously employed for 26 weeks are entitled to: (1) two weeks' Ordinary Paternity Leave; and (2) two weeks' Statutory Paternity Pay currently at GBP 140.98, or 90% of salary if that is lower.

All employees continuously employed for 26 weeks have the right to request flexible working, i.e. to change the hours or times they work or their work location, irrespective of their caring responsibilities. Although compensation for non-compliance, or for a decision based on incorrect facts, is at eight weeks' pay, victimisation, sex discrimination and

unfair dismissal claims may also be brought following an employer's refusal to grant the employee's request.

## Trade unions

It is unlawful to refuse to employ a person because they are a member or a trade union. In addition, the dismissal of an employee on union grounds will be an automatically unfair dismissal (see "Terminating Employment" below). A strike, work to rule or other industrial action need not be called by a union and non-union members can participate. The action that employers can take against employees as a result of industrial action is limited. If employees are on strike, the employer does not need to pay them for the times they are not working. However, they will usually be entitled to full pay when they take industrial action short of a strike. The Government has introduced new legislation (the Trade Union Act 2016) specifying the proportion of union members who must vote in favour of industrial action. For industrial action to be lawful, 50% of those members participating in the ballot must vote in favour of industrial action. There is an additional threshold for ballots in "important public services".

## Tax and social insurance

The UK has a comprehensive social security system, funded from general taxation and from National Insurance Contributions. The social security system provides state benefits to cover maternity/paternity, childcare, disability and carer matters. It also administers retirement pensions. State benefits can be contractually supplemented by employers. The National Insurance Fund aims to provide subsistence level benefits to all those in need.

Employers have to ensure that workers in the UK, between the ages of 22 and state pension age, and earning over the earnings threshold (currently GBP 10,000) are automatically enrolled into a qualifying pension scheme to which the employer must contribute. The duty is being phased in according to the size of the employer and will not be fully in force until 2018.

Employers are under an obligation to collect income tax at source from employment income, pensions and taxable state benefits under the Pay As You Earn (PAYE) system. Employed earners and their employers must also pay National Insurance Contributions. Various contributions are required to be made in respect of all UK employees. Class 1 contributions are payable in respect of earnings by both employer and employee.

# Issues arising on termination of the employment relationship

## Business transfers

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applies to employees when either (1) a business or asset is transferred from one entity to another; or (2) there is a change of identity in an entity providing a service (e.g. outsourcing).

The effect of TUPE is that all employees “assigned” to the economic entity or activity will transfer. In addition, the transferor’s rights, powers, duties and liabilities under the employment contracts of those employees who are transferring, transfer to the transferee. The transferor and transferee have a duty to inform and consult with employee representatives of “affected employees” about the facts, implications, etc. of the transfer. Employers that breach this duty may be liable for up to 13 weeks’ pay for each “affected employee”. Finally, subject to certain exceptions such as redundancy or change of location, dismissals are automatically unfair if the sole or principal reason for dismissal is the TUPE transfer.

## Terminating employment

Subject to certain exceptions, unfair dismissal claims can be brought by employees who have been continuously employed for two+ years. Provided there is no discrimination, employers will not be liable for dismissals where: (1) they follow a fair procedure; and (2) the reason for dismissal is fair, eg redundancy, capability, misconduct.

An unfair dismissal award, which is currently capped at GBP 95,211, is made up of (1) a basic award (calculated according to the employee’s age, length of service and pay) - currently capped at GBP 14,670; and (2) a compensatory award (a “just and equitable” amount) - currently capped at the lower of one year’s gross pay (excluding pension contributions, benefits in kind and discretionary bonuses) and the overall cap of GBP 80,541.

A redundancy situation arises where the business, workplace or job disappears, or fewer employees are needed. For a fair redundancy, the employer must show: (1) the reason for dismissal is redundancy; (2) it is reasonable to dismiss the employee for redundancy; and (3) a fair procedure was followed.

There must be fair selection of employees for redundancy and genuine consultation. If an employer proposes to dismiss as redundant a total of 20+ employees across any sites in the UK within a 90 day period, it must also follow a collective consultation procedure involving a minimum consultation period of 30/45 days, depending on the number

of redundant employees, in addition to any individual redundancy procedure. Employers that breach these collective obligations may be liable for protective awards of up to 90 days’ pay for each affected employee. Employees with two+ years’ service have the right to a statutory redundancy payment currently capped at GBP 14,670.

Lastly, it is unlawful to dismiss employees, or to subject employees or workers to a detriment, if they disclose information with a reasonable belief in its truth, about certain types of wrongdoing by the employer. The awards in whistleblowing claims are uncapped and are assessed on a similar basis to discrimination claims.

## Discrimination

Employees and others have the right not to be discriminated against because of age, disability, gender-reassignment, marriage or civil partner status, pregnancy/maternity, race, religion/belief, sex and sexual orientation (Protected Characteristics) from the job application stage onwards.

Discrimination/victimisation/harassment relating to any of the Protected Characteristics is prohibited at any time during the employment relationship. Claims can be brought by all employees, ex-employees, job applicants, contract workers and agency workers -there is no requirement for a period of continuous service. The award is made up of (1) a compensatory award - uncapped for past and future financial losses and career loss; and (2) an injury to feelings award - there are three guideline bands, with the lower and upper bands ranging from GBP 660-6,600 and GBP 19,800-33,000 respectively, depending on the seriousness of the case, and subject to tribunals applying their own inflationary increases to these bands.

Men and women have the right to be paid the same for the same, or equivalent, work. Where they are paid at different rates, an employee can bring an equal pay claim and the employer must prove that the reason for this is not gender related, or be able to objectively justify this. Any equal pay award will be made up of (1) compensation of arrears of pay plus interest, limited to six years; and (2) revised contractual terms, including remuneration terms, so that they are the same as that of the person of the opposite sex doing the same work.

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# MENA highlights

## Libya

- Companies are required to ensure that a minimum percentage of their workforce is composed of Libyan nationals; this percentage varies from 30% to 75%
- Certain jobs are reserved for Libyan nationals
- Female employees are entitled to 14 weeks' paid maternity leave, which is extended to 16 weeks for employees with more than one child
- There is a minimum wage in Libya which has recently been increased, though employers tend to offer more
- Unlike many other jurisdictions in the Middle East, Libyan labour law prohibits discrimination on the grounds of gender, race, religion and colour
- Expatriate employees, who are not covered by the social security fund, are entitled to end of service gratuity payments

## Saudi Arabia

- Employment of nationals of the Kingdom of Saudi Arabia (KSA) is strongly encouraged. Employers with low levels of Saudi employees will have difficulties hiring foreign staff
- Contracts for KSA nationals may be for a fixed or unlimited period. Contracts for non-KSA nationals must always be for a fixed term, usually linked to the validity of the work permit
- The KSA Labour Law contains an exhaustive list of reasons for termination without notice, or the requirement to pay end of service gratuity. Otherwise, an employee may make a claim for unfair dismissal, for which damages are assessed based on a statutory calculation
- 2015 saw the introduction of some amendments to the KSA Labour Law which came into effect on 18 October 2015 and the introduction of new fines to support the enforcement of those amendments

A stylized map of the Middle East region, showing the outlines of countries in a light blue color against a darker blue background. The map is centered on the Arabian Peninsula and extends to the surrounding regions of the Mediterranean, Red Sea, and Indian Ocean.

### Qatar

- Labour and Immigration Laws in Qatar are intrinsically linked such that a consideration of one without the other is impractical, especially when considering the recruitment and deployment of staff
- The rules regarding exit permits and permission to transfer employment have been relaxed by the New Immigration Law
- Qatarisation initiatives are becoming increasingly popular with a focus on building for the future and certain sectors, including banking and finance, have specific quotas
- Amid global scrutiny, the Labour Law has enshrined minimum working conditions which employers are now obliged to provide and maintain

### United Arab Emirates

- Employment laws have been developed to manage a UAE and expatriate workforce, with Emiratisation quotas, work permits and residence visas for expatriates
- A number of ministerial resolutions have been implemented recently to boost the employment of the local Emirati population, both in the public and private sectors
- 2016 saw a revamp in the standard form employment contracts issued by the Ministry of Human Resources and Emiratisation, and material changes to the structure of limited term employment contracts with respect to circumstances in which such contracts may be terminated
- On termination of employment, expatriate employees with at least one year's service are usually entitled to a gratuity payment, calculated by reference to their length of service



# Libya

Libyan employment law requires companies to ensure that a certain percentage of their employees are Libyan, which may be as high as three-quarters for some categories of employers. There are also provisions for a minimum wage, social security and protection for participation in trade unions. The law also places notable emphasis on family and on the rights of workers, with employees being entitled to periods of leave on marriage, maternity, bereavement and emergencies.

# Issues arising on hiring individuals

## **Immigration**

All expatriate employees must be registered with the Ministry of Labour, and hold an employment permit and residence visa. As part of the application process, the employees must enter into a valid employment contract. In addition, expatriate employees must have one of a number of specified job titles in order to be permitted to work in Libya. Certain jobs are reserved for Libyan nationals or those granted similar rights by the state.

## **Employment of Libyan nationals**

As noted above, employment is a right of Libyan nationals, and companies are required to ensure that a minimum percentage of their workforce is made up of Libyan nationals. In many cases, this minimum can be as high as 75%, although certain companies are only required to ensure Libyan nationals represent 30% of their workforce pursuant to various exemptions under investment law.

Exceptions to the nationalisation quotas are allowed in certain cases, such as specialist roles, where it is in the public interest to allow a relaxation of the rules. However, this requires a resolution from the Ministry of Labour allowing the reduction in Libyan national employment.

## **Employment structuring and documentation**

All employees must enter into a prescribed form employment contract which is registered with the Ministry of Labour. There are two different forms of the employment contract depending upon whether the employee is a Libyan national or expatriate.

As a general rule, the Libyan Labour Law sets out the minimum employment entitlements and standards. These can be exceeded to the employee's benefit, by agreement between the parties, but cannot be reduced or excluded to the employee's disadvantage.

Contracts may be for either fixed or unlimited terms in accordance with the Libyan Labour Law. The maximum duration for a fixed-term contract is two years, which may be renewed once, after which the employment becomes an indefinite (unlimited) term contract with minimum notice provisions.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

The current minimum wage in Libya is approximately LYD 450 (approx USD 316) per month; however few will work for this rate.

The minimum entitlement to paid annual leave under Libyan Labour Law is 30 working days, which increases to 45 working days for those over the age of 50 years or who have attained 20 years' service. An employee can take 20 days' paid leave to perform Haj once in their employment.

With the exception of certain professions, the maximum normal working hours is 48 hours per week and ten hours per day. Friday is the statutory day of rest each week. Overtime should not exceed three hours per day and is payable with a 50% uplift on the normal hourly wage.

## **Family rights**

An employee is entitled to two weeks' paid marriage leave once during their employment. A female employee is also entitled to paid leave of four months and ten days, following the death of her husband.

The Libyan Labour Law entitles a female employee to 14 weeks' paid maternity leave, including a compulsory leave following delivery of not less than six weeks. Where the woman has more than one child, the paid maternity leave is extended to 16 weeks. The Libyan Labour Law includes certain protective provisions which prohibit a woman from being dismissed on the grounds of her pregnancy or maternity leave.

Employees are entitled to emergency leave, of up to 12 days in a year, of which no more than three days may be taken on one occasion. An employee may take this emergency leave without obtaining prior approval from the employer, provided that the employee is able to provide justification for the leave on return to work.

## **Social security**

There is no social security legislation applicable to expatriate employees. However, an employer is required to make payments to the social security fund in respect of Libyan nationals.

# Issues arising on termination of the employment relationship

## Terminating employment

An individual employed under an unlimited term contract must be given at least 30 calendar days' notice of termination. Where an employee is subject to a fixed term, either party may only terminate the contract where certain specific circumstances arise. In each case, where the reason for termination is not valid, the defaulting party may be liable to pay compensation to the other party, to be determined by the Court.

An employer is obliged to pay an end of service gratuity to expatriate employees who are not covered by the Social Security Fund. End of service gratuity is calculated by reference to length of service.

The Libyan Labour Law contains an exhaustive list of reasons from which either party may terminate employment without notice due to the conduct of the other party

## Collective disputes

The Libyan Labour Law contains a workforce disputes procedure. In addition, an employee may not be dismissed by reason of participation in a labour association or trade union.

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The background image shows the interior of a mosque. In the foreground, several people are seen from behind, kneeling on a large, ornate red and blue patterned carpet. They are wearing traditional white thobes and ghutras. The mosque's architecture features high, vaulted ceilings with intricate geometric patterns and arches. Warm, golden light filters through the space, highlighting the textures of the stone and the carpet. A large white pillar is visible on the right side of the frame.

# Saudi Arabia

The Kingdom of Saudi Arabia (KSA) has steadily been taking measures to diversify its economy away from its dependency on oil. The KSA is actively looking to develop its science and technology sectors and to move towards a knowledge-based economy. Since joining the World Trade Organisation in 2005, the KSA has been opening up its markets and in June 2015 it opened up its stock market to direct foreign investment. There is also a strong focus on boosting employment of KSA nationals in the private sector as the overwhelming majority of KSA nationals are employed in the public sector.

# Issues arising on hiring individuals

## **Immigration**

Every employment must be registered with the Ministry of Labour and the General Organisation for Social Insurance (GOSI). If the employee is not a national of a Gulf Cooperation Council member state then he or she must also be registered with the Passport Office. These employees will need to be sponsored by the employer for work permit and residency visa purposes, with such sponsorship being employer-specific. In order to obtain sponsorship, employees must submit attested educational and professional qualifications and undergo medical examinations for contagious diseases. There are restrictions on an employee's ability to move from one sponsor to another (i.e. to effectively move jobs) and various factors come into play including length of service and both the existing and new employers record with the Ministry of Labour.

## **Saudisation: Employment of KSA Nationals**

An employer is under a duty to consider KSA nationals for all vacancies prior to engaging a foreign national. The majority of vacancies must now be posted with the Human Development Fund and advertised for a minimum of two weeks to unemployed KSA nationals registered with the Fund before a non-KSA national can be offered the role. Certain roles, including HR Managers, secretaries, security officers and up to 19 specified roles are reserved for KSA nationals. The KSA government is increasingly offering subsidies and funds to private sector employees to employ KSA nationals and subjecting public tendering and contracts to the company's achievement of percentage targets for the employment of KSA nationals as a total part of the workforce. Conversely, there is a fee of SAR 2400 per employee levied on the employer, and payable yearly

on the renewal of the work permit, where the ratio of KSA nationals to non-KSA nationals is not 1:1. Every employer is also classified according to how many KSA nationals it employs and allocated a target, calculated according to its size (i.e. number of employees) and industry sector. Failure to achieve a target results in the employer being unable to renew sponsorship of existing employees or to obtain sponsorship for new employees. Employers in the lowest two classifications do not have to give consent to their employees moving jobs and joining employers in higher employer classifications.

## **Recruitment agencies and employment businesses**

The sourcing and supply of labour is extremely regulated with the trade license for such commercial activities being restricted to KSA nationals. The engagement of individuals from a manpower supplier without the required trade license can render an employer liable to penalties for engaging individuals without proper sponsorship and also have personal repercussions for the individual.

## **Employment structuring and documentation**

Contracts for KSA nationals may be for a limited or unlimited period. However, contracts for non-nationals must always be for a fixed-term, usually linked to the period of the work permit.

# Issues arising during the employment relationship

## Wages, annual leave and working time

A minimum wage of SAR 3,000 a month applies in KSA but only to KSA nationals and for the purposes of meeting the quotas under Nitaqat. An employer can therefore still elect to pay an employee less than the minimum wage.

In September 2013, KSA commenced the implementation of the Wage Protection System (WPS). The WPS monitors the payment of wages to both KSA and non-KSA nationals employed in the private sector, establishing a link between the employer, the local bank into which wages must be paid, and the employee. The WPS has been phased in and as of 1 February 2016 it applies to registered commercial entities with 80 or more employees and all private schools (regardless of the number of employees).

The minimum entitlement to paid annual leave is 21 calendar days a year, rising to 30 calendar days a year after five years' service. The minimum entitlement to sick leave is 120 calendar days a year, with full pay for 30 days, 75% pay for 60 days and nil pay for 30 days. In addition, once during the employee's term of employment and conditional on accruing two years' service, an employee is entitled to between 10 to 15 days of paid leave to perform Haj. Employees are also entitled to study leave, marriage leave and compassionate leave.

The KSA Labour Law provides for a maximum working week of 48 hours, eight hours a day, with Friday being the weekly day of rest. After the public sector changed its weekend to Friday and Saturday, most private sector employers followed suit, making the position in Saudi consistent with the rest of the region. In addition, the current market practice for a five-day week in the private sector may become a statutory entitlement under the proposed future amendments to the KSA Labour Law.

Employees who are not in managerial positions (meaning someone with supervisory authority over other employees) are also entitled to overtime pay in accordance with statutory rates set according to whether overtime is completed on a normal working day, during night time, a Friday or other normal rest day, or on a public holiday. Overtime is normally restricted to two hours a day meaning an employee should not be asked to work for more than ten hours a day. During Ramadan, working hours are reduced to six hours a day for Muslim employees.

## Family rights

The KSA Labour Law entitles female employees to ten weeks' maternity leave with full pay, out of which a maximum of four weeks may be taken prior to the expected date of delivery and six weeks must be taken following delivery. The employee cannot legally work during the six-week period following delivery. An additional one month unpaid maternity leave may also be taken and additional one month paid leave is available in instances where the child is ill or disabled. A male employee is entitled to three days of leave on the birth of his child, with full pay from the employer.

## Trade unions

Trade unions and labour associations are unlawful in KSA with the KSA Penal Code outlawing labour strikes. However, the KSA Labour Law contains a workforce disputes procedure under which employees may collectively submit a written complaint to the Ministry of Labour which will appoint a labour committee to investigate the complaint and conciliate between the employees and the employer. Workers are also permitted to form Welfare Committees for social welfare within the workplace. KSA national employees are also permitted to form work councils.

## Tax and social insurance

GOSI ministers a social security system for KSA nationals including a number of benefits such as unemployment benefit (Saned), old age retirement pensions, disability allowance, survivor's pensions, and incapacity benefit.

The Human Development Fund provides unemployment allowance for KSA nationals who are university graduates for a period of one year from graduation, providing SAR 2,000 a month. Non-KSA nationals are not entitled to social security-except compensation for workplace injury or disease under the GOSI workplace injury scheme.

# Issues arising on termination of the employment relationship

## Business transfers

Article 18 of the KSA Labour Law provides for employees to transfer by operation of law from one employer to another, pursuant to a change in the corporate ownership of the employer of the part of the business in which they are employed (including the sale of a business or part of a business as a going concern, and the merger of two companies or demerger). However, such a transfer is only possible upon a special application to the Ministry of Labour whose approval is discretionary and it can take up to two years for the process to be completed. In the absence of Article 18 applying, the transfer of employees is effected through a process of termination and rehire.

## Terminating employment

The KSA Labour Law does not set out a list of reasons permitting an employer to terminate an employee's employment, save that Article 80 of the KSA Labour Law sets out an exhaustive list of gross misconduct reasons for which an employer may terminate employment without notice, compensation or the payment of end of service gratuity. These include where the employee fails to perform essential work duties or obey orders and where the employee is absent from work without valid reason for more than 30 non-consecutive days or 15 consecutive days in a year, subject to the employer issuing the employee with a written warning prior to dismissal, once the employee's absence reaches 20 non-consecutive days or ten consecutive days in a year.

Unlimited term contracts may be terminated by either party upon service of 60 day's written notice.

On termination of employment for any reason other than gross misconduct an employee is entitled to an end of service gratuity, a form of severance pay calculated by reference to final salary and linked to length of service. In addition, an employee whose employment is terminated may make a claim to a Labour Committee claiming that the termination has been unfair (ie not for a valid reason) entitling him to compensation of no less than 2 months' wages (calculated in accordance with Article 77). There are no anti-discrimination provisions in the KSA Labour Law; however, the Labour Committee will scrutinise the reason for termination where this is challenged by an employee and it is possible that a discriminatory reason could be held to be invalid. Furthermore, the employee is entitled to have paid time off whilst working his notice period to find alternative employment.

KSA Labour Law provides for termination of the employment contract where the employer shuts down the business or where the employee's role is terminated.

## Discrimination

There is at present no specific discrimination legislation applicable to the workplace in KSA. The Labour Law does provide for equal pay when a man and a woman perform the same job.

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# Qatar

With the announcement that Qatar will host the FIFA World Cup in 2022, the legal and regulatory framework protecting the rights of employees has captured the public interest and continues to attract growing international media attention. Qatar's Labour Law (and Immigration Law), aims to provide comprehensive coverage of the relationship between an employer and employee. With huge investment in civic infrastructure, rising foreign investment and a population growing by the day, the administration and enforcement of employment rights will be key to Qatar's growth and future success.

# Issues arising on hiring individuals

## Immigration

Immigration rules in Qatar were previously covered by Law No.(4) of 2009 (Old Immigration Law). However, on 13 December 2016, the Qatar government announced the implementation of Law No.(21) of 2015 (New Immigration Law) which sets out the regulations under which expatriates may enter, exit, work and reside in Qatar. The New Immigration Law repeals, the Old Immigration Law in its entirety along with the decisions and resolutions previously used to implement it. The Immigration Department of the Ministry of Interior is the main agency of administration. The New Immigration Law defines an expatriate as any non-Qatari individual who enters Qatar to work, reside, visit, or for any other purpose. Unless an individual is an Arabian Gulf Cooperation Council (GCC) national, they must be employed by either a Qatari national, an entity registered to undertake business in Qatar or a resident family member on whom the individual is dependent. This arrangement does not therefore lend itself to short-term or casual employment arrangements.

Currently the nationals of some 33 countries, including the United Kingdom, the United States, Australia and Japan, can enter Qatar on an on-arrival visa; other nationalities may enter and represent their companies or countries on business visas which must be applied for by individuals or entities authorised by the Immigration Department prior to arrival. Details in relation to such applications may be found on the Qatar Embassy website.

Only a holder of a valid work permit may work lawfully in Qatar. Work permits may only be applied for by an individual or entity registered with the employment authorities. These applicants are known as the workers' employer. Employment and immigration are interlinked in Qatar. Once a Qatari entity has been issued with an immigration card it may register with the Labour Department and submit block visa applications. A block visa application should state the gender, nationality and job title of the workers a Qatari entity wants to employ. Once the block visa application has been approved by the Labour Department, passport copies and bachelors' education certificates (notarised, legalised and authenticated for use in Qatar), if appropriate, should be submitted to the Immigration Department in order for each worker to be issued with his or her work permit; then the employer can proceed to apply for the workers residency once they have been relocated to Qatar at the expense of the workers' employer. Dual residency is permitted by discretion in Qatar. The process followed by Qatari nationals to employ expatriates is slightly different.

Where workers hold a valid Qatari residence permit they can apply to arrange for the residency of their spouses and dependent family members at the discretion of the Immigration Department. The resident will have to demonstrate to the immigration authorities that they are appropriately employed with sufficient funds to do so, i.e. currently only an individual with a professional visa designation (such as a manager) or an individual with a bachelor's degree certificate earning at least QAR 10,000 per month (approx USD 2,750).

Holders of residence permits may work but only for the individual or entity which facilitates and maintains their entry and residency in Qatar. Contract working for other third parties is not permitted unless approved by the Immigration Department. Individuals holding family residencies do not automatically have the right to work and must apply for, and be issued with, a labour card to work subject to some exceptions, e.g. the Qatar Financial Centre (QFC).

Part time workers can work, subject to the permission of their employer, for a Qatari national or an entity registered to undertake business in Qatar, there is currently no concept of part time work referred to in the Labour Law per se.

Penalties can be imposed by the Ministry of Interior in relation to breaches of the New Immigration Law. These penalties can be onerous, e.g. up to three years in prison and a fine of up to QAR 50,000 (approx USD 14,000). The penalties may be levied against any or all pertinent parties.

## Qatarisation

It is important to note that there are laws and regulations in place to encourage the employment of Qatari nationals from time to time, known as Qatarisation. Specific sectors including banking may be subject to quota requirements to employ Qatari nationals and some organisations have self-imposed quotas, e.g. Qatar Foundation, but otherwise the Labour Department will review new block visa applications on an application by application basis.

## **Liability**

During the period in which individuals reside in Qatar the worker's employer will be legally responsible for them, including obtaining and renewing residence permits and associated registrations.

The worker's employer will not be liable financially for any of the obligations of the individuals it employs unless it specifically agrees to guarantee such obligations, e.g. in a salary certificate letter addressed to a bank for the purposes of a worker obtaining a car loan etc.

## **Recruitment**

Strictly speaking only 100% Qatari owned entities and Qatari nationals holding valid manpower licences may undertake the business of recruitment for third parties.

## **Employment structuring and documentation**

Employment terms may be for a definite/fixed or an indefinite/unlimited duration. A fixed term is generally understood to be a term during which employment can only be terminated by the mutual agreement of both parties, i.e. notice cannot be given. An indefinite term is one in which notice can be given by either party in accordance with the Labour Law and employment contract and subject to the successful completion of probation.

The Labour Law provides for a single period of probation of up to six months' duration during which the employer may provide the worker with three days' written notice to terminate employment if the worker is not able to undertake the work for which they have has been employed. However, if the employer wants to terminate employment during the probation period for non-performance or capability, they must provide written notice in accordance with the terms of the employment contract.

# Issues arising during the employment relationship

## Wages, annual leave and working time

There is currently no minimum wage in Qatar, although the Labour Law does stipulate that the Emir can set one. Some embassies, e.g. the Philippine Embassy, are developing and promoting recommended minimum wage policies for their nationals.

The Labour Law has recently been amended such that now all salary payments for workers must be processed through the Wages Protection Programme (WPS). The effect of WPS is that salary payments will now need to be paid directly from the employer's local Qatari account into a Qatari account in the name of the worker. There are no recognised exemptions to this practice.

A worker who has completed one continuous year of service is entitled to annual leave with pay. Workers who have been employed for less than five years will receive no less than three weeks' annual paid leave, and those who have been in service for longer than five years will be entitled to no less than four weeks' annual paid leave.

A Muslim worker is entitled to Hajj leave without pay, not exceeding two weeks, to go on pilgrimage once during the period of his service dependent on how such leave is allocated internally from time to time.

The Labour Law provides for a maximum working week of 48 hours, eight hours a day, with Friday being the weekly day of paid rest. In Ramadan this is reduced to a maximum of six hours a day. Workers who are not in a position of responsibility, i.e. non-managerial positions, are entitled to a maximum of two hours' overtime pay a day in accordance with statutory rates which are set according to whether overtime is completed on a normal working day; Friday; during night time; or on a public holiday. The actual working hours of a worker should not exceed ten hours a day if overtime is worked.

## Family rights

Female workers are entitled to 50 days' paid maternity leave if they have been in continuous employment for a year or more when they give birth. There is no other provision for family leave or paternity leave in the Labour Law.

The Labour Law states that female workers must be paid the same wage as male workers, if they undertake the same work, and must be afforded the same opportunities for training and promotion. Provisions are also made in relation to vocational workers and minors.

## Trade unions

The Labour Law provides that where an entity employs more than one hundred Qatari workers, a single worker's committee may be formed by those Qatari workers. Striking is permitted for Qatari nationals only under very limited circumstances, but, amongst other things, the exercise of political or religious activities, the printing and dissemination of materials insulting the State is strictly prohibited. Workers' Committees should publish their policies and regulations according to certain guidelines.

## Social insurance

There is currently no public social security scheme or any retirement pension applicable to non-Qatari workers. However, for Qatari national workers, there are obligations on employers in certain sectors to contribute to a pension fund in accordance with the provisions of Law No (24) of 2002.

The Qatar government announced that the much anticipated health insurance scheme "Seha" under which employers would be responsible for contributing to their employees' healthcare has now been abolished. However, we understand that the Qatar government is currently considering alternative proposals.

There are no obligatory insurances in Qatar. However, some employers may contractually offer workers benefits such as life assurance, permanent health insurance, private medical insurance and company cars etc.

# Issues arising on termination of the employment relationship

## Business transfers

The Labour Law (Article 52) provides that when an enterprise merges with another enterprise or transfers its ownership in, or its right to manage that enterprise, an employee's employment will not necessarily terminate.

In addition, the law provides that employment will not terminate on the death of an employer unless the contract of employment has been concluded because of the death or otherwise.

## Sponsorship Transfer

The New Immigration Law has introduced a number of key changes to the underlying immigration framework in Qatar. The term "sponsor" has now been removed and replaced with "employer" as the entity responsible for bringing expatriate workers into Qatar and obtaining and managing their residency and subsequent exit from the country.

Whilst residency may be transferred between employers, this is subject to the discretion of the Immigration Department. The New Immigration Law does not refer to the requirement for employers to issue a letter of no objection (NOC) to enable an employee to transfer employment. Under the new regime, an individual may in principle transfer employment in two instances: if employed on a fixed term contract, on the expiry of the fixed term; and, if employed on an indefinite, or unlimited contract, once the employee has completed 5 years' continuous employment.

## Terminating employment

Under the Labour Law, if the service contract is of an indefinite duration either the employer or the worker may terminate it without giving any reasons; notification periods will be dependent on the length of service and the terms of the contract. The employer should pay the worker all his other dues for the notice period if the worker continues to work normally during this period. If the contract is terminated without observing notice periods, the party (usually the employer) terminating the contract may be obliged to pay compensation. The Labour Law provides that where an employer employs more than ten employees, they must implement a disciplinary process.

The Labour Law (Art 61) sets out a list of ten prescribed circumstances under which the employer can terminate the worker's employment without notice or the payment

of End of Service Benefit (EOSB) due to the actions of the worker. The Labour Law also provides (Art 51) for various circumstances under which workers can terminate employment due to the actions of the employer, without notice but still remain entitled to receive EOSB if applicable.

The Labour Law (Art 54) provides, in addition to the other monies payable to workers when their employment terminate that workers must be paid an EOSB. As a minimum, EOSB must equal three weeks' (final) basic salary for each full year the worker has worked.

## Exit permits

Workers are required to have an exit permit in order to leave Qatar. Following the implementation of the New Immigration Law, all exit permits are now issued on a multi-exit basis. Further, an employee has the right to exit the country during periods of annual leave, in emergency cases, prior to the expiry of the contract term or for any other reason provided the employer is notified according to the terms of the employment contract.

Where there is a dispute between the employer and employee as to issuing an exit permit, the dispute can be referred to the newly established expatriate exit grievances committee which consists of representatives of the Ministry of Labour, Ministry of Interior and the National Human Rights Committee. The committee will hear representations from all parties, seek evidence, request documents and information, and liaise with different ministries and government departments. The expatriate exit grievances committee will decide on any appeal made to it within a period of three days.

If a worker wishes to leave Qatar while still holding a work permit, i.e. before a residence permit is issued, they must obtain a re-entry or return visa before leaving to avoid automatic cancellation of their work permit. Currently, there are tight restrictions on such visas being issued.

*Note: This guide focuses on the Labour Law which is issued in Arabic, with no official translation.*

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# UAE

The UAE owes much of its success to a historic emphasis on encouraging foreign commerce. In a country where at least 80% of the residents are expatriates, two trends can be seen in the UAE. On the one hand, there is encouragement of foreign investment, encouraged by the establishment of free trade zones, where the regulations sit alongside federal laws and can add a layer of complexity to UAE employment law. Concurrently, there is an emphasis on boosting the local Emirati population in the private as well as the public sector, with the imposition of quotas for Emirati employees in certain sectors, such as retail, insurance and banking. All signs point to increased regulation in the UAE in the near future.

# Issues arising on hiring individuals

## Immigration

All expatriate employees working in the private sector must be sponsored by their employer (or free zone authority on behalf of the employer) and registered with the Ministry of Labour (the Ministry) or applicable free zone authority for work permit purposes and Department of Immigration within the Ministry of Interior for residence visa purposes.

In order to obtain sponsorship, employees must submit attested educational and professional qualifications, as well as undergo medical examinations for communicable diseases. Until recently there were tighter restrictions on an employee's ability to move from one sponsor to another (i.e. to effectively move jobs). However, a new Ministerial resolution was implemented at the start of this year designed to increase the mobility of employees, particularly the unskilled workforce, between UAE employers. This resolution reduces the circumstances in which a ban may be imposed on employees moving from one sponsor to another, taking into consideration the skills level of the employee length of service.

UAE nationals working in the private sector must also be registered with the Ministry, although they will not require registration with the Department of Immigration.

## Employment of UAE nationals

An employer is under a duty to consider UAE nationals for all vacancies prior to engaging a foreign national. Certain roles, including HR managers, secretaries and Government Liaison Officers are reserved for UAE nationals through Ministerial regulations, although these are not always enforced in practice. Specific sectors including retail, insurance and banking are subject to quota requirements to employ UAE nationals of 2%, 5% and 4% of their workforce year on year, respectively. The UAE government is increasingly offering subsidies and funds to private sector employees to employ UAE nationals and government authorities are taking into account a company's achievement of Emiratisation targets as part of any public tendering process.

The Emiratisation requirements do not apply in the free zones.

UAE nationals are protected from termination of employment in the private sector and employers who fall under the Ministry's jurisdiction must obtain the Ministry's consent before dismissing a UAE national employee.

## Recruitment agencies and employment businesses

The sourcing and supply of labour is extremely regulated, with the trade licence for such commercial activities being restricted to UAE nationals, with an additional requirement

for the General Manager of the business to be a UAE national with a university degree. The engagement of individuals from a manpower supplier without the appropriate trade licence can render an employer liable to penalties for engaging individuals without proper sponsorship and can also have personal repercussions for the individual.

## Employment structuring and documentation

Employees based 'onshore' in the UAE (i.e. not in a free zone) are required to enter into a prescribed form, dual-language employment contract that is registered with the Ministry. Prior to the prescribed form employment contract being issued, employers are required to issue prospective employees with a standard offer letter containing clear and enforceable terms and conditions of employment. Once this is executed employers must obtain the Ministry's preliminary approval for employment. The signed offer must be filed with the Ministry prior to the employee coming to the UAE to take up employment or starting the visa status change if the employee is already employed in the UAE. The Ministry contract subsequently issued to the employee must reflect the terms of the offer letter unless the proposed alterations are to the employee's advantage and are accepted by the employee and the Ministry. This contract sets out both the employer's and employee's rights and obligations under the Labour Law and forms the operative employment contract for UAE law.

Other free zones (such as the Jebel Ali and Dubai Airport free zones) have specific dual-language employment contracts similar to the Ministry contract.

Employers in the Dubai International Finance Centre (DIFC) and Abu Dhabi Global Market (ADGM) need not enter into a prescribed form employment contract, but must submit a written employment contract to the authority for every employee.

As a general rule, the UAE Labour Law, the DIFC Employment Law and the ADGM Employment Regulations set out minimum employment entitlements and standards which can be exceeded to the employee's benefit by agreement between the parties, but cannot be reduced or excluded to the employee's disadvantage.

Contracts may be for either fixed or unlimited terms in accordance with the UAE Labour Law. The maximum duration for a limited term contract is two years, after which the employment is automatically converted into an unlimited term contract with minimum notice provisions unless renewed.

Contracts in the DIFC and ADGM may be for limited or unlimited terms.

# Issues arising during the employment relationship

## Wages, annual leave and working time

There is no minimum wage in the UAE. However, there are minimum earnings requirements for a foreign employee who wishes to sponsor his family to reside with him in the UAE. In 2009, the Ministry of Labour introduced the Wages Protection System pursuant to which all employees registered by the Ministry of Labour must be paid by direct electronic transfer through an institution regulated by the UAE Central Bank. The Wage Protection System initially only applied to employees working outside of a free zone, although, the Jebel Ali Free Zone has adopted the system, and others may follow suit.

The minimum entitlement to paid annual leave under the UAE Labour Law is 30 calendar days a year, after the first year of employment. During the first year of employment, an employee is only entitled to two calendar days per month, after completion of the probation period. Under the DIFC Employment Law, minimum holiday entitlement is 20 working days for an employee employed for at least 90 calendar days. An employee can take 30 days' unpaid leave to perform Haj, once in their employment. The ADGM Employment Regulations provide for 20 working days of annual leave (exclusive of national holidays) for any employee who has been employed for 90 days or more.

The UAE Labour Law provides for maximum normal working hours of eight hours per day, or 48 hours per week, assuming a six-day week. Friday is the statutory day of rest each week. Employees who are not in managerial positions (which is limited to certain specified senior individuals who have the delegated authority to act on behalf of the company) are also entitled to overtime pay, calculated with reference to rates set according to whether overtime is completed on a normal working day, during night time, a Friday or other normal rest day, or on a public holiday. Overtime is normally restricted to two hours a day, meaning an employee should not be asked to work for more than ten hours a day. During Ramadan, working hours are reduced to six hours a day for all employees.

The DIFC Employment Law does not provide for statutory overtime. It does provide for a maximum working week of 48 hours and various rest periods. However, an employee is able to agree to contract out of these working time limits. The position in ADGM is very similar to the DIFC in that ADGM Employment Regulations set out a maximum weekly working time of 48 hours for each seven day period, unless prior consent (to work in excess of this) is obtained from the employee.

## Family rights

The UAE Labour Law entitles a female employee to 45 days' paid maternity leave if she has accrued 12 months' continuous service. Such leave is paid at 50% of remuneration if the employee does not have the required service.

The DIFC Employment Law provides for 65 working days' maternity leave. Provided that the employee has achieved 12 months' service prior to the expected week of childbirth, the maternity leave is paid at full pay for the first 33 working days, and at half pay for the remaining 32 working days. A female employee may take time off for ante natal classes and has the right to return to work following maternity leave. A female employee adopting a baby under three months has the right to claim leave according to the same provisions as those for maternity leave.

Similar to the DIFC, the ADGM Employment Regulations provide for 65 days maternity leave (or adoption leave where a child under three months' old is being adopted) if the employee has been employed for 12 months or more and complies with the notification requirements. Such leave will be paid in full for the first 33 days and at half pay for the remainder. The ADGM Employment Regulations also provide for two weeks paternity leave.

## Trade unions

Trade unions and labour associations are unlawful in the UAE with the UAE Penal Code outlawing labour strikes. However, the UAE Labour Law contains a workforce disputes procedure under which employees may collectively submit a written complaint to the Ministry of Labour, who will appoint a labour committee to investigate the complaint and conciliate between the employees and the employer.

## Social insurance

There is no applicable social security legislation for expatriate employees. However, UAE and other GCC nationals are entitled to participate in state pension and social security schemes.

# Issues arising on termination of the employment relationship

## Business transfers

There is no provision providing for the automatic transfer of employees from one employer to another, pursuant to the sale of a business or part of a business as a going concern, or the movement of a service contract pursuant to a retendering or a service provision change. Movement of employees can only occur pursuant to a process of termination and rehire.

## Terminating employment

An individual employed under an unlimited term contract (subject to the UAE Labour Law) may be given notice to terminate the contract of at least 30 calendar days, or such longer period as may be stated in the contract, subject to a maximum of three months. The employee will also be entitled to accrued, but untaken, annual leave calculated to the termination date. In addition, an employee who has achieved at least one year's service prior to termination and is not being dismissed for gross misconduct is entitled to receive an end of service gratuity payment, calculated with reference to the employee's length of service and the last basic pay received prior to termination. An employee who is in receipt of a pension in lieu of gratuity may not accept both benefits, however on termination of employment, the employee can choose to accept whichever of the gratuity or pension is more favourable.

The DIFC Employment Law contains minimum notice provisions where the parties have failed to agree to any contractual notice, although the parties are free to contractually agree to any length of notice (or waive notice altogether). The DIFC Employment Law contains similar provisions regarding end of service gratuity, save that an employee may elect to receive pension in lieu of gratuity during the course of employment.

ADGM Employment Regulations provide for minimum notice periods which the parties cannot contract out of but are free to agree increased notice periods. Provisions regarding end of service gratuity are similar to those contained in the DIFC Employment Law.

Under the UAE Labour Law, where the reason for termination of an unlimited term contract is not considered to be valid, as determined by the courts, an employee may claim arbitrary dismissal compensation of up to three months' remuneration. This is in addition to any notice or gratuity payment.

The DIFC Employment Law does not provide for an entitlement to claim unfair dismissal. Similarly, the ADGM Employment Regulations do not expressly provide for compensation for unfair dismissal nor is there a requirement for an employer to follow established

procedures for implementing dismissals. That said, ADGM is a relatively new free zone which was only established in 2013 and largely applies English common law (to the extent not overridden by ADGM). Such recognition of common law principles could potentially open the door to employee claims for damages under the common law concept of implied duty of trust and confidence. It is yet to be seen how this may be interpreted and applied in practice.

When it comes to limited term contracts, pursuant to a recent Ministerial resolution, parties now have more flexibility to terminate a renewed limited term contract. Either party is permitted to terminate such contract prior to the agreed expiry date by the provision of between one to three months' notice (such notice period to be agreed between the parties).

In circumstances where a party terminates the renewed limited term contract early on the provision of contractually agreed notice (other than due to the other's misconduct), compensation of between one to three months' remuneration (to be agreed between the parties) will be payable. Where the contract does not contain a notice period, a notice period of three months will automatically apply, and similarly, if no compensation has been contractually agreed, the provisions set out in the Labour Law relating to early termination compensation will apply. Article 120 of the UAE Labour Law sets out an exhaustive list of gross misconduct reasons for which an employer may terminate employment without notice or the payment of end of service gratuity. The DIFC Employment Law provides that an employer may terminate without notice or the payment of end of service gratuity if it would be reasonable for an employer in those particular circumstances to do so and the ADGM Employment Regulations provide that both parties are free to terminate "for cause" without notice in specified circumstances. Employees are also entitled to a written statement of reasons for dismissal (upon request and subject to a minimum service requirement of one year).

Finally, the UAE Labour Law, the DIFC Employment Law and the ADGM Employment Regulations do not provide for the concept of redundancy. The UAE courts have recognised an employer's right to reorganise and restructure its business, resulting in the elimination of roles. However, a high burden of proof is applied and the employer's business decisions are scrutinised closely.

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# Asia Pacific highlights

## Australia

- Australia is one of the most employee-friendly jurisdictions in the world
- Employees can challenge a termination of their employment on the basis that it is harsh, unjust or unreasonable. This is a key aspect of Australian employment law which should be kept in mind when contemplating terminating an employment relationship
- Although equal employment opportunity has long been enshrined in law, anti-discrimination provisions in workplace legislation now provide protection to employees from the time of job application through to termination of employment
- Employees are entitled to generous parental leave provisions, including a government funded paid parental leave scheme following the birth or adoption of a child

## China

- Employment contracts must be in writing (with company seal), otherwise employees are entitled to double salary
- Fixed-term contracts can be reviewed twice - but the third contract must be offered on a permanent, indefinite basis
- Working time and overtime are strictly regulated; only 3 hours daily and 36 hours monthly are allowed and overtime payment must be provided up to 300%, unless flexible working time schedules are approved by the labour bureau
- Employees must be compensated for any untaken annual leave at the end of a calendar year or at the end of employment at a rate of 200% of their daily salary if they could not take leave for business reasons
- When an employer dismisses an employee including in the case of the non-continuance of a fixed-term contract, a statutory severance payment must be made to the employee

## Hong Kong

- Both the employer and employee are entitled to make a payment in lieu of notice to terminate an employment relationship notwithstanding any contractual term purporting to restrict such right
- There is no statutory requirement that a certain percentage of employees must be local nationals. Non-locals are welcome to work in Hong Kong, provided they obtain employment visas
- Trade union membership is relatively low compared with Europe and the USA
- Breaches of restrictive covenants and confidentiality are common issues which arise in employment disputes in Hong Kong
- Personal data privacy at work is attracting more public attention and scrutiny by authorities

## India

- The applicable labour law and compliance requirements for employers depends on a variety of factors including the place where the employees are located, the nature of activity, and the number of employees in the organisation
- Employees who fall within the category of ‘workmen’ are afforded greater statutory protection and benefits under Indian labour laws
- The enactment of a central law to protect women from sexual harassment in the workplace and widespread awareness of this issue has been an important step towards promoting equal opportunity in employment
- The period of maternity benefit leave for a woman employee, having less than 2 children, has been increased from 12 weeks to 26 weeks. Further, the maternity benefit for a period of 12 weeks has also been extended to women who legally adopt a child below the age of 3 months and to commissioning mothers
- A Unified Shram Suvidha portal (one-stop-shop for labour law compliance) has been developed to simplify procedural complexities by facilitating the submission of consolidated returns under various labour laws



### New Zealand

- Employers and employees are subject to a mutual statutory obligation to observe “good faith” in all aspects of their employment relationship, and unions must similarly observe good faith
- Employment may only be terminated for cause, except for termination of new employees during the first 90 days of employment during an agreed trial period
- Dismissals must meet the standard of what a fair and reasonable employer could have done in all of the circumstances, and follow a procedurally fair process
- There is a mandatory system of mediation, through which approximately 80% of disputes are now resolved

### Singapore

- While protection of employee rights has been enhanced over the past few years, the Singapore employment landscape is still largely pro-employer.
- Due to recent developments in the employment legal framework, employers should be aware:
  - Of the obligations imposed on employers in relation to employees’ personal data
  - There is greater union protection and representation for employees in managerial and executive positions
  - There is increased protection and benefits for employees who are Singapore citizens
  - That retiring employees should be offered re-employment until they are 65 years of age
  - Of their potential obligation to notify the Ministry of Manpower of retrenchment dismissals
- Employers must make monthly contributions on behalf of Singapore citizens and permanent residents into the Central Provident Fund
- Labour disputes between trade unions and employers are relatively rare in Singapore

# Australia

The employment relationship in Australia is variably governed by detailed legislation, industry awards, workplace agreements and individual contracts, offering employees a suite of protection and entitlements. The most recent legislative innovation is anti-bullying protections for employees, which allows employees who are subject to bullying to apply for an order to stop bullying. This new legislation (which is relatively onerous on employers) is reflective of a broader employment culture in Australia that is one of the most employee-friendly in the world.

# Issues arising on hiring individuals

## Overview

The Fair Work Act 2009 is the principal legislative instrument governing the employment relationship in Australia. The Fair Work Commission and the Fair Work Ombudsman (both established under this Act) are the government agencies charged with providing for workplace related supervision, assistance and redress for employees and employers.

The employment of most employees in Australia is governed by the national workplace relations system. Within that system, employment is primarily regulated through the use of industry specific modern awards or enterprise agreements negotiated between an employer or employers and employees (or union officials on behalf of employees) for a particular workplace.

The National Employment Standards (NES) also apply to employees under the national workplace relations system. NES provide a guarantee of basic minimum benefits for employees. These ten conditions cover working hours, leave, flexible work arrangements and termination of employment and cannot be supplanted to the employee's disadvantage by a modern award, enterprise agreement or individual employment contract.

## Immigration

Any non-Australian nor non-New Zealand citizen seeking permission to work in Australia will need to apply for a visa from the Department of Immigration and Border Protection. If eligible, an employer can also sponsor an individual to work in Australia.

## Employment structuring and documentation

Every employee in the national workplace relations scheme must be given a copy of the Fair Work Information Statement. This document provides information relevant to employment, including the NES, modern awards, agreements, the right to association and termination of employment.

## Discrimination

Employees have the right under the Fair Work Act and various other state and national anti-discrimination statutes not to be discriminated against due to race, colour, sex, sexual orientation, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction and social origin. Anti-discrimination principles apply from the time of job application and throughout the employment relationship.

# Issues arising during the employment relationship

## Wages, annual leave and working time

Employees covered by the national workplace relations system generally have a standard working week of 38 hours, as provided for by the NES. Employers are not able to request or require employees to work more than the standard 38 hours and an employee can refuse to work extra hours if they are unreasonable.

As a matter of practice, working hours above 38 hours a week are often agreed between employer and employee as being 'reasonable' and overtime may be provided for in an applicable award or agreement.

The NES also specifies that carers can request flexible working hours with their employer if they have been working for that employer for at least 12 months prior to the request for flexible hours or, for casual workers, have a history of employment with the company and expect to continue in that employment.

The minimum wages for employees are set out in the relevant industry award or enterprise agreement. There is also a national minimum wage (currently AUD 17.70 per hour or AUD 672.70 per week) for employees not covered by an award or an agreement, and other minimum wages set for junior workers, trainees and apprentices.

Under the NES, full-time employees (other than casual employees) are entitled to four weeks' paid holiday leave a year, with a supplementary leave allowance for shift workers. This leave accrues over the course of the working year and rolls over from year to year if unused. Unused holiday entitlements are also paid out to the employee following termination of their employment.

Full-time employees are also entitled to ten paid personal leave days a year (pro-rata for part-time employees), covering personal illness as well as the need to care for a member of their immediate family or an emergency. These accumulate from year to year. All employees (including casual employees) are also entitled to take two days' unpaid carers' leave on each occasion they are required to care for an immediate family member.

An employee covered by an award, enterprise agreement or individual contract may have different leave entitlements from those stated in the NES provided those entitlements are in excess of those minimum standards.

## Family rights

Once an employee has worked for their employer for 12 months, they are entitled to 12 months' unpaid parental leave upon the birth of a child or adoption. In addition, certain periods of paid parental leave may be available to an employee. The employee is also entitled to return to the same or an equivalent position for which the employee is qualified and suited once they return from unpaid parental leave.

The position of casual employees as regards parental leave depends on their employment history and expected future continuous employment with their employer, as they are generally not entitled to leave unless they are long-term casual employees.

## Trade unions

Membership of a union is voluntary and discrimination of an employee on the basis of membership of a trade union is not permitted. All unions are registered with the Fair Work Commission.

A trade union representative is able to enter Australian workplaces in certain circumstances, such as investigating a breach of a workplace-related law, if they represent workers at that particular workplace and they hold a current right of entry permit issued by the Fair Work Commission.

## Superannuation

Employers are currently required to pay a 9.5% superannuation contribution in addition to salary or wages for full-time, part-time and casual employees. An employee is generally able to select the fund that the superannuation contribution is paid into and can also make their own additional superannuation contributions.

# Issues arising on termination of the employment relationship

## **Business transfers**

Employees do not automatically transfer on the sale of a business or in the event of outsourcing or insourcing, and so an employer's duties in relation to termination and redundancy are often enlivened in this situation. An employer transferring or outsourcing its business should check the relevant award or enterprise agreement, as there is likely to be an obligation for an employer to consult with their employees if they are to be affected by a change to their workplace. Similarly, the Fair Work Act requires consultation with the relevant employee association if the change will result in the termination of more than 15 employees for reasons of an economic, technological, structural or like nature.

On the transfer of a business, an employee's accrual of entitlements generally recommences, but there are certain circumstances in which employment entitlements, including personal and carers' leave and parental leave, are to continue. Annual leave is an exception, and might be recognised by the new employer or, alternatively, might be paid out on termination of the previous employment. Long-service leave, redundancy, unfair dismissal and notice of termination are also exempted from being continuous entitlements following the transfer of a business.

## **Terminating employment**

The termination provisions of the NES provide a minimum protection for employees which cannot be undermined in an award or agreement. Under these provisions, an employer is able to terminate a contract of employment on written notice. The amount of notice required is up to five weeks depending on the employee's length of service with the business. An award, agreement or individual contract might provide for alternate notice terms in excess of the minimum standards and provision for payment in lieu of notice is permitted.

There are some situations where no notice is required, such as for serious misconduct or for a casual employee.

## **Redundancy**

Under the NES, an employee is entitled to redundancy pay if the employer decides that the position is no longer required or on the bankruptcy or insolvency of the company and the worker has been with the company for at least 12 months.

Redundancy entitlements provide employees with up to 16 weeks' pay, based on their length of service with the company. A modern award, agreement or individual contract may provide for an alternative redundancy scheme for an employee provided it is more beneficial than that provided for under the NES.

## **Unfair dismissal**

The unfair dismissal provisions of the Fair Work Act apply to national workplace relations employees. A minimum period of service applies in order to qualify an employee to bring an unfair dismissal claim and the employee must not be a high income earner.

Under the unfair dismissal scheme, if a dismissal is harsh, unjust or unreasonable, or is not a case of a genuine redundancy, the employee is able to challenge that dismissal in the Fair Work Commission. Specific considerations apply for a small business. Employees earning in excess of AUD 138,900 per annum are not eligible to make an unfair dismissal claim.

An unfair dismissal claim must be lodged with the Fair Work Commission within 21 days of the dismissal. The Commission has powers of redress such as reinstatement and payment of compensation to the wronged employee.

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# China

The employment laws of the People's Republic of China (PRC) are based on statutory law in a civil law system. There is no system of binding case law precedent and also no requirement for the reporting of cases. There are primary pieces of national legislation, such as the Labour Contract Law 2008, and also local legislation at provincial or municipal level, as well as varying local practices. In general, PRC employment laws are very protective of employees. In particular, employers can only terminate contracts unilaterally if a specific ground prescribed by law exists and these grounds are limited. For example there are no grounds to terminate for poor performance, unless this can be categorised as incompetence, and prior procedural requirements are met.

# Issues arising on hiring individuals

## **Immigration**

Foreign nationals must obtain a work permit and residence visa to work in China for more than 90 days, whether employed directly by, or seconded to work for, an entity in China. To perform certain statutory work tasks in China for up to 90 days, foreign nationals must obtain a work visa, not a business visa. Foreign employees holding valid work permits may enjoy protection under Chinese employment and labour law. Remuneration paid to foreign nationals for their work performed in China is subject to PRC individual income tax, whether they are employed directly by, or are seconded to work for, an entity in China. Social insurance obligations now also apply to foreign nationals, (although a few exemptions apply according to the respective treaties (e.g. for German nationals).

## **Employment structuring and documentation**

Employers must provide full-time employees with a written Chinese language employment contract governed by PRC law, and penalties apply for failure to do so. A subsidiary English version is permissible.

Employment contracts can be for a fixed-term or indefinite term. Employers tend to use fixed-term contracts (of one to three years) because termination options are limited to certain statutory situations. However, employees are entitled to a contract for an indefinite term in certain statutory situations, (including renewal after two consecutive fixed-term contracts).

Foreign nationals can be employed directly by a company in China (with a contract governed by PRC law). Secondment to a Chinese company has become less advisable over recent years because under the changing laws and practices, several associated risks may be triggered regarding employment, immigration, tax, etc.

Representative offices of foreign companies cannot employ any staff directly. To hire Chinese nationals, a staffing agency must be used. Foreign nationals who are employed by foreign companies are usually seconded to the representative office.

The implementation of handbooks, rules and policies are subject to a statutory consultation process with employees if they concern matters such as remuneration, working time, etc. which have a direct bearing on the immediate interests of the employees.

It is not possible to contract out of mandatory provisions of PRC employment laws. However, terms may be agreed if they are more favourable to the employee than the legal provisions. In addition to national level laws and regulations, local regulations also apply (mainly provincial and municipal).

For part-time employees (working less than four hours per day or 24 hours per week) who are not covered by many of the statutory protections most provisions (including termination) can be agreed by contract.

# Issues arising during the employment relationship

## **Wages, annual leave and working time**

Minimum wage requirements apply and the exact amount, which is reviewed annually, varies by location- in Shanghai this is currently CNY 2,190 per month.

It is common, but not mandatory, to pay a 13th month salary as a form of bonus.

Overtime compensation depends on the employees' working schedules. Employees working under the standard working time schedule of eight hours per day and 40 hours per week are entitled to be paid at increased rates (or in some cases to be given time off in lieu) for overtime work. Subject to the labour authority's approval, an employer may implement flexible working time schedules, including non-fixed working time schedules and comprehensive working time schedules to certain positions such as management staff, transport employees, travelling sales people and security personnel. Under these schemes, payment of overtime compensation may be avoided to a great extent.

In terms of rest times, employees are entitled to a minimum of one day's rest per week. After one year's work (during their career) full-time employees are entitled to a minimum annual leave entitlement of 5-15 days per year - the exact amount varies according to the total years worked.

Medical treatment leave applies - exact entitlements vary by location and years of work, although salary can normally be reduced during medical leave. Maternity leave also applies - the basic minimum is 98 days with extensions in specific circumstances. Further, female employees are protected against termination (except summary dismissal) from pregnancy to one year after the birth of the child. Finally, marriage leave applies (three to ten consecutive days, including weekends; exact entitlements vary by location) depending on the age of the employee.

## **Trade unions**

Employees can require their employer to establish a labour union within the company (or branch) and union representatives may attend board meetings on HR-related matters and can generally represent employees. Unions must be registered with the All-China Federation of Trade Unions. Industrial action is neither expressly permitted nor forbidden, but in the current economic climate, it is increasingly an issue for employers.

## **Tax and social insurance**

Employees have an obligation to pay individual income tax on their remuneration on a monthly basis. Employers have a separate, independent obligation to withhold and pay this tax monthly to the tax authorities.

Employers and employees have statutory obligations to make contributions to various social insurance and welfare funds. The exact funds and the calculation of contributions vary by location, but typically include: medical, pension, unemployment, work-injury and maternity as well as housing funds.

## **Whistleblowers**

Employees have a right and obligation to report unlawful activities to the relevant authorities.

# Issues arising on termination of the employment relationship

## **Business transfers**

There is no automatic transfer of employees with a transfer of business or assets - employees must terminate their employment with the seller and enter into a new contract with the buyer. Certain acquired rights, eg seniority for severance calculation, may be transferred to the new employment.

## **Discrimination**

There is no statutory definition of discrimination, but discrimination on the grounds of nationality, race, sex, religious belief, disability and infectious disease is recognised and prohibited. Sexual harassment of women is also prohibited.

This area of law is not sophisticated but claims are increasing.

## **Terminating employment**

During the probationary period an employer can terminate without notice provided they can prove a reason for termination, mainly that the employee fails to fulfil the recruitment criteria; and an employee can resign with three days' notice. Thereafter, employees can resign at any time by giving notice (normally 30 days).

Employers can only terminate for specific grounds comprehensively listed by law. Permitted grounds for termination without notice or severance include serious breach of validly implemented employer rules and policies; serious dereliction of duty or bribery/embezzlement causing substantial harm to the employer; criminal prosecution, etc. Permitted grounds for termination with prior notice of 30 days (or payment in lieu of notice) and severance include: (1) proven incompetence even after training or re-assignment of duties; (2) failure to return to work after statutory medical treatment leave for non-work related injury or illness even if the position is adjusted; and (3) major changes in circumstances (mainly major organisational changes) which make it impossible to perform the contract after the parties fail to reach an agreement on a contract adjustment.

In specific "mass lay-off" circumstances when an employer faces financial or operational problems and has to lay off a minimum of 20 employees, or a number of persons that is less than 20 but accounts for 10% or more of the total number of the enterprise's employees, consultation with employees/trade union and information obligations to the labour bureau apply and statutory severance must be provided.

The statutory severance referred to above is one month's average salary per year of service, although a cap applies to salary periods of employment from 2008 onwards. The remedy for unlawful dismissal is either double the statutory severance or reinstatement of the employment - the employee is entitled to request their preferred remedy.

Statutory severance must also be provided when a fixed-term contract is not extended and on the conclusion of a termination agreement which has been initiated by the company's initiative.

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# Hong Kong

Hong Kong has pursued a market-orientated approach to the economy and to employment law, in the belief that free competition and relatively little intervention would maximise benefits for all. This philosophy has led to a relatively well-balanced approach to employment legislation and the general observation that Hong Kong is an employer-friendly jurisdiction, while still maintaining and protecting employees' interests.

The Employment Ordinance (Cap. 57) of the laws of Hong Kong (the Ordinance) applies to all employers and employees and to all contracts of employment in Hong Kong. The Ordinance provides for a range of minimum rights and benefits for employees in Hong Kong.

# Issues arising on hiring individuals

## **Immigration**

All individuals without a right of abode or right to land in Hong Kong must obtain an entry permit or employment visa before coming to Hong Kong for the purpose of employment. Applications made to the Immigration Department take around six weeks to process and should be made through the sponsor, usually the employer company in Hong Kong, prior to the employee's arrival in Hong Kong.

## **Employment structuring and documentation**

In Hong Kong, a contract of employment may be made verbally or in writing. It is required under the Ordinance that employers inform each employee of the terms and conditions of their employment before the commencement of their employment, including: (1) wages (rate of pay, overtime rate, any allowances, whether calculated by the job, hour, day, week or otherwise); (2) wage period; (3) length of notice required to terminate the contract; and (4) any entitlement to an end of year payment and the payment period.

A fixed-term contract may be determined by reference to a fixed period or the completion of a task or project. Employees employed on fixed-term contracts enjoy the same statutory benefits and protections as employees employed on indefinite term contracts, save that a fixed-term contract will terminate automatically on expiry of the fixed-term without the need for either party to give notice of termination. Non-renewal of a fixed-term contract is regarded as a dismissal for the purposes of severance and long service payments. Employment protection rights are therefore not diminished merely because a worker is employed under a fixed-term contract.

# Issues arising during the employment relationship

## Wages, annual leave and working time

The current statutory minimum wage (SMW) rate is HKD 32.5 per hour. In the 2017 Policy Address, the Chief Executive in Council adopted the recommendation of the Minimum Wage Commission to raise the SMW rate to HKD34.5 per hour. Subject to approval by the Legislative Council, the revised SMW rate will take effect from 1 May 2017.

The SMW applies to all employees, whether they are monthly-rated, daily-rated, hourly-rated, permanent, casual, full-time or part-time, and regardless of whether or not they are employed under a continuous contract.

However, SMW does not apply to live-in domestic workers, student interns (including work experience students during a period of exempt student employment) and individuals excluded under the Ordinance.

There are no statutory provisions which prescribe maximum working hours except in relation to the employment of young persons in industrial undertakings where special regulations apply. The Standard Working Hours Committee (SWHC) of the Labour and Welfare Bureau is responsible for considering the introduction of a working hours policy. This is an extremely controversial topic in Hong Kong, which is currently in the process of a highly political and lengthy debate.

In addition to paid statutory holidays, employees who have been employed under a continuous contract are entitled to at least one rest day in every seven day period.

Employees who have been employed under a continuous contract for 12 months or more are entitled to a minimum of between seven and 14 days' paid annual leave for each period of twelve months' employment depending on their length of service.

## Tax and social insurance

Hong Kong uses a territory-based taxation system, whereby income tax is only imposed on income which derives from an office or employment or any pension, arising in or derived from Hong Kong. Employees are responsible for the filing and payment of their own income tax to the Inland Revenue Department.

Female employees employed under a continuous contract are entitled to a minimum of ten weeks' paid maternity leave. This is paid at the rate of four-fifths of the employee's average wage over the preceding 12 month period.

All male public sector employees with at least 40 weeks' continuous service are entitled to five days' paternity leave at four-fifths of their average daily wage immediately before the expected or actual date of childbirth. Male employees in Hong Kong's private sector are now entitled to three days' paid paternity leave.

Employees who have been employed under a continuous contract for a period of one month or more immediately preceding a sickness day are entitled to paid sick leave at the rate of four-fifths of their average wage over the preceding 12 month period.

Under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) each employer in Hong Kong is required to contribute an amount equal to at least 5% of an employee's salary to a retirement scheme that is registered as a Mandatory Provident Fund Scheme.

Employees are also required to contribute at least 5% of their salary to the scheme, unless they have a monthly relevant income of less than HKD 7,100 in which case their employer must contribute on their behalf. The maximum contribution from both the employer and the employee is HKD 1,500 per month.

With effect from 1 February 2016, retired employees are allowed to withdraw their Mandatory Provident Fund benefits by instalments. Previously, on retirement, employees either had to withdraw their benefits in a lump sum, or leave all their benefits in the scheme for accumulation. The Employees' Compensation Ordinance (Cap. 282) requires every employer to arrange an insurance policy for a specified minimum amount for all its employees to compensate them for injury, accident or death arising "out of and in the course of employment".

## Discrimination

Discrimination on the grounds of gender, pregnancy, marital status (Sex Discrimination Ordinance (Cap. 480)), disability (Disability Discrimination Ordinance (Cap. 487)), family status (Family Status Discrimination Ordinance (Cap. 527)), race (Race Discrimination Ordinance (Cap. 602)) and trade union membership (the Ordinance) is prohibited in Hong Kong. However, there is currently no protection against discrimination on the basis of age or sexual orientation nor is there any specific provision on equal pay legislation.

Each of the anti-discrimination ordinances prohibits direct and indirect discrimination. Direct discrimination is defined as “less favourable treatment by reason of the prohibited ground”. Indirect discrimination occurs when the complainant cannot comply with a requirement or condition which has been applied to all but which has a disproportionate impact on the group that is protected from discrimination.

The Government issued a Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation in 2009 but public consultation on bringing sexual orientation under the existing anti-discrimination legislation has not yet taken place.



# Issues arising on termination of the employment relationship

## **Business transfers**

Where a change occurs in the ownership of a business or where a trade, business or undertaking is transferred from one entity to another, there is no obligation on the part of the transferee to employ all or any existing employees of the transferor. However, if the transferee decides to employ any of the transferor's employees, the period of continuous employment of those employees before the transfer will be carried forward to the transferee entity and, consequently, continuity of employment is not broken.

If a transferred employee who has been employed under a continuous contract for at least 24 months is dismissed by reason of redundancy, the transferor will be liable to make a severance payment to that employee. In addition, if an employee has been continuously employed for five years or more, even if an offer was made for continued employment, the transferor will still be obliged to pay long service payments if the employee does not agree to be employed under the new contract.

## **Terminating employment**

An employee who has been employed under a continuous contract for at least 24 months is entitled to a severance payment if they are dismissed by reason of redundancy or laid off. The amount of severance payment is two-thirds of one month's pay for each year of employment or HKD 15,000, whichever is less, subject to a maximum payment not exceeding HKD 390,000.

Employees who have been employed under a continuous contract for five years or more and whose employment is terminated other than by summary dismissal are entitled to a long service payment on termination. The amount of the payment is calculated by reference to the same formula as for a severance payment, with the same maximum cap.

The right to a severance payment and a long service payment are mutually exclusive. Furthermore, the amount of any contractual gratuity based on length of service is deductible from the severance or long services payment. Under the current law, employers are entitled to offset redundancy/long service payments payable on termination against the accumulated contributions they have made to an employee's Mandatory Provident Fund. However, in its recent Policy Address, the Government proposed to progressively abolish this offsetting mechanism.

## **Dispute resolution**

As a matter of practice, parties involved in an employment dispute usually/commonly first approach the Labour Relations Division of the Labour Department, which provides an informal and simple mechanism to encourage settlement through voluntary conciliation. If the parties fail to reach settlement through conciliation, a claimant may lodge a claim with the Minor Employment Claims Adjudication Board or the Labour Tribunal, depending on the amount claimed and the number of claimants involved.

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# India

Indian labour and employment laws are being reformed steadily to keep pace with modern business needs. The Indian government is making efforts to facilitate ease of doing business and remove the procedural complexities manifested in the labour laws.

To this end, the government is proposing to formulate a distinct set of labour codes on wages, industrial relations, social security and health and safety thereby combining various laws.

Recently, the central government has approved new “model laws” for shops and establishments which includes a provision allowing commercial establishments to remain open 24/7. However, these model laws will only become law if they are adopted by the respective state governments.

In addition, a Unified Shram Suvidha portal (one-stop-shop for labour law compliance) has been developed to simplify procedural complexities by facilitating the submission of consolidated returns under various labour laws. This portal has been envisaged as a single point of contact between employer, employee and enforcement agencies, bringing transparency to their day-to-day interactions.

To encourage more entrepreneurship, and to reduce the burden of labour law compliance, the Indian Government is allowing registered start-ups to file self-certified returns for a period of 3 years.

# Issues arising on hiring individuals

Hiring and dismissing employees must be considered carefully because of the legal, regulatory, social and cultural idiosyncrasies that can arise when doing business in India. Any form of employment in India can trigger local tax, regulatory, immigration and exchange control compliance requirements.

## **Immigration**

Foreign nationals can be employed by an entity in India, or employed overseas and seconded to an Indian entity. Foreign companies can also consider employing consultants directly in India.

All foreign nationals wanting to work in or visit India must have a visa. Whether an individual should enter India on an employment visa or business visa will depend on the nature of the activity to be conducted in India. Foreign nationals must earn a minimum annual salary of USD 25,000 (amongst other qualifying factors) to be eligible to apply for an Indian Employment visa.

Foreign nationals must obtain the employment visa to work in India from their country of origin or habitual domicile whether employed directly by or seconded to work for an entity in India. The time spent in India is no longer an indicator of the type of visa required. Post-arrival formalities must be completed within the specified period, failing which their exit from India could be delayed. Foreign nationals working for an entity in India must pay all applicable taxes in India.

## **Employment structuring and documentation**

Employers should offer employees working in India a clear written contract of employment. An Offer Letter is commonly used for this purpose, and appropriate terms and conditions should be included in the Offer Letter to avoid any ambiguity. Indian employment contracts can be for a fixed-term or an indefinite term, depending on the requirements.

Companies should ensure they comply with all applicable laws including foreign exchange regulations (where applicable) when structuring employment agreements in India. In addition, employers must ensure that all handbooks, rules and policies are suitable for use in India and enforceable under Indian law.

Finally, employers have certain obligations under specific legislation towards part-time employees and may be held liable even where such employees are hired through a contractor or agent. For instance, in relation to employees who remain on the payroll of the contractor, the “principal employer” must ensure that the contractor has remitted statutory provident fund contributions before releasing any payments to the contractor. The principal employer must also maintain principal employer-related documents and records for employees on the contractor’s payroll.

# Issues arising during the employment relationship

## Wages, annual leave and working time

Terms and conditions of employment are regulated by an employee's employment contract which must meet minimum statutory requirements set out in the respective Shops and Establishment Act (SEA) of the state where the employee is based. The respective SEA could be modified if the relevant state government adopts the "model law" on shops and establishments.

The payment of overtime, notice periods, annual leave and sick leave can vary depending on both the state where an employee is based and the employee's seniority. State specific compliance is required and varying terms of employment may need to be offered to different employees based in different states in India.

India has legislation that offers maternity benefits such as maternity leave and pay, but there is no statutory provision for paternity leave. The period of maternity benefit leave for a woman employee, having less than 2 children, has been increased from 12 weeks to 26 weeks. Further, the maternity benefit for a period of 12 weeks has also been extended to women who legally adopt a child below the age of 3 months and to commissioning mothers.

## Discrimination

The Constitution of India guarantees the right to life, liberty and equality, and the right not to be discriminated against on the grounds of nationality, race, sex, religion or disability. However, such right is ordinarily available only against the State and its instrumentalities and not against private persons. An important law relating to discrimination is aimed at preventing and prohibiting sexual harassment of women in the workplace. This recently enacted law places an onus on employers to instigate a complaint redressal mechanism in the workplace and categorise sexual harassment in the workplace as misconduct. Employers should also educate their workforce on the relevant rights and remedies, assist aggrieved women in exercising their rights and monitor the timely submission of reports and compliance in accordance with the law.

## Trade unions

The Trade Unions Act 1926 allows workers to organise themselves and form trade unions. Current trends suggest that, with the expansion of the service sector, there has been a decline in the importance of trade unions in the overall landscape of industrial relations in India. Political patronage to trade unions has also decreased over the years. It has been proposed that a consolidated Labour Code on Industrial Relations should be enacted which would simplify and combine the Trade Unions Act 1926 with key industrial and labour laws.

## Tax and social insurance

Employees have an obligation to pay individual income tax. Furthermore, companies must comply with corporate tax obligations which includes an obligation to withhold tax on salary, and pay this to the local tax authorities. In addition, both employers and employees have a statutory obligation to make a contribution to the applicable social security schemes including the Provident Fund, pensions and employee state insurance. The courts in India seek strict enforcement of the obligations with respect to social security-related laws. Social security schemes providing universal pension and insurance coverage are also being implemented in India in an effort to introduce a universal social security system.

Amendments are being proposed to make Provident Fund contributions voluntary for certain employees. Under the proposed amendments, instead of making contributions to the Provident Fund, employees may opt for the government approved pension scheme which is available to all citizens.

India has signed social security agreements with countries including Belgium, Germany, Switzerland, Denmark, Luxembourg, Netherlands, Hungary, South Korea, Austria and France which exempts expatriates of these countries from making social security contributions in India. Foreign nationals of all other countries must make contributions to the Provident Fund unless they work at establishments that are subject to Provident Fund legislation.

Pursuant to changes in the employee eligibility requirements, the benefit of social security legislation in relation to employee state insurance and the payment of a statutory bonus is now being extended to more employees who were not previously covered by this legislation.

# Issues arising on termination of the employment relationship

## **Business transfers**

The Industrial Disputes Act 1947 (IDA) provides protection to employees falling into the category of “workmen”. In the event of the transfer of an undertaking, eligible workmen are deemed to be “retrenched” (i.e. redundant) and will be entitled to notice and severance compensation only if such transfer results in adverse working conditions or an interruption in the continuity of service. In other words, no special rights or benefits are given if services have not been interrupted and the terms and conditions of employment are not altered to the detriment of the workman.

Employees who are “non-workmen” do not have statutory rights in the case of a transfer of an undertaking. However, employees will be entitled to contractual rights and/or benefits. Employees may also be entitled to bring a claim against the employer in the case of early termination of their employment or wrongful termination as a result of the transfer.

## **Terminating employment**

The IDA sets out the rules, processes and procedures to be followed by employers when terminating the employment of “workmen”. Certain categories of employees, such as managers, those discharging supervisory duties and those earning more than INR 10,000 per month, are exempt from this statutory protection. In such cases the terms and conditions of their individual contracts of employment, or the applicable SEA, will dictate the process of termination.

All employers must comply with the minimum statutory requirements for notice periods and payments in lieu of notice provided for in the applicable SEA.

Retrenchment or termination without cause is permitted under Indian law subject to certain conditions. In cases of proven misconduct or termination for cause, an employer may be entitled to terminate without notice or make a payment in lieu of notice. Rules and procedures can vary depending on the nature of activity of the entity, the state where operations are based and the number of employees employed by the entity.

Above all, the cultural idiosyncrasies of the Indian workplace must always be considered when terminating employment.

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# New Zealand

New Zealand's employment relations framework is built on the contractual provisions set out in the individual or collective agreements negotiated between employers and employees, overlaid with statutory obligations in respect of "good faith" and certain minimum standards in employment legislation.

# Issues arising on hiring individuals

## **Immigration**

Employees who do not hold New Zealand citizenship, a New Zealand residence visa, Australian citizenship or an Australian permanent residence visa, must obtain a valid work visa to work in New Zealand.

The following types of work may not require a work visa: (1) business negotiations; (2) short-term sales trips; (3) work for official trade missions recognised by the New Zealand government; and (4) work for overseas governments.

“Immigration New Zealand” is the government department which manages work visas. There are various requirements that employees will need to meet such as: (1) be in good health and of good character; (2) have a passport that is valid for at least three months past the date of leaving New Zealand; (3) be genuine in wanting to work in New Zealand; and (4) have the right visa for the visit.

## **Employment structuring and documentation**

Employment agreements may be either individual, where the parties are the employer and the employee, or collective where the parties are the employer and the trade union. In either case the agreement must be in writing.

An individual employment agreement must include the names of the employee and employer, a description of the work and the place of work, hours, salary, a “plain language” description as to how to solve employment relationship problems, an employee protection provision in case of contracting out, sale or restructuring and a provision that confirms the right of the employee to be paid time and a half for work on public holiday in accordance with the Holidays Act 2003.

The Employment Relations Act 2000 (ERA) allows for fixed term agreements that specify that the employment will end at the close of a specified date or period, on the occurrence of a specified event or at the conclusion of a specified project. However, before an employee and employer agree on such an arrangement, the employer must have genuine reasons based on reasonable grounds for a fixed term agreement.

The employer must advise the employee of when or how his employment will end and the reasons for his or her employment ending in that way.

# Issues arising during the employment relationship

## **Wages, annual leave, health and safety**

In New Zealand, the minimum wage is currently NZD 15.75 (approx USD 11.35). The minimum wage is usually increased on 1 April each year

The Holidays Act 2003 governs annual leave, public holidays, sick leave and bereavement leave. Employees are guaranteed not less than four weeks' paid annual leave per year, up to eleven paid public holidays (where time and a half and an alternative day or a day in lieu is provided to most employees who work on such a holiday), five days' paid sick leave per annum accruable to a maximum of twenty days, and paid bereavement leave on the basis of three days for a close bereavement and one day for other bereavements provided certain criteria are met. These are all minimum entitlements and employment agreements may improve on these rights.

The Health and Safety at Work Act 2015 (HSAWA) took effect from 1 April 2016 and replaced the Health and Safety in Employment Act 1992.) The HSAWA imposes obligations on individuals in control of a business or undertaking and others in the workplace, and is designed to protect all people from harm in a workplace. Harm includes physical and psychological harm. The HSAWA is penal and parties who are prosecuted successfully will have a criminal conviction. The HSAWA is strict liability in nature, and the only defence to a charge is to prove there has been a complete absence of fault. Penalties are substantial. The new statutory scheme has increased the obligations on employers, company officers and directors and employees, and substantially increased potential penalties for breaches.

## **Trade unions**

The ERA recognises the right to organise into trade unions, have that right recognised by the employer, and legally withdraw work. A key objective of the ERA is to promote unions and collective bargaining.

Consistent with this objective, the ERA specifically recognises trade unions as the only lawful representative of employees' collective interests. The ERA entitles unions to represent their members in relation to any matter involving their collective interests, and it also allows unions (and other representatives) to represent employees in relation to their individual rights (for example, unions can represent employees at mediation and in court actions), provided that they have the employee's authorisation.

Collective agreements can only be concluded by a trade union and an employer. Employees cannot band together to negotiate a collective agreement unless they are formed and registered as a trade union. Therefore, while union membership is voluntary, if an employee wants to be involved in a collective agreement and to bargain collectively, he or she must be a member of a union.

## **Social insurance**

KiwiSaver is a voluntary, work-based savings initiative set up which is governed by the KiwiSaver Act 2006. It is administered by the Inland Revenue Department and enables employees to save for their retirement with the incentive of assistance (in the form of a compulsory employer contribution) from the employee's employer.

KiwiSaver savings are made up of employee contributions, government contributions and employer contributions.

Employer and employee contributions are calculated using the employee's gross salary. The employee may elect how much of their salary that they wish to have applied to KiwiSaver (3%, 4% or 8%). The current compulsory employer contribution to KiwiSaver is 3%.

# Issues arising on termination of the employment relationship

## Business transfers

The ERA defines a restructuring in relation to an employer's business as: entering into a contract or arrangement under which the employer's business or part of it is undertaken for the employer by another person; selling or transferring the employer's business (or part of it) to another person; or the termination of a contract or arrangement if the work carried out under the contract or arrangement is to be carried out by another person, whether by a new person or by the person for whom the employer carried out the work.

Where a restructuring is proposed, an employer is obliged to consult with the other party/new employer about whether existing employees will transfer and if so, on what terms.

The process the employer must follow must be set out in an employee protection provision and this must be contained in all existing employment agreements. The other party or new employer is not obliged to offer employment to existing employees, other than vulnerable employees.

In a sale situation, the parties may negotiate the transfer of existing accrued leave liabilities. Alternatively, accrued and undertaken annual leave may be paid out to employees by the vendor on termination. Existing KiwiSaver (superannuation) entitlements transfer between employers.

## Terminating employment

Terminating an employment relationship usually happens in one of four ways.

### Resignation or Retirement

Employees can resign at any time, provided they give notice to the employer in accordance with the terms of the employee's employment agreement, or in the absence of an employment agreement, reasonable notice to the employer.

### Abandonment

Abandonment of employment usually occurs when an employee is absent from work for an extended period (usually three working days) and they fail to notify the employer or provide a good reason as to why they are not at work.

## Dismissal for conduct or performance

An employer is entitled to dismiss an employee for unacceptable behaviour, conduct or performance. A lawful decision to dismiss must comply with the ERA. The test (as set out in s103A) is: whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

## Redundancy

An employer may also terminate employment in a genuine redundancy situation (where the role performed by the employee is no longer required by the employer). If, following a consultation process, the employer determines that the employee's role is not required, the employer must consider any opportunities for redeployment before terminating employment. In New Zealand, if an employee claims unjustified dismissal arising from termination by reason of redundancy, it is dealt with as a personal grievance.

Redundancies are commonly challenged for procedural defects such as a lack of consultation, failure to consider alternatives, the fairness of criteria in selecting those to be made redundant and the giving of proper notice.

## Discrimination

The Human Rights Act 1993 protects people in New Zealand from discrimination in a number of areas of life, including in employment. There are a wide range of prohibited grounds of discrimination which include sex, marital status, religious and ethical belief, colour, race and ethnic or national origin, disability, age, political opinion, employment status, family status and sexual orientation. The employee must choose whether to pursue a complaint through the Human Rights Commission or through the Employment Relations Authority; they cannot do both.

The Human Rights Commission has the power to make declarations and to order the payment of damages. Discrimination cases have not traditionally been common in New Zealand however damages awards have increased over the last 18 months, potentially making it a more attractive option for employees and former employees.

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# Singapore

The Employment Act (Cap. 91) of Singapore (the Act) is the principal employment legislation in Singapore. Subject to certain carve-out sections, it generally covers employees (regardless of nationality) who are under a contract of service with an employer, other than seamen, domestic workers, government employees or any person employed in a managerial or an executive position earning more than SGD 4500 per month (EA Employees). Those employees who do not fall within the scope of the Act (Non-EA Employees) enjoy certain limited protections under other legislation. However, their employment terms and conditions are principally governed by their employment contracts. Over the last three years, the employment landscape in Singapore has become more dynamic with a discernible shift towards enhanced employee protection.

# Issues arising on hiring individuals

## **Immigration**

All non-residents have to possess a valid work pass before they can work in Singapore. Ordinarily, the holder of the work pass is only permitted to work for a specified employer and in a specified occupation. There are various types of work passes such as Work Permit, Employment Pass, S Pass, Personalised Employment Pass, Miscellaneous Work Pass, Training Work Permit and Training Employment Pass.

## **Considering Singaporeans first**

Employers submitting Employment Pass applications are required to advertise their job vacancies on the Jobs Bank (a public platform to facilitate job matching between local individuals and employers) for at least 14 calendar days before being allowed to proceed with their application. The advertisement must be open to Singaporeans and must comply with the Tripartite Guidelines on Fair Employment Practices, such as being non-discriminatory. Certain jobs are exempted from the advertising requirement, such as, jobs in firms with fewer than 25 employees, jobs that pay a fixed monthly salary of SGD 12,000 and above, jobs filled by Intra-Corporate Transferees (a manager, executive or specialist who has worked for the firm outside Singapore for one year or more before being posted to the branch, affiliate or subsidiary in Singapore) and short-term jobs for not more than one month.

## **Employment structuring and documentation**

The standard type of employment contract in Singapore is an “open-ended” contract terminable on notice (subject to the protection which the law provides on unfair dismissal).

While a contract of employment may be partly written and partly verbal, with effect from 1 April 2016, the key employment terms must be issued to the employee in writing (whether in soft or hard copy) no later than 14 days from the commencement of employment.

Key employment terms will include the following: (1) names of employer and employees respectively; (2) commencement of employment; (3) appointment (job title and job scope); (4) hours of work; (5) probation period, if any; (6) duration of employment (if fixed-term); (7) remuneration (basic salary, allowances and bonus if any); (8) employee benefits (e.g. sick leave, annual leave, maternity leave); and (9) termination of contract (notice period).

Workers may be contracted to work for a fixed period only or to perform a particular task with the contract terminating at the end of such period or on the completion of the task. There is no requirement for fixed-term contracts to specify the reason why they are fixed-term.

Apart from issuing written key employment terms, employers must issue itemised payslips and maintain updated employment records for each employee.

# Issues arising during the employment relationship

## Wages, annual leave and working time

The Act provides that minimum rates of salaries for children or young persons engaged in particular industries or work may be prescribed. Singapore has no minimum wage system although there may be prescribed minimum rates of salaries for children or young persons engaged in particular industries or work. Singapore has also introduced a Progressive Wage Model system intended to be part of business licensing conditions. It basically comprises of specific wage points to encourage workers to upgrade and progress to their next respective wage points. To date, the Progressive Wage Model has been implemented in the cleaning, security and landscape sectors.

Part IV of the Act (which provides for rest days, hours of work and other conditions of service), applies only to the following workers (Part IV EA Employees):

- Employees to whom the Act applies (except managers and executives (but not workmen)) who are earning a basic monthly salary of SGD 2,500 or less
- Workmen (i.e. manual labourers) earning a basic monthly salary of SGD 4,500 or less

Part IV of the Act provides that no Part IV EA Employee is required to work for more than eight hours in a day or for more than 44 hours in one week. Further, Part IV EA Employees are allowed one rest day per week, although in the case of a shift worker a continuous period of 30 hours may be substituted for a rest day. For employees who are not covered by Part IV of the Act, their working hours will be contractually agreed.

For employees who are not Part IV EA Employees, matters such as rest days and hours of work will depend on contractual provisions found in their contracts of employment.

Part IV of the Act provides that a Part IV EA Employee who has served his employer for not less than three months will be entitled to paid annual leave of seven days in respect of the first year of continuous service with the same employer, and one additional day for every subsequent year with the same employer subject to a maximum of 14 days. For other employees, matters such as rest days, hours of work and annual leave will depend on contractual provisions found in their contracts of employment.

## Family rights

In Singapore, there are provisions for maternity, paternity, childcare, infant-care, and adoption leave for qualifying employees. There are two relevant statutes: the Act itself and

the Child Development Co-Savings Act (Cap. 38A 2002 Rev Ed).

There is no statutory entitlement for marriage or compassionate leave under the Act. The entitlement to such leave depends on what is in the employment contract or agreed mutually between employer and employee.

## Trade unions

The Trade Unions Act (Cap. 333) defines a trade union as an association of workers or employers that aims to regulate relations between workers and employers. The objectives of a trade union are stated as being to promote good industrial relations; to improve workers' working conditions; to enhance the economic and social status of workers; and to raise productivity for the benefit of workers, employers, and the economy. Any employee who is over the age of 16 may join a trade union, and nothing in any contract of service may restrict the right of any employee to join and/or participate in the activities of a registered trade union. While industrial action is permitted, the majority of members affected must have agreed to it by means of a secret ballot. Strike action is prohibited for the three essential services of water, gas and electricity. For other essential services, striking is prohibited unless 14 days' prior notice is given of the strike. As the national confederation of trade unions in the industrial, service and public sectors in Singapore, the National Trades Union Congress has always enjoyed a close working relationship with the Government and employers. Labour disputes between trade unions and employers are relatively rare.

Professionals, managers and executives (PMEs) now enjoy greater union protection and representation due to amendments to the Industrial Relations Act (Cap 136). Prior to the amendments, PME could only be represented by rank-and-file unions as individuals without collective bargaining rights, but now these unions can collectively represent PMEs. Effectively, this will mean that unions will be able to bargain for collective salary agreements and to represent PMEs in any re-employment issues.

## Employment Claims Tribunal

From 1 April 2017, the Employment Claims Tribunal (ECT) and Tripartite Alliance for Dispute Management (TADM) will be established:

1. The ECT will handle salary-related disputes (e.g. for overtime pay, public holiday and rest day pay, maternity leave, re-employment, salary arrears, payment of retrenchment benefits) for most employees, regardless of salary level.

2. Parties must first undergo mediation through TADM will be mandatory before the ECT hears their dispute.
3. The ECT will hear claims up to SGD20,000 or SGD3,000 for those who go through the Tripartite Mediation Framework (being a mediation forum for certain employees who are union members working in non-unionised companies) or mediation assisted by unions who are recognised under the Industrial Relations Act (Cap 136).

The new system should provide a more accessible, expeditious and cost-effective way of resolving salary-related claims than bringing claims in the Singapore Courts.

### **Social insurance**

The Central Provident Fund (CPF) is a compulsory comprehensive savings plan for working Singapore citizens and permanent residents to fund their retirement, healthcare and housing needs. All eligible employees and their employers must make monthly contributions to the CPF. Contribution rates change periodically and are tiered, based on the employee's age. As of 1 January 2016, the rates are 17% for the employer and 20% for the employee (of the employee's monthly salary capped at SGD 6,000). The contribution rates differ for employees in age brackets above 50.

### **Retirement and re-employment**

Under the Retirement and Re-employment Act (Cap 274A), the statutory minimum retirement age is 62 years and employers are required to offer re-employment to eligible employees who turn 62, up to the age of 65 or 67 (eventually). If no suitable job is available, a one-off Employment Assistance Payment is made to the employee (recommended to be at least three months' basic salary with a minimum of SGD 4500 up to a maximum of SGD 10,000).

Employers who voluntarily re-employ workers aged 65 and above may benefit from an additional offset of up to 3% (in addition to any other Special Employment Credit which may apply, e.g. offset of up to 8% of the wages of an employee aged above 50 earning up to SGD 4,000 a month) of an employee's monthly wages through a Special Employment Credit.

### **Employee personal data**

The Personal Data Protection Act (No. 26 of 2012) ("PDPA") imposes obligations on employers in relation to collection, use and disclosure of employees' personal data. Under the PDPA, the employer will have to notify its employees of the purposes for the collection, use or disclosure of personal data and to obtain their consent.

Employers' obligations include limitations on the collection, use or disclosure to purposes that a reasonable person would consider appropriate, providing the right for individuals to access and correct their data, taking reasonable efforts to ensure that the data is accurate and complete, protecting the data in its possession, and not keeping the data for longer than is necessary to fulfil the purpose for which it was collected, or for a legal or business purpose.

However, employers may collect, use and disclose employee personal data without first obtaining consent, if it is for the purposes of: evaluating the suitability or eligibility of an employee for employment; the continuance of their employment; or promotion. Employers are also permitted to collect, use or disclose the personal data of their employees without their consent if the collection is reasonable for the purpose of managing or terminating the employment relationship; nonetheless, employees must still be notified of this.

### **Harassment in the workplace**

The Protection from Harassment Act (Cap 265A) ("PHA") came into effect in 2014. It provides protection from harassment and anti-social behaviour; including cyber-bullying and stalking. Offenders face a wide range of potential penalties such as fines, imprisonment and community orders. Even though there is not a specific offence of workplace harassment, employers should be mindful that the PHA does apply to acts of harassment in the workplace.

The Ministry of Manpower, National Trades Union Congress and the Singapore National Employers Federation has jointly released a Tripartite Advisory on Managing Workplace Harassment which sets out guidance on steps employers should implement to prevent and manage workplace harassment. This would include developing a harassment prevention policy, providing information and training on workplace harassment and implementing reporting and response procedures.

# Issues arising on termination of the employment relationship

## **Business transfers**

Under the Act, where a business or part thereof is transferred from the transferor to the transferee, Section 18A automatically operates to novate the contracts of employment of all of the EA Employees to the transferee.

The Act specifically provides that there will be an automatic transfer with no break in the continuity of employment and the terms and conditions of service of the EA Employees transferred will be the same as those enjoyed by them immediately prior to the transfer.

Section 18A does not apply in a sale of assets.

## **Mandatory Retrenchment Notice**

Under the Tripartite Advisory on Mandatory Retrenchment Notifications, retrenchments are defined as dismissals on the ground of redundancy or by reason of any reorganisation of the employer's profession, business, trade or work. This applies to permanent employees, as well as contract workers with full contract terms of at least 6 months.

Employers who employ at least 10 employees are required to notify the Ministry of Manpower (MOM), if five or more employees are retrenched within any 6 month period beginning 1 January 2017.

Such notification must be submitted within five working days of the employee being notified of their retrenchment. A failure to notify MOM within the required timeline is considered an offence, and offenders may be liable on conviction to penalties including a fine not exceeding SGD 5,000.

## **Terminating employment**

EA Employees and employers may approach the Ministry of Manpower for mediation or conciliation services in respect of employment disputes or be referred to the Commissioner of Labour. Non-EA Employees can still refer a matter to the Commissioner of Labour for disputes relating to matters such as salary payments. Employees who are union members may seek assistance from their unions in resolving disputes. Finally, disputes between unions and the employer may seek conciliation with the Ministry of Manpower or bring the matter to the Industrial Arbitration Court (very rare).

Under the Act, only Part IV EA Employees, who are employed in the continuous service of an employer for at least two years will be entitled to retrenchment/redundancy benefits. In relation to Non-EA Employees, retrenchment/redundancy benefits will depend on contractual provisions found in their contracts of employment.

Employers wishing to retire employees must take into account the requirements of the Retirement and Re-employment Act. A contractual retirement age earlier than 62 will not be enforceable.

## **Discrimination**

Under the Constitution of Singapore, discrimination against Singapore citizens on grounds of inter alia religion, race, or place of birth is prohibited.

There is specific legislation prohibiting discrimination based on pregnancy and age. However, discrimination on the basis of sex, disability or sexual orientation is not statutorily provided for. There is a tripartite alliance for fair employment practices which promotes non-discrimination in the workplace but these are just guidelines and are not legally enforceable.

Whilst the rights of foreign citizens/expatriates are not protected by statute, discrimination against such individuals can be argued as being contrary to public policy. However, these types of cases are not commonly reported in Singapore.

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# The Americas and Canada highlights

## Brazil

- Brazilian employment law is employee-protective. Labour relations are a matter of Federal law. Therefore, labour rights are nationally standardised, and the same labour costs and consequences will apply regardless of an employer's place (State or City) of business
- The Federal Constitution provides several minimum conditions and benefits that are guaranteed to all employees, such as minimum wage, overtime payment and Christmas Bonus
- Unions are very active and may agree additional mandatory benefits through collective bargaining agreements negotiated with the companies
- Both the employer and the employee are allowed to terminate the employment at any time, without cause. Under some specific and exceptional circumstances, employees may be entitled to temporary job stability, which may prevent the employer from terminating the relationship for a given period

## Canada

- Employment law concerns the relationship between an individual and an employer, while labour law regulates the collective representation of employees by trade unions
- With some exceptions, employment in Canada is “at will”, in that the employer may terminate the relationship at its discretion (provided it is not for an illegal reason).

- However, unlike the U.S.A., while the basis for the termination is “at will”, dismissed employees are entitled to notice of termination or pay in lieu of notice unless they are dismissed for “just cause”.
- Provincial employment standards legislation establishes minimum standards for wages, vacation, leave, notice of termination and severance. However, the common law applicable to most (but not all) employment provides greater entitlement on termination and can otherwise regulate the employment relationship. These common law obligations can, however, be limited by contract, subject to the legislated minimum standards
- All jurisdictions have legislation prohibiting discriminatory practices and harassment in the workplace. Employers have significant positive obligations to ensure equality in the workplace

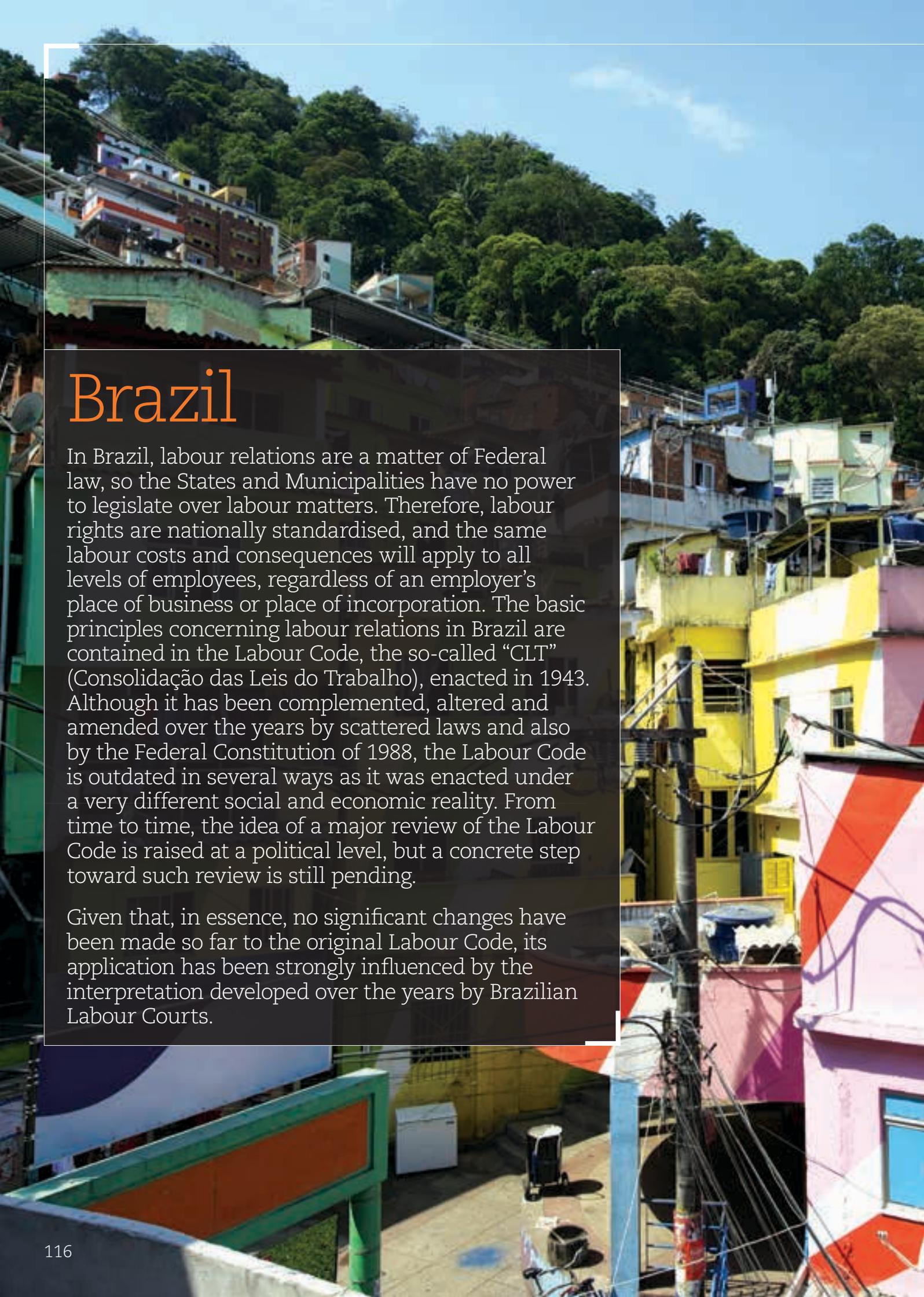
## Mexico

- In case of termination with cause, the employer must deliver a termination notice either directly to the employee at the moment of the dismissal or through the Conciliation and Arbitration Labour Board within five days following the date of termination. No severance pay is required for termination with cause
- When a business transfer takes place, for six months after the transfer, the former employer is jointly liable with the successor employer for any obligations derived from the employment relationship or under law that existed before the effective date of the transfer. The six-month term starts running once the employees are actually notified of the change of employer either directly or through the union

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- Employers of unionised workers are required at the union's request to negotiate a collective agreement. If an employer fails to enter into a collective agreement, the workers may exercise the right to strike
  - At trial, the burden of proof is on the employer to show that the employee is guilty of the conduct justifying dismissal. If the employer fails to do so, the employee may request either reinstatement or a payment equivalent to three months' salary

### USA

- Employers seeking to hire a foreign national may file a petition with immigration services for an employment visa for the prospective employee. If the petition is approved, the prospective employee must obtain a visa stamp from a US embassy or consulate
- There are no minimum requirements for an employment contract. An employment relationship is presumed to be "at will"
- Employees employed on an "at will" basis may be dismissed, with or without a good reason, provided it is not for an illegal reason, notably unlawful discrimination
- US law provides for retirement benefits and subsidised health insurance under federal Social Security and Medicare programs
- There is no legislation which seeks to protect affected employees when a business transfers to new ownership, although statutory notice requirements may be triggered where a transfer results in a mass layoff or plant closing



# Brazil

In Brazil, labour relations are a matter of Federal law, so the States and Municipalities have no power to legislate over labour matters. Therefore, labour rights are nationally standardised, and the same labour costs and consequences will apply to all levels of employees, regardless of an employer's place of business or place of incorporation. The basic principles concerning labour relations in Brazil are contained in the Labour Code, the so-called "CLT" (Consolidação das Leis do Trabalho), enacted in 1943. Although it has been complemented, altered and amended over the years by scattered laws and also by the Federal Constitution of 1988, the Labour Code is outdated in several ways as it was enacted under a very different social and economic reality. From time to time, the idea of a major review of the Labour Code is raised at a political level, but a concrete step toward such review is still pending.

Given that, in essence, no significant changes have been made so far to the original Labour Code, its application has been strongly influenced by the interpretation developed over the years by Brazilian Labour Courts.

# Issues arising on hiring individuals

## Immigration

Before a foreigner is transferred to Brazil and/or retained by a Brazilian company to render services in Brazil, a relevant work visa/permit must be requested. Any visa issued to a foreigner may be extended to their family.

The type of visa required depends on the activities that will be carried out in Brazil. After the applicable visa is selected, the Brazilian entity must comply with the applicable rules concerning the relationship to be maintained with the foreigner.

## Employment structuring and documentation

Some basic principles implicitly or expressly provided by law will govern any employment relationship in Brazil.

The key principles are:

- Prevalence of facts when evaluating the employment relationship: The relevant facts surrounding an employment relationship prevail over formal documents governing it
- Prohibition of detrimental changes: Employers are prevented from making changes to employment terms and conditions that are detrimental to employees, whether or not the employee has previously consented with the change

- Joint liability – group of companies: Companies belonging to a group of legal entities under the same control, direction or management are jointly liable for the obligations of any company belonging to that group with respect to employment relationships

In Brazil, workers may be hired in several ways, but the most common practice is to hire workers as employees. An employment relationship is characterised by the simultaneous presence of four elements: (1) services rendered on a personal basis; (2) on a permanent/habitual basis; (3) with subordination, i.e. the services are rendered under the employer's direction; and (4) on an onerous basis, i.e. the individual must receive remuneration in consideration for the services rendered.

Whenever one or more of the elements above is not present in a labour relationship, the parties are free to structure it in a different way other than as an employment relationship, such as: independent contractors/consultants; service providers/outsourced workers; temporary workers; interns; and non-employed officers, among others, provided that the specific rules and regulations regarding such other forms are complied with.

The Labour Code only applies to employees, while other work structures are governed by different legislation.

# Issues arising during the employment relationship

These labour rights only apply to individuals hired as employees, and a collective bargaining agreement may also apply to them.

## **Wages, working time and annual leave**

With the exception of commission, compensation must be paid at least monthly in Brazilian currency (Reais). Employees are entitled to receive a Christmas bonus corresponding to one month's salary, paid by the end of each year.

In Brazil, the employees' monthly salary is used to calculate all applicable labour and social security charges. However, such charges apply not only to salary, but also on the overall compensation which includes any other amount or benefit granted to the employee such as commission, bonuses and fringe benefits such as personal or family benefits and living expenses. The only exceptions are some benefits expressly excluded by law from labour and social security charges, such as payments connected with profit and/or results sharing plans, transportation vouchers, meal vouchers, health care and education, provided that some specific requirements applicable to each situation are complied with.

In addition to regular compensation, workers are guaranteed a share in the profits or results of the employer's activities. Although profit/results sharing rules are extremely flexible and do not establish any kind of limit, these payments must be governed by a plan which has been discussed previously with an elected committee of employees, with the involvement of the relevant union, or directly with union representatives. Certain requirements must be observed in the profit/results sharing plan, including that there must be clear and objective rules, targets or goals, and not more than two payments per year.

Provided that the applicable rules are complied with, profit/results sharing payments are excluded from labour and social security charges and indeed are an important tool used by Brazilian companies to structure employees' global compensation so as to legally reduce the charges on payroll.

All companies with more than 10 employees must implement a control system of employees' working time to ensure that employees receive overtime when they work more than 8 hours a day. Exceptions include employees who

hold managerial positions and employees who work outside the company's premises, who are not subject to controlled working hours and are not entitled to overtime payment.

Ordinary working hours must not exceed 8 hours per day and/or 44 hours per week. Any overtime worked must be remunerated with an additional 50% of their regular hourly rate, and hours worked on Sundays or holidays must be remunerated with an additional 100%. Collective bargaining agreements may establish higher rates of overtime pay. Provided that there is union authorisation, overtime worked on one day may be offset by a reduction in the hours worked on another day, without the need for an additional overtime payment.

After a year of continuous employment, employees are entitled to 30 days' annual leave, which must be taken within the subsequent 12 month period. Employers must pay employees an additional one-third of their monthly salary as vacation bonus.

## **Health and safety**

Health and safety is a sensitive matter in Brazil. There are several regulations with strict rules concerning mandatory periodical medical examinations, medical examinations on recruitment and termination, medical records, environmental risks prevention, the creation and maintenance of an Internal Commission for Accident Prevention, health-hazards and dangerous activities and corresponding allowances, etc.

## **Trade unions**

All companies and employees are mandatorily represented by a union, regardless of voluntary unionisation/affiliation.

Union classification is made on a territorial basis, based on the dominant activity/core business of the company and territorial scope of authority of the respective union.

Collective bargaining agreements are those executed between the unions representing employers and employees, or between the employees' union and a specific company, for the purposes of establishing general and normative rules which govern the relationship of a given category of employers and employees. Collective bargaining agreements must be observed by all their parties and/or the companies/employees of the respective category and based on the territory where the unions have authority.

## **Social insurance**

Employers and workers must make compulsory contributions to the Brazilian Social Security Agency which manages a system designed to protect employees in the event of illness and retirement.

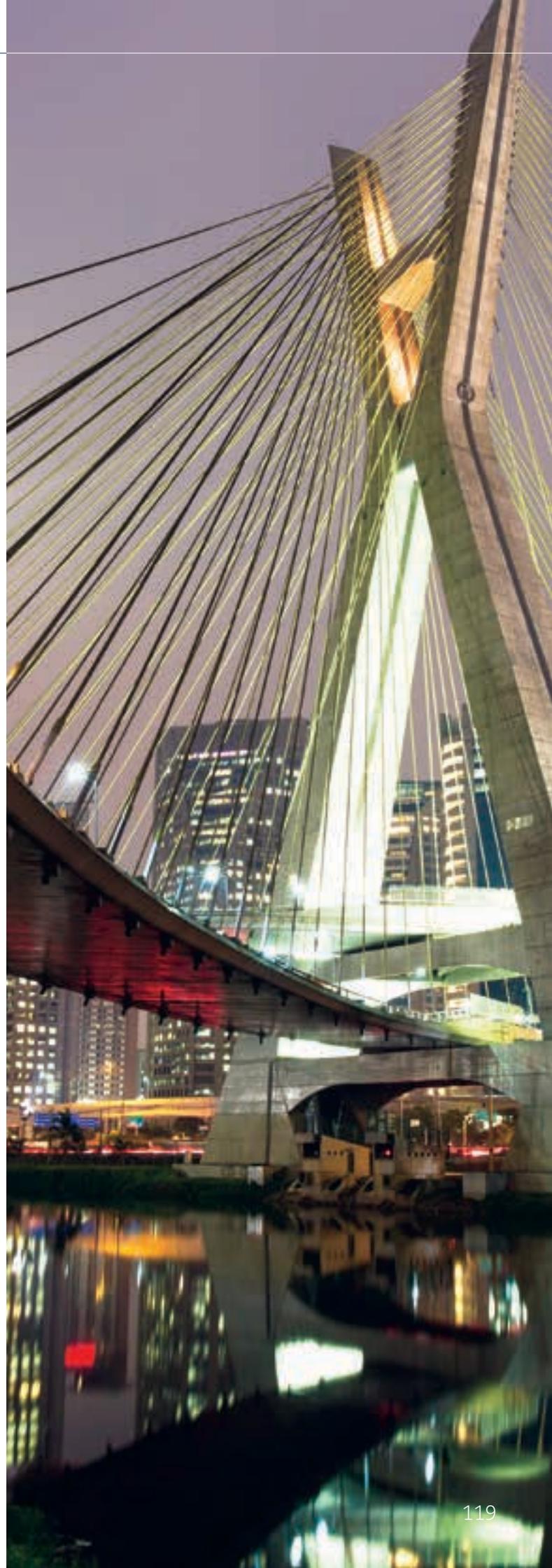
Employers' contributions average 28% of the employee's overall salary. Contributions may be higher than this if the employees are subject to health hazardous working conditions. Companies that develop specific activities (as listed in Law 12.546/11) are subject to 1% or 2% social security contributions on top of their revenue, instead of the 20% contribution made by the employer on the employees' overall salary.

Employees' individual contributions are withheld by the employer. The individual contribution is proportionate to the amount of salary and is capped by the Federal Government, currently on an annual basis.

## **Severance pay funds**

Employers must deposit 8% of each employee's salary on a monthly basis in an account opened on their behalf and administered by an official federal financial institution.

Funds deposited in these accounts, the so-called "FGTS accounts" may be withdrawn in the event of, among others, dismissal without cause, retirement, purchase of real estate and death.



# Issues arising on termination of the employment relationship

## Outsourcing

Although there are no specific legal provisions governing outsourcing in Brazil, this arrangement is commonly accepted by Brazilian Labour Courts provided that certain requirements are complied with.

For an outsourcing arrangement to be regular or lawful:

- the outsourced services cannot constitute the core business of the contracting company
- the contracting party cannot directly supervise or control the outsourced workers
- the outsourced services cannot be rendered on a personal basis

The contracting company will always have subsidiary liability if the outsourced company fails to comply with any applicable law or regulation.

## Business transfers

In Brazil, change in the employer's corporate structure does not affect the employment agreements. Therefore in the event of a business transfer, when the buyer acquires the entire company, the employment agreements are automatically transferred to the new owner, and it will become the new employer under the original employment agreements that will remain in force. Consequently, any labour obligations and liabilities under these agreements, whether past or future, are attributed to the new employer.

The new employer cannot make any detrimental change to the terms and conditions of employment, including any changes to remuneration and benefits, even with the employees' consent.

There is no requirement to inform the unions or employees about the change in the company's corporate structure. However, it is good practice to communicate with employees about this.

## Terminating employment

In Brazil, both the employer and the employee can terminate the employment at any time, without cause. Under certain specific and exceptional circumstances, employees may be entitled to temporary job security, which may prevent their employer from terminating the relationship for a given period.

As a general rule, 30 to 90 days' notice, or payment in lieu of notice, must be given on the termination of an employment contract with an indefinite term. A mandatory severance payment must also be made. The amount payable depends on the employee's length of service and includes, among other rights, a penalty of an additional 50% on top of the balance of the amount deposited in the employee's FGTS account.

However, if an employee is guilty of misconduct, their employment may be terminated with cause, without notice and with a significant reduction in the mandatory severance payment. The Labour Code sets out the types of misconduct that permit termination with cause.

In the case of multiple dismissals, the courts require employers to have held negotiations with the union

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# Canada

In Canada, the power to make laws is divided between the federal and provincial governments. Generally, provinces have jurisdiction over employment matters, while the federal government has jurisdiction over employment only in respect of specific industries, such as airlines, telecommunications, shipping and banks. Employment law in Canada is quite similar from province to province, and is governed by both federal and provincial legislation as well as by the common law (judge-made law). Quebec is the notable exception to this rule, as Quebec operates under a civil law system, which is based on a written “Civil Code”, originally developed from France’s Napoleonic Code.

# Issues arising on hiring individuals

## **Immigration**

Employment and labour law in Canada is generally governed under the jurisdiction of Canada's provinces and territories. Immigration law is under the jurisdiction of the federal government. To be lawfully employed in Canada, one must be a citizen, landed immigrant or have a work visa. There is some increased movement of professionals, executives and skilled trades through free trade agreements, notably NAFTA (North America Free Trade Agreement).

Apart from senior executives, professionals, and workers with specialised skill sets, most foreign workers in Canada are employed in the domestic care or agriculture sectors. Temporary foreign workers are protected by the same laws as Canadian employees, including labour and employment legislation and the Canadian Charter of Rights and Freedoms.

Canada's Temporary Foreign Worker Program (TFWP) is designed to address temporary labour shortages while protecting the Canadian labour market. Employers must obtain a Labour Market Impact Assessment (LMIA) by Employment and Social Development Canada (ESDC) to hire through this programme. The LMIA is designed to verify that there is truly a need for a foreign worker and that no Canadians can do the job. Employers of low-wage temporary foreign workers must reapply for an LMIA every year in order to account for potential changes in the labour market. However, under the International Mobility Program (IMP), employers need not obtain an LMIA prior to applying for a work permit for certain highly skilled workers. Employers who fail to comply with the requirements of the TFWP and IMP can be subject to up to CAD 1 million per year in fines, and may be permanently banned from accessing either of the programs.

# Issues arising during the employment relationship

The specific obligations an employer owes to its employees will typically depend on the jurisdiction in which it operates, whether it is federal, provincial or territorial.

## **Wages, annual leave and working time**

Minimum wages vary by jurisdiction and as of January 2017, range from a low of CAD 10.50 per hour to a high of CAD 13.00 per hour and are subject to periodic review. Certain jobs are exempt from minimum requirements. Employment standards legislation commonly sets out various provisions regulating how employees should be paid, record keeping obligations, and documentation requirements with respect to the payment of wages. In recent years, certain provinces have established mandatory minimum wage increases, tied to the rate of inflation.

Most jurisdictions have legislation governing the maximum number of working hours. Generally, such legislation sets out maximum daily and weekly figures (most frequently, eight hours per day and between 40 and 48 hours per week). Most jurisdictions require employers to provide employees with at least twenty four consecutive hours of unpaid time off from work every seven days. In certain situations, these maximum working hours may be exceeded, such as where overtime is paid, where employees agree, or if there is an emergency. Each jurisdiction's employment standards legislation includes provisions governing overtime pay when an employee works in excess of the maximum working hours (typically x1.5 basic pay).

Employment standards legislation provides employees with a statutory entitlement to annual vacation leave and corresponding pay for each year worked. In all provinces, employees are entitled to at least two weeks' paid leave per year. In Saskatchewan, employees are entitled to at least three weeks' leave per year. In many provinces, employees' entitlement to vacation leave will increase to three weeks with the employee's length of service. In addition, employees are entitled to between six and ten paid statutory holidays per year. If an employee is required to work on a statutory holiday, they are entitled to premium pay (typically at least x1.5 basic pay) as well as to holiday pay for that day.

## **Trade unions**

The labour legislation of the various Canadian jurisdictions governs: how trade unions become certified; how they retain the authority to act as the exclusive bargaining agent for a group of employees; what obligations are created for the employer of those employees; and the framework to govern collective bargaining.

Collective bargaining provisions typically deal with both process and substance. Process provisions include work stoppages (strikes and lockouts) and the grievance and arbitration process, whereas substantive provisions include mandatory and permissive terms and conditions for the collective agreement. Labour statutes also place a duty of fair representation on unions with respect to the employees within a bargaining unit. Disputes between parties are submitted to arbitrators or to specialised administrative tribunals located in each jurisdiction.

## **Social insurance**

Individuals who are lawful residents in Canada (citizens and landed immigrants) have significant health care coverage (generally covered by public funds), unemployment insurance coverage, and limited pensions for retirement, or in some cases, long-term disability.

# Issues arising on termination of the employment relationship

## Business transfers

Employers cannot defeat legitimate bargaining rights either by organising their affairs in an attempt to change their legal identity or by selling the affected business to a third party (whether or not that third party has any relationship with the vendor). Labour boards take a wide, remedial approach in these circumstances insofar as their primary objective is to preserve acquired bargaining rights. As such, two or more legally distinguishable entities may be considered to be one employer for labour relations purposes, and bind a third party to a pre-existing collective bargaining relationship.

Also, a purchaser may be bound to the collective bargaining relationship of the vendor. The term “sale” and related terms are given an expansive interpretation, so that various kinds of commercial transactions that transfer control of the core of a business as a going concern may be captured in such a way that bargaining rights continue to attach to the transferred business.

Similar considerations apply under provincial employment standards legislation, which generally contain a “deemed continuity” provision. Therefore, where a purchaser retains or hires the employees of a vendor company, the service of those employees may be deemed to be continuous for the purpose of calculating notice and severance, as well as other benefits linked to length of service under the applicable legislation.

## Terminating employment

With some exceptions, employment in Canada is “at will”, so the employer may terminate the relationship at its discretion (provided it is not for an illegal reason). However, unlike the U.S.A., while the basis for the termination is “at will”, dismissed employees are entitled to notice of termination or pay in lieu of notice unless they are dismissed for “just cause”. “Just cause” is very difficult to establish, and this threshold will typically only be met if the employee committed an unlawful act in the course of their duties, showed wilful misconduct of a significant nature, or was consistently insubordinate despite warnings. As a result, in most employer initiated dismissals, a severance package is negotiated, or is part of an originating written employment contract.

The employment standards legislation sets out minimum notice periods or pay in lieu of notice and, in some cases, statutory severance pay. Typically, these minimum statutory notice periods range from one to eight weeks’ notice (or pay in lieu of notice) depending on the employee’s length of service. The statutory minimums apply unless a particular exception applies. Most jurisdictions also have rules providing for enhanced notice for mass dismissals, such as a plant closure. These additional “mass” dismissal requirements are generally triggered where 10, 25 or 50 employees are affected, depending on the applicable law. Enhanced obligations apply with larger numbers of dismissed employees, often where 100, 200 or 300 employees are affected.

Statutory severance pay (which is separate and distinct from

notice of termination or pay in lieu of notice) is particularly notable for medium sized to large employers operating in Ontario, where a lump sum payment is calculated as one week per year of service to a maximum of 26 weeks’ pay for employees with five years’ service or more. Federally regulated employers are also subject to statutory severance obligations.

In addition to the statutory notice period and any severance pay, non-union employees in Canada’s common law jurisdictions (i.e. where the legal system is based on case law) are also entitled to “reasonable notice” of termination, often much longer than statutory notice. It is important to note that any statutorily mandated payments would be incorporated into a common law award, and a dismissed employee must mitigate their common law losses by actively seeking reasonable alternative employment.

Depending on an employee’s position, age, and length of service, up to 24 months’ notice may be awarded, and longer notice periods have been awarded in some exceptional cases. Employers are also responsible for paying benefits and entrenched bonuses during the common law notice period. However, unlike statutory notice entitlements, employees and employers can contract out of common law notice periods (preferably in writing) provided the contract states that the employee will receive at least their minimum statutory entitlements, and is otherwise enforceable. Finally, some Canadian jurisdictions have legislation that allows dismissed employees to contest their dismissal and seek reinstatement.

## Discrimination

All jurisdictions have legislation and administrative agencies to deal with human rights complaints concerning harassment and discriminatory practices in the workplace. The list of the defined criteria or prohibited grounds of discrimination and harassment varies with each jurisdiction, but generally includes: race related grounds; creed/religion; gender; sexual orientation; age; family or marital status; and disability. In general, employers in Canada have an obligation to offer employment without discrimination, and to guard against harassment, based on prohibited grounds. Increasingly, anti-harassment and anti-violence measures are also a matter of health and safety law. Most jurisdictions in Canada have equal pay and/or pay equity laws to promote wage parity between male and female workers at the same employer doing the same or (in some jurisdictions) equivalent work. Pay equity measures go beyond equal pay requirements and are intended to redress systemic discrimination.

### James Knight

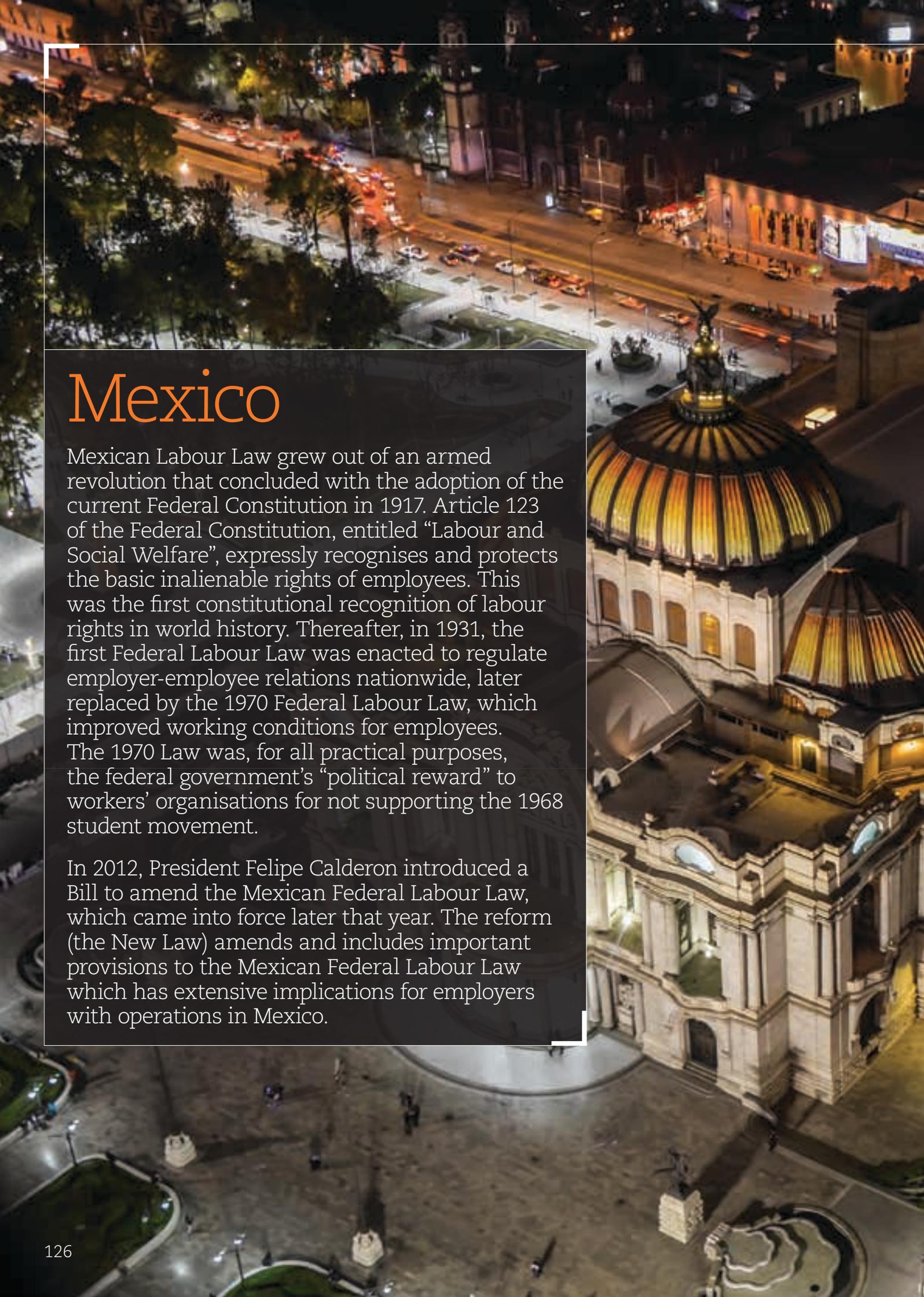
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# Mexico

Mexican Labour Law grew out of an armed revolution that concluded with the adoption of the current Federal Constitution in 1917. Article 123 of the Federal Constitution, entitled “Labour and Social Welfare”, expressly recognises and protects the basic inalienable rights of employees. This was the first constitutional recognition of labour rights in world history. Thereafter, in 1931, the first Federal Labour Law was enacted to regulate employer-employee relations nationwide, later replaced by the 1970 Federal Labour Law, which improved working conditions for employees. The 1970 Law was, for all practical purposes, the federal government’s “political reward” to workers’ organisations for not supporting the 1968 student movement.

In 2012, President Felipe Calderon introduced a Bill to amend the Mexican Federal Labour Law, which came into force later that year. The reform (the New Law) amends and includes important provisions to the Mexican Federal Labour Law which has extensive implications for employers with operations in Mexico.

# Issues arising on hiring individuals

## **Immigration**

To work in Mexico, foreign citizens must obtain a work permit from the National Immigration Institute (INM). With a work permit it is possible to also apply for a residence visa. Since a change in the Mexican immigration law in 2012, the company offering the job has to apply to the INM for a work permit. Once the permit is granted, the foreign citizen must collect it from the Mexican Consulate in their country of residence.

## **Employment structuring and documentation**

The New Law defines an employment relationship as the provision of a subordinated personal service by one person to another, in exchange for the payment of a wage and the execution of an individual employment agreement. The main element of any employment relationship is subordination, which the then Fourth (currently Second) Chamber of Mexico's Supreme Court of Justice has defined as the employer's legal right to control and direct the employee and the employee's corresponding duty to obey the employer. Once an employment relationship exists, all the rights and obligations under the Federal Labour Law automatically apply, regardless of how the agreement is characterised by the parties.

The employment agreement should set out the conditions under which the work is to be performed. According to Article 25 of the New Law, an employment agreement must include: (1) the names of the employer and employee, and nationality, sex, civil status, Unique Population Registry Code ("CURP") and address; (2) whether the employment agreement is for an indefinite term, for a specific project or term, for initial training and/or for season, and/or subject to a probationary period; (3) a description of the services to be provided; (4) the place(s) where the work is to be performed; (5) the length of the work shift; (6) the salary and day and place of payment; (7) training the employee will have in accordance with the procedures and programmes established by the employer as required by the New Law, and (8) other terms and conditions of employment, such as days off and vacation agreed by the employee and the employer.

The employer is responsible for the execution of the agreement. The fact that there is no signed employment agreement does not deprive the employee of their rights under the New Law.

Any individual employment relationship is subject to the principle of "job security", that is, subject to the employee's right to keep their job as long as the employment relationship so requires. If the employment relationship is for an indefinite term, the employee cannot be dismissed without cause. If the relationship is for a specific project, the employee may keep their job until the specific task is completed.

In the case of employment agreements for an initial training, or subject to a probationary period, the employee cannot be dismissed until the corresponding effective term has elapsed and/or the employee fails to prove that they have the requisite knowledge and skills to perform the duties for which they were hired. In addition, the employer must hear the opinion of the Joint Committee for Productivity and Training before terminating these employment agreements.

The Federal Labour Law assumes, as a general rule, that an employment agreement is for an indefinite term, unless the nature or the particular type of services to be provided calls for an employment agreement for a specific project or term, or if the parties agree to an employment agreement for initial training or subject to a probationary period. Specific rules under the New Law apply to these arrangements.

# Issues arising during the employment relationship

## Wages, annual leave and working time

The current daily minimum wage in Mexico City is MXN 80.04 (approx USD 4.0). The parties may agree an hourly rate, which cannot be lower than the applicable minimum wage.

The New Law entitles employees to the following fringe benefits: (1) a year-end bonus equivalent to at least 15 days' wages, payable before 20 December each year; (2) annual leave, the length of which varies according to the employee's seniority; the New Law stipulates 6 days' leave for the first year of service; however, most labour contracts provide for more annual leave; (3) a vacation premium of 25% of the salary payable during the vacation period; and (4) mandatory paid holidays.

The New Law recognises three work shifts:

- day shifts: eight hours between 6:00 a.m. and 8:00 p.m.
- night shifts: seven hours between 8:00 p.m. and 6:00 a.m. and
- swing or “mixed” shifts: 7.5 hours, divided between the day and night shifts, provided that less than 3.5 hours is during the night shift.

Workers are given a rest period of at least half an hour during a work shift. However, for the work shift to be deemed discontinuous, the rest period should be at least one hour, and the employee must be able to leave the company's premises.

In principle there is a 48-hour week, provided employees have one complete day of rest with full pay. However, in some employment relationships, such as in government service, the banking sector, and much of the private sector, a 40 hour week has been established. The 40 hour working week may be over 5.5 days, or any other equivalent arrangement.

The New Law limits overtime to 3 hours per day, for a maximum of three consecutive days, and overtime must be calculated and paid on a weekly basis.

Overtime must be paid at twice the hourly rate of pay. Article 68 of the New Law establishes that if more than 9 hours' overtime is worked in a week, the additional hours must be paid at triple the hourly rate.

## Trade unions

The New Law protects freedom of association and the incorporation of trade unions. Employees may also obtain improvements in working conditions through a collective bargaining agreement. Collective agreements are executed by one or more employees' unions with

one or more employers, or employers' associations, and may be of definite or indefinite duration or for a specific project. Collective bargaining agreements may not reduce employees' rights under the New Law.

The employer of unionised workers is required, at the union's request, to negotiate a collective agreement. If an employer fails to enter into a collective agreement, the workers may exercise the right to strike.

Either party may request an annual review of the wage scale and every two years for a review of all other provisions of the collective bargaining agreement.

The provisions of the collective bargaining agreement cover all employees regardless of union membership, although management employees may be expressly excluded.

The New Law requires the Labour Board to disclose information regarding collective bargaining agreements filed with the Board. Employers must post, the complete text of the applicable collective bargaining agreement in visible places in the workplace.

## Social insurance

All workers regardless of their nationality must be registered at the Social Security Institute (IMSS), the entity responsible for providing medical services, as well as pensions and health and safety compensation. All social security contributions are calculated on the employee's earnings. For this purpose, the salary used as the base for the calculations must not be less than the general minimum wage (for the Federal District), or more than the maximum limit (currently 25 times the minimum wage).

This regime is mandatory for all employees, even if the employer is exempt from paying taxes.

The New Law defines the employment relationship as the provision of a personal subordinated service to another, in exchange for the payment of compensation (salary or wage), irrespective of how the relationship originates. So, whenever a subordinate relationship exists in exchange for the payment of compensation, this will be an employment relationship, and the employer must register the employees with the IMSS.

Notwithstanding this, in Mexico, social security contributions are considered as taxes, according to the Federal Tax Code, and the IMSS is the authority which has jurisdiction to demand payment of the unpaid contributions. Failure to make contributions could be considered as tax fraud.

Employers are responsible for withholding income tax in respect of their employees.

# Issues arising on termination of the employment relationship

## **Business transfers**

Under the New Law, an employer is substituted when the essential assets used in the operation of a business are transferred so that the transferee continues operating the business.

The New Law expressly provides that a business transfer does not affect existing employment relationships. As a result, the new employer cannot modify existing employment agreements in any way.

The New Law additionally states that the transferor is jointly liable with the transferee for six months after the transfer for (1) any obligations derived from the employment relationship, or that existed in law before the effective date of the transfer and (2) social security related obligations. After such terms expire only the transferee remains liable.

Joint liability runs from the date the employees are notified of the change of employer. They must be notified of this in writing, either directly or through the union (if applicable).

## **Terminating employment**

Employers in Mexico can only dismiss an employee without liability for misconduct on one of the 16 grounds set out in the New Law.

For such dismissals, employers must deliver a termination notice to the employee, either directly at the time of the dismissal or through the competent Conciliation and Arbitration Labour Board (federal or local) within 5 days of termination.

An employee may appeal their dismissal within two months to a Conciliation and Arbitration Board (an administrative agency responsible for resolving labour disputes). If the employer fails to show the employee was guilty of the conduct in question, the employee can request (1) reinstatement, or (2) payment equivalent to three months' full salary (this includes premiums, bonuses, commission, etc., and all benefits) plus 20 days' salary for each year of service. The employee also has the right to be paid back salaries from the termination date for a maximum of 12 months.

In certain circumstances, an employer is not obliged to reinstate an employee with less than one year's service where a normal working relationship is impossible.

All employees who are dismissed, as well as those who resign with fifteen or more years' service, are also entitled to a seniority premium equivalent to twelve days' salary for each year of service, subject to a maximum equivalent to twice the minimum wage (plus pro-rated annual leave, leave premium, and year-end bonus).

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# USA

The employment relationship in the United States is subject to markedly less regulation than in other countries. With the exception of some minimum protections for wages, working hours, and the prohibition of discrimination, the parties to an employment relationship in the United States are generally free to negotiate and set the terms and conditions of their relationship.

Moreover, the default position is that private sector employment relationships are “at will”: either the employer or the employee may terminate the employment relationship at any time, for any lawful (i.e., non-discriminatory or non-retaliatory) reason, with or without notice.

# Issues arising on hiring individuals

## Immigration

Foreign nationals without permanent resident status or a work visa are not permitted to work in the United States.

An employer seeking to hire a foreign national may, on behalf of the prospective employee, file a petition with the United States Department of Homeland Security/United States Citizenship and Immigration Services (USCIS) for an employment visa. If the prospective employee is already in the United States with a valid non-immigrant visa, he or she can begin working for the employer upon approval of the petition, provided that approval for change of status or extension of stay has been obtained. If the prospective employee is outside of the United States or was ineligible for a change of status, the petition will be sent to the United States embassy or consulate nearest to the prospective employee's foreign residence, and the prospective employee must apply for and obtain the appropriate temporary worker visa. It should be noted that different procedures apply for Canadian citizens.

All employers are obliged to verify that all the individuals they employ are authorised to work in the United States.

To do so, employers are required to complete a USCIS Form I-9 for each newly hired employee. Employers have the option of participating in the on-line E-Verify programme, under which USCIS confirms whether or not an employee is in fact authorised to work in the United States.

## Employment structuring and documentation

Under United States law, there are no minimum requirements for an employment contract, and in most circumstances, no written contract is required. An employment relationship in the United States is presumed to be "at will", i.e. terminable by either party, with or without good reason or notice. Indeed, a majority of employees in the United States are employed without a written contract, and just with a written offer of employment that outlines their basic terms and conditions of employment. In some states, such as New York, employers must by law notify new employees in writing of some of their terms of employment (but not as extensively as is required under the law of EU Member countries). Generally, however, there are no requirements as to the minimum contents of an offer letter.

Whether the employment relationship is "at will" or pursuant to a written employment contract, parties are free to negotiate and set the terms and conditions of their relationship, provided none of the provisions violate any federal, state, or local law, rule or regulation governing the employment relationship.

There are no legal provisions governing fixed-term contracts. Unlike many other countries, American law does not limit the duration of a fixed-term contract or the circumstances under which the parties may enter into a fixed-term contract.

Many employers have an internal policy on trial periods, often referred to as "introductory periods" or "probationary periods", but there are no legal provisions governing these.

# Issues arising during the employment relationship

## Wages, annual leave and working time

The Fair Labor Standards Act prescribes a (national) minimum wage for all non-exempt employees, of USD 7.25 per hour. States are free to legislate a higher minimum wage. In 29 states and the District of Columbia, the minimum wage is higher than the federal minimum wage. The most common Fair Labor Standards Act exemptions are referred to as 'white collar exemptions'. The term commonly refers to exemptions for executive, administrative, professional, outside sales and computer professional employees.

American workplace law does not impose maximum working hours. However, many state statutes provide for daily rest periods as well as a one day rest period each week. For example, a number of states require that employees who work more than four hours per day receive a break of at least ten minutes for every hour worked.

Under federal law, non-exempt employees must receive overtime pay of x1.5 their regular pay for all hours worked in excess of 40 hours per week. Generally, nonworking time, including absence, rest periods, leave, etc. is not counted towards the 40 hours per week overtime threshold.

Although the United States government recognises several "national holidays", no federal law requires employers to provide employees with time off for these holidays. However, it is customary for employers to provide employees with paid time off to observe nationally- and locally-recognised holidays.

Similarly, no federal law requires employers to provide employees with paid annual leave, although in practice, most employers provide this. It may range from one week per year during the employee's first few years of employment to three or four weeks for long-serving employees. Employees who are represented by a trade union may receive more generous annual leave.

## Trade unions

Trade unions constitute the largest and most influential employee organisations in the United States. Most trade unions are organised under two umbrella organisations, the American Federation of Labour and Congress of Industrial Organisations (AFL-CIO) and the Change-to-Win Federation.

Due to the United States Constitution's guarantee of freedom of association, employees are free to form and join trade unions. Approximately 14.8 million workers, or 11.1% of the workforce, are members of a trade union.

More public sector employees than private sector employees are unionised. While only a small portion of the workforce is unionised, trade unions wield significant lobbying power in the United States, especially within the Democratic political party.

## Social insurance

United States law provides for retirement benefits and subsidised health insurance under federal Social Security and Medicare programmes. Social Security is financed by a 12.4% tax on wages up to an annual threshold (USD 127,200 in 2017), with half (6.2%) paid by workers and half by employers. Employers and employees each pay 1.4545% of wages in Medicare payroll taxes, with no limit on the wage base. These federal programmes provide benefits for retirees, the disabled, and children of deceased workers. In addition, employers with 50 or more full-time equivalent employees who do not provide health insurance to at least 95% of their full-time employees, and dependents up to the age of 26, are subject to a federal fee payment under the Patient Protection and Affordable Care Act, a federal law which is currently the subject of controversy in the U.S.

# Issues arising on termination of the employment relationship

## **Business transfers**

There is no legislation which seeks to protect affected employees when a business transfers to new ownership. As most employees are employed “at will,” a transferee is free to offer employment to the employees of the transferor or to change the terms and conditions of employment. If the transfer of an undertaking will result in a plant closure or mass layoff, as defined under the federal WARN Act, employees are entitled to 60 days’ notice by the transferor, assuming that the transferor is a covered employer under WARN. There may also be similar state or city laws that are applicable to the transferor, called “mini-WARN acts”. Mini-WARN acts may have a different threshold for covered employers and different requirements concerning notice.

If the affected employees are represented by a union, the transferee may be under a duty to bargain with that union and cannot change any terms and conditions of employment without first bargaining with the trade union.

## **Terminating employment**

Generally, employees employed on an “at will” basis may be dismissed, with or without good reason, whether or not the employee was at fault, provided it is not for an illegal reason, notably unlawful discrimination.

Unless the employment contract or collective bargaining agreement provides otherwise, there is no legal requirement for employers to follow a formal procedure when dismissing individual employees. However, employees are protected from unfair dismissal in violation of federal, state, and local discrimination or anti-retaliation laws. Employers are prohibited from discriminating against or dismissing employees on the basis of their race, colour, racial origin, religion, pregnancy, or sex, or in retaliation for making complaints of unlawful discrimination.

The concept of a void dismissal does not exist outside the scope of unlawful terminations in violation of federal, state, or local civil rights laws and/or anti-retaliation provisions. However, to the extent that an employee’s dismissal violates any federal, state or local law, the employee may be entitled to reinstatement to their former position, effectively rendering the termination void.

Unless it is provided for in an employment contract or collective bargaining agreement, employers are not required to make severance payments on termination.

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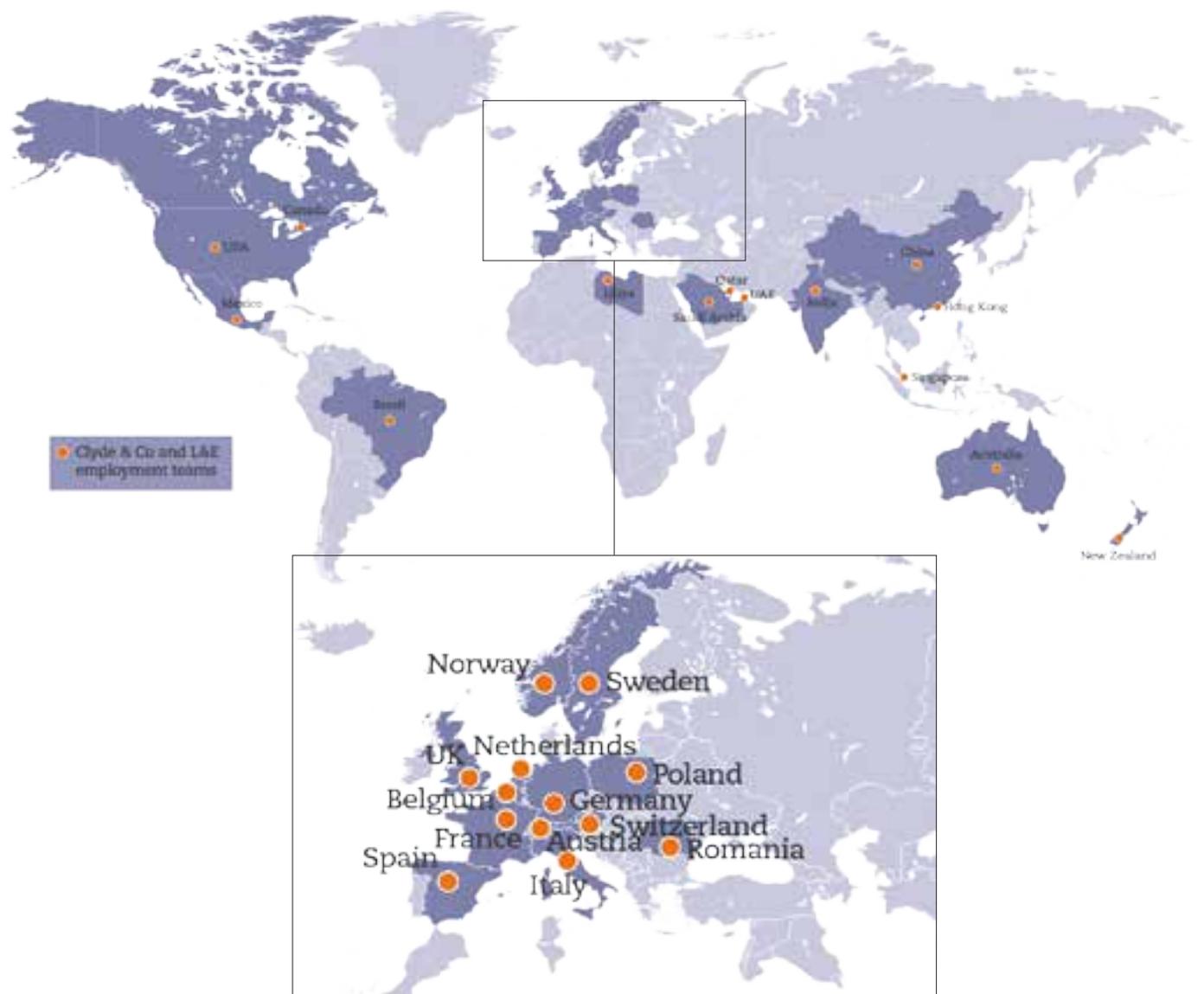
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